IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2016] SGCA 40

Civil Appeal No 37 of 2016

Between

THE MANAGEMENT CORPORATION STRATA TITLE PLAN NO 3322

… *Appellant*

And

(1) TIONG AIK CONSTRUCTION PTE LTD
(2) RSP ARCHITECTS PLANNERS & ENGINEERS (PTE) LTD

… *Respondents*

GROUNDS OF DECISION

[Building and Construction Law] — [Architects, Engineers and Surveyors] — [Delegation of Duties]
[Building and Construction Law] — [Architects, Engineers and Surveyors] — [Statutory Obligations]

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Management Corporation Strata Title Plan No 3322
v
Tiong Aik Construction Pte Ltd and another

[2016] SGCA 40

Court of Appeal — Civil Appeal No 37 of 2016
Chao Hick Tin JA, Andrew Phang Boon Leong JA and Steven Chong J
6 May 2016

4 July 2016

Chao Hick Tin JA (delivering the grounds of decision of the court):

1 For large construction projects, many players with different specialisations are often involved. In the case of a condominium project, besides the *developer*, there will be professionals like the architects who design the project and the main contractor who undertakes to build the project in accordance with the approved plans. Various sub-contractors who carry out specific areas of work relating to the project (*eg*, piling, electrical, plumbing *etc*) are also often involved. Under the Building Control Act (Cap 29, 1999 Rev Ed) ("BCA"), the developer is required to appoint a *builder*, who is the main contractor, "to carry out [the] building works" (s 8(1)(*c*)) and an *architect* "to prepare the plans of the building works in accordance with the Act" (unless an architect has been appointed by the builder) (s 8(1)(*a*)).

2 In the normal course of events, unless the developer wishes to retain the residential units in the condominium as an investment (for example, by leasing the units out and collecting rent), he will place the units on the market for sale to potential home buyers. Every buyer who purchases a unit from the developer will enter into a contract of sale and purchase with the developer. Upon completion of the development, each buyer of a unit becomes a subsidiary proprietor. All the subsidiary proprietors of a development will eventually form the *management corporation* of that condominium development (or, to be precise, the strata title plan) (s 10A of the Land Titles (Strata) Act (Cap 158, 2009 Rev Ed)). The management corporation may "sue and be sued in respect of any matter affecting the common property" (s 24(2)(*b*) of the Building Maintenance and Strata Management Act (Cap 30C, 2008 Rev Ed) ("BMSMA")).

3 The central issue in the present appeal was whether, and to what extent, the *management corporation* had *recourse in tort* against the *builder* and the *architect* for building defects in the common property of the condominium development where the defects were not caused by the negligence of the builder and/or architect, but by the negligence of their sub-contractors. The key contention advanced by the appellant was that the builder and the architect were subject to a *non-delegable duty* in tort to ensure that the building and design (respectively) of the condominium was carried out *without negligence* on the part of any of their sub-contractors. Effectively what the appellant here sought to assert was that the builder and architect could be held liable in tort for *any negligence of their independent sub-contractors*.

4 At the conclusion of the hearing, we were not satisfied that the builder and the architect owed such a duty in law and hence dismissed the appeal. We now set out the detailed grounds for our decision.

Background facts

5 The appellant, Management Corporation Strata Title Plan No 3322 ("the MCST"), was the management corporation of The Seaview condominium ("The Seaview"). The Seaview was completed in 2008 with six 22-storey residential blocks of apartments, comprising 546 residential units. The respondents were Tiong Aik Construction Pte Ltd, the builder of The Seaview ("the Main Contractor"), and RSP Architects Planners & Engineers (Pte) Ltd, the architect of The Seaview ("the Architect").

