Mohammad Nazeem Bin Mustafah Kamal *v* Management Corporation Strata Title Plan No 3023
[2012] SGHC 205

Case Number : Suit No 316 of 2011

Decision Date : 11 October 2012

Tribunal/Court : High Court

Coram : Belinda Ang Saw Ean J

Counsel Name(s) : Anand K Thiagarajan (Anand T & Co) for plaintiff; Michael Eu Hai Meng (United Legal Alliance LLC) for the defendant.

Parties : Mohammad Nazeem Bin Mustafah Kamal — Management Corporation Strata Title Plan No 3023

Tort – occupier's liability – duty of care

Tort – negligence – breach of duty

11 October 2012 Judgment reserved.

Belinda Ang Saw Ean J:

Introduction

1 This is an action commenced by the plaintiff, Mohammad Nazeem bin Mustafah Kamal, who suffered personal injuries on property occupied by the defendant, the Management Corporation Strata Title Plan No 3023. The property in question is known as Eunos Technolink, 5 Kaki Bukit Road 1, Singapore 415936 ("the Property"). The plaintiff fell through what was described as gypsum flooring onto the basement one floor below and sustained injuries.

Background

2 The plaintiff was at the material time a service technician employed by Colt Ventilation East Asia Pte Ltd ("Colt"). Pursuant to a letter of award dated 5 May 2010, Colt was engaged by the defendant to provide quarterly engineering smoke control system maintenance and servicing for one year.

3 On 22 June 2010, two service technicians, Wong Kong Wai ("Mr Wong") and the plaintiff, went to the Property to attend to routine servicing of the smoke control system. Mr Wong, a self-employed service engineer, was a sub-contractor engaged by Colt. The plaintiff, who was despatched to the Property with Mr Wong, was employed as a service technician by Colt. Mr Wong was the senior member of the team. On arrival, Mr Wong and the plaintiff proceeded to the office of the defendant's managing agent and met the defendant's building manager, Mr Aung Sein ("Mr Aung"). The defendant's managing agent was Melana International Pte Ltd. Mr Aung told Mr Wong and the plaintiff to proceed to the smoke extraction fan starter panel riser located at Level 1 ("the Riser") to check the fan starter panel ("the FS panel") as one of the lights on the FS panel was out of order.

4 At about 10.20am, Mr Wong and the plaintiff arrived at the Riser and proceeded to unlock the door to the Riser. Mr Wong had previously been to this particular riser on a few occasions to service

the FS panel. [note: 1] On this occasion, while Mr Wong remained outside selecting his tools, [note: 2] the plaintiff stepped inside the Riser to check the lights on the FS panel. [note: 3] This was the plaintiff's first time in the Riser. [note: 4]

5 At the entrance of the Riser looking in, extending from the wall on the left side to roughly 40% of the doorway is a concrete beam. To its right approximately 58cm below is an internal open space, which we now know, after the accident, was covered by gypsum plasterboard (hereinafter referred to for convenience as "the gypsum flooring", although the plaintiff's expert said that it was technically not "flooring but was in fact the top of the gypsum plasterboard basement ceiling below" [note: 5]).

6 The FS panel was mounted on the wall facing the doorway. Seen from the doorway looking in, the FS panel was mounted more to the left above the concrete beam. However, based on the dimensions provided by the plaintiff's expert, the latter estimated that mounted on the wall, about 34.5% of the FS panel was over the concrete beam and the remaining section of the FS panel was over the gypsum flooring. [note: 6] According to Mr Wong, on the previous occasions when he serviced the FS panel in the Riser, he stood on the concrete beam, [note: 7] which was wide enough for service personnel to stand on to access the FS panel mounted on the wall.

7 In the present case, the plaintiff entered the Riser and stood on the concrete beam to check the lights on the FS panel. Whilst the plaintiff was removing a faulty spring-loaded light bulb from the FS panel, he accidentally dropped the bulb, which landed on the gypsum flooring. He decided to retrieve the bulb. From the concrete beam, he said, he "jump [*sic*] onto" the gypsum flooring, which was approximately 58cm below. [note: 8] Unfortunately, the gypsum flooring gave way under his weight and the plaintiff fell through to the basement one floor below, thereby sustaining personal injuries.

8 It was common ground that the gypsum flooring was of a similar hue as the concrete beam. [note: 9]

The opposing contentions

The plaintiff's case

9 The plaintiff claimed that his bad fall was caused by the negligence of the defendant and/or its servants. The plaintiff alleged that the defendant actually knew or ought to have known of the danger posed by the gypsum flooring because the gypsum plasterboard was not a load-bearing material. He further alleged that the defendant should have put up a sign or notice in the Riser or in the vicinity to warn persons entering the Riser of the gypsum flooring. This was done sometime after the accident. The plaintiff further argued that he should have been told orally, at the time he was directed to go to the Riser, that the internal open space in the Riser was covered by a layer of gypsum plasterboard and that the latter material was not load-bearing. The plaintiff also relied on the aforementioned facts to allege that the defendant had breached its duty of care as the occupier of the Property.

10 In his closing submissions, the plaintiff's counsel, Mr Anand K Thiagarajan ("Mr Thiagarajan"), said that the main issue in this case was whether the defendant had breached its duty of care as the occupier of the Property. [note: 10] In his Amended Statement of Claim, the plaintiff claimed that he was a contractual entrant and/or invitee to the Property. However, the plaintiff was an invitee rather than a contractual entrant as there was no privity of contract between the plaintiff and the

defendant; the relevant servicing contract was between Colt and the defendant (see [2] above).

