# Goh Sin Huat Electrical Pte Ltd v Ho See Jui (trading as Xuanhua Art Gallery) and another [2012] SGCA 32

**Case Number** : Civil Appeal No 61 of 2011

**Decision Date** : 26 June 2012

**Tribunal/Court** : Court of Appeal

**Coram** : Chao Hick Tin JA; Andrew Phang Boon Leong JA; V K Rajah JA

**Counsel Name(s)** : Cavinder Bull SC and Adam Muneer Yusoff Maniam (Drew & Napier LLC) for the appellant; Kelvin Poon Kin Mun and Melissa Kue (Rajah & Tann LLP) for the first respondent; Audrey Chiang Ju Hua and Lim Yew Kuan Calvin (Rodyk & Davidson LLP) for the second respondent.

**Parties** : Goh Sin Huat Electrical Pte Ltd v Ho See Jui (trading as Xuanhua Art Gallery) and another

*Tort*

*Contract*

*Civil Procedure – Appeals*

[LawNet Editorial Note: This was an appeal from the decision of the High Court in [2011] SGHC 108.]

26 June 2012

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

**Introduction**

1 This appeal arose from the following undisputed facts. A water inlet hose ("the Water Inlet Hose") which carried water to a water dispensing unit ("WDU") located at the office of the second respondent, Liquid Advertising Pte Ltd ("Liquid Advertising") ruptured. This resulted in water seepage into an art gallery situated directly below. The art gallery was owned and operated by the first respondent, Ho See Jui trading as Xuanhua Art Gallery ("Ho See Jui"). The water seepage extensively damaged the paintings displayed and stored in Ho See Jui's Xuanhua Art Gallery ("the Art Gallery"). The WDU was supplied, installed and maintained by the appellant, Goh Sin Huat Electrical Pte Ltd. Ho See Jui commenced these proceedings against Liquid Advertising and the appellant in order to recover monies for the loss and damage sustained as a result of the water leakage from the rupture of the Water Inlet Hose. Both the trial and this appeal solely concerned the question of liability. Accordingly, evidence as to the quantum of damages suffered by Ho See Jui was not adduced.

2 The High Court Judge ("the Judge") in *Ho See Jui (trading as Xuanhua Art Gallery) v Liquid Advertising Pte Ltd and another* [2011] SGHC 108 gave judgment in favour of Ho See Jui with costs to be borne by Liquid Advertising and the appellant. The Judge ordered that liability between Liquid Advertising and the appellant be apportioned in the following proportions: 30% to be borne by Liquid Advertising and 70% to be borne by the appellant. Further, as between Liquid Advertising and the appellant, it was ordered that the appellant indemnify Liquid Advertising in respect of their 30% liability to Ho See Jui. In effect, the appellant was held to bear 100% of the liability for Ho See Jui's losses.

3 After considering the parties' submissions, this appeal was partially allowed only with respect to the order of indemnity granted by the Judge. Thus, the apportionment of liability reverted to 70% to the appellant and 30% to Liquid Advertising. The costs order was also varied to reflect the percentage of liability borne by both parties. We now give the full reasons for our decision.

**Background**

***Personae Dramatis***

4 Ho See Jui, the plaintiff and the first respondent in this appeal, is in the business of exhibiting and selling contemporary Chinese ink paintings which are traditionally painted on rice paper.

5 Liquid Advertising, the first defendant and second respondent in this appeal was at all material times the tenant of 70A Bussorah Street ("the Second Floor Unit").

6 The appellant, the second defendant, was at all material times the sole local distributor of the "Frigeria" brand of WDUs, one of which was installed in the Second Floor Unit. The appellant was also responsible for repairing and maintaining the said WDU.

***Facts***

7 Ho See Jui was the tenant of the ground floor of a two-storey shophouse located at 70 Bussorah Street, Singapore 199483. Ho See Jui owned and operated the Art Gallery in the leased space where he displayed his traditional rice paper paintings. The Second Floor Unit which was leased by Liquid Advertising was located directly above the Art Gallery. On or about 2 April 2001, the appellant sold Liquid Advertising a "Frigeria" brand of WDU which was initially installed in Liquid Advertising's previous office, located at 770A North Bridge Road, Singapore 198738.

8 On 2 September 2004, acting on Liquid Advertising's request the appellant re-installed the WDU in the Second Floor Unit. In the course of the reinstallation of the WDU, the appellant also supplied a water inlet hose connecting the water mains in the Second Floor Unit to the WDU. For ease of reference, the area where the WDU was installed will henceforth be referred to as the "WDU Area". It was common ground that the Water Inlet Hose carrying water to the WDU ruptured sometime between the evening of 24 September 2008 and the early morning of 25 September 2008. The water that leaked from the ruptured Water Inlet Hose seeped through the flooring of the Second Floor Unit into the Art Gallery. Ho See Jui alleged that the water that seeped into the Art Gallery damaged his paintings and the cabinet storing his paintings – this damage formed the basis of his action against Liquid Advertising and the appellant.

*The reinstallation agreement*

9 On 28 August 2004, shortly before relocating to the Second Floor Unit, Liquid Advertising entered into an agreement with the appellant for the latter to re-install the WDU at the new premises ("the Reinstallation Agreement") [note: 1]. A quotation issued for the installation ("the Quotation") contained the following clause ("the Quotation Warning"):

> ** PLS NOTE: THE PLACE WHERE THE WATER DISPENSER IS INSTALLED SHOULD HAVE A FLOOR TRAP, SO THAT WHEN THERE IS A LEAK IT WILL NOT FLOOD THE AREA. WE WILL NOT BE HELD RESPONSIBLE FOR ANY DAMAGES RESULTING FROM THE LEAKING OR FLOODING FROM THE FILER OR WATER DISPENSER.

We should add that it was not disputed that the WDU Area had timber flooring which could allow water to pass through its cracks.

*The maintenance agreements of the WDU*

10 Liquid Advertising also entered into service and maintenance contracts with the appellant in August 2001 ("the First Maintenance Contract") [note: 2], on 11 December 2003 ("the Second Maintenance Contract") [note: 3] and on 22 June 2005 ("the Third Maintenance Contract") [note: 4] (collectively, "the Maintenance Contracts"). Pursuant to the First Maintenance Contract, the appellant maintained and serviced the WDU on four separate occasions between September 2001 and November 2002. [note: 5] The Third Maintenance Contract, valid from 22 June 2005 to 21 June 2007, stated that the WDU was to be serviced a total of eight times. In all, the WDU was serviced on 16 occasions. The last service was conducted on 16 September 2008, eight to nine days before the rupture of the Water Inlet Hose. [note: 6]

11 Though not in the First Maintenance Contract, the Second and Third Maintenance Contracts contained the following clause ("the Disclaimer"):

> DEAR CUSTOMER,
>
> PLEASE BE INFORMED THAT THE INSTALLATION OF THE WATER COOLER AND/OR WATER DISPENSER SHOULD BE AT A WET PANTRY AREA. [THE APPELLANT] WILL NOT BE HELD RESPONSIBLE FOR ANY DAMAGES RESULTING FROM FLOODING OR LEAKING FROM THE WATER FILTER AND/OR WATER COOLER AND/OR WATER DISPENSER OR ANY DAMAGES FROM THE INSTALLATION OR REPAIR OR FAULT OF THE WATER COOLER AND/OR WATER DISPENSER.

The Disclaimer was also inserted in the appellant's service orders which were issued for services carried out under the Maintenance Contracts, and in the service order issued for the reinstallation of the WDU at the Second Floor Unit.

***Summary of Pleadings***

12 Ho See Jui raised three causes of action against Liquid Advertising in his claim for general and special damages. He successfully maintained claims in the tort of negligence, in the tort of private nuisance and under the rule in *John Rylands and Jehu Horrocks v Thomas Fletcher* (1868) LR 3 HL 330 ("*Rylands v Fletcher*"). Ho See Jui also pleaded two causes of action against the appellant; one in the tort of negligence and another in the tort of private nuisance. Specifically, Ho See Jui alleged that the appellant was negligent in:

> (a) installing the Water Inlet Hose which was inherently unsuitable for the carriage of potable water and/or for use with the WDU; and
>
> (b) providing and/or installing the Water Inlet Hose without ascertaining whether the Water Inlet Hose was suitable for use with the WDU.