6 In Suit No 563 of 2011 ("S 563/2011"), the MCST brought proceedings against four defendants in respect of defects in the common areas of the condominium, namely, the developer, the Main Contractor, the Architect and one of the Architect's sub-contractors. The MCST cited only the Main Contractor and the Architect as the respondents to this appeal, leaving out the developer and the Architect's sub-contractor. In other words, the MCST had decided not to pursue the appeal against the latter two defendants. The claims made by MCST in the action against the Main Contractor and the Architect were as follows:

> (a) Against the Main Contractor – (a) in tort for failing to carry out the construction works in a good and workmanlike manner and/or in accordance with approved plans, specifications and industry standards; and (b) for breach of warranties which were issued jointly and severally by the Main Contractor and their sub-contractors to the developer and subsequently assigned to the MCST.[1]

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[1] Appellant's case at para 27

(b) Against the Architect – in tort for failing to employ reasonable care and skill in the design of the development and/or supervision of the works for The Seaview.[2]

7 On 28 January 2015, the four defendants wrote to the MCST proposing that certain preliminary issues be tried and determined prior to the main trial of the action. The MCST replied on 4 February 2015, objecting to a separate trial of the proposed preliminary issues and took the position that those issues should be decided together with the rest of the issues in the action as they were inextricably bound.

8 The issue was considered by the trial judge ("the Judge") on 30 March 2015 at a Judge Pre-Trial Conference, and the Judge directed that the following issues should be tried and determined as preliminary issues in S 563/2011:[3]

(a) whether the Main Contractor and the Architect are independent contractors of the developer;

(b) whether the various domestic and nominated sub-contractors are independent contractors of the Main Contractor;

(c) whether Squire Mech Private Limited and Sitetectonix Pte Ltd (*ie*, the sub-contractors) are independent contractors of the Architect;

(d) whether there has been any lack of proper care in the selection and appointment of independent contractors;

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[2] Appellant's case at para 28

[3] Appellant's case at para 36

(e) whether the Main Contractor and the Architect have statutory non-delegable duties under the BCA, and if so, how do these duties affect the application of their independent contractor defence;

(f) whether the Architect has any non-delegable duties under the common law as a construction professional;

(g) who, in light of the above, is responsible for the alleged defects with respect to the "Fibre Optic Cable", "Poolside Landscaping", and "Foul Smell" issues (referring to specific building defects in The Seaview, which will be explained in more detail at [12] below); and

(h) whether a civil remedy is available to the MCST for alleged breaches of the BMSMA by the developer.

9 The MCST *did not appeal* against the Judge's decision to have a separate trial for the determination of the above preliminary issues. Accordingly, the trial of the preliminary issues proceeded and was heard over ten days between 3 July 2015 and 29 January 2016.[4] The present appeal arose from the Judge's decision on the preliminary issues, which is reported as *MCST Plan No 3322 v Mer Vue Developments Pte Ltd and ors* [2016] 2 SLR 793 ("the Judgment").

The decision below

10 The Judge considered the nature of the relationship between the parties in the context of *possible vicarious liability*, and concluded as follows:

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[4] Appellant's case at para 39

(a) The Main Contractor and the Architect were independent contractors of the developer (the Judgment at [69] and [70]).

(b) The nine nominated sub-contractors and twelve domestic sub-contractors were independent contractors of the Main Contractor (the Judgment at [86]).

(c) Squire Mech Private Limited and Sitetectonix Pte Ltd were independent contractors of the Architect (the Judgment at [90] and [91]).

In addition, the Judge found that proper care had been exercised by the Main Contractor and the Architect in their appointment of the independent contractors (the Judgment at [93]).

11 The Judge also considered the question of *non-delegable duties* which arose under both statute and the common law (the Judgment at [27]). The Judge recognised that in law, if a non-delegable duty were breached, an employer could be held liable for the negligence of its independent contractors (the Judgment at [16]). On the facts, the Judge held:

(a) A new common law category of non-delegable duties for construction professionals should not be created (the Judgment at [26]). Instead, construction professionals were only under a common law duty not to *unreasonably* delegate any of its professional responsibilities (the Judgment at [56]–[57]). It followed that the only common law non-delegable duties which the Main Contractor and the Architect were subject to were those which were well-established in common law (the Judgment at [17], [21], [22] and [26]).

