Tan Juay Pah *v* Kimly Construction Pte Ltd and others
[2012] SGCA 17

Case Number	: Civil Appeal No 208 of 2010
Decision Date	: 02 March 2012
Tribunal/Court	: Court of Appeal
Coram	: Chao Hick Tin JA; Andrew Phang Boon Leong JA; V K Rajah JA
Counsel Name(s)	: Lee Eng Beng SC, Disa Sim and Ang Siok Hoon (Rajah & Tann LLP) for the appellant; Christopher Chuah, Joyce Ng and Napolean Koh (WongPartnership LLP) for the first respondent; Martin Roderick Edward SC and Mohamed Baiross (Martin & Partners) for the second respondent; Siaw Kheng Boon (Siaw Kheng Boon & Co) for the third respondent; Ramasamy s/o Karuppan Chettiar and Navin Kripalami (Acies Law Corporation) for the fourth respondent.
Parties	: Tan Juay Pah — Kimly Construction Pte Ltd and others

CONTRACT

DAMAGES – Contributory Negligence

TORT – Breach of Statutory Duty

TORT – Negligence – Duty of Care

[LawNet Editorial Note: This was an appeal from the decision of the High Court in [2011] SGHC 26.]

2 March 2012 Judgment reserved.

V K Rajah JA (delivering the judgment of the court):

Introduction

1 This appeal arises from the collapse of a tower crane ("the Tower Crane") at a project site at the National University of Singapore Society Kent Ridge Guildhouse at Kent Ridge Drive/Law Link ("the Project Site") on 22 February 2008. Tragically, the collapse of the Tower Crane resulted in the deaths of three workers. [note: 1] Following this, the main contractor for the project, Kimly Construction Private Limited ("Kimly"), sued the sub-contractor, Lee Tong Boon trading as Rango Machinery Services ("Rango"), from whom it had rented the Tower Crane.

2 Rango in turn brought in Tan Juay Pah ("TJP"), the certifying mechanical engineer whom it had engaged to inspect the Tower Crane, as a third party, claiming an indemnity against him in the event that it was found liable to Kimly. TJP is a professional mechanical engineer who is registered as an authorised examiner ("AE") under the Workplace Safety and Health Act (Cap 354A, 2007 Rev Ed) ("the WSHA") and its relevant regulations (these regulations and the WSHA will hereafter be collectively referred to as "the WSH Regime"). As an AE, TJP is authorised by the Ministry of Manpower ("the MOM") to inspect, test and certify lifting machines, including tower cranes, as being safe for use.

3 TJP then brought in Feng Tianming ("Feng"), a professional civil and structural engineer, and

FES Engineering Pte Ltd ("FES"), the approved crane contractor, as fourth parties, claiming an indemnity and/or contribution from them in turn. Feng had been engaged by Rango to design and supervise the construction of the foundation of the Tower Crane, while FES had been engaged by Rango to erect and maintain the Tower Crane. (In this regard, we note that there is an inconsistency in the decision by the trial judge ("the Judge") dated 28 January 2011 (*viz*, *Kimly Construction Pte Ltd v Lee Tong Boon (trading as Rango Machinery Services) (Tan Juay Pah, third party; Feng Tianming and another, fourth parties)* [2011] SGHC 26 ("the Decision")), which states both (at [9]) that FES was engaged by Kimly and (at [22]) that FES was engaged by Rango. We have found that [22] of the Decision states the correct position, *ie*, FES was engaged by Rango.) [note: 2]

4 The Judge decided, *inter alia*, that (see [4] of the Decision):

(a) Kimly succeeded in its claim against Rango;

(b) Rango succeeded in its claim against TJP for an indemnity; and

(c) TJP's claim against Feng and FES was dismissed by virtue of TJP's undertaking not to call any evidence against them should his submission of "no case to answer" fail (which turned out to be the case in the court below).

5 This is TJP's appeal against the Decision.

The facts

Background to the dispute

The relevant contracts

6 On or around 28 August 2006, Kimly entered into a sub-contract with Rango for the purpose of renting the Tower Crane from the latter ("the Sub-Contract"). The material terms of the Sub-Contract were as follows: [note: 3]

> **1. <u>SCOPE OF SUPPLY</u>**
>
> Rango will provide one (01) unit of tower crane (hereinafter referred to as "Tower Crane") hereinafter set forth. This shall include all incidental and minor works as may be necessary to enable the proper and safe function/operation of the Tower Crane and acceptance for operation by Authorities having jurisdiction over it.
>
> …
>
> …
>
> **3. <u>TERMS & CONDITIONS</u>**
>
> …
>
> 3.2 **<u>Submission, Commissioning, Testing and Inspection</u>**
>
> …

3.2.2 **Commissioning, Testing and Inspection**

Rango shall be responsible for arrangement for commissioning, load test, certification, testing and inspection by Profession [*sic*] Engineer/Approved Person at a prescribed interval to fulfill Authorities' requirements. All original certificates shall be provided to Kimly for retention.

…

…

3.4 **Monthly Servicing/Maintenance**

Rango shall provide free monthly servicing/maintenance by competent mechanics throughout the whole rental period. This shall include provision of necessary and suitable materials/tools/equipment required for the servicing/maintenance. All original maintenance records shall be provided to Kimly for retention.

…

3.6 **Insurance**

Kimly shall keep the Tower Crane insured against loss or damage by an equipment-all-risks policy with effect from successful commissioning until the date of dismantling. Any deductible[s] shall be borne by Rango in the event of a claim or accident of the Tower Crane caused by Rango. In the event of a claim or accident caused by Kimly, any deductibles shall be borne by Kimly.

…

4. **LIABILITY AND RESPONSIBILITIES**

4.1 **Sub-Contract**

Rango shall observe, perform and comply with all the provisions of the Main Contract as far as they relate to her Sub-Contract Works. Rango shall assume towards Kimly, with respect to her work and all operations of the Sub-Contract, all obligations and responsibilities that Kimly assume[s] towards the Client/Consultants/Authorities as far as they are not repugnant to or inconsistent with the expressed provision of the Sub-Contract.

…

…

4.4 **Statutory Requirements**

In addition to Rango's compliance with the conditions, specification, schedules and requirements issued under the Sub-Contract, Rango shall further be required to have her performance as well as the Sub-Contract Work in accordance with the laws of Singapore and in compliance with all relevant Acts of Parliament, subsidiary legislation, laws, by-

laws and with all rules, regulations, directions, orders and guidelines of the Government or local Authorities having authority or jurisdiction over performance and/or Sub-Contract Works. *Failing which, Rango shall indemnify Kimly [against] all the consequence imposed by these Authorities or arises therewith.*

…

4.8 **Indemnity**

Rango shall indemnify Kimly against all claims, damages, costs, expenses, litigation or liabilities made against or incurred by Kimly, arising out of Rango's negligence, default or non/poor performance of her contractual duties under the Sub-Contract.

…

[underlining and emphasis in bold in original; emphasis added in italics]

7 The Sub-Contract between Rango and Kimly contained an express term (*viz*, cl 4.8) that Rango would indemnify Kimly against "all claims, damages, costs, expenses, litigation or liabilities made against or incurred by Kimly" [note: 4] arising out of Rango's negligence or breach of the Sub-Contract. Unlike the agreement between Rango and Kimly, which was reduced into writing in the form of the Sub-Contract, Rango's oral engagement of TJP on or around 15 August 2006 was not condensed into a written contract. Further, there is no evidence of any agreement by TJP to indemnify Rango. On the evidence, no specific terms were discussed between Rango and TJP. In particular, there was no discussion of any term that TJP was to indemnify Rango. We find that there can be no doubt that neither Rango nor TJP even remotely considered the issue of risk allocation between themselves and non-parties to their contract in the event that TJP was found wanting in the discharge of his professional obligations.

8 It is also undisputed that the fee which Rango paid TJP for his services was just $716.

The structure of the Tower Crane

9 The Tower Crane was a saddle-jib crane. For our purposes, the critical structural aspect of the Tower Crane was the mast anchor assembly (located at the base of the mast), which comprised four mast anchors (also known as foundation anchors or fixing angles) embedded in concrete. These were identified as mast anchors #1 to #4 respectively. Each of the mast anchors had five joints, identified as joints *a* to *e* respectively. The four mast anchors were in turn connected to the four legs of a mast section by pin-joints. The mast of the Tower Crane comprised seven mast sections (identified as masts #1 to #7 respectively) placed one on top of the other, with the mast anchors at its base. [note: 5] It is undisputed that the component parts of the Tower Crane, including the mast anchors, were supplied by Rango.

The erection of the Tower Crane

10 The Tower Crane was erected on 18 November 2006 and was used at the Project Site from that date until it collapsed on 22 February 2008. Before it could be used at the Project Site, certain requirements under the WSHA as well as the Workplace Safety and Health (General Provisions) Regulations (Cap 354A, Rg 1, 2007 Rev Ed) ("the WSH Regulations"), read with the "OCCUPATIONAL SAFETY AN[D] HEALTH DIVISION GUIDELINES FOR THE SUBMISSION FOR USE OF TOWER CRANE IN FACTORY PREMISES" issued by the MOM on 26 May 2005 ("the 2005 MOM Guidelines"), had to be

met. For the purposes of this appeal, the relevant version of the WSH Regulations is that which was in force before the amendments introduced by the Workplace Safety and Health (General Provisions) (Amendment) Regulations 2009 (No S 463/2009).

11 Prior to the erection of the Tower Crane on 18 November 2006, Feng had prepared the design drawings and calculations according to which the Tower Crane was eventually erected. These drawings had been submitted to the MOM on 14 September 2006 in order to seek its approval for the use and operation of the Tower Crane. The MOM issued its approval on 29 September 2006, and Feng proceeded to authorise the erection of the Tower Crane. On 9 November 2006, Feng issued a Certificate of Supervision certifying that: (a) he had supervised the foundation works for and the erection of the Tower Crane; (b) the foundation works were structurally sound and complied with all the requirements under the WSHA; and (c) the Tower Crane was safe for use.

12 It is undisputed that TJP carried out three inspections of the Tower Crane as set out below:

(a) The first inspection was on 15 August 2006. As part of this inspection, TJP engaged Hi Tech NDT Inspection Services (S) Pte Ltd ("Hi Tech") to perform non-destructive tests ("NDTs") on certain critical parts of the Tower Crane (but not the mast anchors). On 18 August 2006, prior to the erection of the Tower Crane, TJP submitted a Third Party Inspection Report to the MOM certifying that: (i) the critical parts of the Tower Crane had been checked for surface flaws; (ii) thickness gauging had been conducted at various points of the crane structure to ascertain the thickness of the metal used; and (iii) the Tower Crane was of sound material and was suitable for use. This Third Party Inspection Report had to be submitted together with the "USE OF TOWER CRANE SUBMISSION CHECKLIST" in Appendix 1 of the 2005 MOM Guidelines [note: 6] ("the Use of Tower Crane Checklist") as the Tower Crane was more than eight years old (see cl 3.3 of the 2005 MOM Guidelines).

(b) The second inspection was on 18 November 2006 after the Tower Crane had been erected at the Project Site. TJP conducted a load test on the Tower Crane, then signed a Lifting Equipment Certificate (prescribed in Appendix 5 of the 2005 MOM Guidelines) certifying that the Tower Crane: (i) had been examined thoroughly as far as construction permitted; (ii) complied in all respects with the requirements pertaining to lifting equipment as stipulated under the WSH Regulations; and (iii) was safe for use.

(c) The third inspection was a further post-installation check on or around 20 November 2007. Thereafter, TJP signed a second Lifting Equipment Certificate to the same effect as the first (see the preceding sub-paragraph).

The collapse of the Tower Crane

13 On 22 February 2008, the Tower Crane, after having been in use at the Project Site for more than a year, collapsed. Part of the jib landed outside the Project Site, hitting two trees, which in turn damaged a linkway, a bus stop sign and a few motorcycles parked in the vicinity. The counterweight of the Tower Crane landed on the roof of a substation, causing partial structural damage to it. Of the three workers killed in the collapse, two were in the Tower Crane's cabin. Of these two, one was not an authorised crane operator.

Investigations into the cause of the collapse

14 Matcor Technology & Services Pte Ltd ("Matcor"), a consultancy company providing services in forensic failure investigation, materials assessment and advanced NDTs, was commissioned by Kimly

to investigate the general condition of the respective components of the Tower Crane and determine the presence of any cracks that might have existed prior to the collapse. Matcor was also commissioned by the MOM to investigate and report on the causes behind the Tower Crane's collapse. Matcor prepared seven reports in total, three for Kimly and four for the MOM.