The appellant denied that it owed a duty of care to Ho See Jui or that it breached that duty for the following reasons:

> (a) the appellant did not know that the carpeted flooring at the WDU Area was made of timber

and that the WDU Area was located directly above Ho See Jui's cabinet containing some of his paintings;

(b) the appellant was not responsible for the location where the WDU was installed;

(c) the appellant did not install the Water Inlet Hose; and

(d) the appellant additionally claimed that the Water Inlet Hose appeared to have been deliberately cut.

Further, as with his claim against Liquid Advertising, Ho See Jui alleged that the appellant had created a nuisance by installing the WDU at an inappropriate location.

***Notice of contribution or indemnity***

13 On 8 December 2010, Liquid Advertising served a notice claiming contribution or indemnity against the appellant for any losses attributable to it from Ho See Jui's claim. Liquid Advertising claimed that it was entitled to an indemnity or contribution because the appellant had breached various implied terms of the Reinstallation Agreement and the Maintenance Contracts in two aspects:

(a) first, Liquid Advertising took the position that the Water Inlet Hose was of an unsatisfactory quality and/or was not reasonably fit for its intended purpose; and

(b) second, Liquid Advertising claimed that the appellant did not perform its obligations under the Reinstallation Agreement and the Maintenance Contracts with reasonable care and skill, or at all.

14 The main arguments raised by the appellant in response to Liquid Advertising's claim for an indemnity or contribution were as follows:

(a) first, the Maintenance Contracts expired before 24 September 2008 or the date of rupture of the Water Inlet Hose;

(b) second, under the terms of the Third Maintenance Agreement, the appellant did not take responsibility for the location of the WDU. Further, the appellant's duties only concerned the WDU itself and not the Water Inlet Hose;

(c) third, the terms that Liquid Advertising claimed were implied into the Reinstallation Agreement and the Third Maintenance Agreement were not so implied because the Water Inlet Hose was not installed by the appellant; and

(d) fourth, and in the alternative, the appellant was entitled to rely on the Quotation Warning and the Disclaimer.

**The decision below**

***Cause of the rupture***

15 The Judge held that the Water Inlet Hose ruptured due to (a) hydrolysis and (b) a pre-existing fabrication defect in the form of two helical seam lines ("the Helical Line Feature"). The Judge found that the Helical Line Feature would not have had any impact on the use of the Water Inlet Hose if it

had been used for its intended purpose of carrying compressed air. [note: 7] The Judge also accepted expert opinions that the Water Inlet Hose was not suitable for use with the WDU on the basis of an industry standard for the types of hoses approved for the carriage of water. [note: 8] The three causes identified for the rupture were:

(a) first, the hydrolytic degradation of the Water Inlet Hose;

(b) second, the Helical Line Feature; and

(c) third, the location of the WDU at the WDU Area because the flooring of the WDU Area was water permeable.

16 Rejecting the appellant's argument that the Water Inlet Hose was not installed by them, the Judge found that on the balance of probabilities the evidence suggested that the Water Inlet Hose must have been the water inlet hose that was installed by the appellant on 2 September 2004.

***Liability and apportionment***

17 As noted above, the Judge found that Liquid Advertising was liable to Ho See Jui for all three causes of action in the tort of negligence, private nuisance and the rule under *Rylands v Fletcher*. The *sole reason* identified by the Judge as underscoring Liquid Advertising's liability was the fact that they instructed the appellant to install the WDU at the WDU Area (*ie*, the third cause stated above at [15]) despite the Quotation Warning (above at [9]), the Disclaimer and warnings in the service orders (above at [10]–[11]). Liquid Advertising did not appeal against any of the Judge's findings.

18 On the other hand, the appellant was only found to be liable to Ho See Jui for having committed the tort of private nuisance. The Judge reasoned that the appellant was responsible for installing the Water Inlet Hose which was unsuitable for the carriage of water and for ignoring its own warnings that the WDU should have been installed at the wet pantry area. Unlike Liquid Advertising, the appellant was held to be responsible for *all three causes* which were identified by the Judge (above at [15]). As for Ho See Jui's claim against the appellant in negligence, the Judge held that she was not satisfied that the appellant owed Ho See Jui a duty of care. Accordingly, no finding was made in relation to this claim.

19 Having found Liquid Advertising to be liable under all three causes of action and the appellant in the tort of private nuisance, the Judge found that Ho See Jui was entitled to a joint judgment as the acts of either defendant could not be attributed to distinct portions of the damage suffered by Ho See Jui. As noted above, the damage was identified to have been caused by a combination of three causes, *viz*, the Helical Line Feature, hydrolytic degradation of the Water Inlet Hose and the location of the WDU at the WDU Area. By reason of Liquid Advertising's limited responsibility only in relation to the location of the WDU, the Judge found that a just and equitable apportionment was 30% liability to Liquid Advertising and 70% liability to the appellant. [note: 9]

***Indemnity***

20 The Judge also found that Liquid Advertising was entitled to an indemnity from the appellant by reason of breaches of implied conditions under the Reinstallation Agreement, implied under s 4(2) of the Supply of Goods Act (Cap 394, 1999 Rev Ed) ("the SGA"). First, s 4(2) of the SGA implied that the goods supplied under the contract were of "*satisfactory quality*". Second, s 4(2A) of the SGA provided for an objective test for determining whether the goods were of satisfactory quality:

(2A) For the purposes of this section and section 5, goods are of satisfactory quality if they meet the standard that a reasonable person would regard as satisfactory, taking account of any description of the goods, the price (if relevant) and all the other relevant circumstances.

The Judge held that the Water Inlet Hose that the appellant had supplied was unsatisfactory because a reasonable person would consider that a hose meant to carry water should not be made of a material prone to hydrolytic degradation. The implied condition that goods supplied by the appellant are to be of satisfactory quality was breached for the same reason. Accordingly, the appellant was ordered to indemnify Liquid Advertising's proportion of liability owed to Ho See Jui.

**The appellant's case**

21 The appellant took issue with the Judge's (a) findings of fact, (b) the apportionment of liability and (c) the order to indemnify Liquid Advertising.

***Findings of fact***

22 The following grounds of appeal were raised against the two primary findings of fact identified as relevant to the appellant's liability under the tort of private nuisance:

(a) *Whether it was the appellant who had installed the Water Inlet Hose*: [note: 10] specifically, the appellant argued that the Judge failed to give due weight to the evidence of all three expert witnesses which strongly suggested that the Water Inlet Hose could not have been the same water inlet hose that had been installed by the Appellant four years earlier in 2004.

(b) *Whether the appellant was responsible for the location of the WDU at the WDU Area*: [note: 11] the appellant argued that the Judge failed to give due weight to the appellant's provision of numerous warnings to Liquid Advertising which clearly stated that the WDU should have been installed at a wet pantry area and that the appellant would not be responsible for any leakage. In essence, the appellant argued that the Judge should have placed greater weight on Liquid Advertising's unilateral and independent decision to install the WDU at the WDU Area.

***Apportionment of liability***

23 In the alternative, on the issue of apportionment of liability between Liquid Advertising and the appellant, the following grounds of appeal were raised: [note: 12]

(a) that the Judge failed to give due weight to the fact that Liquid Advertising had been provided with numerous warnings by the appellant that the WDU should have been installed at a wet pantry area; and

(b) that the learned Judge completely failed to consider the unchallenged evidence before the Court that locating the WDU at the wet pantry area would have prevented most, if not all, of the water that had leaked from the Water Inlet Hose from flowing to the Art Gallery; as most of the leaked water would have been drained away.

***The order to indemnify Liquid Advertising***

24 Finally, on the issue of indemnity, the appellant made the following submissions: [note: 13]

(a) the Judge completely failed to give consideration to her other holding that Liquid Advertising itself had been negligent in instructing that the WDU be located at the WDU Area and not the wet pantry area; and

(b) the Judge fell into error by failing to take Liquid Advertising's contributory negligence into account when deciding on the extent, if any, to which the appellant was obliged to indemnify Liquid Advertising.