The defendant's case

11 The defendant denied the plaintiff's allegations of negligence and liability as the occupier of the Property. The main thrust of the defendant's case was that it never knew of the gypsum flooring in the Riser until after the accident. In particular, the defendant's counsel, Mr Michael Eu Hai Meng ("Mr Eu"), submitted that after the defendant took possession of the common areas in the Property from the developer in December 2005, the defendant did not make any physical changes to the buildings, rooms, walls, floors, ceilings and so on in the common areas of the Property. [note: 11] The existing construction, design and layout of the common areas of the Property had been designed and approved by consultants employed by the developer, and had also been approved by the relevant statutory authorities. In the light of the aforesaid matters, Mr Eu submitted that there was no reason for the defendant to suspect that the internal open space in the Riser was covered by gypsum plasterboard instead of concrete.

12 In any event, the defendant further submitted, the plaintiff had contributed to the accident by his own carelessness and conduct as he should not have jumped from the concrete beam without first ascertaining that it was safe to do so.

Relevant legal principles

13 The common law distinguishes between injuries sustained on account of the defective static condition of a property and injuries sustained on account of activities or operations carried out on a property. If injury is sustained due to the defective static condition of a property, as was the case here, the court is only concerned with the defendant's duty of care as the occupier of the property. Michael F Rutter, *Occupiers' Liability in Singapore and Malaysia* (Singapore Butterworths, 1985) ("*Rutter*") explains the legal significance from the viewpoint of the relevant duty of care in the two different situations as follows (at p 107):

> … Thus, assuming that the damage was not caused by a current activity or operation, it presumably will have been caused by the defective, static condition of the premises. The common law does not impose the ordinary *Donoghue v Stevenson* duty of care upon the occupier in respect of the static condition of his premises …

14 The applicable duty of care owed by an occupier to an invitee for injury caused by the defective static condition of its property was confirmed by the Court of Appeal in *Mohd bin Sapri v Soil-Build (Pte) Ltd and another appeal* [1996] 2 SLR(R) 223 at [47]:

> The only duty [the defendant], as an occupier, owed to the plaintiff was to use reasonable care to prevent damage from unusual dangers which the former knew or ought to have known about. *This relates to the physical condition of the premises, as opposed to current operations at the site.* [emphasis added]

15 Turning to the law on occupiers' liability in Singapore, the Court of Appeal in *Industrial Commercial Bank v Tan Swa Eng* [1995] 2 SLR(R) 385 ("*Tan Swa Eng*") at [15] reminded:

> The law of occupiers' liability in Singapore is derived from English common law and … legislation in England has been passed which has made significant changes to the common law. In Singapore, there is no such parallel legislation, and the English statutes on occupiers' liability are not applicable.

16 The Court of Appeal restated (at [16] of *Tan Swa Eng*) the well-accepted principle that:

> At common law, a person is an invitee if he is on private or public premises for a business purpose of material benefit to the occupier. This is usually referred to as a "common interest" as the invitee himself more often than not also has an economic interest in being on the premises.

In contrast, licensees are those who have been given permission, whether express or otherwise, to enter premises and who are neither trespassers nor invitees. It was undisputed that the plaintiff in the present case was an invitee and not a licensee.

17 The test of an occupier's duty of care *vis-à-vis* invitees may be found in the case of *Indermaur v Dames* (1866) LR 1 CP 274, and is based on the occupier taking reasonable care to prevent damage to the invitee from unusual danger. The test (at 288 of *Indermaur v Dames*) was accepted and followed in *Tan Swa Eng* (see [17] to [19]). In short, an occupier is liable to an invitee for injuries and damage suffered only when *all* of the four elements below are satisfied (see *The Law of Torts in Singapore* (Gary Chan Kok Yew gen ed) (Academy Publishing, 2011) ("*The Law of Torts in Singapore*") at para 10.014):

> (a) *The occupier actually knew or ought to have known of the unusual danger*;
>
> (b) The danger was unusual to that class of plaintiffs having regard to the nature of the place and the knowledge of the invitee;
>
> (c) The danger was unknown to the plaintiff and the significance was not appreciated by the plaintiff;
>
> (d) The occupier failed to use reasonable care to prevent damage from occurring.
>
> [emphasis added]

18 In the English case of *Hawkins v Couldson and Purley Urban District Council* [1954] 1 QB 319 ("*Hawkins*"), Denning LJ suggested that there was a confluence between the laws applying to invitees and the laws applying to licensees. Thus, while *Hawkins* was strictly a case on licensees as it involved a visitor to a home in the possession and control of the defendant, Denning LJ's reasoning can nonetheless be similarly applied to cases involving invitees.

19 Denning LJ held (at 334 of *Hawkins*) that for acts of omission:

> "...*liability depends on whether the occupier has actual knowledge of the state of affairs existing on the land*, no matter whether he himself created it or someone else. Once he has that knowledge, then if he knows or ought to know that it is a danger, he is under a duty to use reasonable care to prevent damage from that danger. [emphasis added]

When Denning LJ spoke in terms of the occupier's "actual knowledge" of the existing state of affairs, he also included knowledge that could be imputed to the occupier (at 336).

20 On the meaning of the phrase "ought to know", Denning LJ stated (at 335, citing with approval an explanation by Lord Greene in *Baker v Bethnal Green Borough Council* [1945] 1 All ER 135 at 140):

> … It is this: if the occupier *actually knows the physical condition of the premises*, and a reasonable man would have realized that it was a danger, the occupier must be taken in law to

have knowledge of the danger, because he ought to have realized it too. *He ought to know what a reasonable man would know*. ... When the statements of their Lordships are read against that background, it becomes clear that what they mean is this: *once an occupier has actual knowledge of the state of affairs existing on his land, then if he knows or ought to know it is a danger he is under a duty to warn a visitor of it unless, of course, the danger is obvious*. [emphasis added]

21 On the facts of *Hawkins*, Denning LJ found that the defendant ought to have known about the danger as *it knew that the step in question was broken*, and a reasonable man in the position of the defendant would have realised that the broken step was a danger to visitors (at 338). Thus, the basis of the decision in *Hawkins* was the defendant's knowledge of the existing state of affairs, *ie*, the defective step, such that it could be said that any reasonable person in the position of the defendant ought to know about the danger.