15 The three reports which Matcor prepared for Kimly were:

(a) Report No M08258 on the NDTs done on the masts of the Tower Crane;

(b) Report No M08259 on the NDTs done on the jibs, counter-jibs and A-frame of the Tower Crane; and

(c) Report No M08260 analysing the cracked sections of the Tower Crane.

16 These three reports were exhibited in the affidavit of evidence-in-chief of David Tay, Kimly's expert witness. Unfortunately, none of these reports addressed the primary cause of the Tower Crane's collapse. Therefore, at the trial in the court below, Kimly relied instead on one of the reports which Matcor prepared for the MOM, *viz*, Report No M08163 ("Report 163 (MOM)"). This report observed the presence of pre-existing cracks in joint *e* of each of the four mast anchors and joint *b* of mast anchor #4. It also observed cracks and porosity in the columns of mast #1. (The cracks in the mast anchors and mast #1 will hereafter be collectively referred to as "the Pre-Existing Cracks".) Report 163 (MOM), however, drew no conclusions as to the cause of the Tower Crane's collapse. The Judge in fact held that this report "bore the appearance of a preliminary report before further testing was carried out" (see the Decision at [17]).

17 Rango also referred to another report prepared by Matcor for the MOM, *viz*, Report No M08209 ("Report 209 (MOM)"). This report stated in cl 3.0 (which was entitled "DISCUSSION"): [note: 7]

> The primary failure was located at the pin-joints of the mast anchor assembly which was not covered by non-destructive test or adequately inspected during the pre-erection stage.

Report 209 (MOM) then went on to observe in the same clause: [note: 8]

> … The erection submission document [*ie*, the Third Party Inspection Report which TJP submitted to the MOM on 18 August 2006 (see sub-para (a) of [12] above)] had only a brief summary of the non-destructive test of the crane. Non-destructive test (NDT) was supposed to be conducted on the critical parts of the crane by [Hi Tech] during the pre[-]erection inspection. The submitted NDT results, shown by marking on drawings, however did not cover the mast #1 and mast anchor assembly. The mast components and mast anchor assembly are deemed as critical parts.

The proceedings below

18 Kimly brought an action against Rango for breach of the Sub-Contract, averring that the collapse of the Tower Crane was due to and/or caused by and/or contributed to by Rango's breach of contract. Kimly averred that the presence of the Pre-Existing Cracks was the primary cause of the collapse.

19 Rango then brought in TJP as a third party, alleging breach of contract and negligence. Rango averred that TJP had breached his obligation to ensure that: (a) the Tower Crane would be of good, proper and/or satisfactory quality, reasonably fit for its purposes and/or safe for use; and (b) all

necessary tests were carried out. In particular, the breaches alleged against TJP were the following:

(a) The first and primary breach was said to be TJP's failure to conduct NDTs on the mast anchors of the Tower Crane. Given that the alleged cause of the Tower Crane's collapse was the Pre-Existing Cracks, Rango contended that if TJP had conducted NDTs on the mast anchors, he would have detected the Pre-Existing Cracks and could have avoided the collapse. [note: 9]

(b) The second breach was said to be TJP's complete failure to carry out the pre-erection inspection required under cl 7.2 of the 2005 MOM Guidelines. [note: 10] (Here, we should point out that under the 2005 MOM Guidelines, a third-party inspection of a tower crane, such as that done by TJP on 15 August 2006 (see sub-para (a) of [12] above), and the prescribed pre-erection inspection are "2 different inspections done at 2 different times".) [note: 11]

20 Notably, neither Rango nor TJP alleged that the other had been contributorily negligent.

21 As mentioned earlier (at [3] above), TJP subsequently brought in Feng and FES as fourth parties.

22 The trial was heard over 11 days. At the close of Rango's case, TJP, who was then represented by different counsel, indicated to the Judge that he wished to make a submission of "no case to answer" on the ground that Rango had not proved its case against him. While TJP accepted that a submission of "no case to answer" meant that he had to undertake not to call evidence against Rango, he asserted that he remained entitled to call evidence against Feng and FES should his submission be rejected. As all the other parties submitted otherwise, TJP sought a preliminary ruling from the Judge on the issue of whether he could proceed with his case against Feng and FES if his submission of "no case to answer" failed ("the Preliminary Issue"). He reserved his right to decide whether he would indeed make a submission of "no case to answer" after hearing the Judge's ruling on this issue.

23 After hearing the parties' arguments on the Preliminary Issue, the Judge ruled as follows (see the Decision at [55]):

(a) TJP had the right to make a submission of "no case to answer";

(b) if TJP did indeed make this submission, he had to give an absolute undertaking not to call any evidence against any of the parties, and had to stand or fall by his submission;

(c) if the court agreed with TJP's submission of "no case to answer", Rango's claim against TJP would be dismissed;

(d) if, however, the court disagreed with TJP's submission, judgment would be entered for Rango against TJP (assuming judgment was given for Kimly against Rango); and

(e) since TJP had to undertake not to call any evidence if he made a submission of "no case to answer" (see sub-para (b) above), should his submission fail, he could not proceed against Feng and FES and his claim against them would be dismissed accordingly.

24 The Judge gave TJP time to consider his ruling on the Preliminary Issue and make a decision as to whether or not to proceed to make a submission of "no case to answer". TJP subsequently informed the Judge that he elected to make this submission on the terms set out by the Judge (see the Decision at [57]).

25 The Judge thereafter heard the parties' closing submissions on the basis of TJP's "no case to answer" submission. Feng and FES did not make any closing submissions because of TJP's undertaking not to call any evidence against them.

Parallel criminal proceedings

26 For the sake of completeness, it should be mentioned that the MOM has charged TJP with an offence under reg 21(15)(*d*) of the WSH Regulations read with reg 45 thereof for certifying that the Tower Crane was of sound material and suitable for use without having first tested the mast anchors. [note: 12] TJP has denied the offence and, at least at the time of the hearing before us, the prosecution was still ongoing. At the time of the hearing before us, Lee Tong Boon (the sole proprietor of Rango) was also being prosecuted by the MOM for breaching his duty under s 16(1)(*b*) of the WSHA in failing to ensure that the Tower Crane's parts, including the mast anchors, were inspected and properly maintained prior to the erection of the Tower Crane. [note: 13]

The decision below

The cause of the Tower Crane's collapse

27 The Judge accepted that the cause of the Tower Crane's collapse was the presence of the Pre-Existing Cracks (see the Decision at [19]). He rejected, on the evidence, TJP's argument that the collapse could have been due to the Tower Crane being operated by an unauthorised person, and that the Tower Crane could have been carrying some load at the material time (see the Decision at [20]).

Liability as between Kimly and Rango

28 Rango's liability to Kimly was not really in issue at the trial because Rango did not seriously contest its liability to Kimly. Rather, it merely sought an indemnity in its favour against TJP. Accordingly, the Judge held (at [26] of the Decision) that Rango was liable to Kimly. He then allowed Kimly's various heads of damages as set out at sub-para (d) of [4] of the Decision. These amounted to $566,691.09 in total (computed as explained at [27]–[34] of the Decision). Interest on this sum at the rate of 5.33% per annum was awarded from 3 November 2008 (the date on which Kimly commenced its action against Rango) to the date of payment (see [35] of the Decision). Rango has not appealed against the Judge's finding of liability and thus remains bound by the Judge's finding that it is liable to pay Kimly $566,691.09 plus interest. The Judge also ordered Rango to pay Kimly costs (to be taxed or agreed) on the standard basis until 3 September 2010, and thereafter, on an indemnity basis by virtue of an offer to settle from Kimly which was not accepted by Rango.

29 Kimly and Rango adopted the same position with regard to the cause of the Tower Crane's collapse. Their expert witnesses agreed that the mast anchors had not been inspected or tested prior to the erection of the Tower Crane, and that it was TJP who was responsible for this lapse. This leads to the next issue of liability, *ie*, as between Rango and TJP.

Liability as between Rango and TJP

30 As between Rango and TJP, the Judge found (at [45] of the Decision) that there was a case for TJP to answer as:

> … [T]he cause of the collapse was not due to a supervening event. In the light of the matters

> set out earlier [at [24]–[25] and [40]–[44] of the Decision], there was clearly a case for [TJP] to answer. He had to rebut both [Kimly's and Rango's] expert witnesses' conclusion as to the cause of the collapse and that he was negligent in his duty of inspection. He had failed to discredit their findings or to make them change their mind in cross-examination. …

The Judge then found that TJP was obliged to indemnify Rango in respect of its liability to Kimly. His reasoning was as follows. First, the Judge found that the evidence before him showed that the cause of the Tower Crane's collapse was the Pre-Existing Cracks, and that TJP was liable for the failure to detect those cracks. Based on this evidence, there was a case for TJP to answer. Second, since TJP had given an undertaking not to call any evidence in (*inter alia*) his defence against Rango should his submission of "no case to answer" fail, the Judge found TJP liable to indemnify Rango in respect of its liability to Kimly. With respect, we do not follow this reasoning as the second finding by the Judge (*vis-à-vis* TJP's liability to indemnify Rango) does not flow from the first finding (*vis-à-vis* TJP's failure to detect the Pre-Existing Cracks). We observe that there was no legal analysis by the Judge as to why TJP was obliged to "indemnify" Rango, nor was there any examination as to the nature and content of this "indemnity". In other words, the key issue of the legal basis of TJP's alleged obligation to indemnify Rango was *not* considered by the Judge, who seemed to implicitly accept that an obligation on TJP's part to indemnify Rango automatically sprung from TJP's liability for the collapse of the Tower Crane, which collapse occurred due to TJP's breach of his statutory duties as an AE.

Liability as between TJP and Feng and FES

31 By virtue of TJP's undertaking not to call any evidence against Feng and FES as well should his submission of "no case to answer" fail, the Judge dismissed his claim against them for an indemnity and/or contribution.

The overall result

32 Overall, therefore, the Judge found TJP liable to indemnify Rango in respect of all sums which Rango had to pay Kimly pursuant to the Decision. TJP was also ordered to pay Rango costs (to be taxed or agreed) on the standard basis until 6 September 2010, and thereafter, on an indemnity basis by virtue of an offer to settle from Rango which was not accepted by TJP.

33 TJP was ordered to pay Feng costs (to be taxed or agreed) on the standard basis up to 2 August 2010, and thereafter, on an indemnity basis by virtue of an offer to settle from Feng which was not accepted by TJP. TJP was also ordered to pay FES costs (to be taxed or agreed) on the standard basis (FES did not make any offer to settle).

The parties' arguments on appeal

34 In the present appeal, TJP is challenging the Decision on four main grounds, *viz*:

(a) the expert evidence was problematic on various grounds (and therefore presumably did not make out a *prima facie* case against TJP); [note: 14]

(b) TJP owed no obligation to indemnify Rango in respect of its liability to Kimly; [note: 15]

(c) the losses claimed by Kimly were too remote; [note: 16] and

(d) the losses claimed by Kimly were not proved. [note: 17]

35 For the sake of clarity, we should mention that in the parties' submissions for this appeal:

(a) Kimly has responded to grounds (a), (c) and (d);

(b) Rango has responded primarily to grounds (a) [note: 18] and (b), [note: 19] and has only commented briefly on grounds (c) [note: 20] and (d); [note: 21] and

(c) Feng and FES have not addressed TJP's objections to the Decision, and have simply submitted that the Judge was correct to find that TJP could not proceed against them in the court below because of his undertaking not to call any evidence against them should his submission of "no case to answer" fail.

The issues before this court

36 As the parties raised many issues, both legal and factual, before this court, we should explain why, in our view, this appeal boils down to only one crucial issue. There are technically two broad issues that arise in this appeal, namely: (a) whether the Judge erred in finding that Rango had established a case for TJP to answer; and (b) assuming that the Judge was correct in so ruling, whether he erred in finding that TJP could not seek an indemnity and/or contribution from Feng and FES. However, issue (b) is not a live issue because TJP is not challenging this part of the Decision. In any case, since TJP explicitly gave an undertaking not to call any evidence against (*inter alia*) Feng and FES pursuant to the Judge's ruling on the Preliminary Issue (which undertaking was given after TJP had had time to consider his course of action in the light of that ruling), it is clear that TJP has no basis to appeal as far as issue (b) is concerned. *The only live issue before us is therefore issue (a)*, which comprises the following questions:

(a) whether the evidence supports Rango's case that had TJP inspected the mast anchors prior to the erection of the Tower Crane, the collapse of the Tower Crane could have been avoided (referred to hereafter as "the Factual Question"); and

(b) whether TJP is under a legal obligation to indemnify Rango in respect of its liability to Kimly (referred to hereafter as "the Legal Question").