**Issues before this Court**

25 Broadly speaking, the appellant raised three grounds of appeal which will be addressed in the following order:

(a) whether the findings of fact made by the Judge in support of the appellant's liability in the tort of private nuisance were supported by the weight of the evidence before the Court (below at [26]–[47]);

(b) whether the Judge erred in the apportionment of liability (below at [48]–[58]); and

(c) whether the Judge erred in ordering the appellant to completely indemnify Liquid Advertising (below at [59]–[63]).

***Issue 1: Whether the findings of fact made by the Judge in support of the appellant's liability in the tort of private nuisance were supported by the weight of the evidence before the Court***

*First finding: Whether the Water Inlet Hose had been installed by the appellant*

26 The appellant placed great weight on certain excerpts from the expert evidence before the Judge relating to the condition of the Water Inlet Hose. The Water Inlet Hose was described as follows: "*it was very new*"; [note: 14] and that it "*would appear likely that the pipe was very recently installed*". [note: 15] By reason of the alleged "pristine state" of the hose, the appellant argued that the Water Inlet Hose could not have been the same hose that was installed by the appellant four years prior to the incident. Secondly, the appellant postulated that based on the expert evidence before the Court, the hydrolytic degradation would have caused any water inlet hose similar to the Water Inlet Hose to have ruptured within weeks or months of being exposed to water. Thus it was clear that the Water Inlet Hose could not have been the same water inlet hose that had been installed by the appellant in September 2004. [note: 16] In summary, the appellant sought to establish that the Water Inlet Hose was not installed by them because (a) it looked too new to be four years old, and (b) because if it indeed was installed in 2004, by reason of the process of hydrolytic degradation, it would have ruptured within weeks or months of exposure to water.

27 Our appraisal of the expert opinion relied on by the appellant revealed that the high threshold for appellate review of a finding of fact was not met as the expert evidence did not clearly indicate either (a) or (b) (above at [26]). Even if it were accepted that there were gaps in the evidence, and the appellant was right that the Water Inlet Hose was replaced after 2004, on a balance of probabilities, this replacement was likely to have been performed by the appellant. Why would Liquid Advertising have chosen to replace the water inlet hose itself or engaged some other party to do so when it had an existing maintenance arrangement with the appellant (see [36]–[41] below)? With that general preface we turn to examining this argument more closely.

The Water Inlet Hose looked "new"

(A) The preliminary examination report

28 Liquid Advertising's witness, Mr Graham Alan Cooper ("Mr Cooper") had prior experience as a materials scientist specialising in failure analysis and failure investigation for more than 25 years. The appellant heavily relied on the reproduced portion of Mr Cooper's report ("the preliminary report") which was based on a preliminary, non-destructive inspection of the Water Inlet Hose on or about 20 October 2008 (less than a month after its rupture on 25 September 2008). It was carried out on the instructions of Liquid Advertising's loss adjusters, Cunningham Lindsay (Singapore) Pte Ltd. Mr Cooper observed as follows: [note: 17]

> The pipe is in *pristine condition* with only minimal wear and abrasion present on the outer surfaces. The general condition of the pipe suggests that *it is nearly new*, which is consistent with it having been *fitted to the water cooler very recently*. *The condition is not consistent with the reported age of the water cooler, i.e. 4 years*. [emphasis added]

29 The weight to be given to Mr Cooper's opinion must be determined keeping in mind that this report was preliminary. Further, Mr Cooper only carried out a non-destructive inspection of the Water Inlet Hose and the inspection was only a visual one which did not involve any detailed analysis of the same. [note: 18] Liquid Advertising argued that the purpose of Mr Cooper's report was for him to assess whether the damage had been caused externally or whether there was a defect with the Water Inlet Hose. After having examined the Water Inlet Hose in greater detail, Mr Cooper found that there were no markings on it which identified the date of its manufacture. [note: 19]

30 In his subsequent expert report, Mr Cooper clarified his views in relation to the appearance of the Water Inlet Hose. In Mr Cooper's expert report dated 4 October 2010, he reiterated that when he had conducted the examination of the Water Inlet Hose in October 2008, the Water Inlet Hose was in very good condition: [note: 20]

> The [Water Inlet Hose] was found to be in visually very good condition ..., with only minimal wear and abrasion present on the outer surface.

However, Mr Cooper also stated as follows: [note: 21]

> Markings on the hose identified its manufacturer, size and type. However, there were no markings present that identified its date of manufacture. It is therefore not possible to conclusively establish the age of the hose. The exterior of the hose was in almost pristine condition, which suggested that it may have been relatively new at the time of the incident, as stated at page 2 of [the preliminary report]. *However, I should clarify that if it had been installed in a relatively clean environment and had been protected from general wear and tear, it is possible that it could have been the original hose that was fitted when the subject WDU was installed at [Liquid Advertising's] Premises in 2004*. [emphasis added]

31 The Water Inlet Hose was installed in an enclosed office area, outside of the wet pantry area which was used for spraying adhesives in the course of Liquid Advertising's business. It was not exposed to sunlight or adhesives. The appearance alone of the hose, documented in a preliminary report did not establish, on a balance of probabilities, that it was new. Mr Cooper's evidence was interpreted by the Judge in support of her findings; it was reasonably plausible that in the conditions in which the Water Inlet Hose was stored, it remained looking new despite its age and installation in 2004. Thus the appellant's submission was not borne out by Mr Cooper's preliminary view alone.

(B) Mr Liam Kok Chye's expert report

32 Ho See Jui's witness at the trial below, Liam Kok Chye ("Mr Liam") had relevant experience in failure and material analysis of polymers and plastics. The appellant relied on para 5.2(d) of Mr Liam's expert report, wherein he stated as follows: [note: 22]

> Based on a review of the reported background information regarding the WDU, it appears that the WDU was in use for about 8 years. The [Water Inlet Hose] was also reportedly **replaced** around 4 years prior to the incident. Considering that the [Water Inlet Hose] instead of commonly accepted tube material such as polyethylene was used, *it is likely that this [Water Inlet Hose] was changed from the originally installed [water inlet hose]*. [emphasis added]

On a plain reading, this excerpt from Mr Liam's evidence did not lend any support to the appellant's argument. In our view, Mr Liam was merely confirming the likelihood that the Water Inlet Hose was the hose which was "reportedly replaced" in 2004 as it could not have been the same tube as was installed when the WDU was installed eight years earlier. In other words, when the WDU was re-installed in the Second Floor Unit, the Water Inlet Hose was replaced. Accordingly, on the first issue of the "new appearance" of the Water Inlet Hose, one possible explanation as suggested by Mr Cooper was the clean environment that it was stored in. At the end of the day, it appeared plain to us that the evidence relied upon by the appellant did not establish that the finding of fact made by the Judge (*ie*, that the Water Inlet Hose was installed by the appellant in 2004) was plainly wrong or unjustified.

The likely period of time before the Water Inlet Hose should have ruptured

33 Secondly, the appellant also relied on the argument that the Water Inlet Hose could not have been the same one which was installed in 2004 as, by reason of the speed of hydrolytic degradation, it would not have remained intact for four years. The appellant relied on Mr Liam's evidence in support of this proposition. In his expert report, Mr Liam noted that the Water Inlet Hose, being made of polyester, was susceptible to degradation on prolonged contact with water and was thus inappropriate for use in potable water systems like the WDU. [note: 23] Mr Liam also clarified that the degradation of the Water Inlet Hose due to exposure to water would have taken place within *a few weeks or months*: [note: 24]

> Q: When you say "prolonged contact", how long would this be? Would this be one day, one week, roughly?
>
> A: It's unlikely to be one day or one week, it's going to take more than that. But it's not possible to put a timeline actually on how long it would take.
>
> COURT: A number of years, isn't it, Mr Liam?
>
> A: Yes, your Honour.
>
> COURT: *When you said prolonged, you are talking in terms of years*?
>
> A: *Not -- maybe in terms of, maybe months, weeks or months.*
>
> COURT: Months?
>
> A: *Yes, but we -- because it is very dependent on the material, the material composition, the material make and all that. So we cannot put a figure to that*.