22 In *Tan Swa Eng*, the appellant was the ground floor tenant of Hotel New World, which collapsed on 15 March 1986. On the day of the collapse, there were tremors and other warning signs. The appellant's officers, after checking cracks in a pillar, concluded that there was no significant danger and did not take any steps to evacuate the appellant's customers from the premises. The appellant was later sued, and it was asserted that the appellant's officers ought to have known of the danger of the building collapsing after experiencing the warning signs and had failed to take the necessary precautions to evacuate the appellant's customers from the premises.

23 In allowing the appellant's appeal, the Court of Appeal, applying the English decision of *Roe v Minister of Health* [1954] 2 QB 66, held that in assessing whether the appellant had breached its duty by risking the dangers that were known or ought to have been known to it, one must examine the dangers within the state of knowledge at the time, namely, that in 1986, no one would contemplate that a building which had stood for more than ten years would suddenly collapse. The Court of Appeal agreed that the officers of the appellant should only be imputed with the state of knowledge of a reasonable man in 1986. In that case, the Court of Appeal held that there was no failure on the part of the appellant to use reasonable care to prevent the damage from occurring. It is clear from the decision that any temptation to view evidence on liability with hindsight must be avoided.

24 The plaintiff's counsel referred me to some authorities. At this juncture, I will mention the two cases cited in support of the proposition that the defendant had a duty to inspect the flooring in the Riser. The first is *Chandran a/l Subbiah v Dockers Marine Pte Ltd* [2010] 1 SLR 786, which is distinguishable as it concerned an employer's liability and not an occupier's liability. The other case is *Marnet v Scott* [1899] QBD 986, which the plaintiff cited in support of the proposition that there was a duty on the defendant's part to inspect the flooring in the Riser. *Marnet v Scott* accepted and applied the test in *Indermaur v Dames* quoted earlier (see [17] above).

25 In relation to the law on negligence, the critical question is similarly whether or not the defendant actually knew or ought to have known of the gypsum flooring. This is ultimately a question of the standard of care expected of the defendant as the occupier of the Property. This is also a factual issue requiring an objective determination after evaluating the facts and the circumstances of the case (see *The Law of Torts in Singapore* at paras 05.006 - 05.008 and 05.012).

26 Interestingly, in the recent case of *See Toh Siew Kee v Ho Ah Lam Ferrocement (Pte) Ltd and others* [2012] 3 SLR 227 ("*See Toh*"), Woo Bih Li J found at [109] that occupiers' liability was part of the law of negligence. The learned judge came to his conclusion after drawing support from *British Railways Board v Herrington* [1972] AC 877 and textbooks like *Rutter*. In the learned judge's view, there was no reason why an occupier should have concurrent liabilities when others had only one (see

[109] of *See Toh*).

27 On the other hand, the author of *The Law of Torts in Singapore* takes the opposite view, noting the following at para 10.048:

> There is interstitial evidence from the cases indicating the close connection between occupiers' liability and negligence. In the author's opinion, *they are not sufficient in themselves to warrant occupiers' liability being entirely subsumed under the tort of negligence*. It is ideal to adopt a consistent standard, such as a negligence standard, for all occupier *vis-a-vis* the different categories of entrants into the premises, if the test is sufficiently certain, as well as flexible, to accommodate a myriad of scenarios. However, the ideal of consistency should not be implemented for the sake of consistency without sufficient appreciation of the different categories. [emphasis added]

28 Further, the author of *The Law of Torts in Singapore* explains at para 10.054:

> The state of the law on occupiers' liability is not entirely satisfactory. Reforms should be considered as to whether the course of the common law in this area should be altered by changing or amalgamating the tests for occupiers' duties towards invitees, licensees and trespasses. There is good reason for considering the amalgamation of the occupiers' duties towards invitees and licensees. On the other hand, on the issue of whether occupiers' liability should be "shunted" onto the negligence "track", the difficulties of subsuming occupiers' liability under the tort of negligence have been discussed above, including the problem of imposing the negligence standard on the occupier's relationship towards trespassers.

2 9 *See Toh* is currently under appeal to the Court of Appeal. In my view, in the light of the pending appeal and the nature of the present case, there is no need for this court to enter into the debate about whether the law on occupiers' liability should be subsumed under the general law of negligence.

Issue before the court

30 The defendant accepted that it was the occupier of the Property, and the plaintiff's case was argued on that footing. The key issue in dispute was whether the defendant was aware of the gypsum flooring in the Riser before the accident. As regards this issue, the court will first consider whether the defendant had actual knowledge of the state of affairs existing in the Riser before the accident. The relevant state of affairs comprises three elements: (a) the internal open space in the Riser; (b) the fact that one layer of gypsum plasterboard was used to cover the internal open space; and (c) the fact that gypsum plasterboard was not a load-bearing material. These facts would go to show that the gypsum flooring would constitute an unusual danger. To succeed in his claim, the plaintiff has to prove either that: (i) the defendant had knowledge (whether actual or imputed) of these facts and knew that the gypsum flooring was a danger; or (ii) short of knowledge of danger, the defendant's knowledge of the relevant state of affairs (*ie*, (a) to (c) above) was such that any reasonable person in the position of the defendant ought to know about the danger. If either of these conditions is satisfied, the plaintiff would have established his case for breach of occupiers' duty. Conversely, if neither of these conditions is satisfied, the plaintiff's case would fall apart.

31 Indeed, as discussed above, regardless of whether one views the current case from the prism of the law of negligence or the law on occupiers' liability, one common threshold element that the plaintiff has to establish is that the defendant *actually knew about or can be imputed with knowledge of* the gypsum flooring (see condition (a) of [17] above).

