See Toh Siew Kee *v* Ho Ah Lam Ferrocement (Pte) Ltd and others
[2012] SGHC 87

Case Number : Suit No 474 of 2010

Decision Date : 23 April 2012

Tribunal/Court : High Court

Coram : Woo Bih Li J

Counsel Name(s) : Lee Wee Peng Lawrence (Lawrence Lee & Co) for the plaintiff; Nagaraja S Maniam and Shelley Lim (M Rama Law Corporation) for the first defendant; Srinivasan Selvaraj (Myintsoe & Selvaraj) for the second defendant; Magdalene Chew and Gho Sze Kee (AsiaLegal LLC) for the third defendant.

Parties : See Toh Siew Kee — Ho Ah Lam Ferrocement (Pte) Ltd and others

TORT – negligence – duty of care

TORT – occupier's liability – duty of care to trespassers

23 April 2012 Judgment reserved.

Woo Bih Li J:

1 This is an action by the plaintiff See Toh Siew Kee ("See Toh") against three defendants claiming damages for injuries caused to See Toh on 13 February 2008 at 9/11 Tuas Basin Close ("9/11 TBC"). That address was apparently changed to 13 Tuas Basin Close subsequently. [note: 1]

Background

Parties to the dispute

2 See Toh was at the material time a service engineer with Norsk Marine Electronic, and was engaged by TCH Marine Pte Ltd ("TCH Marine") as an independent contractor to service the radar on board its tugboat *Fortune II*. Up till the time of the accident, See Toh had for about 26 years been attending vessels about once to thrice a week to repair and maintain radar equipment.

3 *Fortune II* was at the material time used by TCH Marine to tow the barge *Namthong 27*, also owned by TCH Marine, from 9/11 TBC.

4 9/11 TBC was at the material time leased by the first defendant Ho Ah Lam Ferrocement (Private) Limited ("HAL") from Jurong Town Corporation. HAL is in the business of building and repairing ships and other ocean going vehicles. *Namthong 27* was at HAL's premises to collect wood chips to be delivered to TCH Marine's customer Biofuel Industries Pte Ltd ("Biofuel").

5 The second defendant, Lal Offshore Marine Pte Ltd ("Lal Offshore"), had entered into a Cooperation Agreement with HAL dated 14 April 2007 (the "Cooperation Agreement"). At the material time, Lal Offshore was using part of 9/11 TBC to fabricate a set of living quarters for Keppel FELS Ltd ("KFELS") which would eventually be delivered to an offshore oil rig.

6 KFELS had in turn engaged the third defendant, Asian Lift Pte Ltd ("Asian Lift"), to take

delivery of the living quarters at 9/11 TBC and bring it to the offshore oil rig. Asian Lift decided to use a crane barge, *Asian Hercules*, for this purpose.

7 The following witnesses were called to testify at trial:

(a) PW1, See Toh;

(b) PW2, Andrew Tay Nguang Yeow ("Andrew Tay"), a director of TCH Marine presently and at the material time;

(c) PW3, Tan Puay Choon ("Puay Choon"), a manager of Catermas Engineering Pte Ltd ("Catermas") presently and at the material time. Catermas occupies the premises adjacent to 9/11 TBC, *ie*, 15 Tuas Basin Close ("15 TBC");

(d) 1DW1, Tan Sun Kiang ("Sun Kiang"), a consultant with HAL presently and at the material time;

(e) 1DW2, Chua Kien Chong ("Chua"), an employee of Lal Offshore at the material time. He was the project manager overseeing the operations to handover the living quarters to KFELS. At the time of the trial, he was no longer an employee of Lal Offshore;

(f) 2DW1, Vijelal s/o N Krishnan ("Vijelal"), the managing director of Lal Offshore presently and at the material time;

(g) 3DW1, AB Hamid Bin Mohd Ismail ("Captain Hamid"), the Master of *Asian Hercules* presently and at the material time;

(h) 3DW2, Dzainudin Bin Ismail ("Dzainudin"), the chief officer of *Asian Hercules* at the material time and who is presently a Master on rotation for various crane barges owned by Asian Lift; and

(i) 3DW3, Phanthasen Songyot ("Songyot"), an able-bodied seaman of *Asian Hercules* at the material time who is also currently the acting bosun of another crane barge, the *Smit Typhoon*, owned by Asian Lift.

See Toh's version of the facts

8 According to See Toh's version of the facts, he went first to 15 TBC on 13 February 2008 at about 3.30pm. He was there to enquire about *Fortune II*'s location because Andrew Tay had called him, either on the morning of 13 February 2008 or the day before, to check the radar on board *Fortune II*. See Toh believed that *Fortune II* could be located at 15 TBC because he had previously attended to other vessels belonging to TCH Marine at 15 TBC. [note: 2] 15 TBC was occupied by Catermas both presently and at the material time. When See Toh went to the main office of Catermas, he was informed by their manager (Puay Choon) that *Fortune II* was not berthed there but was berthed next door.

9 See Toh then left 15 TBC through 15 TBC's main gate and proceeded to enter what he then thought was HAL's gate but which was actually a second gate of 15 TBC ("second gate"). The second gate was a sliding gate whereas the main gate of 15 TBC was a swing gate. See Toh said that he did not know that the gate through which he entered was 15 TBC's second gate because there was no sign outside the second gate. [note: 3] Further, he said that he saw some people, whom he believed were workers, standing outside the second gate who told him to look for *Fortune II* inside

without asking for his shipyard safety pass. [note: 4] The shipyard safety pass is supposedly issued to everyone who has attended a mandatory shipyard safety course for all workers who want to enter or work in a shipyard. See Toh had attended such a course.

10 After entering the second gate, See Toh then walked to the shore. He said there was a tall fence (leading from the side of the second gate to the shore). There were structures in front of the fence. After the fence ended at the shore, there was an open space of about five metres. [note: 5] Seeing that *Fortune II* was not one of the several barges berthed along the shoreline, See Toh then called Andrew Tay to verify *Fortune II*'s location. Andrew Tay informed See Toh that *Fortune II* was in that area, but did not specifically inform See Toh of the exact address where *Fortune II* was berthed. Andrew Tay also told him that his supplier had gone to *Fortune II* that day and he had no problem locating the vessel.

11 After reaching the end of the fence, See Toh said that he crossed through the space between the end of the fence and the shoreline. [note: 6] When referred to a photo in 1st Defendant's Bundle of Documents ("1DBD") Vol 2 p 11 during cross-examination, See Toh said that the end of the fence was a very low grey corrugated iron sheet (on the right of the photo and not the larger blue and grey corrugated iron sheet seen in the middle of the photo). That photo and the other photos in 1DBD Vol 2 were taken on 29 August 2011 by Mr Nagaraja S Maniam, counsel for HAL. [note: 7] I would add that the photos taken by Mr Maniam and those found in 1DBD Vol 2 at pp 1 and 3 show the fence (made of corrugated metal) as seen from the side of 9/11 TBC and the huge cylindrical structures on the side of 15 TBC which perhaps were the structures See Toh had some difficulty describing.

12 See Toh's evidence on this point was different from the evidence of his own witness Puay Choon who was a director of Catermas, the occupier of 15 TBC at the material time. Puay Choon said that the height of the fence at that time was the height of the grey and blue one depicted in the middle of the photo and not the height of the very low grey one depicted at the right side of p 11. [note: 8] The length of the fence was extended after the accident by two metres. [note: 9] Even then, a person could still go around the extended fence especially at low tide. [note: 10] Puay Choon said that the distance from the second gate to the seashore was about 70 metres. [note: 11] Puay Choon also said that the number "15" was painted on the left of the second gate. [note: 12] The size of that number was similar to the number "15" shown in Exhibit P2 photo 5. Exhibit P2 was an email and a collection of five photos taken by Puay Choon on 6 September 2011. It seemed to me that the size of the number "15" was rather large.

13 Puay Choon also said that the main gate of 9/11 TBC was perpendicular to and less than ten metres away from 15 TBC's second gate. There was a signboard with HAL's name displayed beside the main gate of 9/11 TBC which was elevated and facing the direction of a public road. [note: 13]

14 See Toh said that he did not know that he had crossed into someone else's premises [note: 14] and claimed that he had never been to 9/11 TBC prior to the date of the accident. However, he conceded during cross-examination that it was his duty to check if he had crossed into someone else's premises. [note: 15] After entering 9/11 TBC, See Toh continued walking a short distance along the shore when he saw a barge. While See Toh claimed in para 12 of his affidavit of evidence-in-chief ("AEIC") that he did not know the name of the barge as he could not see its name, he eventually said during cross-examination that he did see the name of the barge, being *Namthong 27*. [note: 16]

15 See Toh said he then saw two Chinese men standing on the shore next to *Namthong 27*'s ramp

which was lowered down onto the shore at the material time. He saw a thick metal cable lying on the shore very close to those two Chinese men and near the ramp of *Namthong 27*. However, when See Toh made a drawing of the relative positions of the Chinese men, the metal cable, the ramp and himself (Exhibit P3) at trial, he drew the metal cable as lying across a small part of the ramp. See Toh claimed that he did not know what the thick metal cable was used for and he did not see the cable being attached to anything on the shore. He also observed that the thick metal cable was not stressed, that is, it was not under great tension and was not vibrating. This thick metal cable was referred to by all counsel as "the mooring wire" (of *Asian Hercules*) and I will use that same description. See Toh also said he did not notice *Asian Hercules*, notwithstanding its huge size which I will elaborate on later.

16 When See Toh was about five to six metres away from the men and the mooring wire, he asked them whether *Fortune II* was "up" *Namthong 27*. The men, although facing him, appeared not to have seen or heard him because they were talking with each other and the place was very noisy. Seeing that there was no warning sign, cordon, or anyone there giving him any warning, See Toh decided to walk towards *Namthong 27*'s ramp to take a look. However, when he was about two metres away from the ramp and had just taken one or two steps towards the ramp, he suddenly heard a loud bang and felt himself being hit by what he believed was the thick metal cable he earlier saw on the shoreline. See Toh only found out after the accident that the thick metal cable was actually *Asian Hercules*' mooring wire. See Toh said that he was still standing on the shore of 9/11 TBC and not on the ramp when he was hit. After being hit by the mooring wire, See Toh fell to the ground face up, and could not move his body. His mouth was also covered with blood and he was only able to speak very slowly and weakly as he was seriously injured. [note: 17] Shortly after, an ambulance was called to take See Toh to a hospital.

HAL's version of the facts

17 According to HAL's version of the facts, Lal Offshore had completed the fabrication of a living quarters structure for KFELS prior to 13 February 2008. KFELS had engaged Asian Lift to take delivery of the living quarters, and Asian Lift had sent *Asian Hercules* to 9/11 TBC to lift the structure and carry it back to KFELS' yard first.