...

COURT: So that is how you get the chemical attack and I suppose over a prolonged period, you can't say how long.

A: Yes, your Honour.

[emphasis added]

34 On the one hand, the appellant argued that it was significant that when directly queried by the Judge if the degradation of the Water Inlet Hose would have taken place over a period of years, Mr Liam's response was that the degradation would have occurred within *weeks or months*. [note: 25] Liquid Advertising, on the other hand, interpreted Mr Liam's evidence as indicating that his comments in relation to the time frame of "months or weeks" related to the time before degradation set in and the chemical attack took place rather than how long it would have taken from the time the Water Inlet Hose came into contact with water to the time it ruptured. [note: 26] Unfortunately, the precise time likely to have been taken from the installation of the Water Inlet Hose to its rupture was not extensively investigated in any of the expert reports.

35 In light of the unsatisfactory nature of the evidence, leaving aside the question of degradation for a moment, on the evidence before this Court, *even if* the water inlet hose installed in 2004 had indeed been replaced, we were of the view that on the balance of probabilities it was replaced by the appellant (below at [36]–[41]). Thus the arguments raised by the appellant seeking to establish that the Water Inlet Hose was not installed by them were effectively neutralised. The objective evidence supported the finding that any subsequent replacement of the water inlet hose was, on a balance of probabilities, performed by the appellant.

Replacement Water Inlet Hose

36 It was not disputed that a water inlet hose had been installed by the appellant in September 2004. The issue really was whether an independent third party or perhaps even Liquid Advertising had installed a replacement in the four years between 2004 and the date of rupture. We found the likelihood of Liquid Advertising choosing to replace the water inlet hose on its own accord to be highly unlikely. The replacement of the water inlet hose would have involved the following steps which were both time consuming and required expertise on the part of the individual servicing the equipment: [note: 27]

(a) measuring the length of the water inlet hose to be replaced;

(b) removing the same from the back of the WDU and the filter;

(c) passing it through a hole in the door frame;

(d) attaching the new water inlet hose to the water filter;

(e) passing the same through the hole in the door frame; and

(f) attaching the other end to the back of the WDU.

Thus, Liquid Advertising was likely to have lacked the necessary expertise to replace the water inlet

hose, explaining their decision to enter into three separate agreements with the appellants to service and maintain the WDU unit in the first place. In fact, as noted above (at [10]), the appellant continued to service the WDU regularly until 16 September 2008, eight to nine days before the incident. [note: 28]

37 Further, upon cross-examination, the appellant's service director, Mr Goh Chin Siew ("Mr Goh"), went so far as to state that there was no reason for the appellant to believe that any third party had serviced the WDU: [note: 29]

> Q: Would you agree with me that since the day my client bought the [WDU] from your company in 2001, your company had regularly serviced the [WDU]?
>
> A: Yes.
>
> Q: And they had several contracts with my client for it -- they had several maintenance contracts; right?
>
> A: No, one contract, but renewal.
>
> Q: So it has been renewed?
>
> A: Yes.
>
> *Q: If that is the case, there is no reason for you to believe that anyone else had serviced it?*
>
> A: Yes.
>
> [emphasis added]

38 It was also Mr Goh's evidence that if there was a need to replace the Water Inlet Hose the appellant would have supplied one: [note: 30]

> Q: Since the water inlet hose was supplied by your company in September 2004 and you said just now that you have no reason to believe that anyone else had serviced the water dispenser but your company, would you agree that, therefore, the water [inlet] hose ... which eventually burst was actually supplied by [the appellant]?
>
> A I disagree.
>
> Q But you said earlier in cross-examination by my learned friend that if you had to replace a pipe, you would find a pipe that is of a similar colour or similar make?
>
> A: Yes.
>
> Q: *So since this [WDU] had not been serviced by anyone else, which you accept, if there was a need to replace a water inlet hose, for example, during installation, you would have supplied the pipes*?
>
> A: *If it's a job done by [the appellant], yes*.
>
> [emphasis added]

39 Furthermore, we were inclined to agree that if a third party had provided another water inlet hose, Liquid Advertising's employees would have had either the knowledge or a record of this. Liquid Advertising employees/ex-employees testified that the water inlet hose was installed by the appellant and/or that the appellant was the only party who had provided maintenance services for the WDU.

40 While the appellant argued that the Water Inlet Hose could have been subsequently replaced by someone else and that other employees of Liquid Advertising who did not testify may have known of this, these arguments were speculative. It was always open to the appellant to call any witness and discover any documents that it thought would advance its case theory. Pertinently, the evidence given by Liquid Advertising's employees who were called as witnesses was not challenged by the appellants. Further, it seemed curious that the appellant would have continued to regularly service the WDU unit without realising that a replacement had been made by a third party.

41 Accordingly, if indeed there had been any replacement of the water inlet hose between 2004 and the date of rupture, on a balance of probabilities, on the evidence, we were satisfied that this replacement was performed by the appellant. Accordingly, there was no reason to disturb the Judge's finding that the Water Inlet Hose was installed by the appellant.

*Second finding: Whether the appellant was responsible for the location of the WDU at the WDU area*

42 The appellant further submitted that the Judge erred in finding that the appellant was responsible for the location of the WDU for the following reasons: [note: 31]

(a) pursuant to a contractual arrangement between the appellant and Liquid Advertising it was Liquid Advertising and not the appellant who would be responsible for the location of the WDU; and

(b) it was Liquid Advertising's unilateral decision that the WDU was to be installed at the WDU area.

Accordingly, the appellant took the position that it had been wrongly held responsible for the third cause of the location of the WDU in the WDU Area. As noted above at [41], as the appellant was found to have installed the Water Inlet Hose, the Judge's findings of liability founded by the two other causes, *viz*, the Helical Line Feature and hydrolytic degradation remained undisturbed. On the available evidence, we found that the Judge was correct to have found the appellant responsible for the location of the WDU at the WDU Area instead of the wet pantry area for the reasons stated below.

43 The appellant relied on the Disclaimer and Quotation Warning in the quotation and service contracts (above at [9]–[11]) which notified Liquid Advertising of the dangers of installing a WDU outside the wet pantry area. It was argued that the decision to install the WDU in the WDU Area rather than the wet pantry area was made by Liquid Advertising without reference to the appellant. The appellant suggested that Liquid Advertising wished to use the wet pantry area to carry out the spraying of adhesives on art work, which was part of its advertising business. Also, the appellant heavily relied on the fact that in his affidavit of evidence-in-chief ("AEIC"), Mr Goh explained that the above warnings had been introduced into the appellant's contracts and service orders as the appellant had no way of controlling where the owner of a WDU may decide to install the WDU or the suitability of the placement site of the WDU. He stated as follows: [note: 32]

10. …

h. The [WDU] is small and light. And, [Liquid Advertising] could re-position the said [WDU] wherever they chose.

11. In short [the appellant] incorporated the warning that the [WDU] should be installed in a wet pantry area because it has no way of controlling where the owner may decide to install the said [WDU] or knowing how suitable that placement site may be. *[The appellant] would install a [WDU] in a library or a meeting room if that is what a buyer of a Frigeria [WDU] wants and will pay for*.

[emphasis added]

44 It was not disputed that Liquid Advertising had instructed the appellant to install the WDU at the WDU Area. It was also not disputed that the decision on where to place the WDU had been made independently by Liquid Advertising, before it instructed the appellant to relocate the WDU. [note: 33] In fact, before the Judge, Mr Adrian Ng of Liquid Advertising explained that the decision to locate the WDU at the WDU Area and not the wet pantry area was a conscious decision made by Liquid Advertising. [note: 34] It was because of Liquid Advertising's above-mentioned conduct that the Judge found them to have been responsible for one cause of the damage, namely the third cause, *ie*, the location of the WDU at the WDU Area. As a consequence of this, the Judge did not find the appellant to be solely responsible for the location of the WDU. Thus the more relevant question to be asked was whether the fact that Liquid Advertising had decided the location of the WDU *absolved* the appellant of *any responsibility* in relation to the same. The answer to this question was in the negative for the reasons given below at [45]–[47].