37 It is important to note that *because TJP made a submission of "no case to answer" in the court below, the threshold against which the above questions are to be assessed is that of whether a* prima facie *case has been established by Rango against TJP, and not that of whether a case against TJP has been established on a balance of probabilities*. This is because a submission of "no case to answer" by a defendant succeeds if: (a) the plaintiff's evidence, *at face value*, does not establish a case in law; or (b) the evidence led by the plaintiff is so unsatisfactory or unreliable that his burden of proof has not been discharged (see *Bansal Hemant Govindprasad and another v Central Bank of India* [2003] 2 SLR(R) 33).

38 Counsel canvassed both the Factual Question and the Legal Question before us, particularly the Factual Question. That question goes to a determination of the cause of the Tower Crane's collapse, specifically, whether the cause was the Pre-Existing Cracks and whether TJP could have discovered those cracks by carrying out the necessary tests. With respect, we felt that counsel, in their enthusiasm to answer the Factual Question, neglected to adequately address the Legal Question, which, in our view, lies at the heart of this appeal. This is because *even if all the evidential issues are resolved against TJP where the Factual Question is concerned*, Rango's case against TJP would still fail if there is no legal basis to find that TJP owes an obligation to indemnify Rango in respect of its liability to Kimly. *This appeal therefore ultimately depends on one narrow question*: taking Rango's

case at its highest, assuming that all factual disputes are resolved in its favour where the Factual Question is concerned, has Rango established a *prima facie* legal basis for TJP to indemnify it in respect of its liability to Kimly? In our view, Rango's case, taken at its highest, merely proves that TJP breached his duties under the WSH Regime by failing to inspect the mast anchors before the erection of the Tower Crane. However, even if this is accepted, *it is a separate and further question whether this breach of statutory duty by TJP as an AE necessarily results in his having a civil obligation to indemnify Rango in respect of its liability to Kimly.* We will now explain why.

Our decision

Overview

39 Rango's pleaded case against TJP, as set out in its statement of claim against the latter in the third-party proceedings ("Rango's Statement of Claim against TJP"), rested on the following alternative legal bases:

(a) "an express or implied contractual … right" [note: 22] to an indemnity from TJP in respect of its (Rango's) liability to Kimly;

(b) "other right" [note: 23] to such an indemnity; and

(c) contribution under s 15 of the Civil Law Act (Cap 43, 1999 Rev Ed). [note: 24]

Of these three alternative legal bases, Rango actively pursued only the first two at the trial. For the sake of completeness, we ought to also mention that in addition to the aforesaid legal grounds, Rango further included in its pleadings a claim for damages "under contract or alternatively under tort", [note: 25] but likewise did not proceed with this head of claim at the trial.

40 TJP's counsel in the present appeal rightly pointed out that the Judge did not state which of the above legal grounds formed the basis of his decision that TJP was under a civil obligation to indemnify Rango. [note: 26] Before us, it was s 15 of the Civil Law Act ("the s 15 ground") that took centre stage, and it will therefore be the primary focus of this judgment. Indeed, the s 15 ground probably assumed primacy for good reason, *viz* – the other two grounds can be disposed of quite quickly, as we will explain before we turn to analyse the issues arising under the s 15 ground.

41 Before we embark on our analysis proper of the various legal grounds pleaded by Rango, it is useful to highlight the implications of Rango's claim that it is entitled to be indemnified by TJP. An unhappy feature of this case is that because of the way in which the proceedings evolved during the trial, there were significant gaps in the facts established in the court below. Even assuming the Judge was right to find, on the evidence, that the Tower Crane's collapse was caused by the Pre-Existing Cracks, it is far from clear how and why the *Pre-Existing* Cracks were present in the first place. The precise extent of liability which Rango should bear for the Tower Crane's collapse is therefore correspondingly unclear. Only after querying counsel did we learn that there is no evidence on record as to the history of the Tower Crane's prior usage before its installation at the Project Site; neither is there evidence as to when, during its previous usage, it had been inspected or certified and by whom. These are all obvious matters that ought to have been fleshed out in the course of the trial. Nevertheless, even though we do not know the exact details, on the evidence before us, we can be certain that the component parts of the Tower Crane, including the mast anchors, were not new and did have a history of prior usage. As mentioned at [26] above, we also have it on record that Lee Tong Boon (Rango's sole proprietor) is, by Rango's own admission, being prosecuted by the MOM for

breaching his duty under s 16(1)(*b*) of the WSHA [note: 27] (s 16(1)(*b*) provides that a person who, *inter alia*, supplies any machinery for use at work is under a duty to ensure, so far as reasonably practicable, "that the machinery ... is safe, and without risk to health, when properly used"). Further, it is clear to us that TJP *certainly was not responsible for the existence of the Pre-Existing Cracks – the wrong alleged on his part is his failure to detect the Pre-Existing Cracks, which were present because another party had failed in its responsibility to ensure that those defects ought not to have been there in the first place.* The necessary wider implication of Rango's claim to be entitled to an indemnity from TJP in this case (a point which may not have been appreciated by the Judge) is that regardless of what the primary cause of a defect in a tower crane is, once an AE breaches his statutory duty and fails to detect that defect, all legal liability for any damage resulting from that defect falls on the AE to the exclusion of any other party who might be responsible (whether partly or wholly) for the presence of that defect. *On this analysis, the outcome reached in the court below is, tersely put, an astonishing result, particularly since the same outcome would occur even if the person claiming an indemnity from the AE is himself entirely responsible for the presence of the defect in question.* We will bear this in mind as we examine the various legal bases pleaded by Rango in support of its claim against TJP.

The legal bases pleaded by Rango against TJP

Express or implied contractual right to an indemnity

42 As mentioned at sub-para (a) of [39] above, the first legal basis pleaded by Rango in support of its claim against TJP was that of an express or implied contractual right to an indemnity from TJP in respect of its (Rango's) liability to Kimly. It is undisputed that the oral contract between TJP and Rango contained no express obligation of indemnity. Any express contractual right to an indemnity can therefore be immediately dismissed. The only question is whether a term as to indemnity can be implied into this oral contract. We find that it cannot. It is trite that a term will be implied into a contract only if it is so necessary that all the contracting parties must have intended its inclusion in the contract. In the present case, as stated earlier (at [7] above), from the circumstances surrounding the conclusion of the oral contract between TJP and Rango, we find that neither party even remotely considered the issue of risk allocation between themselves and non-parties to their contract in the event that TJP was found wanting in the discharge of his professional obligations. It also cannot be said that TJP was privy to or "knew or ought to have known" [note: 28] [emphasis in original omitted] of Rango's contract with Kimly (*viz*, the Sub-Contract), in particular, of Rango's obligation to indemnify Kimly in respect of (*inter alia*) any damage suffered by Kimly. This was a significant part of Rango's case in the court below, which does not seem to have been resurrected on appeal. In any case, as TJP's counsel has rightly pointed out, [note: 29] this argument is tenuous because TJP was engaged by Rango nearly two weeks *before* Kimly and Rango executed the Sub-Contract, which included the term that imposed on Rango its obligation to indemnify Kimly. It would thus not be within the reasonable contemplation of TJP that he was assuming liability to indemnify Rango in respect of its liability to Kimly. We also observe that an obligation to indemnify is an onerous one, and the courts will be slow to imply such an obligation into a contract as it goes against commercial logic to have an implied term on indemnity without laying down properly defined parameters for the purported indemnity. While Rango pleaded an alternative claim for damages "under contract or alternatively under tort", [note: 30] this claim was (as mentioned at [39] above) not pursued at the trial (nor in this appeal), and we thus see no need to address it in this judgment.

"Other" right to an indemnity

43 Other than either an express or an implied contractual right to an indemnity from TJP, Rango

also relied in the court below on a so-called equitable "assumed promise" to indemnify. [note: 31] To this end, Rango cited the Privy Council case of *Eastern Shipping Company, Limited v Quah Beng Kee* [1924] AC 177 ("*Eastern Shipping*") and the (Singapore) High Court case of *Hygeian Medical Supplies Pte Ltd v Tri-Star Rotary Screen Engraving Works Pte Ltd (Seng Wing Engineering Works Pte Ltd, third party)* [1993] 2 SLR(R) 411 ("*Hygeian*").

44 The principles for determining when an equitable "assumed promise" to indemnify may be found can be gleaned from a brief examination of the aforesaid authorities. *Eastern Shipping* recognised (at 182–183) that an obligation to indemnify, apart from arising from contract, could also arise from statute or from an equitable duty to indemnify stemming from "*an assumed promise by a person to do that which, under the circumstances, he ought to do*" [emphasis added] (see *Eastern Shipping* at 182). This equitable duty to indemnify may be found where the parties stand in a relationship of trustee and *cestui que trust* to each other (see *Birmingham and District Land Company v London and North Western Railway Company* (1887) 34 Ch 261 at 271). In such cases, the trustee may claim an indemnity from the *cestui que trust*, and *vice versa* (see *Eastern Shipping* at 182–184). The notion that such an equitable obligation can be imposed when one party stands in a fiduciary relationship to another was expanded in *Checkpoint Fluidic Systems International Ltd v Marine Hub Pte Ltd and Another Appeal* [2009] SGHC 134, which was an appeal to the High Court against a district judge's finding that an equitable right to an indemnity had arisen in favour of the respondent against the appellant in view of the fact that the transaction in question had been entered into by the respondent for the appellant's benefit. This finding was upheld by the High Court. While *Hygeian* neither cited *Eastern Shipping* nor explicitly mentioned the doctrine of the equitable "assumed promise" to indemnify, there is arguably implicit recognition of this doctrine in the finding in that case that the third party was to indemnify the defendant.

45 We find that both *Eastern Shipping* and *Hygeian* are readily distinguishable from the present case. In both of those cases, the third party's acts were the primary – indeed, the *only* – cause of the respective defendants' liability to the respective plaintiffs. In *Eastern Shipping*, it was the third party's wrongful act in instructing a ship to berth at the plaintiff's wharf that caused the defendant to be liable to the plaintiff. The defendant itself had not committed any wrongful act, and there was no other cause leading to the defendant being liable to the plaintiff. Similarly, in *Hygeian*, the defendant would not have been liable to the plaintiff but for the wrongful act of the third party, which caused the defendant's premises to discharge water into the plaintiff's premises and flood them. By contrast, it would be a stretch to say, in the present case, that TJP's wrongful conduct was the sole reason for Rango being placed in a position of liability *vis-à-vis* Kimly, and that it is therefore necessary in equity to assume a promise on TJP's part to indemnify Rango. TJP's failure to *detect* the Pre-Existing Cracks is hardly analogous to the acts of the third parties in *Eastern Shipping* and *Hygeian*, especially since it is plausible that the Pre-Existing Cracks may have been the consequences of Rango's own wrongful acts or omissions. Further, another distinguishing factor in *Eastern Shipping* is that the third party in that case stood in a *fiduciary relationship* to the defendant who incurred liability to the plaintiff as a result of the third party's actions (see *Eastern Shipping* at 183). While the third party in *Eastern Shipping* was not a trustee in the full sense of the word, he was a trustee of his powers such that he stood in a fiduciary relationship to the defendant in respect of his exercise of those powers. As noted in the preceding paragraph, the presence of a fiduciary relationship is one of the touchstones for the imposition of an equitable "assumed promise" to indemnify. This feature is missing in the present case as it is difficult to see how TJP can be said to be in a fiduciary relationship *vis-à-vis* Rango.

Section 15 of the Civil Law Act

46 We now turn to the s 15 ground, which is the mainstay of Rango's attempt to uphold the Judge's decision that it is entitled to be indemnified by TJP in respect of its liability to Kimly.

Section 15(1) of the Civil Law Act states:

> Subject to subsections (2) to (5), any person liable in respect of any damage suffered by another person may recover contribution from any other person liable *in respect of the same damage* (whether jointly with him or otherwise). [emphasis added]

(1) The legislative backdrop

47 In interpreting s 15(1) of the Civil Law Act, we will consider the mischief that this section is intended to cure. In this regard, it is helpful to examine the legislative history of s 1(1) of the Civil Liability (Contribution) Act 1978 (c 47) (UK) ("the 1978 UK Act"), upon which s 15(1) of our Civil Law Act (referred to hereafter as "our s 15(1)" where appropriate to the context) is based. Section 1(1) of the 1978 UK Act provides:

> Subject to the following provisions of this section, any person liable in respect of any damage suffered by another person may recover contribution from any other person liable in respect of the same damage (whether jointly with him or otherwise).