18 Sun Kiang said that HAL and its servants and agents did not give permission to See Toh to enter 9/11 TBC and that HAL had no knowledge of See Toh's exact location until the accident occurred and was reported to HAL. Further, Sun Kiang said that at all material times, the main gate to 9/11 TBC was closed in accordance with his instruction [note: 18] and the premises of 9/11 TBC was fenced off by a fence which ran three sides of the perimeter of 9/11 TBC leaving only the seafront unfenced. Visitors to 9/11 TBC had to go through a security check-point at HAL's main gate before being allowed into the premises. HAL had hired guards to guard the premises of 9/11 TBC. Sun Kiang also said in his AEIC that although the premises of 9/11 TBC had been fenced up to the area at the seashore, access into 9/11 TBC could still be gained from the seashore. [note: 19] Sun Kiang agreed that HAL did not place employees to guard the area around the seashore and had not put any warning sign at or near the seashore about the lifting operations. [note: 20] However, Sun Kiang did explain that HAL had people all around the premises generally and that they would report any suspicious characters seen. [note: 21] Sun Kiang said that safety supervision of 9/11 TBC at the time of the operations was Chua's responsibility. [note: 22]

19 Although Chua was the Project Manager of Lal Offshore, he was giving evidence for HAL. Chua was aware that access into 9/11 TBC could be gained through the seashore after the end of the

fence ("the Seafront Access Point"). However, Chua said that this access point was not under his control and that he did not place anyone at the Seafront Access Point because it was a dangerous area. [note: 23] He did not elaborate whether the area was dangerous because of the intended lifting operation or some other reason.

20 Before the lifting operation commenced, Chua had also, on Sun Kiang's instructions, set up a barricade comprising one row of metal stands with safety tape running through to alert people coming from the back end of the premises not to cross into the seafront end of the premises where the lifting operation would take place. [note: 24] Chua had positioned himself at the barricade to ensure that none of HAL's or Lal Offshore's workers would enter the lifting operation site. Chua further said that, besides himself, no other worker from HAL or Lal Offshore had been present at the site where the lifting was to take place. He had instructed all other workers of HAL and Lal Offshore to stop work and to stand behind the barricade. He had also instructed the guard at the entrance to 9/11 TBC to stop anyone from entering.

21 After arriving at the shoreline of 9/11 TBC, the crew of *Asian Hercules* intended to affix two metal mooring wires from *Asian Hercules* to bollards on the shore of 9/11 TBC. While the crew of *Asian Hercules* were in the process of mooring the first mooring wire to a bollard onshore, the mooring wire got stuck at the ramp of *Namthong 27*. The crew of Asian Lift used the word "fouled", which I will adopt to describe a stuck mooring wire. According to Chua, one crew member of *Asian Hercules*, Songyot, then went to free the fouled wire with a crowbar and it was at this time that Chua suddenly noticed See Toh walking into 9/11 TBC from the direction of the seafront on Chua's right. He said See Toh was walking inwards in the direction of the barricade, *ie*, away from the sea. [note: 25] Chua said that he immediately shouted repeatedly and loudly in the Hokkien dialect for See Toh to run but did not gesticulate to him to do so. However, See Toh continued walking towards the barricade. The mooring wire then suddenly sprung up in See Toh's direction and hit him. Chua initially stated in his AEIC that the impact of the blow flung See Toh forward, causing See Toh to land on the ground. However, he later amended his AEIC to say that the impact of the blow had flung See Toh backwards instead. [note: 26]

Lal Offshore's version of the facts

22 I come now to Lal Offshore's version. Vijelal agreed that Lal Offshore had finished fabrication works of a living quarters structure for KFELS and that KFELS had engaged Asian Lift to lift and transport the structure from 9/11 TBC to KFELS' yard on 13 February 2008. Asian Lift was using *Asian Hercules*. Vijelal said that Lal Offshore and its servants and agents were not supposed to be involved in the lifting operation and that the crew of Asian Lift conducted the lifting operation.

23 Vijelal said that the premises of 9/11 TBC was at all material times under the control and management of HAL, being the tenants and occupiers of 9/11 TBC, and that Lal Offshore, as mere licensees of HAL conducting marine fabrication works in a demarcated site of 9/11, had no control and management of 9/11 TBC. Vijelal also said that Lal Offshore had no knowledge of See Toh's presence at the material time. He had believed that See Toh was at 9/11 TBC in connection with works carried out by HAL because *Namthong 27* was being repaired by HAL at 9/11 TBC at the material time. However, this belief turned out to be incorrect. See Toh later explained the purpose of his presence at 9/11 TBC, as stated above, and this part of See Toh's evidence was not challenged by anyone.

24 Vijelal also said that Lal Offshore had barricaded three sides of the living quarters structure to keep workers away from the lifting operation, leaving only the side facing the seafront unfenced, and that the waterfront and the berthing facilities there were at all material times controlled and managed

by HAL. However, the former piece of evidence was incorrect. According to Chua, he had arranged to barricade only one side in order to stop those not involved in the lifting operation from entering the area of the lifting operation. Chua's evidence on this point was not disputed by anyone.

Asian Lift's version of the facts

25 I come now to Asian Lift's version of the facts. Asian Lift alleged that after receiving instructions from KFELS and a copy of the lifting concept for the lifting operation of the living quarters structure, *Asian Hercules* left Tuas Finger Pier West and berthed at 9/11 TBC at about 3.00pm on 13 February 2008. Upon arrival at 9/11 TBC, *Asian Hercules* had to be securely moored and positioned for the lifting operation by, *inter alia*, attaching the starboard forward and port forward mooring wires to bollards onshore. I shall refer to this portion of activity as the mooring operation. I will refer to the areas of the mooring and the intended lifting operation as the "Operations Site".

26 With its boom lifted up, *Asian Hercules* is about 100 metres high. A brochure with its specifications can be found at Agreed Bundle pp 153A to 156A. Puay Choon said that the boom was still high before the accident. [note: 27] He could see the crane barge from his office at 15 TBC which was used to allow parking on the first level. He could also see it from ground level. He described it as "a very big structure, very towering". [note: 28] According to Asian Lift, the mooring wire (see Exhibit 3D2) is 32 millimetres in diameter and heavy. It requires six or seven men to carry it from the shore to the relevant bollard. [note: 29]

27 Captain Hamid and Dzainudin were at all material times standing at the mooring console of the bridge of the *Asian Hercules*. Dzainudin was the one operating the controls of the winching device on Captain Hamid's instructions. Both said that they did not have a constant direct line of sight of the starboard mooring wire which was lying across part of the loading ramp of *Namthong 27*. Thus, Captain Hamid had given clear instructions to the crew of both KFELS and Lal Offshore that the Operations Site must be cleared of all personnel and obstruction. Captain Hamid had also instructed about seven to eight crew members of *Asian Hercules*, including Songyot, to go onshore to coordinate the mooring and lifting operations and to ensure that the Operations Site was clear. Songyot was also instructed to keep watch by the bollard to which the starboard mooring wire of *Asian Hercules* was tied ("Bollard A") and ensure that the area around Bollard A was clear of personnel. Songyot was also the only on-shore crew member holding onto a handheld walkie-talkie device. He was standing near *Namthong 27*'s ramp to watch over the mooring wire and to have Captain Hamid stop the winching process should the mooring wire get fouled in the ramp.

28 After looping the end of *Asian Hercules*' starboard mooring wire around Bollard A and seeing that the area around Bollard A was clear of personnel, Songyot notified Captain Hamid by way of handheld walkie-talkies held by both of them that the mooring area was clear. Captain Hamid then instructed Dzainudin to start tensioning the mooring wire. About five minutes later, Songyot noticed that the starboard mooring wire, which was lying across part of *Namthong 27*'s ramp, was fouled on the ramp. Songyot then informed Captain Hamid that the mooring wire was fouled on the ramp. Captain Hamid then instructed Dzainudin to stop winching the mooring wires and instructed Songyot to clear the fouled mooring wire.

29 Songyot said that he went over to the fouled wire and cleared it using his hands. It was at this time that Songyot saw See Toh walking along the shoreline from outside 9/11 TBC towards *Namthong 27*. Songyot then shouted and told See Toh to stop and not proceed further because there was a wire and it was dangerous. See Toh then told Songyot that he wanted to go onto the barge (*ie*,*Namthong 27*) to check it anyway, but stopped moving towards the barge after Songyot warned

him a second time. Seeing that See Toh had stopped moving forward towards the barge, Songyot then focused his attention towards the living quarters structure to ensure that the lifting operation was proceeding properly. When he turned his attention back to See Toh about less than five minutes later, Songyot saw See Toh standing on *Namthong 27*'s ramp, and he also noticed that the mooring wire had become fouled on the ramp a second time. Within a split second, the fouled wire became free due to the momentum of *Asian Hercules* moving forward, and the wire hit See Toh. Songyot elaborated that the wire hit See Toh in the stomach causing See Toh to bend over the wire. See Toh was then swung out over the sea and then brought back when he landed on the shore. [note: 30]

See Toh's main claims

30 See Toh claimed that all three defendants were negligent. See Toh also claimed that HAL and Lal Offshore were in breach of their duty of care owed by each of them as occupier of the Operations Site. As can be seen, See Toh's claim against HAL and Lal Offshore assumed that a claim in negligence is different from a claim on the basis of occupier's liability and that both such claims can be made concurrently.

31 HAL and Lal Offshore denied liability for both negligence and for occupiers' liability while Asian Lift denied liability for negligence. All three defendants alleged contributory negligence on the part of the other parties as an alternative defence. Asian Lift also relied on the defence of a time limitation under s 8(1) of the Maritime Conventions Act 1911 (Cap. IA3, 2004 Rev Ed) ("MCA").

32 I will deal with the defence of the time bar first. Secondly, I will give my conclusion on the facts as they are likely to have a material bearing on the applicable law. Thirdly, I will deal with the applicable law and then apply the applicable law to the facts.

The time bar defence

33 Section 8(1) of the MCA reads:

> Limitation of actions
>
> 8. —(1) No action shall be maintainable to enforce any claim or lien against a ship or her owners in respect of —
>
> (a) any damage or loss to another ship, her cargo or freight, or any property on board her, or damages for loss of life or personal injuries suffered by any person on board her, caused by the fault of the former ship, whether such ship be wholly or partly in fault; or
>
> (b) any salvage services,
>
> unless proceedings therein are commenced within 2 years from the date when the damage, loss or injury was caused or the salvage services were rendered.

This means that See Toh would only have two years to bring a claim for personal injuries against the owners of *Asian Hercules* if:

(a) *Namthong 27* is considered a "ship" under the MCA; and

(b) See Toh was standing on the ramp of *Namthong 27* when he was hit by the mooring wire of *Asian Hercules*.

Whether Namthong 27 is a "ship" under the MCA

34 Unlike most typical ships, *Namthong 27* is a flat top barge which is unable to self-propel and has to be tugged by tugboats like *Fortune II*. The MCA provides no definition of a "ship", but s 2(1) of the Interpretation Act (Cap 1, 2002 Rev Ed) provides that a "'ship' includes every description of vessel used in navigation not exclusively propelled by oars or paddles". Since it is clear that *Namthong 27* is not exclusively propelled by oars or paddles, the operative phrase to be contended with is whether *Namthong 27* is "used in navigation". There are no helpful authorities in Singapore interpreting this term, so I refer to authorities in the UK interpreting the equivalent of the MCA.

35 In *Steedman v Scofield* [1992] 2 Lloyd's Rep 163 at 166, Sheen J was of the view that the phrase "used in navigation" as understood in the Merchant Shipping Act 1995, which contains a limitation section substantially similar to s 8(1) MCA, "conveys the concept of transporting persons or property by water to an intended destination." Since *Namthong 27* was constructed for navigation at the material time (though not being to navigate on her own) and it was meant to transport wood chips for Biofuel from one port to another, [note: 31] I find that it is a vessel "used in navigation" and may be a "ship" within the meaning of s 8(1) of the MCA.