45 Independent of the responsibility borne by Liquid Advertising for its instructions, the appellant also did in fact have a role in the location of the installation of the WDU. The appellant's conduct in fact illustrated its awareness of its responsibility. Prior to the relocation and reinstallation of the WDU at the Second Floor Unit, on 23 August 2004, the appellant sent experienced workers to assess if the area where Liquid Advertising wanted to have the WDU installed was appropriate. [note: 35] In addition to a planned site visit, the appellant's staff was also trained to verbally inform customers that the WDU should be installed in a wet pantry area. [note: 36] The appellant had given internal directions to its staff to comply with the Quotation Warning: [note: 37]

Q: Do you have internal directions to your staff to comply with the warning?

A: Yes.

Q: In other words, when you say yes, are you saying that you do tell your staff, "Look this is very important and you must make sure that it is put in a wet pantry area or else there could be damage"? Is that what you are saying?

A: Yes.

If indeed the appellants had taken a hands-off approach on this issue, as they alleged, it was odd that they undertook a site visit (in addition to training and service functions) in relation to the location of installation of the WDU. Furthermore, contrary to Mr Goh's AEIC (above at [43]) under cross examination, Mr Goh accepted that the appellant could also refuse to install the WDU in an unsuitable area. [note: 38] This admission alone was sufficient to expose the fact that the appellant viewed itself as, at the very least, partially responsible for the location of the installation of the WDU.

Mr Goh stated as follows: [note: 39]

> A: Our practice is if they know it's not a wet pantry area and if they advise the customer and the customer don't want to listen [*sic*], *we actually will not provide the service. We will not install if it is not a wet pantry area.*
>
> [emphasis added]

Further, not only did the appellant have a *right* to refuse to install the WDU outside the wet pantry area but the appellant also took the view that faced with such a request, they would simply "*not do it*". [note: 40]

> Q: If you go to clause 8, it reads:
>
> "[The appellant] reserves the right to refuse to undertake any service or repairs of any appliances which may contradict or be not in conformance with good business ethics or which Goh Sin Huat in its complete discretion may see fit to refuse".
>
> A: Yes.
>
> Q: So you agree with me that you have the right not to install a water cooler in a place that is not a wet pantry area, even if the customer asks you to do it?
>
> A: *If it's not a wet pantry area, we will not do it*.
>
> [emphasis added]

46 Given these facts it was only reasonable that the appellant bore some responsibility to Liquid Advertising as the installer and servicer of the "Frigeria" brand of WDU. The appellant would have known far better than a commercial client what constituted a "suitable area" for the installation of the WDU. On this basis alone, the appellant owed a duty to its customer to take reasonable care and skill in the installation of the WDUs. Also, Ho See Jui's expert witness Mr Wan Fook Yong stated that when installing the WDU in a non-wet pantry area, the appellant should have installed a tray beneath the WDU with a connecting discharge pipe leading to the water trap in the wet pantry area to prevent or mitigate the damage caused by any possible leakage. [note: 41] Despite having knowledge of the significance of such a discharge pipe and its significance when a WDU is installed in a non-wet pantry area, the appellant failed to install such a pipe. [note: 42]

47 The Judge, in our view, correctly found that the appellant was at least equally responsible for ignoring its own Quotation Warning when installing the WDU at the WDU Area. Further, from the evidence discussed above, it was clear that the appellant saw itself as responsible to some degree for the location of installation of the WDU and could have refused to install the WDU at an unsuitable area even if so instructed by a client. This evidence shone an unflattering light on the contractual agreement with Liquid Advertising as described by the appellant. Furthermore, in installing the WDU in a non-wet pantry area, the appellant should have installed a discharge tube so as to mitigate any water leakage. Accordingly, the Judge's finding that both the appellant and Liquid Advertising were responsible for the location of the WDU was clearly supported by the weight of the evidence. Thus, the appellant's challenge to the Judge's finding on its liability was without merit. The question then turned to whether the Judge erred in the apportionment of liability between Liquid Advertising and the appellant as joint tortfeasors.

***Issue 2: Whether the Judge erred in the apportionment of liability between Liquid Advertising and the appellant***

*The law on appellate review of apportionment of liability*

48 More than 12 years ago it was held by this Court in the case of *Chuang Uming (Pte) Ltd v Setron Ltd and another appeal* [1999] 3 SLR(R) 771, that apportionment of liability between two defendants must be carried out in a manner that is just and equitable, having regard to the person's responsibility for the damage in question. In *TV Media Pte Ltd v De Cruz Andrea Heidi and another appeal* [2004] 3 SLR(R) 543 ("*TV Media*") at [159], in relation to the appeal on apportionment of damages, citing *Ramoo v Gan Soo Swee* [1971–1973] SLR(R) 42 at [15] and *British Fame (Owners) v Macgregor (Owners) (The Macgregor)* [1943] AC 197 at 201 ("*The Macgregor*"), this Court observed that:

> 159 An appellate court is only justified in interfering with a trial judge's apportionment of damages in "*very exceptional circumstances*" ... [emphasis added]

The words in quotation marks in the above quote, *ie*, "very exceptional circumstances", were quoted from *The Macgregor*. It appears to us that this observation requires further clarification. To start with, it is worthwhile setting out the full context within which the *The Macgregor* quote cited *in part* above (cited with approval in *TV Media*), should be understood. In *The Macgregor*, Lord Chancellor Viscount Simon had stated at 198–199:

> The only question that remains for debate is the question of the distribution of that blame. Speaking for myself, I think that the conclusion at which Bucknill J. arrived on that question was a perfectly reasonable one, having regard to the facts which he found. The Court of Appeal, however, has thought it right while maintaining the view that both ships were to blame, to vary the distribution of the blame by putting two-thirds of it on the *British Fame* and relieving the *Macgregor* so that the *Macgregor* has to carry only the remaining one-third.
>
> It seems to me, my Lords, that the cases must be very exceptional indeed in which an appellate court, while accepting the findings of fact of the court below as to the fixing of blame, none the less has sufficient reason to alter the allocation of the blame made by the trial judge. I do not say that there may not be such cases. I apprehend that, if a number of different reasons were given why one ship is to blame, but the Court of Appeal, on examination, found some of those reasons not to be valid, that might have the effect of altering the distribution of the burden. If the trial judge, when distributing blame, could be shown to have misapprehended a vital fact bearing on the matter, that, I think, would be a reason for considering whether a change in the distribution should be made on appeal. But, subject to rare exceptions, I submit to the House that, when findings of fact are not disputed and the conclusion that both vessels are to blame stands, the cases in which an appellate tribunal will undertake to revise the distribution of blame will be rare.

Concurring with the Lord Chancellor's view, Lord Wright explained the difference between an appeal brought exclusively on findings of fact and one on apportionment of liability, albeit in the context of admiralty law (at 200). Citing the earlier House of Lords decisions of *The Umtali* (1938) 160 L T 114, 117 and *Owners of S.S. Haugland v Owners of S.S. Karamea* [1922] AC 68, he stated that it would take a "very strong case" to induce a court to interfere with the judge's *discretion* as to the proportions of blame. Further, so long as the appellate court arrived at the same conclusion on both the facts and in law, it should not then interfere with the apportionment order merely because it

disagrees with the proportions given by the trial judge. Explaining his view further he remarked, in apportionment appeals (at 201):

> It is a question of the degree of fault, depending on a trained and expert judgment considering all the circumstances, and it is different in essence from a mere finding of fact in the ordinary sense. It is a question, not of principle or of positive findings of fact or law, but of proportion, of balance and relative emphasis, and of weighing different considerations. It involves an individual choice or discretion, as to which there may well be differences of opinion by different minds. It is for that reason, I think, that an appellate court has been warned against interfering save in very exceptional circumstances, with the judge's apportionment.