As can be seen, this provision is *in pari materia* with our s 15(1).

48 In the House of Lords case of *Royal Brompton Hospital NHS Trust v Hammond and others (Taylor Woodrow Construction (Holdings) Ltd, Part 20 defendant)* [2002] 1 WLR 1397 ("*Royal Brompton*"), Lord Bingham of Cornhill discussed the legislative history of s 1(1) of the 1978 UK Act. He noted (at [3]) that the Law Revision Committee, in its Third Interim Report (Cmd 4637) of July 1934, had addressed the difficulty faced by one tortfeasor in getting contribution from the other tortfeasor(s) at common law. Lord Bingham then went on to note:

> 3 ... In paragraph 7 of its report the committee said:
>
> > "We think that the common law rule should be altered as speedily as possible. The simplest way of altering the law would seem to be to follow the lines of section 37(3) of the Companies Act [1929 (c 23) (UK)], and to give a right of contribution in the case of wrongs as in cases of contract. If this were done, joint tortfeasors in the strict sense would be given a right of contribution inter se. We think, however, that such a right might with advantage also be conferred where the tort is not joint ([*ie*], the same act committed by several persons) but where the same damage is caused to the plaintiff by the separate wrongful acts of several persons. This is the position which frequently arises where the plaintiff sustains a single damage from the combined negligence of two motor car drivers, and recovers judgment against both ... We think therefore that when two persons each contribute to the same damage suffered by a third the one who pays more than his share should be entitled to recover contribution from the other."
>
> The committee included the following among its recommendations:
>
> > "(II) Any person who is adjudged to be liable to make any payment ... in respect of an actionable wrong may recover contribution ... from any other person who has been made liable in respect of the same wrong, or who, if sued separately, would have been so liable, unless ... [*sic*] (III) Where two or more persons have committed independent wrongful acts which have been the cause of the same damage they shall have the same right to contribution among themselves but subject to the same exception as in the case of persons liable in respect of the same wrong."

Effect was given to these recommendations in section 6(1)(c) of the Law Reform (Married Women and Tortfeasors) Act 1935 [(c 30) (UK) ("the 1935 UK Act")] ...

4 The Law Revision Committee's Third Interim Report and section 6(1)(c) [of the 1935 UK Act] were directed only to the liability, as between each other, of those who had committed tortious acts, whether jointly or concurrently. This limited field of application came in time to be recognised as a weakness, for section 6(1)(c) did not apply to wrongdoers other than tortfeasors and did not apply if only one of the wrongdoers was a tortfeasor. This was one of the weaknesses addressed by the Law Commission in its Report on Contribution (Law Com No 79) published in March 1977. A number of recommendations were made with the main aim of widening the jurisdiction given to the courts by the 1935 [UK] Act (paragraph 81) and specific recommendations were made:

> "(a) … that statutory rights of contribution should not be confined, as at present, to cases where damage is suffered as a result of a tort, but should cover cases where it is suffered as a result of tort, breach of contract, breach of trust or other breach of duty ... (d) ... that the statutory right to recover contribution should be available to any person liable in respect of the damage, not just persons liable in tort ..."

In the draft bill appended to its report the Law Commission proposed a subsection (in clause 3(1)) which differed from section 1(1) of the 1978 [UK] Act quoted at the outset of this opinion only in its reference to the time when the damage occurred, a reference which has been omitted in the subsection as enacted. The words which I have emphasised at the outset were included in the Law Commission draft. Section 1(1) of the 1978 [UK] Act is supplemented by section 6(1) [of the same Act]:

> "A person is liable in respect of any damage for the purposes of this Act if the person who suffered it ... is entitled to recover compensation from him in respect of that damage (whatever the legal basis of his liability, whether tort, breach of contract, breach of trust or otherwise)."

This differs more obviously, at least in wording, from the interpretation clause proposed by the Law Commission:

> "(1) For the purposes of this Act — (a) a person is liable in respect of any damage if he is subject to a duty enforceable by action to compensate for that damage, whether or not he has in fact been held to be so liable in any action actually brought against him; and (b) it is immaterial whether he is liable in respect of a tort, breach of contract, breach of trust or on any other ground whatsoever which gives rise to a cause of action against him in respect of the damage in question."

5 It is plain beyond argument that one important object of the 1978 [UK] Act was to widen the classes of person between whom claims for contribution would lie and to enlarge the hitherto restricted category of causes of action capable of giving rise to such a claim. It is, however, as I understand, *a constant theme of the law of contribution from the beginning that B's claim to share with others his liability to A rests upon the fact that they (whether equally with B or not)* are *subject to a common liability to A*. I find nothing in section 6(1)(c) of the 1935 [UK] Act or in section 1(1) of the 1978 [UK] Act, or in the reports which preceded those Acts, which in any way weakens that requirement. Indeed both sections, by using the words "*in respect of the same damage*", emphasise the need for one loss to be apportioned among those liable.

[emphasis added]

(2) The crucial question

49 From this brief examination of the legislative developments which gave rise to s 1(1) of the 1978 UK Act, it is clear that the essence of that provision (and correspondingly, our s 15(1)) is whether the person from whom contribution is sought and the person claiming contribution are liable in respect of "the same damage". The relevant test for deciding whether TJP and Rango are liable for "the same damage" in the present case is the three-step test established in *Royal Brompton* at [6], which may, for our purposes, be stated as follows:

(a) What damage was suffered by Kimly as a result of the Tower Crane's collapse?

(b) Is Rango liable to Kimly in respect of that damage?

(c) Is TJP also liable to Kimly in respect of that very "same damage" or some of it?

In order words, for the s 15 ground to be made out, it must be established that TJP was liable not only to Rango (whether in tort or in contract) for the damage caused by the Tower Crane's collapse, but also to *Kimly* for that same damage, *ie*, Rango needs to show that TJP *directly* owed Kimly a duty of care at common law.

50 The crucial question ("the Crucial Question"), therefore, is whether an AE, in the discharge of his statutory duties *vis-à-vis* the use of a tower crane at a factory and/or worksite (referred to hereafter as a "workplace" for short), owes a duty of care at common law to the main contractor who will ultimately be using the tower crane (in this case, Kimly), *even though the AE is engaged not by the main contractor but by the sub-contractor* renting out the tower crane to the main contractor (in this case, Rango). After the hearing before us on 7 July 2011, we reserved judgment and directed the parties to file:

(a) any information and/or materials available in the record of proceedings and/or in the public record on the background and/or policy of the 2005 MOM Guidelines; and

(b) authorities showing how the courts have construed the duty of care imposed on inspectors in positions analogous to the position of the AE under the WSH Regime.

The parties submitted the aforesaid materials and their further submissions on these materials on and around 4 August 2011. We turn now to consider the Crucial Question in the light of these materials and submissions.

(3) The general test for imposing a common law duty of care

51 As this court stated in *Animal Concerns Research & Education Society v Tan Boon Kwee* [2011] 2 SLR 146 ("*Animal Concerns*") at [22]:

> … *A statutory duty does not* ipso facto *impose a concomitant duty of care at common law.* A statutory duty may, of course, form the backdrop to and inform the existence (or lack thereof) of a common law duty of care (see, for example, [*X (Minors) v Bedfordshire County Council* [1995] 2 AC 633] at 739), but that does not mean the statutory duty *per se* is a duty of care, *even if it is phrased (as here) in terms of requiring the taking of "reasonable steps" and "due diligence"*. [emphasis added]

52 Rather, to establish a common law duty of care, the general test set out in *Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency* [2007] 4 SLR(R) 100 ("*Spandeck*") must be fulfilled. This test ("the *Spandeck* test") comprises two limbs (see *Spandeck* at [73] and *Animal Concerns* at [29]). First, it must be shown that there is "sufficient *legal* proximity between the claimant and [the] defendant for a duty of care to arise" [emphasis in original] (see *Spandeck* at [77]). If such a relationship of proximity is established, a *prima facie* duty of care arises. Second, the court will then apply policy considerations to the factual matrix of the particular case at hand to determine whether the *prima facie* duty of care is negated (see *Spandeck* at [83]). In this regard, there must be no policy considerations which negate, reduce or limit the scope of the duty or the class of persons to whom it is owed or the damages recoverable for a breach of that duty.

53 Under the first limb of the *Spandeck* test, one of the many factors taken into consideration is the existence of a statutory duty. However, as amply clarified in *Animal Concerns*, the mere existence of a statutory duty owed by the defendant to the relevant authorities is *not* in itself conclusive in establishing that the defendant owes a common law duty of care to the plaintiff. As for the second limb of the *Spandeck* test, one important policy consideration that the courts will evaluate in determining whether a particular statutory duty gives rise to a concomitant common law duty of care is that the imposition of the alleged common law duty of care *should not be inconsistent with the statutory scheme concerned and the statutory duties owed under that scheme* (see *Harris v Evans and Another* [1998] 1 WLR 1285 at 1297, applying *X (Minors) v Bedfordshire County Council* [1995] 2 AC 633).

54 Several general principles inform the law in this area. First, the party seeking to establish that a private right of action exists for a breach of statutory duty must show that Parliament, in imposing the statutory duty in question to protect the members of a class, intended those members to have such a right of action. Here, it must also be borne in mind that such right is not immediately established just because a statute is intended to protect a particular class of persons. Ordinarily, something more is required to demonstrate a statutory intention to confer a private right of action. In matters where the statute's objective is to protect the public in general, exceptionally clear language will be required before an intention to confer a private remedy for a breach of statutory duty can be established. Second, a concurrent common law duty of care may be found alongside a statutory duty imposed by subsidiary legislation provided there are clear indications that the primary legislation contemplates the creation of such a common law duty. Third, while the existence of a statutory remedy for a breach of statutory duty is relevant and may suggest the absence of a private right of action for such breach, it is not in itself decisive (see *Charlesworth & Percy on Negligence* (Christopher Walton gen ed) (Sweet & Maxwell, 12th Ed, 2010) at paras 12-43–12-44). Similarly, the existence of a statutory sanction for a breach of statutory duty neither necessarily nor conclusively indicates that the Legislature intended to preclude a private right of action for such breach (see, *eg*, *Animal Concerns* at [81]). Fourth, we caution that in this complex area of the law, formulas are not helpful. While the general principles stated here may help in terms of setting out relevant factors for consideration, they are mere guidelines and will not yield answers as to whether a common law duty of care exists alongside a statutory duty *in a particular case*. The variety of statutory duties and the different objects which different statutes are directed at make it impossible to have a universal formula. Each statute will have to be considered contextually, and precedents will illuminate only infrequently the right legal path to be taken. Fifth, we emphasise that the underlying statutory scheme and the parliamentary intention behind the enactment of that scheme are not controlling factors in determining whether an alleged common law duty of care exists concurrently with a statutory duty, but rather go towards *negating* the alleged common law duty of care (*ie*, these factors are considered under the second limb of the *Spandeck* test, rather than under the first limb).

55 Turning to the factual matrix before us, to determine whether TJP owed a common law duty of

care to Kimly, it is important to first establish what exactly the office of the AE entails. We are aware that our decision on the existence or otherwise of concurrent civil liability is a point of significance that goes far beyond the instant case, with implications across the WSH Regime. We will thus consider the issue framed in broader terms, specifically, in the form of the Crucial Question as defined at [50] above. In essence, this question requires us to determine whether an AE, in the discharge of his statutory functions, owes a common law duty of care to a person to whom he owes no contractual obligation. As the office of the AE is purely a statutory creation under the WSH Regime, we will need to decide whether the imposition of such a common law duty of care is consistent with the statutory scheme.