36 Is *Namthong 27*'s inability to self-propel fatal to its classification as a "ship" within s 8(1) MCA? I do not think so. The learned authors of Halsbury's Singapore, vol 17(2) (Shipping Law) at para 220.0058 state that "it is not necessary that a ship is able to propel itself or navigate under its own power. A ship may therefore be a 'dumb' barge, that is, a barge without an engine". This was also the view taken by the Irish Supreme Court in *The Von Rocks* [1998] 2 Lloyd's Rep 198 which held that "[t]he preponderance of judicial opinion would support the view that, provided the craft was built to do something on water and, for the purpose of carrying out that work, was so designed and constructed as to be capable of traversing significant water surfaces and did in fact regularly so traverse them, it is capable of being classified as a 'ship', despite the absence of any form of self-propulsion or steering mechanism, such as a rudder." Therefore, I find that a dumb barge like *Namthong 27* is a "ship" under s 8(1) MCA.

Whether See Toh was standing on the ramp of Namthong 27 when the mooring wire hit him

37 Having found that the barge *Namthong 27* is a "ship" under the MCA, I have to next consider if the injuries suffered by See Toh were inflicted when he was on board *Namthong 27*, or more specifically, on board the ramp of *Namthong 27* which is affixed to the vessel. It was accepted by both See Toh and Asian Lift that if See Toh was on that ramp, then he would have been on board *Namthong 27* for the purpose of s 8(1) MCA.

38 On the one hand, See Toh said that he was not on the ramp when he got hit by the *Asian Hercules*' mooring wire. This was the position taken in his first statement of claim. I note that See Toh subsequently amended his statement of claim to include the possibility of him being at the shore "and/or on a barge" (Statement of Claim Amendment No 1), but this added portion was then removed in the Statement of Claim (Amendment No 2) after See Toh had received Asian Lift's statement of defence pleading the limitation defence in s 8(1) MCA. During the cross-examination of See Toh by counsel for Asian Lift, counsel suggested that the only reason why the words "and/or on a barge" were deleted was because Asian Lift applied to strike out See Toh's claim by relying on the limitation period in s 8(1) MCA. See Toh explained that the words "and/or on a barge" were added to his Statement of Claim (Amendment No 1) by his counsel and not at his own instance, [note: 32] and that See Toh at the outset never claimed that he was on the ramp of *Namthong 27* when he was hit by the mooring wire (as evidenced by his initial statement of claim). See Toh also said during cross-

examination that the addition of the words "and/or on a barge" to his Statement of Claim (Amendment No 1) was to cover the possibility that he was on *Namthong 27* when he was hit by the *Asian Hercules*' mooring wire. [note: 33] See Toh's explanation for this was that a medical report from Tan Tock Seng Hospital ("the TTSH Report") relied on by Asian Lift seemed to have stated that See Toh was on *Namthong 27*'s ramp when he was hit. [note: 34]

39 Besides relying on the pleadings of See Toh, Asian Lift relied on other evidence to establish See Toh's location when he was hit.

40 Its witness, Songyot, testified that he saw See Toh standing at the fourth or fifth rung of the ramp when the mooring wire hit See Toh. [note: 35]

41 Songyot also testified that See Toh was on the extreme right of the ramp. As mentioned at [29] above, he said he saw the mooring wire spring up and hit See Toh in the stomach which caused See Toh's body to bend over the wire. The wire brought See Toh out towards the sea and then brought him back. See Toh then fell onto the shore.

42 Asian Lift also sought to rely on various documentary reports made in relation to the accident which they submit corroborates Songyot's testimony. The documentary reports relied upon were:

(a) a police report made by See Toh on 6 March 2008 (the "Police Report");

(b) a medical report prepared by the National University Hospital ("NUH") on 24 March 2008 (the "NUH Report");

(c) an in-patient discharge summary report dated 15 April 2008 (the TTSH Report); and

(d) an ambulance report dated 10 July 2009 issued by the Singapore Civil Defence Force (the "Ambulance Report").

43 These were included in the parties' agreed bundle (see AB2-AB9). Counsel for Asian Lift submitted that these reports either suggested expressly or impliedly that See Toh was on the ramp of *Namthong 27* when he got hit. The relevant excerpts from the reports are as follows:

(a) In the Police Report (at AB 2): "Just as I was stepping on the first step of the ram[p] leading to the ship, I heard a loud bang and all of a sudden, I felt something hit onto me & I fell backwards". I should mention that the Police Report mentioned only a ship by the name of *Fortune II*. One might think that the "ramp leading to the ship" in the relevant sentence was a reference to the ramp of *Fortune II* but, on the undisputed facts before me, the only relevant ramp was the ramp of *Namthong 27*. It seemed to me that at the time See Toh made this report, he still had not realised that the barge was *Namthong 27*. Although he said in cross-examination during the trial that he saw the name of *Namthong 27* on the side of the barge before the accident, I noted his hesitancy before giving this evidence. He also muttered that the letters of the name were so big before giving this evidence. It seemed to me that he wanted to say that he did not notice the name (and indeed that was what he had said in para 17 of his AEIC) but when he realised (from a photo at AB 161A) how big the letters and numbers of "*Namthong 27*" were on the barge, he felt that it would be foolish for him to say that he did not notice. Hence, he then said that he did notice the name when in fact he did not.

(b) In the NUH Report (at AB 4): "Fell from height after being hit by a cable at work on a ship on 13/2/08";

(c) In the TTSH Report (at AB 9): "[See Toh] was boarding ship ramp when he was struck on long camp [*sic*], causing him to fall about 1m";

(d) In the Ambulance Report (at AB 3): "According to [See Toh] he fell backwards after being swiped by a steel cable rope and fell backwards while walking on a ramp"

44 See Toh initially said that each of the sentences (in the various reports) which were relied upon by Asian Lift was incorrect.

(a) For the Police Report, he said that the relevant sentence should read that he was "walking towards the ramp". [note: 36]

(b) For the NUH Report, he said that the relevant sentence should read that he was hit by a cable "on the way to the ship" or "on the way to work on the ship". [note: 37]

(c) For the TTSH Report, he said that the relevant sentence should read as his "travelling towards the ship ramp". [note: 38]

(d) For the Ambulance Report, he did not elaborate on what the relevant sentence should read. [note: 39]

45 Then on the next day of cross-examination, he pointed out that for the Police Report, the relevant sentence stated "Just as I was stepping on the first step…". According to See Toh, this did not mean that he had already stepped onto the ramp. [note: 40]

46 See Toh also said that the account of the accident given to the ambulance crew which conveyed him to the hospital was given when he was in a state of serious injury and that his speech was temporarily impaired because of the tongue laceration he had suffered from the accident. [note: 41]

47 I will deal first with the four reports which Asian Lift was relying on.

48 As mentioned above, See Toh appeared eventually to accept that the relevant sentence in the Police Report was a correct record of what he had said but his point was that it did not assist Asian Lift. I agree that the relevant sentence therein did not unequivocally place See Toh on the ramp before he was hit.

49 As for the sentences in the other three reports, it was not clear whether See Toh accepted that he was the source of the information contained therein and that the reports correctly reflected what he had said but that he had made a mistake, or that he disputed that he was the source, or that he disputed the accuracy of what he had allegedly said, if he was the source. Unfortunately, no proper clarification was sought from him. Furthermore, if he was the source of the information, the persons who obtained the information from him were not called to give evidence. Counsel for Asian Lift appeared to have assumed that it was sufficient to tender reports without requiring the person who recorded the reports to give evidence.

50 In this regard, I would like to take the opportunity to remind solicitors that documents included in the parties' agreed bundle only show that parties have agreed to the authenticity, but not the accuracy or truth of the contents therein. If the contents of a report are disputed then the evidence

of the persons who actually wrote the contents in the report should be obtained.

51 Here, See Toh was disputing the accuracy of the relevant sentences in the other three reports. It does not help Asian Lift to say that the reports were disclosed by See Toh himself. He may have sought to rely on them for other aspects of his claim.

52 In the circumstances, I give no weight to the relevant sentences of the other three reports even if the reports are admissible in evidence by virtue of their being included in an agreed bundle of documents.

53 As for See Toh's pleadings, I am of the view that the first amendment in his statement of claim to include the possibility that he might have been on *Namthong 27* by the words "and/or on a barge" was done with See Toh's consent. Nevertheless, I am of the view that the amendment was done more as a matter of caution in case See Toh was already standing on that barge at the time of the accident. The relevant clause read that "[See Toh] was at 9 and/or 11 Tuas Basin Close and/or on a barge or thereabouts". There was still no unequivocal assertion as to where he was. See Toh and his solicitors must have thought that they were being careful to include that amendment.

54 Unfortunately, the amendment backfired. It gave Asian Lift a chance to rely on a limitation defence and to apply to strike out the claim against Asian Lift. I agree that it was because of Asian Lift's application to strike out that See Toh then amended his Statement of Claim to take out the phrase "and/or on a barge" that he had inserted.

55 Nevertheless, the earlier insertion was not unequivocal as I have said.

56 I come now to Songyot's evidence that See Toh was standing on the fourth or fifth rung of the ramp when See Toh was hit by a mooring wire.

57 Ironically, this time it was the initial defence filed by Asian Lift on 27 October 2010 that worked against it. The material part of para 3 of the initial defence stated, "Despite the warnings, [See Toh] failed to heed the said warnings and attempted to and/or continued to attempt crossing the mooring lines and fell off the barge into the sea". Significantly, there was no mention then that See Toh had been hit by a mooring wire. Asian Lift's current defence, *ie*, Defence (Amendment No 2), accepts that See Toh was hit by a mooring wire from *Asian Hercules*. No reason was given as to why the initial defence omitted mentioning that See Toh was hit by a mooring wire if indeed Songyot saw See Toh being hit by the mooring wire. The omission is even more glaring when the case for Asian Lift is that Captain Hamid had prepared an incident report dated 13 February 2008, *ie*, the date of the accident, in which the cause of the accident was stated on the first page to be "Hit by mooring wire". Captain Hamid's report was based on what Songyot had allegedly told him. Furthermore, how is it that the initial defence stated that See Toh had fallen off the barge and into the sea when he did not fall into the sea? I also find Songyot's oral evidence of the mooring wire hitting See Toh in the stomach, causing See Toh to bend over the mooring wire and being swung out to an area over the sea and bringing See Toh back quite incredible. I note that See Toh suffered no injuries to his abdominal area and this account was not even posed to See Toh or to Chua. It was an embellishment that Songyot suddenly came up with. Indeed, the allegation in para 3 of the Defence (Amendment) No 2 of Asian Lift is that the mooring wire whipped See Toh in the chest and not in the stomach. The only witness for Asian Lift who had allegedly seen the accident was Songyot. In my view, he did not even notice See Toh before or when the mooring wire hit him. In fear that he or his employers might be blamed for the accident, he conjured up a story about how he initially saw See Toh and asked him to stop and that he then later saw See Toh on the ramp and how See Toh was hit by the mooring wire. He was not a reliable witness and I reject his evidence in respect of See Toh.