(b) The Architect and the Main Contractor were subject to statutory non-delegable duties under ss 9 and 11 of the BCA respectively, but these duties were limited to those stated in the BCA, which concern only building safety, construction in accordance with the relevant approved plans, compliance with building regulations and provisions of the BCA, and compliance with the terms and conditions imposed by the Commissioner of Building Control (the Judgment at [42] and [47]).

12 Several *specific defects* were also considered by the Judge (*ie*, the "Fibre Optic Cable", "Poolside Landscaping", and "Foul Smell" issues). He found as follows:

(a) The Fibre Optic Cable issue concerned alleged incomplete and/or inconsistent fibre optic cabling. The fibre optic cable was installed by Singtel and any negligence relating to the installation of the cables would not lie with how the defendants had performed their contracted work, save for the Main Contractor's possible lack of care over its control over the construction site (the Judgment at [101]).

(b) The Poolside Landscaping issue concerned the alleged negligent design of the trees and plants around the pool which led to the nuisance of small leaves falling into the pool. This was designed by Sitetectonix Pte Ltd, who would *prima facie* be liable for its own negligence. The Architect would not be vicariously liable for Sitetectonix Pte Ltd's negligence in this regard, if any (the Judgment at [102]–[103]). Further, there was no evidence that the developer had condoned Sitetectonix Pte Ltd's alleged negligent acts (the Judgment at [108]).

(c) The Foul Smell issue concerned bad odours in the kitchen and wash areas as well as adjoining bathrooms and some bedrooms in various apartment units. This stemmed from an alleged defect in the design of the plumbing and sanitary system, which fell within the scope of Squire Mech Private Limited's contracted work. The Judge found that neither the Architect nor the developer would be liable in tort for Squire Mech Private Limited's negligence in relation to this issue, if any (the Judgment at [116] and [122]).

13 Finally, the Judge held that the BMSMA did not give the MCST a *private right of action against the developer for breach of statutory duties* (the Judgment at [132]).

Issues on appeal

14 The Judge's decision covered a broad array of issues, but the MCST ultimately only appealed against *one* aspect of the Judge's decision. We noted that the scope of the MCST's appeal had evolved quite significantly. The Notice of Appeal initially filed by the MCST suggested that the appeal would be a wide-ranging one. It was clear when the Appellant's Case was filed, however, that the MCST had substantially narrowed the scope of its appeal and was only taking issue with the Judge's finding on *non-delegable duties*. Based on the Appellant's Case, the appeal centred on whether the Main Contractor and the Architect owed the MCST *non-delegable duties* in tort under *statute and/or common law* to build and design The Seaview with reasonable care ("the Proposed Non-Delegable Duty").[5] During oral submissions, however, counsel for the MCST, Mr Ang Cheng Hock, SC ("Mr

[5] Appellant's case at para 59

Ang"), informed us that he was not pursuing the submission that the respondents were subject to statutory non-delegable duties under the BCA. The scope of the appeal was therefore further narrowed, and focused *solely* on whether the Main Contractor and the Architect owed the MCST non-delegable duties *under common law* to build and design The Seaview with reasonable care.

15 As mentioned at [4] above, we dismissed the appeal and found that the non-delegable duty advanced by the MCST did not exist under statute or common law. We shall explain our decision by first considering the nature of non-delegable duties in the law of tort. We shall then explain why we thought Mr Ang was correct to abandon the submission that a statutory non-delegable duty existed in the form advanced in the Appellant's Case. We shall finally consider the principles governing non-delegable duties under the common law, and explain why we concluded that there was no basis to find that the Proposed Non-Delegable Duty should be recognised in the present case.

Setting aside the preliminary issues determination

16 Before we explain our decision proper, we should mention that a question as to the appropriateness of the preliminary issues determination arose in the course of the oral hearing before us. Mr Ang informed the court that the MCST was not necessarily seeking a positive, favourable determination on the issue of non-delegable duties at this stage of proceedings. Instead, it would have been content if the court set aside the Judge's determination on the preliminary issues and ordered that these issues be decided *de novo* at the end of the main trial. Mr Ang's submission was that the question of non-delegable duties could only properly be decided in the context

of all the evidence, and was not a matter suitable for preliminary determination.