49 It is, however, clear that 'exceptional' circumstances as conceived by the House of Lords, includes the trial judge's error in law and failure to apply his or her mind to a material fact bearing on the relative culpability of the parties found to be jointly liable. By way of comparison, in appeals against ordinary findings of fact, this Court in *Peh Eng Leng v Pek Eng Leong* [1996] 1 SLR(R) 939 at [21] had earlier adopted the approach of the House of Lords in its seminal decision in *Mrs Sarah Ann Clarke v Edinburgh and District Tramways Company, Limited* (1919) SC HL 35 wherein Lord Shaw of Dunfermline said (at 36):

> When a Judge hears and sees witnesses and makes a conclusion or inference with regard to what is the weight on balance of their evidence, that judgment is entitled to great respect, and that quite irrespective of whether the Judge makes any observation with regard to credibility or not. I can of course quite understand a Court of Appeal that says that it will not interfere in a case in which the Judge has announced as part of his judgment that he believes one set of witnesses, having seen them and heard them, and does not believe another. But that is not the ordinary case of a cause in a Court of justice. In Courts of justice in the ordinary case things are much more evenly divided; witnesses without any conscious bias towards a conclusion may have in their demeanour, in their manner, in their hesitation, in the nuance of their expressions, in even the turns of the eyelid, left an impression upon the man who saw and heard them which can never be reproduced in the printed page. What in such circumstances, thus psychologically put, is the duty of the appellate Court? In my opinion, the duty of an appellate Court in these circumstances is for each Judge of it to put to himself, as I now do in this case, the question, Am I — who sit here without those advantages, sometimes broad and sometimes subtle, which are the privilege of the Judge who heard and tried the case – in a position, not having those privileges, to come to a clear conclusion that the Judge who had them was plainly wrong? *If I cannot be satisfied in my own mind that the judge with those privileges was* ***plainly wrong*** *, then it appears to me to be my duty to defer to his judgment*.
>
> [emphasis added in italics and bold italics]

The basis for review of findings of fact in the Singapore context has been restated in *Tat Seng Machine Movers Pte Ltd v Orix Leasing Singapore Ltd* [2009] 4 SLR(R) 1101 ("*Tat Seng*") at [41] where this Court stated as follows:

> 41 Given that this appeal largely involves the evaluation of the Judge's finding of facts below, it is apposite that we remind ourselves of an appellate court's role with respect to the finding of facts made in the course of a trial. The appellate court's power of review with respect to finding of facts is limited because the trial judge is generally better placed to assess the veracity and credibility of witnesses, especially where oral evidence is concerned (*Seah Ting Soon v Indonesian Tractors Co Pte Ltd* [2001] 1 SLR(R) 53 at [22]). However, this rule is not immutable. Where it can be established that the trial judge's assessment is plainly wrong or against the

> weight of the evidence, the appellate court can and should overturn any such finding (see *Alagappa Subramanian v Chidambaram s/o Alagappa* [2003] SGCA 20 at [13] and *Jagatheesan s/o Krishnasamy v PP* [2006] 4 SLR(R) 45 at [34] – [36]). Furthermore, where a particular finding of fact is not based on the veracity or credibility of the witness, but instead, is based on an inference drawn from the facts or the evaluation of primary facts, the appellate court is in as good a position as the trial judge to undertake that exercise (*Tan Chin Seng v Raffles Town Club Pte Ltd* [2003] 3 SLR(R) 307 at [54] and *Ho Soo Fong v Standard Chartered Bank* [2007] 2 SLR(R) 181 at [20]). In so doing, the appellate court will evaluate the cogency of the evidence given by the witnesses by testing it against inherent probabilities or against uncontroverted facts (*Peh Eng Leng v Pek Eng Leong* [1996] 1 SLR(R) 939 at [22]).

Thus, a finding of fact is subject to appellate intervention where it is plainly wrong or unjustified by the totality of the evidence ("findings of fact test"). The "exceptional circumstances" test as articulated in *The Macgregor* also falls within the ambit of the findings of fact test as it is triggered when the trial judge has failed to apply his mind to a material fact or has made an order unsupported by the totality of the evidence. The question then arises as to whether there really can be said to be a separate, higher standard of appellate review for appeals concerning the apportionment of liability among two or more defendants and if so whether such a standard is defensible. A close analysis of the English and Australian positions clarifies that in practice, the threshold of review envisioned for both types of appeals is in fact the same. In other words, a unified approach to the appellate review of findings of fact and apportionment of liability has been taken.

50 By way of example, in the English Court of Appeal decision in *Wells v Mutchmeats Ltd* and Another [2006] EWCA Civ 963 ("*Wells v Mutchmeats*") at [15], the court quoted Brook LJ's judgment in *Plumb v Lisa Ayres and Ryford Ltd*, Court of Appeal transcript [1988] 1028/2 of 17 March 1999:

> It is very firmly established that this court will not interfere with a trial judge's apportionment of responsibility *unless it can be shown that he erred in principle, or misapprehended the facts, or he is clearly shown to have been wrong …* [emphasis added]

Similarly, the more recent English Court of Appeal's decision *Woodham v M Turner T/A Turners of Great Barton and Peterborough City Council* [2012] EWCA Civ 375, is illustrative of the view that when the appellate court is satisfied that the trial judge erred in his analysis of the evidence in relation to the blameworthiness of the parties, it will intervene. The court remarked at [36] as follows:

> I appreciate that the appellate court is indeed ordinarily slow to interfere in a question of apportionment in cases of this kind. But in my own view, having regard to his primary findings, the judge simply was wrong to attribute the greater share of responsibility to Miss Turner in the way that he did, and was wrong to assess her overall liability as that of 70 per cent. Moreover, I have concerns that the judge, on the issue of assessing relative responsibility and apportionment, may not have had sufficient regard for those purposes of the potential significance of Mr Gladwish's evidence. I am not able to agree with Mr Ferris's submission that the greater share of responsibility lay with Mr Woodham. In my view, on the facts of this particular case, there was no reason to differentiate between the two in terms of apportionment of responsibility. In my view, the appropriate finding should have been, and is, that Mr Woodham was 50 per cent liable for what happened and Miss Turner was 50 per cent liable for what happened.

51 Very recently, in *Satnam Rehill v Rider Holdings Limited* [2012] EWCA Civ 628, the English Court of Appeal discussed the applicable principles of appellate review of apportionment of liability (in contributory negligence) by a lower court. In this case, allowing the appeal in part, the court

substituted the apportionment of liability of the lower court from one-third to half. Citing its earlier decision in *Karen Janet Eagle (By her Litigation Friend E E Giles) v Garth Maynard Chambers* [2003] EWCA Civ 1107 approvingly, the court noted, at [28]:

> It is submitted that the correct place to start is *Eagle v Chambers* [2003] EWCA Civ 1107 ... In that case the driver had struck a young woman walking at night in the carriageway. The trial judge found that she should bear a greater share of the responsibility for her injures and apportioned her contribution at 60 per cent. The Court of Appeal substituted a figure of 40 per cent. Hale LJ, giving the judgment of the court, stated at para [10] that there are two aspects to apportioning responsibility between claimant and defendant, namely the respective causative potency of what they have done and their respective blameworthiness. The court rejected an argument, based on the wording of section 1(1) of the Law Reform (Contributory Negligence) Act 1945, that the primary focus should be on the claimant's conduct and her share in the responsibility: Hale LJ said at para [14] that realistically the court has to compare the two parties. At para [16] she said this:
>
> > "We also accept that this court is always reluctant to interfere with the trial judge's judgment of what apportionment between the parties is 'just and equitable' under the 1945 Act. *But a finding as to which, if either, of the parties was the more responsible for the damage is different from a finding as to the precise extent of a less than 50 per cent contribution. There is a qualitative difference between a finding of 60 per cent contribution and a finding of 40 per cent which is not so apparent in the quantitative difference between 40 per cent and 20 per cent.*"
>
> [emphasis added]

It seems to us that an appellate court ought to intervene in appeals against apportionment of liability when it can be shown that the trial judge erred in principle, misapprehended the facts, or is otherwise clearly shown to have been wrong.