58 The burden of proof is on Asian Lift to establish that See Toh was already standing on the ramp when he was hit. In my view, it failed to discharge this burden. Hence, the time bar defence fails.

The court's conclusion on other facts

Whether HAL and/or Lal Offshore was an occupier of the Operations Site

59 See Toh alleged that HAL and Lal Offshore were occupiers of 9/11 TBC. No such allegation was made of Asian Lift.

60 The test of who is considered an occupier of certain premises was laid down by Lord Denning in *Wheat v Lacon & Co Ltd* [1966] AC 552 at 578 ("*Wheat*"):

> Wherever a person has a sufficient degree of control over premises that he ought to realise that any failure on his part to use care may result in injury to a person coming lawfully there, then he is an 'occupier' and the person coming lawfully there is his 'visitor': and the 'occupier' is under a duty to his 'visitor' to use reasonable care. In order to be an 'occupier' it is not necessary for a person to have entire control over the premises. He need not have exclusive occupation. Suffice it that he has some degree of control. He may share the control with others. Two or more may be 'occupiers'. And whenever this happens, each is under a duty to use care towards persons coming lawfully on to the premises, dependent on his degree of control. If each fails in his duty, each is liable to a visitor who is injured in consequence of his failure, but each may have a claim to contribution from the other.

This test of sufficient degree of control over the premises laid down in *Wheat* has been accepted by the Court of Appeal in *Awang bin Dollah v Shun Shing Construction & Engineering Co Ltd* [1997] 2 SLR(R) 746.

61 One instance where a party could have sufficient degree of control to make it an occupier of premises is when it has the power of permitting or prohibiting the entry of other persons into the premises (see *Wheat* at 578-579 and *Chandran a/l Subbiah v Dockers Marine Pte Ltd (Owners of the Ship or Vessel "Tasman Mariner", third party)* [2009] 3 SLR(R) 995 (HC) at [35]). In the present action, it is not disputed that aside from the crew members of KFELS and the *Asian Hercules*, no other employee of HAL or Lal Offshore was present at the Operations Site save for Chua, the project manager of Lal Offshore. It was Chua who instructed the other employees of HAL and Lal Offshore to keep behind the barricade set up to cordon off the Operations Site, and it was Chua who instructed HAL's guard at 9/11 TBC's main entrance to prevent anyone entering 9/11 TBC once the lifting operation commenced. [note: 42] In these circumstances, I find that Lal Offshore was an occupier of the Operations Site at the material time.

62 Even though HAL did not have its supervisors at the Operations Site and thus did not have immediate supervision and control over who could or could not enter the Operations Site, I still have to consider if HAL was a co-occupier of the Operations Site because the power to prohibit entry is not determinative of the legal status of occupier in and of itself, that is, the absence of immediate supervision and control does not necessarily lead to the cessation of duty as an occupier in law: see *Amus bin Pangkong v Jurong Shipyard Ltd* [2000] 1 SLR(R) 839 (HC) ("*Jurong Shipyard*") at [45] and *Awang bin Dollah v Shun Shing Construction & Engineering Co Ltd and Others (Cosmic Insurance Corporation Ltd, Third Party)* [1996] SGHC 296 ("*Shun Shing Construction*") at [31], affirmed by the Court of Appeal [1997] 2 SLR(R) 746 at [28]-[29].

63 In *Jurong Shipyard*, the appellant worker was employed by the second respondent ("the

employer") to carry out blastering work in a tank of a vessel at the shipyard of the first respondent ("shipyard owner"). The shipyard owner had subcontracted the blastering work to the employer. While carrying out blastering work on a scaffolding platform about 9.5 metres from the bottom of the tank, the worker accidentally fell to the bottom of the tank and suffered injuries. He then claimed damages for personal injuries suffered as a result of, *inter alia*, the negligence of the shipyard owner and/or the employer. The District Court in *Jurong Shipyard* found that although the shipyard owner was an occupier of the shipyard itself, it could not be considered an occupier of the interior of the tank because it did not have control over the conditions within the tank. However, on appeal to the High Court, Lai Siu Chiu J found that the shipyard owner was also an occupier of the interior of the tank because, as an owner of the shipyard, the owner must have had some degree of control and interest over the works on vessels in its shipyard. Further, the shipyard owner was ultimately responsible for approving the erection of the necessary scaffolding.

64 In *Shun Shing Construction*, the plaintiff was injured when an uncompleted site office at a construction site collapsed onto him. The construction site belonged to the Housing and Development Board ("HDB"), which had awarded the construction contract in relation to the site to the defendant main contractors, Shun Shing. Shun Shing had in turn subcontracted the whole of the construction works to Sources Construction Pte Ltd ("Sources"), Sources had in turn subcontracted the carpentry works to Hood Seng Construction Engineering ("Hood Seng"), and Hood Seng had in turn subcontracted part of the carpentry works to Quick Start Construction ("Quick Start"). The plaintiff then commenced a suit against HDB, Shun Shing, and Quick Start, claiming damages for personal injury caused by, *inter alia*, the defendants' negligence. Lim Teong Qwee JC found that Shun Shing had a sufficient degree of control over the whole of the construction site including the part where the site office was under construction notwithstanding that the subcontractors (Sources, Hood Seng, and Quick Start) might also have had some degree of control over that part of the construction site. This was because Shun Shing (a) had possession of the construction site, (b) had its supervisors at the site and (c) further had an interest in the construction of the site office because (i) the site office was part of the main contract works, (ii) Shun Shing would be paid for the works, and (iii) Shun Shing's professional engineer was required by HDB to supervise the construction and submit a Certificate of Supervision upon completion of the works.

65 From the cases of *Jurong Shipyard* and *Shun Shing Construction*, it can be seen that even where a party has no immediate control over the section of premises where an accident occurred, some form of general control over the premises coupled with an interest in the activity that is taking place at the accident site is sufficient to make the party an "occupier" for the purposes of determining occupiers' liability. In the present action, I find that HAL was also an occupier of the Operations Site despite not having immediate supervision and control over the site. First, it is not disputed that at the material time HAL had the power of permitting or prohibiting the entry of other persons into the premises of 9/11 TBC generally. Visitors to 9/11 TBC had to go through a security check-point manned by HAL's security guards before being allowed in. Indeed, even though Sun Kiang was not present at the Operations Site on the day of the accident, he had retained some degree of control via instructions to Chua. Sun Kiang had given instructions to HAL's employees to clear the Operations Site when *Asian Hercules* arrived, and had further given instructions to barricade the Operations Site, to clear the Operations Site, and to close the main gate of 9/11 TBC when *Asian Hercules* arrived. Secondly, like the shipyard owners in *Jurong Shipyard*, HAL as lessees of 9/11 TBC must have had some degree of control and interest over all works in their premises, including the fabrication and lifting of the living quarters structure.

66 Thus, I find that both HAL and Lal Offshore were co-occupiers of the Operations Site.

Whether See Toh knowingly trespassed onto 9/11 TBC and, if so, whether he had a

reasonable excuse for doing so

67 See Toh eventually admitted during the trial that he had trespassed onto 9/11 TBC but alleged that he did so unknowingly.

68 See Toh claimed that after he had left 15 TBC through 15 TBC's main gate, he proceeded to enter through the second gate. He then thought that that was a gate of 9/11 TBC. See Toh claimed that he did not know that that second gate was 15 TBC's second gate because there was no sign outside this gate to indicate as such. [note: 43] See Toh claimed that when he crossed over from 15 TBC to 9/11 TBC from the Seafront Access Point, he did not realise that he was crossing from one address to another. He still thought he was on 9/11 TBC since he had thought that the gate he had used was a gate of 9/11 TBC. However, as mentioned above (at [13]), Puay Choon gave undisputed evidence at trial that the main gate of 9/11 TBC was perpendicular to and less than ten metres away from 15 TBC's second gate. There was also a signboard with HAL's name displayed beside the main gate of 9/11 TBC and the signboard was elevated and facing the direction of a public road. Since See Toh said he had approached the second gate from 15 TBC's main gate by travelling along the public road, I find it likely that he would have seen the signboard showing HAL's name next to the main gate of 9/11 TBC. Furthermore, contrary to See Toh's evidence, Puay Choon said that there was a number "15" (which was large in size) next to the second gate which I accept. In my view, it was likely that See Toh would also have seen this number and known that the second gate which he had gone through was of 15 TBC and not 9/11 TBC.

69 Also, as See Toh entered the second gate and walked towards the shore, there was a side fence made up of corrugated metal sheet which would have been on the left side of See Toh. I accept Puay Choon's evidence that the height of the fence was not as low as See Toh said it was. Puay Choon was a more steady witness than See Toh. To be fair, much of the fence would have been blocked by the huge cylindrical objects I mentioned at [12] above. [note: 44] Nevertheless, See Toh did not say that he did not notice the fence which he described as "tall" (see [10] above). Also, he would still have seen the end of the fence at the Seafront Access Point. He must have known that the fence was demarcating two separate premises.

70 It is significant that in See Toh's AEIC, his version was different from that of his oral evidence at trial. In his AEIC, See Toh said that he had gained access to the shore of 9/11 TBC through a gate of 9/11 TBC. He did not say that he had entered through a gate of 15 TBC thinking that it was a gate of 9/11 TBC. Neither did he say in oral evidence that he had discovered the true facts only after he had executed his AEIC. Instead, he attempted to give a strained interpretation of his AEIC on this point to show that it was consistent with his oral evidence. I need not elaborate on his attempt except to say that I found it wholly unconvincing.

71 In my view, See Toh had realised that he could not substantiate the initial allegation in his AEIC that he had entered 9/11 TBC lawfully as there was evidence that the main gate of 9/11 TBC was closed and the guard there had been told not to allow entry into 9/11 TBC at the material time. So See Toh had to reveal that he had entered 9/11 TBC from 15 TBC through the second gate and then through the Seafront Access Point.

72 In closing submissions, See Toh relied on the evidence of Sun Kiang who said during cross-examination that he agreed that See Toh had entered 9/11 TBC unknowingly. This was a reference to Sun Kiang's evidence as recorded in the Notes of Evidence of 9 September 2011 at p 76 lines 8 to 29 and at p 77 lines 20 to 22. However, Sun Kiang had no personal knowledge as to how See Toh in fact came to enter 9/11 TBC. He was not even at 9/11 TBC at the time when See Toh entered 9/11 TBC. Furthermore, while Sun Kiang's attention was drawn during cross-examination to the absence of a

signboard at or near the Seafront Access Point, his attention was not drawn to the actual route that See Toh had taken or the factors I mentioned above at [68] to [70]. I gave little weight to the inference that he was drawing.

73 After considering all the evidence, I conclude that See Toh knew that he was entering through a second gate of 15 TBC and not the gate of 9/11 TBC and he knew that he was crossing over from 15 TBC to 9/11 TBC through the Seaside Access Point.