Discussion and decision

32 As just mentioned, the key issue in this case relates to the first condition set out in *Indermaur v Dames* (*ie*, condition (a) of [17] above). From the overall evidence before the court, my view, on the balance of probabilities, is that the plaintiff has not satisfied this condition for the reasons set out below.

The defendant had no actual knowledge of the gypsum flooring in the Riser

i. The gypsum plasterboard was there because of an original design flaw

33 The plaintiff called an expert witness, Mr Philip Edward Marshall ("Mr Marshall") of Construction Solutions Consultancy. Mr Marshall has spent over 50 years in the construction industry, with 14 years spent as a quantity and building surveyor and 36 years spent in project management as a project manager. Of those 36 years, 14 years involved project management in Singapore.

34 Mr Marshall stated in his expert report dated 18 January 2011 ("the January report") that he did not carry out a site visit, but that he had seen photographs taken by one Aedan Phua of Colt on the day of the accident after the plaintiff was taken to hospital. The January report was based on the photographs and the plaintiff's responses to Mr Marshall's questionnaire. Subsequently, Mr Marshall made a site visit on 27 July 2011. He produced a supplementary report dated 29 July 2011. After this site visit, Mr Marshall took site dimensions and prepared an approximate drawing of the Riser. A further report dated 21 October 2011 was issued by Mr Marshall to comment on the loss adjuster's preliminary report dated 6 August 2010. The January report remained the principal report.

35 Mr Marshall opined in the January report that an original design flaw led to the internal open space of the Riser being covered with one layer of gypsum plasterboard. Paragraph 3.1.2 of the January report states:

> 3.1.2 From Photographs Nos 5-9 (Appendix F) of the Riser where the accident occurred, *it can be clearly deduced that at the time of the construction of the concrete superstructure, the full design co-ordination of the Mechanical and Electrical installation with the structural work had not been carried out*, *as the Structural Engineering Consultant had only included in their construction drawings an oversized opening in the floor of the Riser* for the smoke extract ductwork and the trunking to the Fan Starter Panel, as demonstrated in the above mentioned photographs.
>
> *If at the time of the construction of the concrete superstructure the full design co-ordination of the Mechanical and Electrical installation and the structural work had been carried out, then the Structural Engineering Consultant would have designed for a concrete slab to the floor to the riser and included on their construction drawings for openings in the concrete slab for the smoke extract ductwork and the trunking to the Fan Starter Panel*. The openings would have been some 50 mm larger than the size of the smoke extract ductwork and the trunking to the Fan Starter Panel, to allow for ease of installation of the ductwork and the trunking. *On completion of the installation of the ductwork and the trunking, the resultant gap between the concrete slab and the ductwork and the trunking, would have been filled with suitable fireproof stopping material.*
>
> [emphasis added]

36 In para 3.1.3 of the January report, Mr Marshall opined that as the design process described was not properly co-ordinated and carried out, the structural engineer did not design a concrete slab to cover the opening in the floor of the Riser following the installation of the smoke extract ductwork.

Mr Marshall further opined that this large opening in the floor of the Riser (*ie*, the internal open space of the Riser) had to be either covered or infilled in a safe and proper manner for the following reasons (at para 3.1.4):

a. To provide a level and safe platform to the entire open space of the Riser for access to the Fan Starter Panel for maintenance and servicing of the said panel by a Service Engineer.

b. To provide adequate fire integrity within the Riser between the Basement and Level One.

c. To ensure that the ceiling in the basement was continuous from a finishes [*sic*] perspective only.

37 Mr Marshall noted at paras 3.1.5 and 3.1.6 of the January report that while the various consultants and/or the main contractor involved in the construction of the Property ought to have ensured that the infill satisfied all the requirements set out in sub-paras (a)–(c) of para 3.1.4 of the January report, the gypsum flooring satisfied only the requirement in sub-para (c). Furthermore, the following pertinent points were noted:

(a) Whoever supervised the installation of the said infill ceiling in the basement would have been aware of the inadequacy of the installation from a safety aspect *vis-à-vis* the Riser above, and should have raised this with the relevant person in charge so that the appropriate instruction could be given. Clearly, this process did not occur (see para 3.1.6 of the January report).

(b) During the formal handover inspection of the Property after it was completed, when an inspection of the interior of the Riser should have been carried out, it would have been plainly clear to the person in charge of the inspection that there were problems with the Riser in that the requirements set out in paras 3.1.4(a) and 3.1.4(b) of the January report had not been satisfactorily achieved (see para 3.1.7 of the January report).

(c) A Qualified Person ("QP") was statutorily required to certify the completed works for, *inter alia*, fire integrity and safety aspects. To do so in a proper manner, the QP would have required a detailed inspection of the completed works. According to the January report, either: (i) an inspection of the interior of the Riser was carried out by the QP and he reported the problems, but these problems were not corrected by the relevant party; or (b) there was an oversight and an inspection of the Riser was in fact not carried out (see para 3.1.8 of the January report).

38 The above points from his January report were confirmed by Mr Marshall during cross-examination. [note: 12]

39 During cross-examination, Mr Marshall elaborated on his view that the gypsum plasterboard used to cover the internal open space in the Riser was part of the architect's direction: [note: 13]

...

A: So at the point in time when the construction was being done, the painter painted the wall of the basement and went up and painted the wall—part of the wall in the riser which is shown on photograph 6 on page 66. So from my experience, I can anticipate what happened at the end. The architect was walking round, they painted up into the riser and said "Look, I haven't got a level ceiling, fill it in". He may have said "with plaster" or just said "contractor, fill it in". He'd have probably said "Plaster", but I don't--- this would have been a late instruction towards the end when the job was nearly finished, and the contractor then put in

plasterboard. *So I would accept that plasterboard was part of the original, not design, more of an instruction*. *I doubt you'll find on an architect's drawing, it was an oversight. When they look at the relationship of the structure and the ductwork, they suddenly said "We have a hole, we better fill it in". This often happens. And they filled in, but with the wrong---the architect instructed the wrong material.* It should have been---because it's a riser above, he should have instructed either to get the structural engineer to do a floor or done something different, but not what was instructed. *But it's still part of the architect's designing quote/direction or instruction*.