52 A similar approach to this issue has been taken in Australia as illustrated by the decision in *Podrebersek v Australian Iron and Steel Pty Ltd* (1985) 59 ALR 529 at [8] where Gibbs CJ, Mason, Wilson, Brennan and Deane JJ merely observed that such findings would not be reviewed lightly as distinct from belonging to a special category of fact finding:

> A finding on a question of apportionment is a finding upon a "question not of principle or of positive findings of fact or law, but of proportion, of balance and relative emphasis, and of weighing different considerations. It involves an individual choice or discretion, as to which there may well be differences of opinion by different minds": *British Fame (Owners) v MacGregor (Owners)* [1943] AC 197, at p 201. *Such a finding, if made by a judge, is not lightly reviewed.* [emphasis added]

I n *Macquarie Pathology Services Pty Ltd v Sullivan* (Court of Appeal (NSW), 28 March 1995) (unreported), Clarke JA said:

> It is well established that a trial judge is invested with a very wide discretion in making his apportionment and that he must be allowed much latitude in arriving at a judgment as to what is just and equitable. In these circumstances the onus cast on an appellant who seeks to disturb an apportionment is a high one ... Obviously where one party can point to an error of fact or of law on the part of the trial judge it may not be difficult to argue that his or her determination as to what is just and equitable may be flawed.

53 While it is important to clarify the approach taken in *The Macgregor* as cited in *TV Media*, it is crucial to also appreciate that findings on apportionment import a large number of discretionary considerations. In *C (A Child) v Imperial Design Limited* [2001] Env LR 33 at [45]–[46] the English Court of Appeal discussed the comparatively narrower approach taken in *The Macgregor*:

> 45 It is of course well established that the review by this court of the apportionment by the trial judge is of a very limited nature. As Lord Wright said in *British Fame (Owners) v. Macgregor (Owners) (The Macgregor)* [1942] AC 197 at 201:
>
> > "… I do repeat that it would require a very strong case to justify any such review of or interference with this matter of apportionment where the same view is taken of the law and the facts. It is a question of the degree of fault, depending on a trained and expert judgment considering all the circumstances, and it is different in essence from a mere finding of fact in the ordinary sense. *It is a question, not of principle or of positive findings of fact or law, but of proportion, of balance and relative emphasis, and of weighing different considerations. It involves an individual choice or discretion, as to which there may well be differences of opinion by different minds. It is for that reason, I think, that an appellate court has been warned against interfering, save in very exceptional circumstances, with the judge's apportionment.* The accepted rule was clearly stated by Lord Buckmaster, with the assent of the other Lords, in Kitano Maru (Owners) v. Otranto (Owners) (The Otranto) [1931] AC 194, 204, in these words: *'Upon the question of altering the share of responsibility each has to take, this is primarily a matter for the judge at the trial, and unless there is some error in law or in fact in his judgment it ought not to be disturbed.'* I might add that in The Karamea, [1921] page 76 the Court of Appeal varied the proportion of liability because they took a different view of the facts. Their decision was affirmed by this House: Haugland (Owners) v. Karamea (Owners) [1922] 1 AC 68."
>
> 46 Likewise Viscount Simon LC, at page199, said:
>
> > "If the trial judge, when distributing blame, could be shown to have misapprehended a vital fact bearing on the matter, that, I think, would be a reason for considering whether a change in the distribution should be made on appeal."
> >
> > [emphasis added]

54 As highlighted in the above excerpt, an appellate court should be mindful of the fact that by reason of the discretionary nature of apportionment, wherein the identified causes of damage cannot be clearly attributed to either party, often there is no intelligible way of distinguishing between why a trial judge ordered, for example, 25% and not 40% of the liability to be borne by one party. In such cases, the appellate court ought not to readily intervene on the basis that it would have exercised its discretion differently had it decided the matter as a first instance court. That said the review of apportionment discretion should not be made impossible. Judges are obliged to justify their determinations on apportionment with clear reasoning (see *Thong Ah Fat v Public Prosecutor* [2012] 1 SLR 676 at [14]–[46]). Particularly, where the apportionment decision of the trial judge is supported by cogent reasons alluding to the interaction of the respective parties' individual culpability in a myriad of identified causes from which the damages flowed, the appellate court should be slow to intervene. The phrase "exceptional circumstances" used in *The Macgregor* should be understood in the light of the real concerns surrounding the disturbing of discretionary decisions of the trial judge. Having said that, it is clear that the threshold of appellate review of apportionment of liability in England and Australia is the same as that concerning a finding of fact, *ie*, when the apportionment was plainly wrong or unjustified on the totality of the evidence before the trial judge. We endorse this

approach. In the circumstances, the law on appellate review of apportionment of liability as stated by this Court in *TV Media* should be read in light of our clarifications here.

5 5 *We reiterate that the principal objective of the appellate process must be to do justice by correcting plainly wrong decisions. This function, a constitutional responsibility of this Court, is a necessary pre-requisite to ensuring that public confidence in the administration of justice is maintained. A proper balance has therefore to be struck by appellate courts between due deference and undue deference in relation to findings of fact (and apportionment) by trial courts. Arid historical distinctions between correctable errors of law and irretrievable errors of fact no longer resonate. Improvements to the record, such as verbatim transcripts that are electronically recorded, now permit closer appellate review of findings of fact by trial courts. The trial judge's notes are no longer the only reliable record of what has transpired below. With this development, some of the previously exclusive advantages of triers of fact have shrunk.*

*Application to the facts*

56 We return to the facts. The appellant argued that the apportionment of liability by the Judge in the present case was not just and equitable as the location of the WDU at the WDU Area was the predominant cause of the damage to the paintings in the Art Gallery; which Liquid Advertising was allegedly solely responsible for. For the reasons stated above at [42]–[47], Liquid Advertising and the appellant were *both* responsible for the location of the WDU in the WDU Area. Also, it was precisely because of the absence of clear evidence to establish whether the Water Inlet Hose (*ie*, hydrolytic degradation and Helical Line Feature) or the location of the WDU at the WDU Area was the predominant cause, that the Judge held that Liquid Advertising and the appellant were jointly liable and held that all three causes contributed to Ho See Jui's damages. The appellant was found to bear a greater percentage of the liability for its greater responsibility in relation to all three identified causes.

57 The appellant's alternative submission that the Judge erred in finding that the hydrolytic degradation and the Helical Line Feature were two separate causes was a non-starter. [note: 43] The hydrolytic degradation occurred because the appellant had selected and supplied a hose which was made of material unsuitable for the carriage of water. The Helical Line Feature was a manufacturing feature of the hose which was exacerbated by the improper use of the installed hose intended for the carriage of air rather than water. No evidence was led to establish that the hose would have ruptured notwithstanding the Helical Line Feature or vice-versa, negating the element of causation for one of the identified causes. The Judge was correct in defining the causes separately. In any event, the appellant's complaint did not further its cause as *even if* as per the appellant's suggestion the unsuitable material of the Water Inlet Hose and the location of installation of the WDU were the only two operative causes, apportionment would have been varied to the advantage of Liquid Advertising. The very fact that the appellant was found to be responsible for both causes as compared with Liquid Advertising which was specifically found *only* to be liable for its responsibility in relation to one of the causes pointed to apportionment in Liquid Advertising's favour.

58 Accordingly, in light of the discretionary nature of apportionment and the lack of any clear evidence of error, the apportionment of liability by the Judge was not disturbed.

***Issue 3: Whether the Judge erred in ordering the appellant to completely indemnify Liquid Advertising***

*Applicable law*

59 Order 16 r 8 of the Rules of Court (Cap 322, R 5, 2006 Rev Ed) ("the Rules") states as follows:

> **8.—(1)** Where in any action a defendant —
>
> (*a*) claims against a person who is already a party to the action any contribution or indemnity;
>
> (*b*) claims against such a person any relief or remedy relating to or connected with the original subject-matter of the action and substantially the same as some relief or remedy claimed by the plaintiff; or
>
> (*c*) requires that any question or issue relating to or connected with the original subject-matter of the action should be determined not only as between the plaintiff and himself but also as between either or both of them and some other person who is already a party to the action,
>
> then, subject to paragraph (2), the defendant may, after having entered an appearance if required to do so under these Rules, without leave, issue and serve on that person a notice containing a statement of the nature and grounds of his claim or, as the case may be, of the question or issue required to be determined.