74 In my view, See Toh was anxious to get his job over and done with. He had already been told by Puay Choon that *Fortune II* was not at 15 TBC (see [8] above). As he left the main gate of 15 TBC and headed towards 9/11 TBC, something must have deterred him from entering through the main gate of 9/11 TBC. According to Sun Kiang, the gate of 9/11 TBC was closed at that time to prevent access during the lifting operation (see [18] above). If the gate was not closed, the guard there would have stopped See Toh from entering 9/11 TBC as instructed by Chua. It seemed to me that See Toh realised he had to wait. Instead of waiting, he made a deliberate decision to enter through the second gate, walked pass the corrugated iron fence and then gained access into 9/11 TBC from 15 TBC through the Seaside Access Point. Thereafter, he was hoping to quickly locate *Fortune II*, do his job, and then leave without further ado.

75 Although See Toh did not actually climb over the fence and instead went around it, he was, in my view, akin to a trespasser who deliberately climbed over a fence. I find that See Toh had knowingly and unlawfully entered HAL's premises of 9/11 TBC as a trespasser. He had no reasonable excuse for doing so. He could and should have waited for the main gate of 9/11 TBC to be opened and to be allowed to have access into 9/11 TBC.

76 As for the knowledge of HAL and Lal Offshore, neither See Toh nor Andrew Tay had sought the consent of HAL (or anyone else) for See Toh to enter the premises to 9/11 TBC. However, I also considered whether HAL and/or Lal Offshore knew that it was likely that See Toh or others might use the Seafront Access Point to enter 9/11 TBC. 9/11 TBC was a shipyard. It was not a public venue. Neither was it situated near to a public venue. Only adults who had some specific reason to be there would be there. There was a side fence separating the two. However, Mr Lawrence Lee, counsel for See Toh, relied on the following evidence.

77 Firstly, Sun Kiang and Chua were aware that people can enter 9/11 TBC through the Seafront Access Point.

78 Secondly, Puay Choon had said that there had previously been a theft case where some workers had brought something from 9/11 TBC into 15 TBC and hid the item near a tower staircase at the seashore of 15 TBC. Although Puay Choon did not specifically say that the thieves had used the Seafront Access Point, I am prepared, for present purposes, to infer that that was what he meant.

79 Thirdly, after Puay Choon had learned about the accident, he had himself crossed over to 9/11 TBC on the same day, by using the Seafront Access Point, to see what had happened.

80 Mr Lee then submitted, at para 27 of his closing submission, that HAL and Lal Offshore owed a duty of care to anyone, including See Toh, who might enter 9/11 TBC through the Seafront Access Point.

81 In my view, Mr Lee's submission was a quantum leap. He seemed to assume that the evidence he was relying on was sufficient to establish that HAL and Lal Offshore knew that it was likely that adults would use the Seafront Access Point (and that such knowledge alone would be sufficient to

give rise to a duty of care). In my view, the evidence only established that they knew that such access was possible and perhaps, that it had been used before, but not that it was frequently used. Indeed, the evidence suggested that such access was seldom used. In my view, neither HAL nor Lal Offshore knew that it was likely that anyone would use the Seafront Access Point at the material time.

82 As for the knowledge of the crew of *Asian Hercules*, it was the evidence of Captain Hamid that he had given instructions through KFELS that the Operations Site must be cleared of all personnel and obstruction. [note: 45] This part of his evidence was unchallenged. Therefore, in my view, Asian Lift did not know that it was likely that someone else other than those involved in the mooring and lifting operations would be present at the material time.

Whether Songyot saw See Toh before the accident and shouted any warning to See Toh

83 Songyot said that after *Asian Hercules*' crew members were sent to the shoreline of 9/11 TBC to moor the mooring wires, he was instructed to keep watch by Bollard A and ensure that the area around Bollard A was clear of personnel. When the mooring wire first got fouled in *Namthong 27*'s ramp, Songyot said he went over to the fouled wire and cleared it using his hands. Songyot claimed that it was at this time that he saw See Toh walking along the shoreline from outside 9/11 TBC towards *Namthong 27*. Songyot said that he then shouted and told See Toh to stop and not proceed further because there was a wire and it was dangerous.

84 For the reasons stated at [57] above, I do not believe that Songyot had seen See Toh on the day of the accident before See Toh was hit by the mooring wire or shouted any warning at him.

Whether Chua saw Songyot using a crowbar to remove a foul and whether Chua saw See Toh before the accident and shouted any warning to See Toh

85 Chua asserted that he had noticed Songyot trying to remove the foul with a crowbar. Upon seeing See Toh walk up from the shoreline in the direction of the barricade, he shouted loudly in Hokkien at See Toh for See Toh to run, but See Toh continued walking. [note: 46] Chua gave further evidence that he had shouted about two or three times at See Toh for him to run and that the time interval between the shouting and See Toh being hit by the mooring wire was only about two to three seconds. [note: 47] However, Chua said he did not gesticulate to See Toh. On the other hand, See Toh's evidence was that no one gave him any warning when he was approaching *Namthong 27*'s ramp. [note: 48] Chua's evidence was also in contrast to Songyot's evidence that he did not hear anyone other than himself shouting at See Toh as See Toh was approaching *Namthong 27*'s ramp. [note: 49] Importantly, counsel for HAL failed to put or suggest to See Toh or to Songyot that Chua had shouted two or three times for See Toh to run away from the ramp when See Toh was approaching it. It was also unlikely that Chua would have shouted without any gesticulation bearing in mind that he allegedly shouted more than once.

86 Another related factual dispute is whether or not the area around *Namthong 27*'s ramp was so noisy that See Toh would not be able to hear any shouts directed at him. When Mr Lee asked Chua whether the area around *Namthong 27*'s ramp was noisy at the material time, Chua replied that it was not. [note: 50] This was corroborated by Songyot's evidence during his cross-examination that the area around *Namthong 27*'s ramp was not noisy at the material time. [note: 51] Both Chua's and Songyot's evidence in this regard is in contrast to See Toh's evidence in his affidavit [note: 52] and his oral testimony in court [note: 53] that the area was very noisy at the material time although See Toh

stopped short of saying that it was too noisy to hear shouts. Unfortunately, when See Toh was on the witness stand, both counsel for HAL (for which Chua was a witness) and counsel for Asian Lift (for which Songyot was a witness) again did not put these conflicting claims to See Toh.

87 In the light of the evidence before me, I find that Chua did not shout at See Toh to run from the danger created by the mooring wire. If Chua did shout the alleged warnings, he would probably also have gesticulated to See Toh to run but Chua said that there was no gesticulation from him. Also, if Chua had shouted some warnings, this would mean that he was alert to the danger of the fouled mooring wire springing up. This could possibly be explained if I accept that he saw Songyot trying to clear the foul with a crowbar. However, it seems strange to me that if Songyot was trying to do that, there was no evidence from any person about Songyot's reaction when the mooring wire sprung up. Did Songyot move backwards or sideways to avoid the mooring wire? Chua did not say. Songyot himself did not give any evidence of such a reaction because it was his evidence that he was not trying to remove the foul then. In my view, HAL has failed to establish that Chua had noticed Songyot trying to remove the foul with a crowbar and that Chua had shouted warnings to See Toh to run. In view of the unsatisfactory evidence from Songyot and Chua, I am unable to conclude what caused the mooring wire to spring up.

88 Furthermore, Chua's evidence that he saw See Toh walking in the direction of the barricade (see [21] above) was inconsistent with See Toh's version that See Toh was looking for *Fortune II* and was walking towards the ramp of *Namthong 27*. Indeed, all counsel appeared to accept that See Toh was walking towards the ramp. I am of the view that HAL has failed to establish that Chua even saw See Toh before the accident occurred.

See Toh's conduct

89 I come now to See Toh's conduct.

90 See Toh was someone familiar with the typical operations which might take place at a shipyard. Prior to the date of the accident, See Toh had attended a shipyard safety course which is mandatory for all workers who enter or work in a shipyard. Having attended vessels to repair their radar equipment for many years, See Toh also agreed that he was familiar with the safety precautions needed to be taken when embarking on a vessel.

91 As mentioned above, I have concluded that See Toh knowingly and without reasonable excuse trespassed onto 9/11 TBC.

92 See Toh claimed that when he was on the seafront of 9/11 TBC searching for *Fortune II*, he had seen a thick metal cable (*Asian Hercules*' mooring wire) on the ground near *Namthong 27*'s ramp. However, he said that he did not see any bollard to which the wire was tied and did not see *Asian Hercules*. [note: 54] I find that See Toh was not paying attention to his surroundings. If he was, he would have noticed the crane barge. *Asian Hercules* was about ten [note: 55] to twenty five [note: 56] or thirty [note: 57] metres apart from *Namthong 27*. Furthermore, *Namthong 27*'s sideboards were only about two to three metres tall when measured from its deck [note: 58] and were not tall enough to block See Toh's view of the *Asian Hercules* from the ground level. As mentioned at [26] above, the crane barge (together with the crane) was a very huge structure. Puay Choon said he could see the crane barge from his office at 15 TBC and from ground level. [note: 59]

93 Although See Toh said in cross-examination that he did see the name of *Namthong 27* on that barge, this was contrary to what he had said in his AEIC (see [14] above). Indeed, as mentioned in

[43] above, I noticed that he changed his evidence in cross-examination only because he saw how big the letters and numbers of *Namthong 27* were. It seems to me that he also did not notice that name because he was not paying attention to his surroundings.

94 As regards the question whether See Toh saw that the mooring wire was tied to Bollard A, I accept his evidence that he did not see the bollard. The bollard was situated further inland and was not right at the shoreline. However, See Toh ought to have seen the mooring wire extending from *Asian Hercules*. If he was paying attention he would have realised that the mooring wire was not just one loose wire lying on the ground but was a mooring wire extended from *Asian Hercules* which might be looped over a bollard. If he was paying attention, he would also have seen that the mooring wire was caught on the ramp of *Namthong 27* and been more careful to check to see if it was safe for him to go near it.

95 Indeed, See Toh also ought not to have entered 9/11 TBC through the Seafront Access Point. He took this route knowing it was not the proper route for entry into 9/11 TBC.

The applicable law in Singapore

The Law on Occupiers' Liability

96 The law on occupiers' liability in Singapore is derived from English common law prior to 1957 (as regards the duty to lawful entrants) or 1984 (as regards the duty to trespassers). In *Industrial Commercial Bank Ltd v Tan Swa Eng* [1995] 2 SLR(R) 385 ("*Industrial Commercial Bank*"), the Court of Appeal observed at [15]:

> The law on occupiers' liability in Singapore is derived from English common law. However, 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.

97 The Court of Appeal, however, did not specify the English statutes which have made significant changes to the common law but which have no parallel in Singapore legislation. In this regard, I find it useful to refer to Michael Rutter's *Occupiers' Liability in Singapore and Malaysia* (Butterworth & Co (Asia): Singapore, 1985) ("Rutter"). Rutter lists and explains the various English statutes which have modified the common law in England but which are not applicable in Singapore under the *Application of English Law Act* (Cap 7A, 1994 Rev Ed), s 4(1), and which find no counterpart in Singapore (Rutter at pp 5-8). However, only two pieces of legislation listed in Rutter's book are of relevance to the present dispute, namely, the Occupiers' Liability Act 1957 (covering lawful entrants) and the Occupiers' Liability Act 1984 (covering persons other than visitors, including trespassers). In this regard, Rutter observes (Rutter at 6):

> Two English statutes – the Occupiers' Liability Act 1957 (covering lawful entrants) and the Occupiers' Liability Act 1984 (covering trespassers) – have codified the duties of occupiers towards persons injured on premises. There has, to date, been no equivalent legislation in Singapore and Malaysia. This means that English textbooks and decisions of English Courts rendered since 1957 must be read with caution, since to the extent that they are based on the English statues they are not directly relevant in Singapore and Malaysia.