...

[emphasis added]

40 While Mr Marshall's views were based on deduction as he never had sight of the relevant construction drawings, [note: 14] he said that his views were based on his experience as the project manager of many construction projects over the course of 36 years, and I accept that his opinion is not without some degree of credence. I note that Mr Marshall was shown the as-built drawings of the Riser that were provided by the defendant. Although Mr Marshall said that his brief did not include reviewing the as-built drawings, he went on to explain that without the necessary mechanical and electrical drawings and the structural engineer's drawings, the as-built drawings by the architect in themselves were incomplete. He said: [note: 15]

...

A: ... So in fact this as-built drawing, if you want to use that, it's incorrect. If you want, but only--- it's incomplete. I want to see the structural engineer. This is not the structural engineer's drawing. This is to my conclusion, er, mechanical drawing showing mechanical ductwork. But it doesn't show the plan of the room and the mechanical engineer saying, "Where you positioned the duct in the opening?" *And the structural engineer says how is his structure in relation to the riser, to this ductwork as I expressed earlier should be within 15 millimetres. So this---these drawings may be indicative, give me some indication but it doesn't give me the story and in fact it's incorrect because we know by inspecting it, there's no concrete ...*

[emphasis added]

41 Mr Marshall went on to point out several other flaws in the as-built drawings and opined that he did not have "great faith" in the as-built drawings. [note: 16] However, Mr Marshall revealed that as-built drawings were supposed to serve the important purpose of recording accurately what was built, and that they were "a very critical part of the process of handing over the building from the contractor to the owner" and would be relied on by "future owners who may want to make a change". [note: 17]

42 Mr Marshall's other evidence is that if the contractor or whoever installed the gypsum plasterboard had erected a metal frame first, it would have put people on notice that the Riser's flooring was not made of concrete. It could even have stopped the fall of the plaintiff. [note: 18] Mr Marshall further added that when construction of the Property was completed, it was likely that the architect would have noticed that the Riser's floor was not level and would have instructed that the opening be filled (see [39] above). [note: 19]

43 It is clear that Mr Marshall's opinion evidence shifts the blame away from the defendant as it was a design flaw: an original design flaw led to the internal open space of the Riser being covered with one layer of gypsum plasterboard. The facts in evidence support the defendant's case that before the accident it did not know about the internal open space, and that it was covered by the gypsum plasterboard. As the facts in evidence show, this was *not* a case of an occupier who had the means to find out about a concealed danger but omitted to take action to make its premises safe for invitees.

ii. The defendant was not the developer of the Property

44 The foregoing paragraphs throw into sharp focus the main difficulties in the plaintiff's case, not least the fact that the defendant was neither the original developer of the Property nor the original party that actually contracted with the relevant consultants involved in the construction of the Property (*eg*, the architect and other professionals), but was instead the management corporation formed on 20 December 2005 to take over the common areas in the Property. Given Mr Marshall's testimony on design flaw and architect's direction in [39] above, and his further testimony that the as-built drawings provided by the architect to the original developer were, on Mr Marshall's evidence, incomplete or inaccurate, on the overall evidence, on a balance of probabilities, I find that that the defendant, as the management corporation of the Property, would not have known from its occupation of the common areas of the Property of the design flaw or from the as-built drawings themselves about the design flaw in the Riser, including the fact that gypsum plasterboard was used to cover the internal open space in the Riser.

iii. The defendant did not know of the gypsum flooring until after the accident

45 The main witness for the defendant was Mr Aung. He has been the defendant's building manager since 2007. Mr Aung steadfastly maintained during his cross-examination that he had never been inside the Riser, [note: 20] and that he and the defendant only found out about the gypsum flooring after the accident. [note: 21]

46 During the cross-examination of Mr Aung, counsel for the plaintiff, Mr Thiagarajan, attempted to rely on the *preliminary report* of Ms Toh Hui Hong ("Ms Toh"), a loss adjuster with Crawford & Company International Pte Ltd, to suggest that Mr Aung had informed Ms Toh that the defendant was aware of the gypsum flooring *before* the accident. The relevant part of Ms Toh's preliminary report ("the Crawford Report") reads as follows: [note: 22]

> We were told by Mr Aung that this was the original architect's design that was in place since the development was constructed, i.e., in 2004. We requested for a copy of the floor plans and will submit the same when received. However Mr Aung informed that the management is aware of the design as the same floor position is found in the other control panel room.

47 Mr Thiagarajan sought to rely on the last sentence of the above paragraph to suggest that the defendant's management was aware of the design of the Riser's flooring before the accident. Mr Aung's reply, however, made it clear that that was not in fact the position: [note: 23]

> …
>
> Q: … Since when were the management aware?
>
> A: After the accident, I in---I told this loss adjustor we're aware.

Q: So this is the management was aware after the accident?

A: After accidents, yes.

...

48 Mr Thiagarajan used the same line of inquiry for the next paragraph of the Crawford Report, and he was given the same answer by Mr Aung. The relevant paragraph of the Crawford Report reads: [note: 24]

> We inquired on whether the contractor had been informed of the potential danger/design of the floor and to this Mr Aung related that he brought Colt's employees on orientation rounds when they first attended at the development although he did not forewarn/inform them of the flooring design.

49 The line of cross-examination on this particular paragraph proceeded as follows: [note: 25]

...

Q: ---is it seems to suggest that you actually have been to the accident riser before because you seem to have taken the employees on an orientation round.

A: Okay, this, er---

Q: You---

A: ---same as the one will [*sic*] handover time, I just show that Colt employ ---Colt employees inside, er, one DB [distribution board] have. I just assure them it's your --- we never open the door.