17 The respondents strongly objected to this suggestion. Both Mr Ravi Chelliah ("Mr Chelliah"), counsel for the Main Contractor, and Mr Melvin Chan ("Mr Chan"), counsel for the Architect, submitted that it would be inappropriate for this court to set aside the Judge's preliminary issues determination and direct that the question of non-delegable duties be heard *de novo*. They emphasised that the MCST did not appeal against the Judge's initial order to have these matters heard as preliminary issues. It would be unjust for the court to *now* set aside the determination after time and costs had been expended on a ten-day trial during which witnesses were extensively cross-examined and the MCST had the chance to adduce whatever evidence it needed.

18 We agreed. First, the MCST could have, but *did not*, appeal against the Judge's direction that there would be a trial of the preliminary issues listed at [8] above. Second, even during the trial, the MCST had the opportunity to adduce the necessary evidence for a proper determination of the non-delegable duties issue, and was even at liberty to submit before the Judge that the presence of non-delegable duties was fact specific and may depend on the type of building defect in question. This submission, however, was never made at trial and was only raised by Mr Ang on appeal. We therefore found that it was not appropriate to reopen the issue of whether the preliminary issues trial was correctly ordered to begin with.

The nature of non-delegable duties in tort

19 We begin with a conceptual analysis of the nature of non-delegable duties in tort and how it relates to vicarious liability and the independent contractor defence. As the Judge held, tortious liability is generally circumscribed by the "fundamental fault-based principle in the law of torts that liability lies with the party that has engaged in the tortious acts in question" (the Judgment at [39]). In this regard, Lord Sumption JSC, in delivering the leading judgment in the United Kingdom Supreme Court ("UKSC") decision of *Woodland v Swimming Teachers Association and others* [2014] AC 537 ("*Woodland*"), held at [5]:

> The law of negligence is generally fault-based. Generally speaking, a defendant is personally liable only *for doing negligently that which he does at all*, or for omissions which are in reality a negligent way of doing that which he does at all. The law does not in the ordinary course impose personal (as opposed to vicarious) liability for what *others* do or fail to do. This is because, as Cory J observed, delivering the judgment of the majority in the Supreme Court of Canada in *Guardian ad litem of Lewis v British Columbia* [1997] 3 SCR 1145, para 18, a common law duty of care
>
> > "does not usually demand compliance with a specific obligation. It is *only when an act is undertaken by a party* that a general duty arises to perform the act with reasonable care."
> >
> > …[emphasis added]

In other words, in the context of the tort of negligence, a person is generally only held liable for his *own* carelessness, and not for the carelessness of *others*. The reason for this is that the nature of the duty imposed by common law is merely to *do what you are required to do with reasonable care*. One implication of this is that if the performance of a particular task is delegated to another party, the party who was originally responsible for the performance of that task (under, for example, contract) would, ordinarily, not be subject to *any*

tortious liability for the negligent performance of that task (since he did not personally perform the task).

20 Vicarious liability stands, in a sense, as a derogation from this principle, or as a "true exception" to this, in the words of Lord Sumption JSC in *Woodland* at [3]. It permits the imputation of secondary tortious liability on an employer on the basis of its employee's primary tortious liability (Gary Chan Kok Yew, *The Law of Torts in Singapore* (Singapore Academy of Law, 2nd Ed, 2016) ("*Gary Chan*") at para 19.001). The employer is liable not because of its *own* negligence, but because of its *employee's* negligence. The principles of vicarious liability, however, do not extend to imposing liability on employers for the negligence of their *independent contractors*. There is no basis in the doctrine of vicarious liability for suing an employer in tort for the negligence of its independent contractors. An employer may thus raise the independent contractor defence (*ie*, that the negligent party was an independent contractor, not an employee) against a claim of vicarious liability.