98 The *locus classicus* is *British Railways Board v Herrington* [1972] 1 AC 877 ("*Herrington*"). *Herrington* is supposed to be authority for the following propositions:

(a) An occupier owes a duty of care to a trespasser only if the occupier knew about the presence of the trespasser or as good as knew about the likelihood of trespass; and

(b) In that event, the standard of the duty of care owed by the occupier to the trespasser is not the usual duty under the tort of negligence to take reasonable care to avoid acts or omissions which one can reasonably foresee would be likely to injure one's "neighbour" (see *Donoghue v Stevenson* [1932] AC 562 at p 580). Rather, it is a duty to act with common or ordinary humanity which is a lower standard than the usual duty of care.

99 The law on occupiers' liability has been the subject of much comment in various textbooks.

100 For example, Rutter states (at pp 10-12) that the older cases on occupiers' liability were decided before the general rules for the tort of negligence became well-settled. He suggests that after the tort of negligence was developed it would have covered occupiers' liability but this did not happen. The rules on occupiers' liability remained intact and distinct. Nevertheless, he suggests that the cause of action for unintentional damage suffered on premises is still an action in negligence although with special rules for an occupier's liability. I add that in *Herrington*, Lord Wilberforce said at p 912 that "[t]here can be no doubt that the law regarding occupiers' liability forms part of the general law of negligence."

101 On the other hand, the author in Gary Chan's *The Law of Torts in Singapore* (Academy Publishing Singapore, 2011) ("Chan"), seems to disagree with such a view. Chan argues that the close connection between occupiers' liability and the tort of negligence is not sufficient in itself to warrant the former being entirely subsumed under the latter (Chan at para 10.048). Apparently, in Australia, occupiers' liability is so subsumed although Chan highlights the dissenting judgment of Brennan J in *Australian Safeway Stores Pty Ltd v Zaluzna* (1987) 162 CLR 479 on the utility of retaining the special duties of occupiers (Chan at para 10.052). Yet, it is not clear whether Chan is suggesting that occupiers have concurrent liabilities one as occupier and another under the tort of negligence or only one as occupier and none under the tort of negligence.

102 Halsbury's *Laws of Singapore* vol 18 (Butterworths Asia, 2009 Reissue) ("Halsbury's Singapore vol 18") does not cover the point as to whether the law on occupiers' liability is part of the law of negligence.

103 *Clerk & Lindsell on Torts* (Sweet & Maxwell, 15th Ed) ("*Clerk & Lindsell*") states, at para 12-52 that *Herrington* fails to give clear guidance as to the applicable principle for which an occupier is liable for negligent injury to a trespasser. At para 12-55, they also criticize the foreseeability test (from the point of view of factual foreseeability) and go on to say in respect of adult trespassers:

> "It is submitted that the correct approach is this. The occupier ought in principle to be liable to a trespasser who is injured by the occupier's breach of duty towards his lawful visitors, if there are any; but, as a substantive rule of law—a qualification upon *Herrington*'s case—an occupier ought not to be so liable to an adult who trespasses knowingly and without any reasonable excuse for doing so."

I will refer to this as the *Clerk & Lindsell* approach.

104 The *Clerk & Lindsell* approach was suggested before the enactment of The Occupiers' Liability Act 1984 and was therefore still relevant to Singapore in respect of non-lawful entrants. Generally, *Clerk & Linsell* also appear to treat occupiers' liability under the common law as being part of the law of negligence.

105 In *Lim Seow Wah and another v Housing & Development Board and another* [1990] 2 SLR(R) 760 ("*Lim Seow Wah*"), Chan Sek Keong J was also dealing with a case of occupiers' liability. He found that the plaintiff there was not a trespasser but even if he were a trespasser, Chan J found that the second defendant (which was the remaining defendant in the action) "ought to have foreseen" such a trespasser on the facts before him. He cited with approval the *Clerk & Lindsell* approach. Chan J concluded that the plaintiff there did not know of the danger and had a reasonable excuse to come into the site.

106 Mr Lee relied on *Lim Seow Wah* which in turn adopted the *Clerk & Lindsell* approach. Nevertheless, *Lim Seow Wah* did not suggest that an occupier is subject to the concurrent liabilities discussed above.

107 As it was, Mr Lee did not elaborate or adequately elaborate in his submission on the issue of concurrent liabilities and whether the law of occupiers' liability forms part of the law of negligence. Neither did counsel for Lal Offshore. Both seemed to assume that the law of occupiers' liability was separate and distinct from the law of negligence as they had submissions for each.

108 As for counsel for HAL, he submitted that "there should be no separate duty in negligence against an occupier. This is because the law on occupiers' liability had taken into account the neighbour principle in the context of occupier's [*sic*] of land" (see para 227 of his closing submissions).

109 As mentioned above, Rutter is of the view that occupiers' liability is part of the law of negligence. The cases cited by Rutter at p 12 support this view. So does Lord Wilberforce's statement in *Herrington* (which I have cited above at [100]). I see no reason why an occupier should have concurrent liabilities when others have only one. I conclude that an occupier does not have concurrent liabilities and his liability is part of the law of negligence.

110 What then is the approach to determine whether an occupier owes a duty of care to a trespasser?

111 It seems to me that while the *Clerk & Lindsell* approach appears more predictable, there will still be difficulties in applying it.

112 Take for example, a canteen in a school which is known to serve cheap and good food. The canteen is meant for the students and staff of the school. However, members of the public make their way uninvited into the school premises to partake of the food. This is not an unrealistic situation in Singapore. Are such members of the public trespassing and do they know they are trespassing? I would think so on both counts, unless a court were to conclude that they have implied consent from the school authority who knew of such an activity and did not take any active steps to stop or protest against it. Such an approach may be criticised as an attempt by the court to conclude artificially that there is implied consent in order to do justice. Must then all schools put up noticeable signs in the premises to state that members of the public, other than students, staff and authorised workers, are trespassers unless express consent to entry is obtained? Would that be enough or would a court still be inclined to find implied consent? If there is no implied consent, is it a reasonable excuse for members of the public to say that they entered uninvited into the school premises to savour cheap and good food? I think not.

113 On the other hand, the *Herrington* approach puts the focus on the knowledge of the occupier rather than on the knowledge of the trespasser which seems to be unfair. This means that the more blatant and the more frequent the trespass the more likely the imposition of a duty of care on the

occupier. Why should this be so? To ameliorate this outcome, *Herrington* then prescribes a lower standard for the duty of care, that is, the duty to act with common humanity. That in turn gives rise to nice distinctions between the duty to act reasonably and to act with common humanity.

114 I think the *Clerk & Lindsell* approach is preferable. It throws the onus on the trespasser to show that he trespassed unknowingly or had reasonable excuse to do so. I will adopt that approach.

115 I have the following additional observations about the *Clerk & Lindsell* approach and *Lim Seow Wah*.

116 First, the approach applies to adult trespassers, not child trespassers. It remains to be seen whether it will be extended to the latter.

117 Secondly, as enunciated, the *Clerk & Lindsell* approach does not take into account the occupier's knowledge or lack of knowledge of the presence of the trespasser or the likelihood of trespass. It is not clear to me whether Chan J intended to qualify the *Clerk & Lindsell* approach when he stated that the second defendant before him ought to have foreseen the presence of the trespasser or whether he considered that the knowledge of an occupier was part of the *Clerk & Lindsell* approach.

118 Thirdly, in so far as Chan J referred to the fact that the plaintiff in *Lim Seow Wah* did not know of the danger, this is not relevant under the first limb of the *Clerk & Lindsell* approach. Under the first limb, the question is whether a plaintiff knew that he was trespassing. Perhaps this part of *Lim Seow Wah* can be explained on the basis that the absence of knowledge of the danger was a factor in considering the second limb, that is, whether the plaintiff there had a reasonable excuse to come onto the site. I also add that, in my view, *Lim Seow Wah* was not suggesting that a trespasser's absence of knowledge of the danger in question necessarily constitutes a reasonable excuse for the trespass.

119 Fourthly, the *Clerk & Lindsell* approach is silent as to who the burden of proof is on. Is it for a defendant to prove that a plaintiff was a trespasser and that he trespassed knowingly and without reasonable excuse or is it for the plaintiff to prove that he trespassed unknowingly or that he had a reasonable excuse to do so? I have assumed that the burden should be on the plaintiff to establish his status as it is for him to establish that the defendant owes him a duty of care. If he was a trespasser, it is for him to establish that he trespassed unknowingly. If he trespassed knowingly, then it is for him to establish that he had a reasonable excuse for doing so. Is it then necessary for a plaintiff who trespassed unknowingly to also establish that he had a reasonable excuse? I think so although in most instances he is likely to have a reasonable excuse once he establishes that he did not trespass knowingly.

120 Fifthly, *Lim Seow Wah* apparently preferred the *Clerk & Lindsell* approach to *Herrington* although the latter was adopted by the Federal Court of Malaysia in *Lembaga Letrik Negara, Malaysia v Ramakrishnan* [1982] 2 MLJ 128 ("*Ramakrishnan*").

121 Sixthly, it seems that the *Clerk & Lindsell* approach deals with the existence of a duty of care rather than the standard of a duty of care. The latter is dealt with elsewhere in *Clerk & Lindsell*.

122 I come now to the standard of the duty of care owed by an occupier to an adult trespasser. *Clerk & Lindsell* criticizes the duty of common humanity under *Herrington* which is supposed to be lower than a duty to take reasonable care. They also suggest at para 12-52, that after *Southern Portland Cement Ltd v Cooper* [1974] AC 633, there is little difference between the two even at a

purely theoretical level.

123 The reasons for a lower duty of common humanity towards a trespasser appear to be that the relationship of a "neighbour" is forced onto an occupier by a trespasser and there is a concern not to impose unnecessary or onerous burdens on an occupier. As discussed above, the lower duty was to mitigate the imposition in the first place of a duty of care on an occupier *vis-a-vis* a trespasser. I am of the view that the usual standard of reasonable care should apply. The above concerns for an occupier are addressed to a large extent by the point that there must first be a duty of care owed to the trespasser. The bar for the latter has been raised under the *Clerk & Lindsell* approach.

124 The adoption of the standard of reasonable care will also align occupiers' liability closer to the rest of the law of negligence. It will also render fine distinctions between the standard of reasonable care and that of common humanity unnecessary.