(4) The office of the AE under the WSH Regime

56 Pursuant to s 7(3) of the WSHA, the Commissioner for Workplace Safety and Health ("the Commissioner") may appoint "such number of persons as inspectors, and such number of other persons as authorised officers, as may be necessary to assist the Commissioner in the administration of [the WSHA]". Section 8 of the WSHA provides (*inter alia*) that every inspector and authorised officer appointed under s 7 shall be deemed to be a public servant within the meaning of the Penal Code (Cap 224, 2008 Rev Ed). The specific office of the AE is first mentioned in s 32 of the WSHA under Pt VII (which is headed "Safety and Health Management Arrangements"). Section 32 provides that no person shall act as (*inter alia*) an AE without the approval of the Commissioner:

> **Requirement for approval of Commissioner to Act**
>
> **32**. No person shall act as —
>
> (*a*) an authorised examiner for the purpose of carrying out any prescribed examination or test of any —
>
> (i) hoist or lift;
>
> (ii) lifting gear;
>
> (iii) lifting appliance or lifting machine;
>
> (iv) steam boiler;
>
> (v) steam receiver;
>
> (vi) air receiver;
>
> (vii) refrigerating plant pressure receiver;
>
> (viii) pressure vessel; or
>
> (ix) any other machinery required by this Act to be examined or tested by an authorised examiner;
>
> ...
>
> (referred to in this Part as an authorised person) except with the approval of the Commissioner.

57 Sections 33, 34 and 35 of the WSHA set out, respectively, the application process for obtaining

the Commissioner's approval to act as an "authorised person" (which expression includes an AE), the duration of such approval and the grounds upon which the Commissioner may suspend or cancel such approval. Acting as an AE without the approval of the Commissioner is an offence punishable by a fine not exceeding $5,000 or imprisonment for a term not exceeding six months or both (see s 38 of the WSHA).

58 The WSHA itself does not precisely spell out the duties of an AE. These duties are instead fleshed out under the WSH Regulations and the 2005 MOM Guidelines. Regulation 21(15) of the WSH Regulations provides as follows:

> It shall be the duty of an authorised examiner to —
>
> (*a*) issue and sign a certificate, in a form determined by the Commissioner, of the result of the examination referred to in [reg 21(3)];
>
> (*b*) provide the certificate referred to in sub-paragraph (a) to the occupier of the factory;
>
> (*c*) inform the Commissioner —
>
> (i) as soon as is reasonably practicable, if the examination shows that the lifting appliance or lifting machine cannot continue to be used safely unless repairs are made; or
>
> (ii) in any other case, within 28 days of the completion of the examination, of the results of the examination in a manner acceptable to the Commissioner; and
>
> (*d*) exercise all due diligence in making any certification or in conducting any test or examination of any lifting appliance or lifting machine under this regulation.

59 An examination of the WSH Regime reveals that the office of the AE is an integral component of the statutory framework. Under reg 21(1) of the WSH Regulations, no lifting appliance or lifting machine (which includes a tower crane) shall be used unless an AE has both: (a) tested and examined it; and (b) issued and signed a certificate of test and examination specifying its safe working load. If the lifting appliance or lifting machine in question has not been so examined and tested, the Commissioner may serve a remedial order or a stop-work order under s 21 of the WSHA.

60 Before the MOM will grant approval for the use of a tower crane at a workplace, the Use of Tower Crane Checklist (see sub-para (a) of [12] above) must be filled in and submitted with eight other documents to the MOM's Occupational Safety Department at least 30 days ahead of the proposed installation date. [note: 32] At this stage, the AE is involved in the preparation of two of the eight documents that must be submitted to the MOM, *viz*, the Third Party Inspection Report (required only in cases where cll 3.1–3.3 of the 2005 MOM Guidelines apply), [note: 33] and layout plans showing the zones of influence and affected areas. [note: 34] If the submission is in order, the MOM will then endorse and return a copy of the layout plan to the occupier or owner of the workplace ("the occupier/owner"). [note: 35] Upon this endorsement, the occupier/owner must again engage an AE to check the parts of the tower crane according to the MOM's "CHECKLIST FOR INSPECTION & TESTING OF TOWER CRANE" (provided in Appendix 6 of the 2005 MOM Guidelines) [note: 36] *before* erecting the tower crane (referred to hereafter as "the Pre-Erection Inspection"). The AE must also test the tower crane another time *after* it has been erected (referred to hereafter as "the Post-Erection Inspection").

61 The scope of the AE's statutory duties *vis-à-vis* the use of a tower crane at a workplace can therefore be seen to span three distinct stages, namely: (a) the stage where the occupier/owner applies for the MOM's approval to use the tower crane on the basis of the Use of Tower Crane Checklist and its accompanying documents; (b) the Pre-Erection Inspection stage; and (c) the Post-Erection Inspection stage. Therefore, in so far as TJP argues that the statutory purpose behind an AE's duties is merely to "give assurance to [the] MOM that approval [can] be granted for the installation of the [t]ower [c]rane", [note: 37] this is plainly wrong because this touches on only the first of the three stages of an AE's statutory duties. The AE's statutory duties are much broader than that. That said, the breadth of these duties is not an indicator of the coexistence of a private claim in the event of a breach by an AE of his statutory duties. Therefore, we must examine what the WSH Regime has to say about the existence of a concurrent private claim for a breach of statutory duty.

(5) Statutory materials on the existence (or otherwise) of a concurrent civil claim for a breach of statutory duty under the WSH Regime

62 According to TJP, the WSHA contemplates that an AE owes no civil liability for a breach of any of his statutory duties under the WSH Regime. In support of this argument, TJP relies on s 60 of the WSHA, which provides as follows:

> **Civil liability**
>
> **60.**—(1) Nothing in this Act shall be construed —
>
> (*a*) as conferring a right of action in any civil proceedings in respect of any contravention, whether by act or omission, of any provision of this Act; or
>
> (*b*) as conferring a defence to an action in any civil proceedings or as otherwise affecting a right of action in any civil proceedings.
>
> (2) Subsection (1) shall not affect the extent (if any) to which a breach of duty imposed under any written law is actionable.

63 While s 60(1)(*a*) of the WSHA provides that the WSHA *does not confer* any right of action in civil proceedings, s 60(1)(*b*) provides (*inter alia*) that the WSHA also *does not affect* any (independent or pre-existing) right of action in civil proceedings. In other words, s 60 of the WSHA neither confers nor takes away any right to bring a private claim in respect of a breach of statutory duty under the WSH Regime. More importantly for present purposes, s 60 does not answer the question of whether there is an independent or a pre-existing private right of action for such a breach. As noted above at [53], under the *Spandeck* test, it is clear that the mere fact that a particular statutory duty exists does not suffice to give rise to a common law duty of care founded on that statutory duty. Indeed, the statutory scheme may provide compelling policy reasons to negate such a common law duty of care. In the present case, however, we find that s 60 of the WSHA does not in itself provide compelling policy reasons to negate a common law duty of care on the part of an AE, if such duty does exist.

64 We now turn our attention to s 61 of the WSHA, which protects certain officers under the WSH Regime against personal liability in certain prescribed circumstances. Section 61 states:

> **Protection from personal liability**
>
> **61.**—(1) *No action, suit or other legal proceedings shall lie personally against* —

(*a*) the Commissioner;

(*b*) a Deputy Commissioner;

(*c*) an inspector; or

(*d*) an authorised examiner,

for any damage done to any item specified in subsection (2) in the course of carrying out in good faith any prescribed examination or test of the item.

(2) Subsection (1) shall apply only in respect of the following items:

(*a*) a hoist or lift;

(*b*) a lifting gear;

(*c*) a lifting appliance or lifting machine;

(*d*) a steam boiler;

(*e*) a steam receiver;

(*f*) an air receiver;

(*g*) a refrigerating plant pressure receiver;

(*h*) a pressure vessel; or

(*i*) any other machinery required by this Act to be examined or tested by an authorised examiner.

(3) No action, suit or other legal proceedings shall lie personally against the Commissioner or any Deputy Commissioner for anything done or omitted to be done in good faith in the course of or in connection with the performance or purported performance of any duty or function under section 21.

[emphasis added]

65 Section 61 does not apply in the instant case because TJP's alleged personal liability is not in respect of physical damage done to an item in the course of carrying out a prescribed examination. TJP is therefore not protected by s 61 against personal liability in this case. We should add that we do not think s 61 implies that personal liability is excluded *only* in the instances enumerated in that section. Instead, it seems to us that the specific instances where personal liability has been expressly negated by s 61 were inserted *ex abundanti cautela* to protect those involved in the statutory inspection scheme from liability for any physical damage caused in the course of carrying out a prescribed inspection. Surely, it cannot be argued that economic loss caused by (*eg*) delays by an AE in carrying out a prescribed inspection is actionable because liability for such loss has not been expressly excluded. In short, we do not think that s 61 is a statutory indicator of whether an AE may be subject to a private claim for a breach of any of his statutory duties. Section 61 is wholly neutral on this issue. Therefore, we find that nothing in the WSH Regime itself supports either the imposition

or the negation of a concurrent common law duty on the part of an AE.

66 Although the WSH Regime is itself silent on the aforesaid matter, the parliamentary statements on the WSH Regime are illuminating. During the second reading of the Workplace Safety and Health Bill 2005 (Bill 36 of 2005) ("the WSH Bill"), Dr Ng Eng Hen ("Dr Ng"), the then Minister for Manpower, stated as follows (see *Singapore Parliamentary Debates, Official Report* (17 January 2006) vol 80 ("*Singapore Parliamentary Debates* vol 80") at cols 2206 and 2208–2210):

> … Three fundamental reforms in this Bill will improve safety at the workplace. First, this Bill will strengthen proactive measures. Instead of reacting to accidents after they have occurred, which is often too little too late, we should reduce risks to prevent accidents. To achieve this, all employers will be required to conduct comprehensive risk assessments for all work processes and provide detailed plans to minimise or eliminate risks.
>
> Second, industry must take ownership of occupational safety and health standards and outcomes to effect a cultural change of respect for life and livelihoods at the workplace. Government cannot improve safety by fiat alone. Industry must take responsibility for raising [occupational safety and health] standards at a practical and reasonable pace.
>
> Third, this Bill will better define persons who are accountable, their responsibilities and institute penalties which reflect the true economic and social cost of risks and accidents. Penalties should be sufficient to deter risk-taking behaviour and ensure that companies are proactive in preventing incidents. Appropriately, companies and persons that show poor safety management should be penalised even if no accident has occurred.
>
> ...
>
> ***Better defined liability regime to reduce risks at source***
>
> ...
>
> ***Part IV [of] the Bill effects a new and more direct liability regime which assigns legal responsibility to those who create and have control over safety and health risks. Clause 11 assigns liability to occupiers for dangers arising from the physical environment under their control. Clauses 12 and 13 assign responsibility for safety to employers and self-employed persons respectively*** .
>
> Clause 14 covers principals who engage contractors for specialised tasks or the services of workers from third-party labour suppliers. In such situations, there is no contract of employment between the principal and the contractor or the worker supplied. Traditionally, a principal who engages a contractor would be engaging the specialist services of the contractor, and would not be directing the contractor on how to do the work. However, today the situation is different. Principals often engage "contractors" and third-party labour not for their specialist expertise, but precisely so that they can avoid entering into a direct employment relationship, for organisational or other reasons. In such situations, the principal, in terms of supervision, takes on the role of an employer. The Bill thus places on him responsibility for the worker's safety and health as if he were the employer. If this were not the case, then the duties under the Act could be simply circumvented by a careful crafting of the legal relationship.
>
> ***The Bill also expands accountability for [occupational safety and health] risks to include risks posed to members of the public by employers, self-employed persons and principals***

. This is necessary as workplace accidents may have catastrophic effects, not only on their employees, but also on the public at large. ...

[emphasis in italics in original; emphasis added in bold italics]

67 We also note the Explanatory Statement to the WSH Bill, which reads as follows:

This Bill seeks to repeal and re-enact with amendments the Factories Act (Cap. 104) for the following purposes:

(*a*) to secure the safety, health and welfare of persons at work in workplaces;

(*b*) to impose specific duties on various persons, which includes employers, self-employed persons, principals, occupiers of workplaces, persons at work, manufacturers or suppliers of machinery or equipment for use at work, persons who erect, install or modify machinery or equipment and persons having control over common areas, etc.;

(*c*) to provide a range of enforcement methods, so as to enable an appropriate response to a failure to comply with the Bill depending on its nature;

(*d*) to provide for the appointment of authorised examiners and inspectors to carry out such safety and health inspections as are prescribed under the Bill; and

(*e*) to provide for safety and health management arrangements.

...