21 A *separate* legal basis for such a cause of action may, however, exist in the doctrine of *non-delegable duties*. The liability incurred upon a breach of a non-delegable duty is *not vicarious* (*The "Lotus M"* [1998] 1 SLR(R) 409 ("*The Lotus M*") at [37]). Non-delegable duties are *personal* duties, the delegation of which will not enable the duty-bearer to escape tortious liability because the legal responsibility for the proper performance of the duty resides, in law, in the duty-bearer (*Woodland* at [7]). The High Court of Australia (per Gleeson CJ) has described such duties as "duties [which] cannot be discharged by delegation... [or] by entrusting its performance to another" (*State of New South Wales v Lepore* [2003] 212 CLR 511 ("*Lepore*") at [20]). While the task of performing a non-delegable duty may be delegated, the person owing the

duty remains legally responsible for the conduct of those employed to perform the duty (*Lepore* at [145]).

22 From another perspective, it has been said that "the concept of personal duty departs from the basic principles of liability and negligence by substituting for the duty to take reasonable care a more stringent duty, *a duty to ensure that reasonable care is taken*" [emphasis added] (*Commonwealth of Australia v Introvigne* [1981–1982] 150 CLR 258 ("*Introvigne*") at 270–271, per Mason J). Separately, Lord Sumption JSC described a non-delegable duty as a duty which "extends beyond being careful, to procuring the careful performance of work delegated to others" (*Woodland* at [5]). In this regard, the duty may be said to be "analogous to that assumed by a person who contracts to do work carefully" (*Woodland* at [7]).

23 It should be clarified that the concept of non-delegable duties does not *per se* import a higher or absolute standard of care. Referring to non-delegable duties, Gleeson CJ helpfully explained in *Lepore* at [26]:

> … It also seems clear that the increased stringency to which he was referring lay, not in the extent of the responsibility undertaken (reasonable care for the safety of the pupils), but in the inability to discharge that responsibility by delegating the task of providing care to a third party or third parties.

Kirby J made the same point in *Lepore* at [291]:

> However, the non-delegable nature of the duty was not designed, as I read the cases, to expand the *content* of the duty imposed upon the superior party to the relationship, so as to enlarge that duty into one of strict liability or insurance. … [emphasis in original]

24 From the above, it is clear that where a party is subject to non-delegable duties, he will be held liable in tort if those duties are breached, *even if* he had non-negligently delegated the performance of those duties to an

independent contractor, and it was the independent contractor who was negligent. In this sense, non-delegable duties create an exception to the rule that an employer cannot be liable for the negligence of its independent contractors (*Management Corporation Strata Title Plan No 2297 v Seasons Park Ltd* [2005] 2 SLR(R) 613 ("*Seasons Park*") at [38]). As the Judge held at [16] of the Judgment, however, this is *not an exception which extends the doctrine of vicarious liability*; the tortious liability imposed pursuant to a breach of non-delegable duties is *primary*, rather than *secondary* (*Gary Chan* at para 19.103).

25 In sum, it may be said that there are at least two *separate* legal doctrines which permit "derogation" from the fault-based principle and impose tortious liability on a defendant for the negligence of another: the first is vicarious liability, where an employer may be subject to tortious liability for the negligence of its employee; and the second is non-delegable duties, where a party may be subject to tortious liability even if the negligent party was its independent contractor. In this sense, vicarious liability and liability which arises out of non-delegable duties may be said to be closely linked doctrines. Conceptually, however, the doctrines are separate and distinct. As this court observed in *Chandran a/l Subbiah v Dockers Marine Pte Ltd* [2010] 1 SLR 786 at [13]:

> An employer may, at common law, be made liable to an employee who sustains an injury in the course of employment in two *distinct*, but not mutually exclusive, ways. One is through the *doctrine of vicarious liability* where the employer is made liable for the negligence of another employee. This is sometimes called *secondary liability*. The other route that may be available is if the employer has been *personally in default of the non-delegable duty of care* to take care of the health and safety of its employees. This type of liability is typically known as *employer's liability or primary liability*. … [emphasis added]

26 At this juncture, we pause to mention that the Judge's finding that the respondents' sub-contractors were independent contractors (and not employees) was not challenged on appeal. Hence, the MCST could no longer rely on vicarious liability to hold the respondents liable for their sub-contractors' negligence. Instead, the MCST's contention on appeal was that the Main Contractor and the Architect were subject to particular *non-delegable duties* which were breached by their *sub-contractor's negligence*. Tortious liability therefore remained with the Main Contractor and the Architect. These contentions will now be examined.