The law on Non-Occupiers' Liability

125 I come now to the position of Asian Lift. As mentioned above, See Toh did not allege that it was an occupier. Neither did Asian Lift make this allegation. Nevertheless, counsel for Asian Lift, Ms Chew, submitted that it should not be in a different position from an occupier and that if HAL and/or Lal Offshore did not owe See Toh a duty of care, then neither would Asian Lift. In equating a non-occupier with an occupier, Ms Chew relied on a passage in the judgment of Ormerod J in *Davis v St Mary's Demolition and Excavation Co Ltd* [1954] 1 WLR 592 (QBD) ("*Davis*"). The relevant passage reads:

> Applying that test, which appears to me to be the proper test to apply in the present circumstances, I have to ask myself whether the defendants are in the same position vis-a-vis the plaintiff as they would be if they were the occupiers of the land in question? Do they owe no other duty to the plaintiff than the occupier of the land would owe to a trespasser, or are the defendants in these particular circumstances in such a position in relation to the plaintiff that in spite of the fact that he is a trespasser they owe to him a duty to take care so far as this building is concerned? *I think any decision which puts the defendants in a different position from the occupier of the land is one which must be considered with very great care* [emphasis added by counsel for Asian Lift]

126 However, it must be remembered that Ormerod J nevertheless concluded that, on the facts before him, the non-occupier defendant did owe a duty of care to the trespasser whereas an occupier would not have in view of the state of the law then.

127 Ormerod J's decision in *Davis* is preceded by Morris J's decision in *Buckland v Guildford Gas, Light & Coke Co* [1949] 1 KB 410 ("*Buckland*"). *Buckland* is authority for the proposition that a non-occupier is not in the same position as an occupier *vis-a-vis* others who come onto a property. A non-occupier owes the general duty of care as stated by Lord Atkinson in M'alister (Or *Donoghue) (Pauper) v Stevenson* [1932] AC 562 at 580 and a trespasser may be a neighbour giving rise to a duty of care on the non-occupier. The decisions in *Buckland* and *Davis* were followed by Ashworth J in *Creed v John McGeoch & Sons Ltd* [1955] 1 WLR 1005.

128 However, this trilogy of cases were decided before *Herrington*. *Winfield and Jolowicz on Tort* (Sweet & Maxwell, 11th Ed) ("*Winfield and Jolowicz*") refers, at p 214 footnote 85, to the three judgments of Lords Wilberforce (p 914), Pearson (p 929) and Diplock (p 943) from *Herrington* and conclude that the balance of dicta from these three judgments points toward the removal of any sharp distinction between occupiers and non-occupiers.

129 Actually, Lord Wilberforce appeared to be in favour of a similar, if not necessarily the same, duty for occupiers and non-occupiers. Lord Pearson clearly disagreed with any differentiation between the two categories. Lord Diplock appeared to be of the view that there should be such a differentiation but decided that *Herrington* was not an appropriate case to give his view thereon.

130 In *Ramakrishnan*, the Federal Court referred to the judgment of the three law Lords in *Herrington* and to *Winfield and Jolowicz* and concluded that the non-occupier defendant's duty was that of an occupier towards the plaintiff trespasser, although it must be remembered that the Federal Court adopted the approach in *Herrington* and not the *Clerk & Lindsell* approach in determining the existence of an occupier's duty of care. For completeness, I would also mention that the Federal Court eschewed any suggestion of concurrent liabilities for an occupier. The Federal Court also appeared to accept that an occupier's liability is part of the law of negligence but an occupier is subject to the lower standard of common humanity.

131 *Lim Seow Wah* did not discuss the question of whether a non-occupier owes a similar, if not the same, duty as an occupier.

132 As discussed, the *Clerk & Lindsell* approach deals with the existence of a duty of care in respect of an occupier. They appear to be silent as to whether such an approach applies to a non-occupier.

133 In *Buckland*, Morris J was of the view that a distinction should be drawn between an occupier and a non-occupier because a non-occupier does not have the same knowledge as an occupier of the extent to which others may come onto the property. I am not persuaded that the difference on the extent of the knowledge should cause a difference in approach between the two categories. In any event, as I have adopted the *Clerk & Lindsell* approach, knowledge of the occupier to the likelihood of trespass is irrelevant.

134 In my view, the approach to determine whether a duty of care arises is the same for Asian Lift as for the other two occupier defendants. Likewise, the standard is the duty to take reasonable care and not the lower duty to act with common humanity.

135 Is there then any distinction in the standard of the duty of care between the static condition of the land and activities conducted on it? For example, should an occupier's standard of the duty of care for activities which he carries on on the land be different from the standard for the static condition? The Privy Council in *Quinlan* thought not (at p 829). In *Herrington*, Lord Morris thought not (at p 910) and Lord Pearson also thought not (at p 929). I am inclined to thhink that there should be no distinction, although the fact of and the nature of an activity may yield a different result when one considers whether an occupier or non-occupier has in fact breached his duty of care. However, it is not necessary for me to reach a conclusion on this point.

Applying the law to the facts

The claim against HAL and Lal Offshore

136 As mentioned above, Mr Lee relied on *Lim Seow Wah* which in turn adopted the *Clerk & Lindsell* approach. Counsel for each of the defendants urged me to adopt the *Herrington* approach.

137 It seems to me that Mr Lee relied on the *Clerk & Lindsell* approach because he realised that it was difficult to say that HAL and Lal Offshore knew of the presence or the likelihood of the presence of See Toh. Accordingly, he sought to persuade me that See Toh had trespassed unknowingly and

that he had a reasonable excuse to do so.

138 As I have concluded differently on the facts, it follows that even with the *Clerk & Lindsell* approach which I have adopted, HAL and Lal Offshore owed no duty of care to See Toh.

139 In the event that I am incorrect in the above conclusion, I will also deal with the question of whether HAL or Lal Offshore had breached its duty to take reasonable care. For this purpose, I will deal with See Toh's allegations of breach of occupiers' liability and of negligence together.

140 The closing submissions for See Toh alleged (at paras 52 and 53) that HAL and Lal Offshore were liable under occupiers' liability because there was no guard or personnel from HAL or Lal Offshore at the Seaside Access Point to stop See Toh from entering. There was also no notice or sign.

141 The Statement of Claim (Amendment No 2) did not specifically plead these allegations under the claim for occupiers' liability. The relevant particulars of para 3 thereof only referred to:

a. Failing to take any or any reasonable care to see that the Plaintiff would be reasonably safe in the compound.

b. ...

c. ...

d. ...

e. ...

f. In the circumstances, failing to discharge the common duty of care to the Plaintiff.

142 It seems to me that particulars (a) and (f) were too vague to assist See Toh who was not entitled to try and introduce the allegations about an absence of guards or personnel or notices or signs in his closing submissions.

143 If See Toh was entitled to rely on such allegations, I am of the view that HAL and Lal Offshore did not fail in their duty. See Toh is an adult. 9/11 TBC is not near to any area to which the public has access. The main gate of 9/11 TBC was closed. The security guard had been instructed to stop anyone from entering. In addition, Chua had caused a barricade comprising one row of metal stands with safety tape running across to alert anyone coming from the back end of the premises not to cross into the Operations Site. There was no reason to think that an adult would try to cross over from 15 TBC to 9/11 TBC from the seashore without warning when there was a proper entrance through the main gate of 9/11 TBC and a fence which ran down to the seashore. Although the fence did not completely preclude access from the seashore, it seems to me nearly impossible to do so when one is dealing with a shipyard. Also, there was insufficient evidence to establish that the seashore was being used frequently as a means of access between the two properties.

144 In the circumstances, I am of the view that neither HAL nor Lal Offshore should be required to place someone or any sign at the Seafront Access Point to stop or deter trespassers from entering.

145 If there was a breach by reason of the absence of a guard or personnel or a sign at the Operations Site, the breach would probably be that of both HAL and Lal Offshore. Sun Kiang should then have given instruction for the same to be present and Chua should, on his own initiative, have also done likewise. If someone had been stationed at or near the Seafront Access Point to specifically

stop trespassers, he would probably have stopped See Toh from entering 9/11 TBC. That omission might have caused or contributed to See Toh's presence there.

146 However, as for the absence of a sign, it was not clear from the closing submissions for See Toh what the sign should say. If Mr Lee was referring to a sign at the seashore to state the address of 9/11 TBC, I am of the view that that would have made no difference to See Toh because I have found that he was aware that he was crossing into 9/11 TBC.

147 If Mr Lee was referring to a sign to tell the public to keep out or to inform the public that a dangerous operation was being undertaken, I am of the view that it is likely that See Toh would have disregarded the sign. He already knew that the main gate was closed. He knew something was going on. Instead of checking with the security guard at 9/11 TBC as to what was happening he decided to make his own way to try and locate *Fortune II* at 9/11 TBC. Furthermore, the presence of *Asian Hercules*, the ramp of *Nampthong 27* and the mooring wire were clearly visible. In other words, the absence of either sign did not cause See Toh to enter 9/11 TBC.

148 See Toh also pleaded a host of particulars of the negligence against all the defendants without trying to relate each act or omission to specific defendants. It was a machine-gun approach, that is, spraying bullets randomly without focus. In para 28 of the written submissions for See Toh, Mr Lee relied on the following allegations of negligence against HAL or Lal Offshore:

> (a) Failing to keep any or any proper lookout or to have any or any sufficient regard for the presence of [See Toh]; [note: 60]
>
> (b) Failing to ensure that the area surrounding the [mooring wire] was properly and safely cordoned off; [note: 61] and
>
> (c) Failing to give any or any adequate warning of the presence of the [mooring wire]. [note: 62]

(a) Failing to keep any or any proper lookout or to have any or any sufficient regard for the presence of See Toh

149 As already mentioned, there is insufficient evidence to establish that HAL or Lal Offshore knew about the likelihood of the presence of See Toh.

(b) Failing to ensure that the area surrounding the mooring wire was properly and safely cordoned off

150 Allegation (b) refers to a failure to surround or cordon off the mooring wire, not the Operations Site. Para 34 of See Toh's closing submissions alleged that HAL or Lal Offshore ought to have set up a three-sided barricade around the area of the lifting operations. That is quite different from saying that they ought to have set up such a barricade around the mooring wire which is what was pleaded. The pleaded allegation fails because there is no logic in cordoning off the mooring wire as such.

151 There was also no evidence that it is usual to cordon off the Operations Site on all three sides when there is a perimeter fence on the relevant side.

(c) Failing to give any or any adequate warning of the presence of the mooring wire

152 As regards allegation (c), Mr Lee's closing submissions alluded only to the absence of any warning sign without elaborating what the warning sign should have said. Allegation (c) refers to "warning of the presence of the [mooring wire]" specifically. However, the mooring wire was a heavy and thick wire, being 32mm in diameter. Neither was it hidden. It was clearly visible to anyone who was paying attention.

153 If HAL and Lal Offshore were obliged to put up a warning sign or signs specifically about the mooring wire, then they would also have been obliged to put up warning signs about every other item or equipment that might cause injury, for example, the ramp (over which someone might trip). In my view, that would be an unrealistic and unfair burden.

154 If the allegation was meant to mean that there should have been a sign at or near the Seafront Access Point to warn about the lifting operation and/or the mooring operation, I am of the view that the mooring operation is a common one undertaken at shipyards and is undertaken frequently and openly without the need for any warning sign.

155 Mr Lee's point was that there should be some sort of warning sign at or near the Seafront Access Point. Here again, the absence of evidence about the frequency of access and knowledge of such frequency comes into play.

156 In the circumstances, I would have found that neither HAL or Lal Offshore breached its duty of care to See Toh.

The claim against Asian Lift

157 As for Asian Lift, I find that it also did not owe See Toh a duty of care. However, I would have found Asian Lift to be in breach of its duty to take reasonable care for the reasons stated below, if there had been such a duty in the first place.