68 In our view, the above statements make it clear that the objective of the WSH Bill (which was later enacted as the Workplace Safety and Health Act 2006 (Act 7 of 2006)) 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" (see *Singapore Parliamentary Debates* vol 80 at col 2209) was put in place under Pt IV of the WSH Bill 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 WSH Bill, a main contractor and a sub-contractor may fall under one or more of those categories (*eg*, as an employer under cl 12 of the WSH Bill, or as a manufacturer and supplier of machinery under cl 16). The structure of the WSH Bill 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 WSH Bill (*inter alia*, contractors and sub-contractors). Indeed, the specific office of the AE is first mentioned only in Pt VII of the WSH Bill (specifically, in cl 32; in this regard, see also [56] above), and the WSH Bill does not spell out the duties and liabilities of an AE (these were set out only later via the 2005 MOM Guidelines and the WSH Regulations). The Explanatory Statement to the WSH Bill confirms that this Bill had several purposes, with the office of the AE fulfilling a different purpose from that of imposing liability on the persons enumerated in Pt IV of the WSH Bill. Had the office of the AE been mentioned under Pt IV, this would have made for a stronger argument for the imposition of a common law duty of care on an AE. Further, in assessing whether a common law duty of care coexists alongside an AE's statutory duties, it is not an unimportant consideration that all of the AE's statutory obligations have been set out in subsidiary legislation (see [58] above), supplemented by the 2005 MOM Guidelines, with a regime of criminal enforcement in place to remedy any breaches of these statutory duties (see [57] and also [54] above). We will further elaborate on the significance of

this distinction between AEs on the one hand and contractors and sub-contractors on the other later at [73] below.

(6) Analysis of the Crucial Question

69 We set out earlier the three distinct inspections of the Tower Crane which TJP carried out in this case (see [12] above) and the breaches alleged against him (see [19] above). Even if TJP is found to have breached his statutory duties, as we pointed out above at [51]–[52], a statutory duty imposes a concomitant duty of care at common law only if the two limbs of the *Spandeck* test are satisfied, *viz*:

(a) if there is a relationship of sufficient legal proximity between the parties concerned; and

(b) (assuming the requisite relationship of proximity exists) if there are no policy considerations which negate, reduce or limit the scope of the duty or the class of persons to whom it is owed or the damages recoverable for a breach of that duty.

70 Pursuant to our direction of 7 July 2011 for the parties to submit on (*inter alia*) cases involving statutory duties analogous to those of an AE (see sub-para (b) of [50] above), TJP has submitted that on the basis of *Caparo Industries Plc v Dickman and Others* [1990] 2 AC 605 ("*Caparo*") and *Ikumene Singapore Pte Ltd and another v Leong Chee Leng (trading as Elizabeth Leong & Co)* [1993] 2 SLR(R) 480 ("*Ikumene*"), he owes no common law duty of care in discharging his statutory duties as an AE. Rango has submitted to the contrary based on four cases, namely: *Swanson et al v The Queen in right of Canada* (1991) 80 DLR (4th) 741 ("*Swanson*"), *Perrett v Collins and Others* [1998] 2 Lloyd's Rep 255 ("*Perrett*"), *Anns and Others v Merton London Borough* Council [1978] AC 728 and *Welton and Another v North Cornwall District Council* [1997] 1 WLR 570.

71 At one end of the tortious spectrum of liability, *Caparo* and *Ikumene* demonstrate that the courts have in some cases declined to impose a common law duty of care where liability may be indeterminate. In *Caparo*, the plaintiffs relied on the defendant auditors' report on a public listed company's accounts (which report was required under ss 236 and 237 of the Companies Act 1985 (c 6) (UK) ("the UK Companies Act")) to make a takeover bid for the company. The plaintiffs subsequently sued (*inter alia*) the auditors for negligence in making the report. The House of Lords declined to impose a common law duty of care on the auditors in respect of their statutory duty to make the report. Their Lordships held that while it was reasonably foreseeable that the accounts of a public listed company might be relied upon by a range of persons for a number of purposes, an auditors' report on such accounts was required by the UK Companies Act for a specific statutory purpose (see *Caparo* at 652D), and to find that a public listed company's auditors owed a common law duty of care towards persons relying on their report on the company's accounts *outside* its statutory purpose would be to "*create a liability wholly indefinite in area, duration and amount and … open up a limitless vista of uninsurable risk for the professional man*" [emphasis added] (see *Caparo* at 643C–643D). By a process of similar reasoning, in *Ikumene*, this court declined to impose a common law duty of care on a company's auditor *vis-à-vis* a guarantor of the company's credit facilities on the basis that the imposition of such a duty of care would fall outside the statutory purpose for which an auditor's report on a company's accounts was required (see *Ikumene* at [24]).

72 In our view, *Caparo* and *Ikumene* can reasonably bear one of two interpretations, which correspond to, respectively, the two limbs of the *Spandeck* test. It can be said that no common law duty of care was found to exist in these two cases: (a) on the basis of a lack of sufficient legal proximity (*ie*, there was insufficient legal proximity between the statutory actors and the plaintiffs, who were individuals falling outside the class of people protected by the relevant statutory purpose);

or (b) on the basis of policy (*ie*, the courts declined to impose a common law duty of care that would expose the statutory actors to indeterminate liability). Indeed, some commentators have expressed the view that policy considerations are built into the element of proximity (see, *eg*, W V H Rogers, *Winfield and Jolowicz on Tort* (Sweet & Maxwell, 18th Ed, 2010) at para 5-17). In *Caparo* itself, Lord Oliver of Aylmerton opined (at 633C) that a finding of an absence of proximity "[could] most rationally be attributed simply to the court's view that it would not be fair and reasonable to hold the defendant responsible". The same sentiment was echoed by Lord Nicholls of Birkenhead in the House of Lords case of *Stovin v Wise, Norfolk County Council (Third Party)* [1996] AC 923, where his Lordship expressed the view (at 932B–932C) that the concept of proximity was "convenient shorthand for a relationship between two parties which [made] it fair and reasonable [that] one should owe the other a duty of care". As can be seen, there is an established view that the elements of the *Spandeck* test are inter-related and overlapping. The effect of this is that factors which are relevant to one limb of the *Spandeck* test may also be relevant to the other limb in the conduct of the balancing exercise to determine whether a duty of care should be imposed at common law (see *Clerk & Lindsell on Torts* (Michael A Jones gen ed) (Sweet & Maxwell, 20th Ed, 2010) at para 8-15). This is uncontroversial, and, as indicated earlier at [53] above, the applicable statutory scheme, in particular, may be relevant to both limbs (*ie*, both the proximity and the policy limbs) of the *Spandeck* test.

73 Regardless of which of the two interpretations of *Caparo* and *Ikumene* we adopt, we find that the concerns which were determinative in those two cases also apply in our case. In so far as the first interpretation (*viz*, insufficient legal proximity) is adopted, we find that an argument based on a lack of sufficient legal proximity succeeds in the present case. 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 (see [56]–[61] above), the statutory objective is not to protect contractors and/or sub-contractors as they have primary responsibility for all aspects of safety at a workplace. Indeed, Dr Ng's statements in Parliament during the second reading of the WSH Bill (see above at [66]) suggest that the objective of the WSH Regime is to guard against safety lapses at workplaces by contractors and those to whom they have delegated operational control of their work. In our view, the office of the AE is designed as a safety net, as an additional layer of protection to catch any safety hazards present in tower cranes used at workplaces that may have slipped past the notice of contractors and/or that may arise if contractors cut corners. The creation of this office amounts to statutory recognition that there may be occasions where safety lapses by contractors and/or their sub-contractors occur, and is designed to protect those working or present at workplaces from injury caused by such lapses. As such, the office of the AE is not intended to protect either the contractor and/or the sub-contractor from risk, but is instead intended to protect workers and members of the public present at workplaces. Therefore, Kimly, as the ultimate user of the Tower Crane and the occupier of the Project Site, is clearly *not* within the class of people intended to be protected by the statutory purpose behind an AE's duties. In other words, the first limb of the *Spandeck* test is *not* satisfied in the present case and, thus, TJP did not owe Kimly any *prima facie* duty of care at common law.

74 We should add that a striking feature of the instant case is that contributory negligence was not pleaded as between Rango and TJP (see [20] above), and a finding that TJP owed a common law duty of care to Kimly would produce the extraordinary result of TJP being liable for the *entire* damage ensuing from the collapse of the Tower Crane regardless of whether or not he was responsible for the cause of the collapse (see above at [41]). Such a result goes against the spirit, if not the letter, of the WSHA and also against common sense. Nothing in the WSHA contemplates the apportionment of liability, not to mention the imposition of a common law duty of care, between the various persons on whom statutory duties are imposed under Pt IV of the WSHA. Section 10 of the WSHA (which falls under that Part) expressly provides that the same duty or liability can be imposed on two or more

persons, and that the duty or liability imposed on a person will not be diminished or affected simply because it is concurrently imposed on another person. Of course, this position is with regard to the persons who owe statutory duties under Pt IV of the WSHA, and, as we alluded to earlier (at [68] above), an AE is not one of the persons enumerated in that Part. Be that as it may, we find that 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. This does not, however, exclude the possibility that in appropriate cases, persons who are individually liable for breaching their statutory duties under the WSHA may also be found to have been contributorily negligent towards each other.

75 Assuming, for argument's sake, that there is a relationship of sufficient legal proximity between TJP and Kimly (*contra* our finding at [73] above), we now go on to discuss the second limb of the *Spandeck* test, which corresponds to the second interpretation of *Caparo* and *Ikumene*, *viz*, that no common law duty of care was found in those two cases because of policy reasons (see above at [72]). In so far as the second interpretation is concerned, we find that there could plausibly be what may be broadly described as indeterminate liability to an indeterminate class in the present case if the Crucial Question is answered in Rango's favour. While an AE's statutory duties are specific to the installation of a particular tower crane at a particular workplace for a particular period of time, in the event of a breach of these duties, the cascading effects of consequential economic loss can be enormous, particularly if there are work stoppages. All affected parties as well as their suppliers and other actors further down the chain may have some sort of consequential claim against an AE for his statutory lapse(s) if a private cause of action were coexistent. That said, we recognise that the fear of indeterminacy is not the key policy consideration in the present case as this concern might be better addressed at the stage of assessing remoteness of damage. Even so, for the reasons given below (at [84]–[89]), we find that the second limb of the *Spandeck* test is not satisfied in the present case as there are other policy factors which militate against finding that TJP owed a common law duty of care to Kimly.

76 Before we set out these policy factors, we wish to first discuss two of the cases cited by Rango, *viz*, *Swanson* and *Perrett*, both of which lie at the other end of the spectrum of tortious liability from *Caparo* and *Ikumene*. In both *Swanson* and *Perrett*, a common law duty of care was quite readily imposed. Both cases involved airplane crashes which were the result of the negligence of the relevant statutory inspectors in failing to prevent certain flight operations. In *Swanson*, the estates of the deceased passengers sued (*inter alia*) the relevant government agency which, through its inspectors, had allowed the flight operations of a small commercial airline to continue despite the presence of many safety irregularities. In *Perrett*, an injured passenger sued, *inter alia*, the inspector who had negligently provided a certificate of fitness for the airplane in question to fly. In both cases, the courts quite easily found that the inspector (in *Perrett*) and the Department of Transport (the relevant government agency in *Swanson*) owed a duty of care to the passengers of the respective airplanes. In particular, in *Swanson*, the Canadian Federal Court of Appeal expressed its agreement with the trial judge's ruling that (see *Swanson* at 750):

> The *Aeronautics Act* [RSC 1985, c A-2 (Canada)] and [the] Regulations made thereunder if not explicitly imposing a duty of care of the general public, at least do so by implication in that this is the very reason for their existence. The flying public has no protection against avaricious airlines, irresponsible or inadequately trained pilots, and defective aircraft if not [for] the Department of Transport and must rely on it for enforcement of the law and regulations in the interest of public safety. … While there may be no contractual duty of care owed to the public, as [the] plaintiff suggests, this does not of itself protect [the] defendant from liability in tort. [emphasis in original]

77 Similar reasoning was echoed by the English Court of Appeal in *Perrett* (at 272) as follows:

> The regulatory framework recognizes the dangers that are inherent in flying. That is the very purpose lying behind the prohibition on taking aeroplanes into the air without a certificate of airworthiness and a permit to fly, and the appointment of the [Civil Aviation Authority] or those authorized by them to issue such certificates. The whole purpose is one of air safety. In my judgment, any reasonably well informed member of the public, although not in possession of the detailed framework, would expect there to be such a regulatory framework in force to ensure his safety when flying and would rely upon it. Furthermore, a member of the public would expect that a person who is appointed to carry out these functions of inspecting aircraft and issuing permits would exercise reasonable care in doing so.