Statutory non-delegable duty

27 As mentioned at [14] above, Mr Ang did not pursue the argument that the Main Contractor and the Architect were subject to liability on account of their breach of a *statutory non-delegable duty*. In our view, he was right not to do so. Nevertheless, given that extensive submissions were made on this point in both the parties' written cases, we thought it appropriate to express our views on it.

28 A statute can give rise to non-delegable duties in tort. Whether a particular statute does so is a question of construction (*Clerk & Lindsell on Torts* (Michael A Jones gen ed) (Sweet & Maxwell, 21st Ed, 2014) at para 6-61). Where they do arise, the non-delegable duties in tort would be *identical in content* to the statutory duties imposed by the Act.

29 In the present case, the Judge found that the BCA did give rise to statutory non-delegable duties in tort (see [11(b)] above). This finding was not challenged on appeal. The arguments, however, centred on the *scope* of these non-delegable duties. In its Appellant's Case, the MCST submitted that the

Judge had adopted too narrow an interpretation of the statutory non-delegable duties established by the BCA because he focused too closely on the wording of ss 9 and 11 of the BCA. As framed by the MCST, the statutory non-delegable duty owed by the Main Contractor and Architect was to "build and design [The Seaview] with reasonable care".[6] This duty would place legal responsibility on the Main Contractor and Architect to ensure that *all* aspects of the building and design of the condominium, respectively, were completed with reasonable care. The MCST advanced the following arguments in support of its submission:

(a) The aim of the BCA was to maintain and promote high standards of professionalism, competence and quality among construction professionals in Singapore.[7] It would be antithetical to this objective if the Main Contractor or the Architect could delegate their responsibilities without any risk of tortious liability.[8]

(b) The BCA required a developer to appoint a builder (s 8(1)(*c*)) and an architect (s 8(1)(*a*)).[9] This signalled the intent to place the responsibility of designing and constructing the relevant building on qualified construction professionals who were also in a financial position to bear the risks and liabilities of any defects.[10]

(c) Parliament specifically excluded sub-contractors from the ambit of the BCA.[11] The overall scheme of the BCA placed legal

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[6] Appellant's case at para 59

[7] Appellant's case at para 60

[8] Appellant's case at para 62

[9] Appellant's case at para 64

[10] Appellant's case at para 65

responsibility for designing and constructing the building on the builder and architect appointed by the developer.[12]

(d) It was artificial to draw a distinction based on whether the subcontractor's negligence resulted in non-compliance with the BCA or with the building regulations *etc*.[13]

(e) The object of the BCA was to protect the eventual occupier/owner of the premises.[14]

In short, the MCST's submission was that the statutory duties imposed by the BCA had to be interpreted more widely in light of the object of the Act.

Express statutory duties

30 Given that the scope of the statutory non-delegable duties, if any, necessarily depended on the precise statutory duties imposed by the BCA on the Main Contractor and the Architect (see [28] above), we, therefore, first considered the statutory duties imposed on the Main Contractor and the Architect under the BCA. In this regard, we found that the Judge was correct to identify ss 9 and 11 of the BCA as the *only* provisions which expressly stipulated the duties of architects and builders. We noted that the MCST was unable to point us to any other relevant provision.

31 The duties of an architect are found primarily in s 9(1) of the BCA:

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[11] Appellant's case at para 63

[12] Appellant's case at para 70

[13] Appellant's case at paras 69 and 93

[14] Appellant's case at para 71

> 9.—(1) Every qualified person who is appointed under section 8 or 11 to prepare the plans of any building works shall —
>
> (*a*) take all reasonable steps and exercise due diligence to ensure that the building works are designed in accordance with —
>
> (i) the provisions of this Act; and
>
> (ii) subject to section 6A, the requirements prescribed in the building regulations;
>
> (*b*) notify the Commissioner of Building Control of any contravention of this Act or the building regulations in relation to those building works of which the qualified person knows or ought reasonably to know; and
>
> (*c*) supply a copy of every plan of the building works approved by the Commissioner of Building Control to —
>
> (i) the site supervisor or the team of site supervisors, as the case may be, appointed under section 10;
>
> (ii) the builder of those building works; and
>
> (iii) the qualified person appointed under section 8 or 11 to supervise those building works.