158 In the present case, See Toh has pleaded the following instances of negligence of Asian Lift: [note: 63]

(a) failing to keep any proper lookout or to have sufficient regard for the presence of See Toh;

(b) failing to exercise reasonable care, skill and prudence in the management, control or operation of the mooring wire or *Asian Hercules*;

(c) failing to ensure that the mooring wire was properly or safely secured;

(d) failing to give adequate warning of the presence of the mooring wire;

(e) failing to give any or any sufficient or timely warning of their intention to move the mooring wire or cause the mooring wire to move;

(f) managing, controlling or operating the mooring wire without first ascertaining or ensuring that it was safe to do so and when it was unsafe and dangerous to do so;

(g) causing the mooring wire to move, to lift off or fly off the ground and to hit See Toh; and

(h) *Res ipsa loquitur*.

159 Mr Lee also submitted [note: 64] that Asian Lift was in breach of its duty of care when:

(i) it failed/neglected to prevent the starboard mooring wire fouling on the ramp of *Namthong 27* by not getting the ramp of *Namthong 27* out of the way before commencing the lifting operation;

(j) only one crew member was deployed to the area between Bollard A and the ramp of *Namthong 27* when it was expecting that the mooring wire would become stuck on the ramp; and

(k) Songyot released the foul from *Namthong 27*'s ramp using a crow bar without first checking for the presence of See Toh.

160 Mr Lee appeared to suggest that allegations (i) to (k) had in themselves established allegations (a) to (h) (Plaintiff's closing submissions para 67). That was a rather simplistic approach.

161 As I have found that Songyot and the other *Asian Hercules* crew members omitted to keep watch over the mooring wire and there was insufficient evidence to prove that Songyot released the mooring wire when it got fouled before springing up, I do not find it necessary to deal with allegations (e) and (g).

162 I come back to the remaining allegations of negligence against Asian Lift which I can deal with together.

163 In my view, this was not a case of Asian Lift failing to keep any or any proper lookout or to have any or any sufficient regard for the presence of See Toh (allegation (a)). He had snuck in quietly through the Seaside Access Point.

164 It was also not so much a case of failing to ensure that the mooring wire was properly or safely secured (allegation (b)). The eye of the loop was properly placed around Bollard A.

165 It was also not a case of failing to give any or adequate warning about the presence of the mooring wire (allegation (d)). As previously mentioned, the mooring wire was clearly visible.

166 *Res ipsa loquitur* (allegation (h)) also does not apply on the facts.

167 This leaves allegations (b) and (f) which overlap.

168 It is pertinent to note that in para 9 of his AEIC, Captain Hamid said that it is "a common and recurring matter" for mooring wires to get fouled. Although he did not have a clear line of sight of the entire starboard mooring wire, he was apparently aware that part of it was lying on the ramp of *Namthong 27* and he had expected that it would "in all likelihood, get fouled".

169 It is also important that Dzainudin agreed that Captain Hamid was careless in not asking for the ramp to be lifted up before proceeding with the mooring operation. [note: 65]

170 Further, when asked why they decided to continue with the mooring operation despite knowing that part of the mooring wire was lying across the ramp, all that Captain Hamid could say was that there were no other mooring points available on the shore of 9/11 TBC to be used. [note: 66] Captain Hamid probably also wanted to complete the lifting operation by the same day and was willing to run the risk of the mooring wire being fouled on *Namthong 27*'s ramp and springing up after being freed. Dzainudin also said that the reason why he did not suggest to Captain Hamid to ask for

Namthong 27's ramp to be lifted was that they just wanted to get the job done. [note: 67] Songyot's testimony in court was that having the ramp removed would require an additional one to two days and that they had instructions to finish the lifting operation within the same day because the yard was rented. [note: 68]

171 Under such circumstances, Captain Hamid should either not have begun the mooring operation until the ramp was lifted up so that the mooring wire would not lie across the ramp or if it was too late to do that, he should have stationed someone at the ramp to ensure that no one else came near the ramp then. Even if I accept his allegation in para 12 of his AEIC that he had instructed about seven to eight crew members, including Songyot, to coordinate the mooring operations and to ensure that the Operations Site was clear, it seems that there had been no specific instruction for a crew member to be stationed at the ramp all the time to ensure that no one came near it. If there had been such an instruction, it was not carried out. That was why Songyot did not notice See Toh until he was hit.

172 I would have found that allegations (b) and (f) were established. However, as indicated above at [89] to [95], I would also have found that See Toh was negligent too for entering 9/11 TBC by the route he had taken and for not paying attention to the surrounding after that. On this point, I note that Halsbury's Singapore vol 18 states at para 240.289 that "[t]he fact that the plaintiff is a trespasser does not make him contributorily negligent, and has no bearing on whether the defendant has the defence of contributory negligence". This is a very wide statement. I think that it means that the mere fact of trespass does not necessarily make a trespasser negligent. In my view, See Toh was negligent in fact and in law and his negligence contributed to the accident.

173 Therefore, if Asian Lift owed a duty of care to See Toh, I would have apportioned liability for the accident as follows:

(a) See Toh - 65% liable; and

(b) Asian Lift - 35% liable.

Conclusion

174 In the circumstances, I dismiss See Toh's claim against all the defendants.

175 I will hear parties on costs which I may decide to fix.

[note: 1] Notes of Evidence ("NE"), 8/9/2011, p 73 lines 25 to 31

[note: 2] NE, 5/9/2011, p 24 line 25 to p 25 line 3

[note: 3] NE, 6/9/2011, p 7 lines 11 to 20 and p 8 lines 14 to 17

[note: 4] NE, 6/9/2011, p 10 line 21 to p 11 line 5

[note: 5] NE, 5/9/2011, p 42 line 10 to p 45 line 4

[note: 6] NE, 5/9/2011, p 44 lines 7 to 23

[note: 7] NE, 8/9/2011, p 18 line 4

[note: 8] NE, 8/9/2011, p 93 lines 12 to 17, p 94, line 24 to p 95 line 9

[note: 9] NE, 8/9/2011, p 95 lines 20 to 29

[note: 10] NE, 8/9/2011, p 96 line 27

[note: 11] NE, 8/9/2011, p 89 line 19 to p 90 line 10

[note: 12] NE, 8/9/2011, p 105 line 17 to p 106 line 3

[note: 13] NE, 8/9/2011, p 74 lines 10 to 11, p 77 lines 7 to 21 and p 78 lines 7 to 32. See also Exhibit P6 and Exhibit TPC-1 in Puay Choon's AEIC.

[note: 14] *Supra* at note 3

[note: 15] NE, 6/9/2011, p 12 lines 20 to 23

[note: 16] NE, 6/9/2011, p 68 line 30 to p 71 line 15

[note: 17] NE, 8/9/2011, p 15 lines 5 to 14

[note: 18] Sun Kiang's AEIC para 11 and NE, 9/9/2011, p 60 lines 9 to 17 and p 60 line 27 to p 61 line 18

[note: 19] Sun Kiang's AEIC para 20

[note: 20] NE, 9/9/2011, p 75 lines 26 to 29

[note: 21] NE, 9/9/2011, p 85 line 31 to p 86 line 3

[note: 22] Sun Kiang's AEIC para 10 and NE, 9/9/2011, p 47 lines 2 to 23

[note: 23] NE, 9/9/2011, p 101 lines 22 to 27 and p 103 line 9 to p 104 line 8

[note: 24] NE, 9/9/2011, p 47 line 24 to p 48 line 11

[note: 25] NE, 4/11/2011, p 13 line 26 to p 14 line 4

[note: 26] NE, 9/9/2011, p 87 lines 24 to 34

[note: 27] NE, 8/9/2011, p 115 line 7

[note: 28] NE, 8/9/2011, p 107 line 20 to p 108 line 30 and p 110 line 20 to p 111 line 1

[note: 29] NE, 8/11/2011, p 15 line 10 and p 78 lines 14-15

[note: 30] NE, 10/11/2011, p 85 line 18 to p 86 line 16

[note: 31] Andrew Tay's Affidavit para 5

[note: 32] NE, 7/9/2011, p 14 line 29 to p 15 line 10

[note: 33] NE, 7/9/2011, p 18 line 20 to p 19 line 26

[note: 34] NE, 7/9/2011, p 19 line 24 to p 20 line 5

[note: 35] NE, 10/11/2011, p 83 line 7 to p 84 line 10

[note: 36] NE, 6/9/2011, p 96 lines 8 to 24

[note: 37] NE, 6/9/2011, p 95 lines 1 to 7

[note: 38] NE, 6/9/2011, p 98 lines 3 to 10

[note: 39] NE, 6/9/2011, p 95 line 5 to p 98 line 15

[note: 40] NE, 7/9/2011, p 25 lines 16 to 22

[note: 41] *Supra* note 17.

[note: 42] NE, 4/11/2011, p 6 line 29 to p 7 line 15

[note: 43] *Supra* note 3.

[note: 44] Exhibit P1 and Pictures 1, 3 and 11 of 1DBD Vol 2

[note: 45] para 11 of Captain Hamid's AEIC and NE, 8/11/2011 at p 73 line 22 to p 74 line 14.

[note: 46] Chua's AEIC para. 12 and NE, 4/11/2011, p 12 line 27 to p 13 line 7

[note: 47] NE, 4/11/2011, p 18 lines 12 to 24

[note: 48] Plaintiff's AEIC para. 14, NE, 6/9/2011 p 32 lines 16 to 19

[note: 49] NE, 10/11/2011, p 99 lines 21 to 24

[note: 50] NE, 4/11/2011, p 19 lines 19 to 24

[note: 51] NE, 10/11/2011, p 96 lines 10 to 17

[note: 52] Plaintiff's AEIC para. 13.

[note: 53] NE, 6/9/2011, p 34 line 30 to p35 line 2 and p 87 line 30 to p 88 line 13

[note: 54] NE, 6/9/2011, p 32 lines 20 to 22 and p 87 lines 9 to 15

[note: 55] NE, 4/11/2011, p 12 lines 10 to 22 (according to Chua)

[note: 56] NE, 9/11/2011, p 10 line 21 to p 11 line 1 (according to Captain Hamid)

[note: 57] NE, 8/9/2011, p 113 lines 25 to 31 (according to Puay Choon)

[note: 58] NE, 6/9/2011, p 87 lines 5 to 8 (according to See), NE 8/9/2011, p 48 line 29 to p 49 line 6 (according to Andrew Tay)

[note: 59] *Supra* note 27

[note: 60] Plaintiff's SOC (Amendment No 2), para 2a

[note: 61] Plaintiff's SOC (Amendment No 2), para 2d

[note: 62] Plaintiff's SOC (Amendment No 2), para 2e

[note: 63] Plaintiff's SOC (Amendment No 2), para. 2.

[note: 64] Plaintiff's closing submissions para 66(a) and NE, 9/11/2011, p 81 lines 26 to 32, p 142 lines 2 to 16 and p 144 line 25 to p 145 line 2

[note: 65] NE, 9/11/2011, p 144 line 25 to p 145 line 2

[note: 66] NE, 8/11/2011, p 32 lines 13 to 25

[note: 67] NE, 9/11/2011, p 118 lines 5 to 15

[note: 68] NE, 10/11/2011, p 63 lines 6 to 28

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