78 While it *ex facie* appears that the reasoning in *Swanson* and *Perrett* resonates strongly with the instant case, where the regulatory framework of the WSHA is aimed at ensuring safety at workplaces, with the AE playing an integral role in this framework, we would be hesitant to uncritically transplant the result in *Swanson* and *Perrett* to our case. This is because both the Canadian Federal Court of Appeal in *Swanson* and the English Court of Appeal in *Perrett* seemed to take it for granted that a duty of care would exist if certain specific issues were resolved in the respective plaintiffs' favour (*viz*, in *Swanson*, the issue of whether s 8 of the Crown Liability Act 1985, c C-50 (Canada) shielded the relevant government agency from liability, and in *Perrett*, the issue of whether there was any difference between cases of physical damage and cases of economic loss). With respect, it seems to us that the reasoning in these two cases (as set out above at [76]–[77]) does not involve a sufficient examination of whether the *Spandeck* test is satisfied, and is not particularly helpful in ascertaining whether a common law duty of care exists alongside a statutory duty in a particular case. In fact, the reasoning suffers from over-inclusion as it would arguably point towards a concomitant common law duty of care existing alongside *every* statutory duty – in that all statutory frameworks arguably exist for the purpose of protecting some public interest, and the public would expect those appointed to carry out functions under these frameworks to carry out their functions competently and diligently. We find that reference to the protective function of a statutory framework, in itself, does not necessarily answer the question of whether the statutory actors concerned owe a *legal* duty *directly* to the members of the public who are intended to be protected by that statutory framework. As already stated above at [51]–[52], not all statutory duties give rise to a concomitant common law duty of care. It is equally plausible that the legislative intention that statutory actors perform their functions competently and diligently is to be met by only the criminal sanctions provided for within the relevant statutory framework itself, without any coexistent common law duty of care.

79 We emphasise that the question of 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 in issue in each case. This can be seen from *Animal Concerns*. In that case, the appellant engaged a contractor ("A.n.A") to construct an animal shelter; A.n.A in turn appointed its director (the respondent) as the clerk of works to supervise the construction project. In carrying out the backfilling of the construction site, A.n.A used materials which were inferior to the contractually-stipulated materials. As a result, the animal enclosures on some portions of the site later had to be reconstructed. The appellant sued A.n.A for breach of contract, and also sued the respondent for negligence in (*inter alia*) supervising the backfilling works. This court held that although s 10(5)(*b*) of the Building Control Act (Cap 29, 1999 Rev Ed) ("the BCA") did not impose any statutory duty on the respondent, as the clerk of works, to supervise the backfilling works and although a breach of s 10 of the BCA resulted in purely criminal sanctions under ss 10(7)–10(9), based on the *Spandeck* test, the respondent nonetheless owed the appellant a duty of care at common law to supervise the backfilling works because of the very particular nature of a clerk of

works' function in relation to the client commissioning a construction project (the "client"). At [45] of *Animal Concerns*, this court cited the English High Court case of *Leicester Board of Guardians v Trollope* (25 January 1911) (reported in Alfred A Hudson, *The Law of Building, Engineering and Ship Building Contracts and of the Duties and Liabilities of Engineers, Architects, Surveyors, and Valuers; with Reports of Cases and Precedents* vol 2 (Sweet & Maxwell, 4th Ed, 1914) at p 419), where it was stated (at p 423): "[e]verybody knows that an architect cannot be there all the time, and *everybody knows that the clerk of the* [*sic*] *works is appointed to protect the interests of the employer against the builder*, mainly because the architect cannot be there" [emphasis in original omitted; emphasis added in italics]. This court further elaborated at [44] and [51] of *Animal Concerns*:

> 44 It appears, therefore, that the industry practice has been that clerks of works assist the architect by monitoring the work of contractors on behalf of the person commissioning the construction works ("the client"), in order to ensure that work is carried out to *the client's* standards, specifications and schedule, that the correct materials are used and that proper workmanship is observed.
>
> …
>
> 51 This survey of authorities demonstrates that, both as a matter of industry practice and judicial observation, a clerk of works is regarded as being, by virtue of his functions and responsibilities at the building site, in fairly close proximity to *the client*, regardless of whether they are in a formal employer-employee relationship. If, of course, the clerk of works is in fact employed by the client, then there would also be a *contractual relationship* (which would, naturally, entail the corresponding legal obligations) between the parties. The clerk of works protects the interests of the client against the builder, by inspecting and supervising the works to ensure that they conform to the client's budget, standards and specifications, and that the client is getting value for money and proper workmanship. …
>
> [emphasis in original]

80 As stated in the preceding paragraph, this court's finding of sufficient legal proximity between the respondent clerk of works and the appellant client in *Animal Concerns* was premised on the very particular function of a clerk of works *vis-à-vis* a client. *Even given this unique relationship between a clerk of works and a client in industry practice*, this court was careful to mention that not all clerks of works would inexorably owe a common law duty of care to clients – whether such a duty of care existed would depend on the *particular scope of duty* of the clerk of works in a particular case (see *Animal Concerns* at [51]–[55]). This was because, this court explained, the qualifications and functions of clerks of works could vary enormously from case to case (see *Animal Concerns* at [53], citing vol 1, para 2-024 of I N Duncan Wallace, *Hudson's Building and Engineering Contracts* (Sweet & Maxwell, 1995)):

> Clerks of works are usually employed for a specific project, in many cases on the recommendation of the architect, though it is not unusual for building owners with their own building departments or organisations to put forward one of their own employees. They are almost invariably employed and paid for by the building owner. ... Their use is more common in building than in engineering contracts ... *Their qualifications may vary from those of a retired tradesman or foreman to a fully qualified archit[e]ct or engineer, but in general their position is considerably inferior to that of a resident engineer, and the extent of their authority much more rigorously circumscribed by the contract documents ...* [emphasis in original]

81 This court therefore cautioned at [55]:

> … [A]t a *threshold* level, *there might not even be a duty of care to begin with* … We are, of course, assuming a situation in which there is *no contractual nexus* between the clerk of works concerned and the client to begin with. Whilst, following from the analysis above at [39]–[51], it might be argued that, in such a situation, there would, ordinarily, be a duty of care in *tort* owed by the clerk of works to the client (*cf* Stephen Furst and Sir Vivian Ramsey, *Keating on Construction Contracts* (Sweet & Maxwell, 8th Ed, 2006) … at para 13-049), we are of the view that, *in order for such a duty of care to exist, there must first be demonstrated that, on the facts of the case concerned, there had been legal proximity between the parties – for example, that there had been an assumption of responsibility by the clerk of works* vis-à-vis *the client. At this juncture, the universal and the particular (necessarily and, indeed, inevitably) intersect, with the focus tending towards the latter (as opposed to the former).* This necessarily entails an application of the general legal principles to the *facts* of the case itself. … [emphasis in original]

82 What *Animal Concerns* illustrates is that the question of whether a statutory actor owes a concurrent common law duty of care is highly, *but not wholly*, dependent on the particular features of the statutory regime in question. The specific facts of the particular case at hand are equally (and may even be more) important. In short, the *Spandeck* elements have to be established in every case. Care must be taken not to apply cases from other jurisdictions – or, for that matter, even Singapore cases involving different statutory regimes – without a proper appreciation of their context, both legal and factual. In any case, we do not think we can derive much assistance from the variable current of English cases because they are premised on the distinction between physical damage and economic loss. On the one hand, the inspector in *Perrett* was found to owe a duty of care because the loss involved was physical damage; on the other hand, it was held in *Reeman and Another v Department of Transport and Others* [1997] 2 Lloyd's Rep 648 ("*Reeman*") that the government department in question did not owe a duty of care to the purchaser of a fishing boat who had relied on an incorrect safety certificate in respect of the vessel because the loss suffered by the purchaser was pure economic loss. Indeed, the court in *Perrett* took great pains to clarify that the requirement of legal proximity was fulfilled in the case before it because that was not a case of economic loss, but a case of physical damage (see *Perrett* at 260–261 and 263–265), and specifically distinguished *Reeman* on that basis (see *Perrett* at 265). Given this court's affirmation in *Spandeck* (at [115]) that "[a] *single* test to determine the existence of a duty of care [at common law] should be applied regardless of the nature of the damage caused (*ie*, [whether] pure economic loss or physical damage)" [emphasis in original], the English line of cases is not particularly helpful.

83 Reverting now to the policy considerations alluded to at [75] above *vis-à-vis* the second limb of the *Spandeck* test, we now go on to consider the WSH Regime in the context of the specific facts of this case.

84 As we pointed out above at [41], the necessary implication of Rango's claim against TJP for an *indemnity* in respect of all damage caused to Kimly by the Tower Crane's collapse is that regardless of what the primary cause of a defect in a tower crane is and what responsibility (if any) other persons bear for the defect, once an AE fails to perform his statutory duties *vis-à-vis* the use of that tower crane at a workplace, *all* legal liability falls on the AE in respect of any damage arising from the said defect. A finding that TJP is liable to indemnify Rango would be tantamount to *converting a statutory regime meant to ensure workplace safety into an insurance regime for the other private parties involved in the operational aspects of a workplace regardless of their individual responsibility for any safety lapses.* This goes against considerations of corrective justice, which includes an element of "proportionality between the wrongdoing and the loss suffered thereby" (see *McFarlane and Another v Tayside Health Board* [2000] 2 AC 59 ("*McFarlane*") *per* Lord Clyde at 106A).

85 For the following reasons, we find that the imposition of a common law duty of care on TJP

would also go against considerations of distributive justice. While Lord Clyde arrived at his decision in *McFarlane* based on considerations of corrective justice, Lord Steyn arrived at the same result based on considerations of distributive justice, which he recognised (at 82A–83E) as a legitimate concern to be balanced against corrective justice. One of the factors to be taken into account in the matrix of distributive justice is that of risk allocation and the availability of protection through insurance. In this regard, Lord Denning MR noted in *Lamb and Another v Camden London Borough Council and Another* [1981] QB 625 (at 637G–638B) apropos the plaintiffs' claim that the defendant local council owed them a duty of care to prevent squatters from invading a property which they had left unfurnished and unoccupied:

> On broader grounds of policy, I would add this: *the criminal acts here – malicious damage and theft – are usually covered by insurance. By this means the risk of loss is spread throughout the community. It does not fall too heavily on one pair of shoulders alone.* ... It is commonplace nowadays for the courts, when considering policy, to take insurance into account. It played a prominent part in *Photo Production Ltd. v. Securicor Transport Ltd.* [1980] A.C. 827. The House of Lords clearly thought that the risk of fire should be borne by the fire insurers who had received the full premium for fire risk – and not by Securicor's insurers, who had only received a tiny premium. That, too, was a policy decision. … [emphasis added]

86 In *Morgan Crucible Co Plc v Hill Samuel & Co Ltd and Others* [1991] Ch 295 ("*Morgan Crucible*"), Hoffmann J considered that the factor of insurance was what distinguished *Smith v Eric S Bush* [1990] 1 AC 831 ("*Smith*") from *Caparo*. In *Smith*, a common law duty of care was imposed on the defendant surveyor *vis-à-vis* the plaintiff client who sought a survey report on a property which she intended to purchase, whereas in *Caparo*, no common law duty of care was found on the part of the defendant auditors *vis-à-vis* the plaintiffs, who had relied on the auditors' report on a public listed company's accounts to make a takeover bid for the company. Commenting on these two cases, Hoffmann J stated (at 302G–303A of *Morgan Crucible*):

> … [T]he typical [house purchaser] in a *Smith*-type case is a person of modest means and making the most expensive purchase of his or her life. He is very unlikely to be insured against the manifestation of inherent defects. The surveyor can protect himself relatively easily by insurance. The take-over bidder, on the other hand, is an entrepreneur taking high risks for high rewards and while some accountants may be able to take out sufficient insurance, others may not. Furthermore, the take-over bidder [in the case of *Caparo*] is a limited liability company and the accountants are individuals for whom, save so far as they are covered by insurance, liability would mean personal ruin. … [T]he imposition of liability upon surveyors would probably not greatly increase their insurance costs and push up the cost of surveys because the typical buyer who relies on a building society survey is buying a relatively modest house. …

87 Hoffmann J went on to find that the case before him, which was factually similar to *Caparo*, fell on the *Caparo* side of the line, where no common law duty of care was imposed (*Morgan Crucible* was a case of a plaintiff, who had relied on a company's audited financial statements to make a takeover bid for the company, suing (*inter alia*) the company's accountants for alleged negligent misstatements in those financial statements). We note that Hoffmann J's judgment was overturned on appeal on the ground that, *inter alia*, it "would not [be] right by reference to economic considerations to dismiss as unarguable an otherwise arguable case" (see *Morgan Crucible* at 321C). This statement, however, must be understood in its context. The issue to be determined in *Morgan Crucible* was whether the plaintiff's application to amend its statement of claim should be allowed. (The plaintiff made this application after the defendant indicated that it was considering applying to strike out the plaintiff's (original) statement of claim.) The applicable test for whether the plaintiff's application should be allowed was thus whether the proposed amendments to the statement of claim would survive an

application to strike them out as disclosing no cause of action. While economic considerations, including questions of risk allocation and insurance, were not found (on appeal) to be determinative in *Morgan Crucible*, the English Court of Appeal endorsed the continued *relevancy* of these factors (at 321B):

> … [S]o far as it is possible to do so, it will be right for the court at the trial not to close its eyes to the possible economic consequences of its decision as to the existence of a duty of care.