Q: But it went on to say that he took them on round but you "did not forewarn or inform them of the floor … design."

A: Yes because, Sir, I also don't know the---what is the design inside. Sir, this---this, er, is a small place so I've, er, other place, er, ducting, DB, then DB, other place have--- there are other place [sic] more important than the---this one.

...

50 Finally, the Crawford Report concluded with the following: [note: 26]

> The insured [*ie*, the defendant], being aware of the flooring design in the control panel room failed to forewarn/inform the appointed contractor of the potential danger...

51 Mr Aung, however, again clarified the defendant's position in his answers: [note: 27]

...

A: So---so---I want to tell two portion[s]: First, we [are] not aware of the floor design.

Q: Yes.

A: The second one, as such, we didn't inform the contractor the danger---potential danger of the---this---er, this, er, compartment. We didn't inform. We didn't remind.

...

52 Later in his cross-examination, Mr Aung went on to confirm that he had not informed Ms Toh that the defendant's management was aware of the design of the Riser's flooring before the accident. [note: 28]

53 At this juncture, it ought to be pointed out that Ms Toh herself appeared to have taken a somewhat contrary position from Mr Aung. I am minded to reach the conclusion that her questioning of Mr Aung, who is from Myanmar, could have led to confusion and misunderstanding. I begin with Mr Thiagarajan's cross-examination of Ms Toh on the paragraph quoted at [46] above. Ms Toh's answers to Mr Thiagarajan's questions showed that the "design" she was referring to was the "split level" due to the existence of the concrete beam that occupied the left side of the Riser and the lower section to the right. At this part of her testimony, Ms Toh was not talking about the gypsum flooring itself: [note: 29]

Q: When you mean you were told "original architect design that was in place" what is the design? What design are you talking about?

A: I'm referring to the … er, if you have seen in the photograph, there's one of higher level.

Q: Yes

…

A: ... so I'm actually asking him, er, why is there such ... such design. Then he ... he answer me that is the original architect.

Q: *You ... you ... are you telling me...you are referring to the top part which is the cemented*?

A: *Yah, okay.*

Q: Yes

A: *What I asked him is that instead of a whole level … level ground, why is it like one section is lower and one section is higher*?

Q: *And that's your reference to design?*

A: *Yah*.

Q: And you said you requested for a copy of the floor plans. Did you get a copy?

A: Er, later on.

…

Q: You said the management is aware of the design, Who told you this? Aung?

A: Yes

Q: *And what did you mean when you said that you were aware? That … that Aung informed that the management is aware.*

A: *That means the … one section is higher, one section is lower. So I'm just asking is he aware*.

Q: *And what was the answer*?

A: *Yes, he's aware*.

Q: Was your … aware prior to the accident?

A: Cannot remember did I specify it. It was after or it was before the accident.

Q: You can't remember whether the management was aware after or before or you can't remember what Aung ...

A: From the second paragraph … it would … it … it would be before.

Q: So just to recap. That means the management was aware of the design of the riser floor before the accident.

A: Yes.

[emphasis added]

54 It was later on, when this court sought clarification from Ms Toh, that she said that her reference to "design" had included "the floor board at the lower level", *ie*, the gypsum flooring: [note: 30]

Court: So are you also referring to the floor board at the lower level as well, as part of the design?

A: Yes

Ms Toh referred the court to the Crawford Report, where she wrote: [note: 31]

> Mr Aung related that the [plaintiff] fell through the lower level floor of the control room. We ascertained this section although appears to be cemented floor forms part of the ceiling at the lower level. We show below photographs of the relevant section with the sections of the collapsed board in place.

Nothing on the face of this paragraph can be attributed to Mr Aung's alleged comment that the "cemented floor" was the original architect's design. It was in answer to the court's question that Ms Toh explained that she had asked Mr Aung about the "cemented floor" and had been told that it was the original architect's design: [note: 32]

Court: Okay. So when you talk about design, ... you also mean the section as you [referred] to in 397 (*ie*, Crawford report internal p 4).

A: Yes

55 In another part of her cross-examination, Ms Toh was informed by Mr Thiagarajan that Mr Aung had been shown the Crawford Report and had denied having informed her that the defendant's management was aware of the gypsum flooring. Ms Toh said: [note: 33]

A: Er … subsequently he did clarified [*sic*] with me, er, through an email, er, but actually it's not from himself but rather from his supervisor that, er he is … he's not an expert in.. in reading all these drawings. And so he's not in a position to … to commit himself and say whether he's are or not aware.

Q: But this statement says that the management is aware. You said …

A: Yah, correct. This … okay, this report was put up straight, er …

Q: Sorry.

A: … a few days after my … my site attendance. That means my first gathering of information, okay. So subsequently I asked for the drawing and all that. Then Mr Au [*sic*] superior okay clarified with me.

...

Q: So what did you do with the email, Ms Toh?

A: I forward this to insurer.

...

Q: So are you saying that … are you maintaining that your report is accurate on that part today?

A: It's accurate because there and then this is the information I received in the first instance.

Q: Thank you. So management was aware?

A: That was what I gather [*sic*].

56 Notably, during her re-examination, Ms Toh shifted from her earlier testimony. In her re-examination, she conceded that the question which she had posed to Mr Aung had been somewhat unclear, and she herself was unable to recall the precise question which she had asked. Her answers to the questions posed by the defendant's counsel, Mr Eu, during re-examination were as follows: [note: 34]

...

Q: Yes. So just one--- the last question on---on this point is so when you said that Mr Au told you that the management is aware of this design, do you mean that they are aware of an opening or do you mean that they are aware of this gypsum board covering the opening?

A: I cannot remember the specific question that I've, er, asked him. I think, on the whole, I just asked him, this design, whether the management is aware of this design. So he could, I mean, er, he could have misinterpreted my---my questions.

...

Court: Sorry, what was your question? I mean you said he misinter---

A: Yah, he could have mis---

Court: ---misunderstood, right, your question so there must have been a question right? So what was your question?