60 While the Rules set out the necessary procedure, as observed by Chao Hick Tin JA in *Checkpoint Fluidic Systems International Ltd v Marine Hub Pte Ltd and Another Appeal* [2009] SGHC 134, it is trite law that indemnity can arise from contract, express or implied, or by conduct. A right to indemnity arises where the relationship between the parties is such that either in law or in equity there is an obligation upon one party to indemnify the other. Chao JA quoted Lord Wrenbury's observations in the Privy Council decision of *Eastern Shipping Company, Limited v Quah Beng Kee* [1924] AC 177 at 182–183 are particularly instructive. Lord Wrenbury stated as follows:

> A right to indemnity generally arises from contract express or implied, but it is not confined to cases of contract. A right to indemnity exists where the relation between the parties is such that either in law or in equity there is an obligation upon the one party to indemnify the other. There are, for instance, cases in which the state of circumstances is such that the law attaches a legal or equitable duty to indemnify arising from an assumed promise by a person to do that which, under the circumstances, he ought to do. The right to indemnify need not arise by contract ; it may (to give other instances) arise by statute ; it may arise upon the notion of a request made under circumstances from which the law implies that the common intention is that the party requested shall be indemnified by the party requesting him ; it may arise (to use Lord Eldon's words in *Waring v Ward* [7 Ves 332, 336]; a case of vendor and purchaser) in cases in which the Court will "independent of contract raise upon his (the purchaser's) conscience an obligation to indemnify the vendor against the personal obligation" of the vendor.

*Appellant did not owe an obligation to indemnify Liquid Advertising under the Reinstallation Agreement*

61 The Judge ordered the appellant to indemnify Liquid Advertising's 30% (to be assessed) on the basis of the breach of implied terms of the Reinstallation Agreement. The implied terms identified pursuant to the SGA were as follows:

> (a) the Water Inlet Hose supplied under the contract for reinstallation of the WDU was to be of satisfactory quality; and

(b) the said Water Inlet Hose was to be reasonably fit for its purpose of the carriage of water.

In the present case, on the Judge's reasoning, it is cardinal that the obligation to indemnify arises from the contractual agreement between the parties. It is clear that the breach of the above-mentioned terms relates squarely to the first and second causes identified by the Judge, namely (a) the hydrolytic degradation of the Water Inlet Hose and the (b) Helical Line Feature. It is also important to note that the Judge *did not* find that Liquid Advertising was responsible for these causes. Rather, she clearly stated that Liquid Advertising's liability under all three causes of action was premised *solely* on its responsibility in directing the appellants to install the WDU in the WDU Area rather than the more suitable wet pantry area (*ie*, the third cause). The Reinstallation Agreement did not relate to the location of installation of the WDU.

62 While the appellant owed contractual duties to Liquid Advertising consisting of the implied terms stated above, capable of construction as an implied indemnity, as Liquid Advertising's liability was not premised on the above breaches or obligations, the question arose as to why the appellant was obliged to indemnify Liquid Advertising in the first place. It is trite law that a narrow construction should be adopted in the context of implied indemnities. The location of the installation rather than the material used for the Water Inlet Hose could not be read into the implied obligations upon the appellant of "satisfactory quality" and "fitness for purpose". Alternatively, the Judge could have considered an indemnity on the basis of breaches of the Third Maintenance Contract which would have related more closely to the cause founding Liquid Advertising's liability, giving rise to an obligation to indemnify on the part of the appellant. While Liquid Advertising pleaded the Maintenance Contracts as a basis for their contractual indemnity claim, the Third Maintenance Contract expired on 21 June 2007, prior to the rupture of the Water Inlet Hose (above at [10]). Thus the indemnity could not have been founded on this basis either.

63 Accordingly, Liquid Advertising's application for an indemnity was erroneously founded on the basis of breaches of the above-mentioned implied terms which *did not* mirror or relate to the liability incurred by Liquid Advertising. In effect, the appellant was ordered to indemnify Liquid Advertising for the breach of an obligation which it did not owe to it under the scope of the implied terms of the Reinstallation Agreement. The lack of congruity between the obligations owed by the appellant and the liability incurred by Liquid Advertising required the Judge's order of indemnity to be set aside.

**Conclusion**

64 Accordingly, the appeal was allowed partially with Liquid Advertising bearing 30% of the liability for the damage caused to Ho See Jui. The order as to costs was also varied to reflect the apportionment of liability at 30% by Liquid Advertising and 70% by the appellant.

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[note: 1] Appellant's Core Bundle ("ACB") Vol II, p 39.

[note: 2] ACB Vol II pp 25–26

[note: 3] ACV Vol II p 35

[note: 4] ACB Vol II p 43

[note: 5] Appellant's case ("AC") at para 20.

[note: 6] Second respondent's case at para 10.

[note: 7] The Judge's grounds of decision ("GD") at [35].

[note: 8] GD at [37]–[38].

[note: 9] GD at [81].

[note: 10] AC at para 56

[note: 11] AC at para 57

[note: 12] AC at para 59

[note: 13] AC at para 60.

[note: 14] AC at para 65.

[note: 15] AC at para 36.

[note: 16] ACB Vol II p 104 at line 19, p 105 at lines 15 to 19 RA(III)(D) p 139 at line 19, RA(III)(D) p 167 at lines 15 to 19.

[note: 17] AC at para 35; ACB Vol II p 53 at [1] RA(V) p 151 at [1]

[note: 18] Second respondent's Case at para 27.

[note: 19] ACB (II) p 111 at para 6.3; RA(III)(A) p 183 at para 6.3.

[note: 20] ACB Vol II p 110 at para 5.3; RA (III)(A) p 179 at para 5.3.

[note: 21] ACB Vol II p 111 at para 6.3; RA (III)(A) p 183 at para 6.3.

[note: 22] AC at para 76; ACB Vol II p 108 RA (III)(A) p 110.

[note: 23] AC at para 77; ACB Vol II p 109 at [c] RA (III)(A) p 112 at [c].

[note: 24] ACB Vol II p 104 at lines 10–23; RA (III)(D) p 139 at lines 10–23, p 145 at lines 13–15.

[note: 25] AC at para 79.

[note: 26] Second respondent's case at para 52.

[note: 27] Second respondent's case at para 63, SCB at pp 23, 24 and 37.

[note: 28] Second respondent's case at paras 15–16; CB(II) pp 119–124, 148-185; RA(V) pp 40,

41,48,49, 53, 54; RA(III)(B) pp 89–126.

[note: 29] SCB p 25; RA(III)(D) p 79 lines 7–15.

[note: 30] SCB pp 26–27; RA(III)(D) p 80 line 10 to p 81 line 1.

[note: 31] AC at para 116.

[note: 32] ACB Vol II p 125 at para 10h; RA (III)(C) p 9 at para 10h; ACB Vol II p 125 at para 11; RA (III)(C) pp 9 at para 11

[note: 33] AC at para 29, ACB Vol II p 13 at para 32; RA (III)(B) p 13 at para 32.

[note: 34] AC at para 128.

[note: 35] Second respondent's case at para 75; SCB p 9-10; RA(III)(D) p 62 line 23 to p 63 line 15.

[note: 36] Second respondent's case at para 75; SCB p 36; RA(III)(D) p 58 lines 18–25.

[note: 37] Second respondent's case at para 75; SCB p 30; RA(III)(D) p 71 lines 1–9.

[note: 38] Second respondent's case at [14]; RA(III)(D) at p 63 lines 21–23;

[note: 39] RA(III)(D) p 59 at lines 18–22.

[note: 40] Second respondent's case at para 75; SCB p 8–9; RA(III)(D) p 61 lines 11–21, p 62 lines 9–11.

[note: 41] Second respondent's case at para 79; SCB p 34; RA(III)(C) p 130 lines 8–21.

[note: 42] Second respondent's case at para 80; SCB p 32; RA(III)(D) p 66 lines 3–10.

[note: 43] AC at para 167.