We share the view expressed by the English Court of Appeal in *Morgan Crucible*, *viz*, that economic considerations, such as the availability of insurance coverage, are relevant, although not determinative.

88 Turning to the facts of the instant case, while Kimly and Rango had agreed in cl 3.6 of the Sub-Contract (see above at [6]) that Kimly was to take out an equipment all-risks policy to insure against the loss of or any damage to the Tower Crane, there is no indication that TJP was covered by any sort of professional insurance or had been requested to seek insurance coverage. Had there been a similar allocation of risk between TJP and Rango as that which existed between Rango and Kimly, it is likely that Rango would have made similar arrangements with TJP for the latter to purchase insurance. In our view, the imposition of a common law duty of care on TJP would cut across, and be inconsistent with, the structure of the relationships created by the contracts which Kimly, Rango and TJP entered into in the present case (*viz*, the Sub-Contract between Kimly and Rango, and the oral contract between Rango and TJP).

89 Our view that a common law duty of care should not be imposed on TJP is supported by our reading of the WSHA and what we consider to be its primary objective – namely, ensuring the safety of those present at workplaces (particularly workers), and attributing responsibility for workplace safety to those having operational control of workplaces. The role of the AE in the context of the WSH Regime is to provide an additional layer of checks on contractors and sub-contractors so as to reduce safety risks at workplaces and thereby avoid accidents (see [73] above). Given that there is no particular indication that the WSH Regime contemplates the coexistence of a common law duty of care on the part of an AE in addition to his statutory duties (and the criminal and regulatory sanctions expressly stipulated for breach of those duties), we find nothing to demonstrate or support a finding that the WSH Regime intended that AEs, when discharging their statutory function of *examining* whether private parties have complied with the prescribed safety standards, should become exposed to a coextensive private liability for breaches of their professional responsibilities to other contractors with whom they have no direct contractual relationship. In short, we do not think that the WSHA has made AEs insurers for such parties, and certainly not to an *unlimited* degree. This is particularly so given that: (a) insurance arrangements can be made by the parties; and (b) the fee for TJP's services was only $716 (see above at [8]), which appears from the record before us to be the going rate for similar services. *Given that the WSHA is intended to protect persons present at workplaces from safety lapses by contractors and their sub-contractors, we think it remarkably ironic that Rango now seeks an indemnity from TJP when Rango was responsible for supplying Kimly with a tower crane without any pre-existing defects such as the Pre-Existing Cracks in the Tower Crane.*

90 For the above reasons, even if TJP did indeed owe Kimly a *prima facie* duty of care at common law under the first limb of the *Spandeck* test, we find that policy considerations ought to negate this duty of care under the second limb of that test. In short, we find that TJP did not owe Kimly a common law duty of care in the discharge of his statutory functions. Therefore, s 15 of the Civil Law Act does not apply because TJP is not liable to Kimly for "the same damage" as the damage for which Rango is liable to Kimly (see the three-step test set out at [49] above). Rango's reliance on s 15 as a basis for its claim against TJP must therefore fail.

Further observations on the legal bases pleaded by Rango

91 In any case, even if we had found that the *Spandeck* test was satisfied and that TJP owed Kimly a common law duty of care, we would still hold that Rango did not make out a case for TJP to answer in the court below. In the myriad of issues that have arisen in this appeal, it is easy to lose sight of the basics. The fact is that despite pleading various alternative legal bases in support of its claim against TJP (see above at [39]), Rango did *not*, as we have shown above, make out any of these legal bases in the proceedings below. Tellingly, in Rango's closing submissions for the trial, there was only one paragraph (*viz*, para 55) which alluded to any sort of legal basis for Rango's claim – the rest of Rango's closing submissions pertained to factual evidence indicating that TJP had discharged his statutory duties negligently, which, as we have held (at, *inter alia*, [38] above), is not the issue in this appeal. All that para 55 of Rango's closing submissions stated by way of the legal basis of Rango's claim against TJP was the following: [note: 38]

> The Defendant's [*ie*, Rango's] claim against the Third Party [*ie*, TJP] is based on contract (alternatively in tort) in that the Third Party had breached his contract with the Defendant by failing to exercise due diligence in the discharge of his duties as [an AE]; in particular to undertake or to ensure that the mast anchors were subjected to the MOM mandated tests …

92 In our view, this cryptic submission is patently inadequate as it fails to explain why TJP is obliged to indemnify Rango completely in respect of its liability to Kimly. The "express or implied contractual or other right to [an] indemnity" [note: 39] pleaded by TJP is also untenable for the reasons stated at [42] and [45] above. As for s 15 of the Civil Law Act, this ground, although pleaded in Rango's Statement of Claim against TJP and although constituting the centrepiece of Rango's submissions in this appeal, was *not* part of the case which Rango eventually actively pursued against TJP in the court below. Therefore, even if we had found that s 15 of the Civil Law Act applied, this would be of no avail to Rango in the present appeal. It must be borne in mind that this appeal relates to a particular procedure adopted at the trial, *viz*, the submission of "no case to answer" made by TJP. *Whether TJP had a case to answer in the court below must be assessed against the case which Rango eventually actively advanced against TJP in that court, and not against the case which could have been advanced (in view of Rango's Statement of Claim against TJP) – but which was not eventually taken up – by Rango.*

93 Even more crucially, even if we had taken Rango's submissions on s 15 of the Civil Law Act on board, this still would not make out a case for the *indemnity* awarded by the Judge in Rango's favour. Based on its plain language, s 15 of the Civil Law Act would allow Rango to claim only *contribution* from TJP. Under the usual principles of tort law, any contribution payable by one tortfeasor to another tortfeasor would be in proportion to their respective degrees of contributory negligence. As we noted above at [20] and [74], contributory negligence was not pleaded by either Rango or TJP. Even if it had been pleaded, there would, in our view, still be no legal basis for Rango to claim that TJP's breach of his common law duty of care (assuming we had found such duty existed) resulted in his being under an *unlimited* obligation to *indemnify* any other party who might have been contributorily liable for the damage suffered by Kimly, as opposed to being under only a *limited* obligation to *contribute* to the extent of his negligence. Indeed, even in the cases referred to above where the courts imposed a common law duty of care on the statutory actors concerned (*viz*, *Perrett*, *Swanson* and *Animal Concerns*), *this was only to the extent to which they were contributorily negligent for the loss or damage in question*. In *Perrett*, liability was apportioned between the inspector and, *inter alia*, the individual who had assembled and piloted the airplane; in *Swanson*, liability was apportioned between the government agency which had appointed the inspector as well as the pilot and the airline; and in *Animal Concerns*, both the respondent clerk of works and the contractor (*viz*, A.n.A) were found liable

to the appellant client who had engaged the contractor to carry out the construction works. There was no question of the respondent clerk of works in *Animal Concerns* being legally obliged to indemnify the contractor just because of his negligence in failing to detect that the contractor had not used the contractually-stipulated materials to carry out the backfilling works.

94 In conclusion, therefore, Rango's case in the court below was fatally flawed as it was based on two cumulative leaps of logic: the first was the leap from TJP's breach of his statutory duties under the WSH Regime to his concurrently owing a common law duty of care in the discharge of those duties; the second was the leap from TJP's owing a common law duty of care to Kimly (assuming such duty did exist) to his being under an obligation to indemnify Rango for the entirety of the damage suffered by Kimly, rather than being under merely an obligation to contribute to the extent of his breach of duty (if any). In the result, we find that TJP was entitled and correct to make a submission of "no case to answer" in the court below.

95 For the sake of completeness, we should mention that since we have found that TJP is not liable to indemnify Rango in respect of the latter's liability to Kimly, it is not necessary for us to deal with the remaining grounds of appeal raised by TJP (*ie*, that the losses claimed by Kimly are too remote, and that those losses have not been proved (see sub-paras (c) and (d) of [34] above)).

Conclusion

96 For all of the above reasons, we allow this appeal, with TJP's costs here and below to be borne entirely by Rango. As a consequence of our decision, some of the other costs orders made by the Judge (including his order that TJP is to bear the costs of Feng and FES for the proceedings below) may have to be varied. All the parties to the proceedings below have seven days from the date of this judgment to make written submissions on the further consequential orders that we ought to make.

[note: 1] See, *inter alia*, the Appellant's Core Bundle ("ACB") vol 2, p 325 para 1.1.

[note: 2] See the Fourth Respondent's Skeletal Arguments at para 4.

[note: 3] See the affidavit of Yuan Long Sheng affirmed on 15 July 2010 ("YLS's affidavit of 15 July 2010") at pp 13–18.

[note: 4] See YLS's affidavit of 15 July 2010 at p 18.

[note: 5] See ACB vol 2, p 327.

[note: 6] See ACB vol 2, pp 38–40.

[note: 7] See the Record of Appeal ("ROA") vol 3(K), p 3316.

[note: 8] *Ibid*.

[note: 9] See Rango's Closing Submissions filed on 29 October 2010 for the trial at para 90 (at ROA vol 3(P), pp 4758–4759). See also the affidavit of evidence-in-chief of Kenneth James Patterson-Kane filed on 8 September 2010 ("Patterson-Kane's AEIC") at para 93 (at ROA vol 3(I), p 2884).

[note: 10] See Patterson-Kane's AEIC at para 99 (at ROA vol 3(I), pp 2886–2887).

[note: 11] See Patterson-Kane's AEIC at para 99(a) (at ROA vol 3(I), p 2886).

[note: 12] See the Second Respondent's Case at para 308.

[note: 13] *Ibid*.

[note: 14] See the Appellant's Case at paras 50–123.

[note: 15] See the Appellant's Case at paras 124–168.

[note: 16] See the Appellant's Case at paras 169–186.

[note: 17] See the Appellant's Case at paras 187–190.

[note: 18] See the Second Respondent's Case at paras 80–226.

[note: 19] See the Second Respondent's Case at paras 227–304.

[note: 20] See the Second Respondent's Case at para 305.

[note: 21] See the Second Respondent's Case at para 307.

[note: 22] See the "Statement of Claim by Defendant in Third Party Proceedings" filed by Rango on 28 September 2009 ("Rango's Statement of Claim against TJP") at para 43(a) (at ROA vol 2(A), p 118).

[note: 23] *Ibid*.

[note: 24] See Rango's Statement of Claim against TJP at para 43(b) (at ROA vol 2(A), p 118).

[note: 25] See Rango's Statement of Claim against TJP at para 44 (at ROA vol 2(A), p 118).

[note: 26] See the Appellant's Case at para 126.

[note: 27] See the Second Respondent's Case at para 308.

[note: 28] See the Appellant's Case at para 148.

[note: 29] *Ibid*.

[note: 30] See Rango's Statement of Claim against TJP at para 44 (at ROA vol 2(A), p 118).

[note: 31] See the Second Respondent's Case at paras 301–304.

[note: 32] See the 2005 MOM Guidelines at cl 1.1 (at ACB vol 2, p 34).

[note: 33] See ACB vol 2, p 35.

[note: 34] See the 2005 MOM Guidelines at cl 4 (at ACB vol 2, p 35).

[note: 35] See the 2005 MOM Guidelines at cl 1.3 (at ACB vol 2, p 34).

[note: 36] See ACB vol 2, pp 46–48.

[note: 37] See the Appellant's Further Submissions at para 19.

[note: 38] See ROA vol 3(P), p 4741.

[note: 39] See Rango's Statement of Claim against TJP at para 43(a) (at ROA vol 2(A), p 118).