A: What I see on that day is that, erm, there---there---there was an opening.

Court: Opening as in the---the gypsum board having given way?

A: Yes, correct. And then there's the gypsum covering it. So, to me, it seems like a---a---a design so I asked Mr Aung---Aung on the whole---this whole design--- this design.

...

57 I am mindful that Ms Toh had stated earlier that Mr Aung had informed her during the site attendance that the defendant's management was aware of the defect in the floor design of the Riser *before* the accident. [note: 35] She then prepared the Crawford Report, which was a preliminary report. From my reading of the overall evidence, there is in my view real doubt that Mr Aung had told Ms Toh that the defendant's management was aware of the "cemented floor", meaning the gypsum flooring.

58 In any case, the Crawford Report, being a preliminary report, is not determinative of the defendant's knowledge of the state of affairs in the Riser. Ms Toh did not issue a further report after she received some drawings from the defendant. She passed the drawings to the defendant's insurers, who asked her to speak to Mr Aung about them. According to Ms Toh, a few days later, she received an email from Mr Jason Teo ("Mr Teo") of Melana International Pte Ltd, whom she believed was Mr Aung's supervisor. Mr Teo had emailed her to clarify that as Mr Aung was not an expert in reading drawings, he was accordingly not in a position to comment on whether the defendant's management was aware of the design flaws in the Riser's flooring. [note: 36]

59 As between Ms Toh and Mr Aung, I prefer the evidence of Mr Aung. Mr Aung's position – *ie*, the defendant's management was unaware of the gypsum flooring – is more credible. I also reach this conclusion supported by other objective evidence. First, the Crawford Report was based on hearsay evidence. It was a preliminary report that was made after talking to people, and Ms Toh's conclusions were drawn from those conversations. There was no objective collaborative evidence to verify or test the veracity of what she was told or her own understanding of the situation. Secondly, other than forwarding Mr Teo's email to the defendant's insurers, there was no investigation by Ms Toh to follow up on Mr Teo's email. [note: 37] Thirdly, the as-built drawings (also produced in discovery) were sent to Ms Toh after she prepared the Crawford Report and they gave no indication of any design flaw in

the Riser including the fact that gypsum plasterboard was used to cover the internal open space in the Riser. Maintenance works had been carried out on the FS panel in the Riser over the years by Colt's employees without incident. There was little reason for the defendant to suspect that something was amiss.

60 Moving on from Ms Toh's statements in the Crawford Report, the evidence before me did not support a finding that the defendant was aware of the existence of the gypsum plasterboard used to cover the internal open space in the Riser.

61 First, all the witnesses for both sides testified that visually, the colour of the gypsum plasterboard was similar to that of the concrete beam in the Riser. [note: 38] This was also accepted by the plaintiff's expert, who opined: [note: 39]

> plasterboard when laid horizontally for some six years (as it has been in this case) will darken to a similar colour to concrete, which together with the accumulation of dust and dirt on its surface that would have ingressed through the louvred doors to this riser (see Photograph No 1-Appendix B of our Supplementary Expert's Report dated 29 July 2011) will give the appearance of a cemented floor", as demonstrated in Photographs Nos 7,8, and 9 included in Appendix F in our Expert's Report dated 18 January 2011, where both the concrete floor and the plasterboard clearly have the a similar colour.

In short, there was no evidence that the gypsum plasterboard was visible to anyone including the defendant's servant or agent.

62 Second, the as-built drawings which the defendant obtained when it took possession of the common areas of the Property. I have already touched on this evidence above when dealing with Mr Marshall's evidence on the as-built drawings and his opinion of a design flaw in the Riser. As stated above, the as-built drawings gave no indication of any design flaw in the Riser including the fact that the internal open space in the Riser was covered by gypsum plasterboard.

63 Third, there was also no evidence of any previous incident in the Riser or evidence to suggest that any of the service technicians who had previously worked in the Riser had alerted the defendant to the danger posed by the gypsum flooring. Even during servicing, there was usually no need for a service technician to stand on the gypsum flooring as it was too low to reach the FS panel mounted on the wall. Given the layout of the Riser and the FS panel, the gypsum flooring was not the usual area for a service technician to stand on to access the FS panel.

64 This was attested to by Mr Wong, who had previously carried out work in the Riser: [note: 40]

> ...
>
> Court: So from 2009 to 2010, before 22nd of June 2010, you were there, you---you went to that particular riser 5 to 6 times?
>
> A: Er, about 3 times like that.
>
> ...
>
> Q: And on those occasions ... were there any occasion in which you actually [needed] to go down to the lower level of the platform or flooring?
>
> A: Mm, mm, no.

...

Q: And in carrying out the work on the panel, you ... can carry out the work standing on the upper level, is that correct?

A: Er, yes, right, mm.

65 The only reason the plaintiff stood on the gypsum flooring was because he had dropped a light bulb. In the words of the plaintiff himself, he jumped down to retrieve the bulb because "it looked of a similar material from the place that I was working". [note: 41] This was confirmed by the plaintiff during re-examination: [note: 42]

...

Q: And you were asked before you jumped down, did you not---did not occur to you to check with Wong before doing so and you said, "It did not occur to me." Is there any reason?

A: Yes, there was no indication of danger of the lower floor not being load bearing and so I would expect the lower floor to be made of concrete, similar to the platform I was standing on.

Q: Why was that so?

A: They looked exactly alike.

...

66 This is a convenient juncture to digress for a moment to mention the use of the phrase "load bearing" in the evidence. It was the plaintiff who explained that he had used the expression "load bearing" and not "weight bearing" because of his size and weight. He said: [note: 43]

Q: A non load bearing or something that can't support your weight basically in that sense.

A: I was saying non load bearing.

Q: Non load bearing. Why? Why this specific non load bearing?

A: Well, I will assist... well. A lighter weighted person than I would also not be supported. That's what I mean.

67 Finally, Mr Aung testified that the door to the Riser was usually locked to prevent vandalism, with access given only for servicing: [note: 44]

...

Court: All right, I'll ask you just one question. This is just for completeness. Why---why is the access door to the riser locked?

...

A: So---all our riser are too---are locked. When for servicing or authorized access only, we issue the key. Always locked.

Court: Is there a reason for that?

A: Yes.

Court: Why? What is the reason for that?

A: Because there are odds---in this, er, Riser, we have Sumi riser, in the riser, we have a electrical riser, telcom---communication risers, telephone riser, TV riser, all these, er, locked because, er, we afraid this---the, er, vandalism. If, er, we---we did not lock, somebody they will go and, er, damage our---

Court: Yes.

A: ---equipment in the---damage our telecommunication system. Then the electrical riser also very important for us. Once the electric power shut down, we have to suffer a lot.

...

68 In the light of all these pieces of evidence taken cumulatively, it is more likely than not that the defendant was unaware of the gypsum flooring in the Riser, and I so hold. In my view, the first condition in *Indermaur v Dames* has not been satisfied (see condition (a) at [17] above).

Other matters

69 The plaintiff alleged that the defendant was under a duty to inspect or warn of the danger constituted by the gypsum flooring. Applying the principles enunciated in *Indermaur v Dames* (see also *Hawkins* at 338), I hold that there is no such duty unless the plaintiff has satisfied the requirement of proving that the defendant knew of the gypsum flooring in the Riser and either knew or ought to know of the danger posed by the gypsum flooring. It is only then that the defendant would be under a duty to use reasonable care to prevent damage from that danger. In that scenario, the exercise of reasonable care, depending on the facts, may include a duty to inspect the gypsum flooring and to warn the plaintiff of the danger.

70 Given my findings at [68] above, the alleged duty to take reasonable care does not arise for determination.

Conclusion

71 To summarise, for the reasons stated above, the defendant was not aware of the gypsum flooring in the Riser. It was not aware of the internal open space in the Riser; that a layer of gypsum plasterboard was used to cover the internal open space in the Riser, and that gypsum was not a load-bearing material and thus posed a danger to service technicians working in the Riser like the plaintiff. In the result, I agree with Mr Eu that the plaintiff has not established on the overall evidence the threshold requirement for the existence of a duty of care on the defendant's part as the occupier of the Property. For the same reason, the plaintiff's claim in negligence is also not made out. Accordingly, the plaintiff's action is dismissed with costs to be taxed if not agreed. I reach this decision with regret, being acutely aware of the consequences of the accident to the plaintiff, for whose injuries one can have sympathy.

[note: 1] Transcripts of Evidence dated 15 March 2012, p 11

[note: 2] Wong's AEIC para 11

[note: 3] Transcripts of Evidence dated 15 March 2012, p 10

[note: 4] Transcripts of Evidence dated 15 March 2012, p 27

[note: 5] AB 104 Marshall's Supplementary Report No 2 at para 2.1.8(d)

[note: 6] AB 108 Marshall's Supplementary Report No 2 at pare 2.1.3(f)

[note: 7] Transcripts of Evidence dated 15 March 2012, p 12

[note: 8] Plaintiff's AEIC at para 23

[note: 9] Plaintiff's AEIC at para 19

[note: 10] Plaintiff's Closing Submissions, para 1

[note: 11] Defendant's Closing Submissions, p 16

[note: 12] Transcripts of Evidence dated 16 March 2012, pp 17-21

[note: 13] Transcripts of Evidence dated 16 March 2012, pp 26-27

[note: 14] Transcripts of Evidence dated 16 March 2012, pp 14-15

[note: 15] Transcripts of Evidence dated 16 March 2012, p 39

[note: 16] Transcripts of Evidence dated 16 March 2012, p 40

[note: 17] Transcripts of Evidence dated 16 March 2012, p 41

[note: 18] Transcripts of Evidence dated 16 March 2012, p 17

[note: 19] Transcripts of Evidence dated 16 March 2012, p 26

[note: 20] Transcripts of Evidence dated 16 March 2012, pp 47 and 48

[note: 21] Transcripts of Evidence dated 16 March 2012, pp 49 to 53 and p 60

[note: 22] AB 19

[note: 23] Transcripts of Evidence dated 16 March 2012, p 53

[note: 24] AB 19

[note: 25] Transcripts of Evidence dated 16 March 2012, p 53

[note: 26] AB 20

[note: 27] Transcripts of Evidence dated 16 March 2012, pp 60-61

[note: 28] Transcripts of Evidence dated 16 March 2012, p 77

[note: 29] Transcripts of Evidence dated 16 March 2012, pp 93-94

[note: 30] Transcripts of Evidence dated 16 March 2012, pp 94-95

[note: 31] AB 17

[note: 32] Transcripts of Evidence dated 16 March 2012, p 95

[note: 33] Transcripts of Evidence dated 16 March 2012, pp 96-97

[note: 34] Transcripts of Evidence dated 16 March 2012, p 110

[note: 35] Transcripts of Evidence dated 16 March 2012, pp 96 and 109

[note: 36] Transcripts of Evidence dated 16 March 2012, p 96

[note: 37] Transcripts of Evidence dated 16 March 2012, pp106-107

[note: 38] Transcripts of Evidence dated 16 March 2012, p 92

[note: 39] AB 109 Marshall's Supplementary Report No 2, p 6, para 2.1.4 (d)

[note: 40] Transcripts of Evidence dated 15 March 2012, p 12

[note: 41] Transcripts of Evidence dated 15 March 2012, p 36

[note: 42] Transcripts of Evidence dated 15 march 2012, p 44

[note: 43] Transcripts of Evidence dated 15 March 2012, p40

[note: 44] Transcripts of Evidence dated 16 March 2012, p 86

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