For completeness, it is noted that s 9(2) also concerns the duties of an architect, but it merely details the scope of the duty under s 9(1)(*a*). Section 9(5) also imposes on the architect a duty to notify the authorities and the builder if he becomes unwilling or unable to prepare the plans of any building works. From the above, it is clear that apart from the duty to keep the authorities and the other parties to the building works sufficiently informed about the plan of the building works, the architect's duties are centred on ensuring that the building works are designed *in accordance with the BCA and the relevant building regulations*.

32 The duties of a builder are found primarily in s 11(1) of the BCA:

> 11.—(1) A builder undertaking any building works shall —
>
> (*a*) ensure that the building works are carried out in accordance with —

(i) the provisions of this Act;

(ii) subject to section 6A, the building regulations;

(iii) the relevant plans approved by the Commissioner of Building Control and supplied to him by a qualified person under section 9(1)(*c*); and

(iv) any terms and conditions imposed by the Commissioner of Building Control in accordance with the provisions of this Act and, subject to section 6A, the building regulations;

(*b*) notify the Commissioner of Building Control of any contravention of this Act or the building regulations relating to those building works of which the builder knows or ought reasonably to know;

(*c*) keep at the premises on which the building works are carried out, and make available on request (at a reasonable time) by any specialist builder appointed in respect of specialist building works comprised in those same building works, all plans of those building works approved by the Commissioner of Building Control and supplied to him by a qualified person under section 9(1)(*c*);

(*d*) where no such qualified person has been appointed by the developer in respect of those building works, appoint —

(i) an appropriate qualified person to prepare the plans of the building works;

(ii) an appropriate qualified person to supervise the carrying out of those building works; and

(iii) where the building works comprise wholly or partly of any geotechnical building works —

(A) a geotechnical engineer (who may or may not be the same person referred to in sub-paragraph (i)) to prepare the plans relating to the geotechnical aspects of the geotechnical building works; and

(B) a geotechnical engineer (who may or may not be the same person referred to in sub-paragraph (ii)) to supervise the geotechnical aspects of the geotechnical building works;

(*e*) have an adequate number of construction supervisors working under his direction to assist the builder to ensure that paragraph (*a*) is complied with;

> (*f*) within 7 days of the completion of the building works, certify that the new building has been erected or the building works have been carried out in accordance with the provisions of this Act and, subject to section 6A, the building regulations and deliver that certificate to the Commissioner of Building Control;
>
> (*g*) notify the Commissioner of Building Control of the appointment and termination of appointment of any specialist builder appointed by the builder in respect of specialist building works comprised in those same building works; and
>
> (*h*) comply with such other duties as may be prescribed in the building regulations.

Section 11(4) also imposes on the main contractor a duty to notify the authorities if it becomes unwilling or unable to prepare the plans of any building works, and s 11(5) requires the builder to cease building works if the architect or the site supervisor ceases to carry out their duties.

33 From the above, it is clear that the *express statutory provisions* of the BCA (see especially ss 9(1)(*a*) and 11(1)(*a*)) supports the Judge's conclusion that the *only* relevant statutory non-delegable duties imposed under the BCA concerned building safety, construction in accordance with the relevant approved plans, compliance with building regulations and provisions of the BCA, and compliance with the terms and conditions imposed by the Commissioner of Building Control (see [11(b)] above). The other express duties related to specific obligations which were not relevant to the present case. More importantly, nothing in the express words of the BCA countenance the imputation of the Proposed Non-Delegable Duty.

34 In our view, the absence of any express statutory language to ground the Proposed Non-Delegable Duty was dispositive of the matter. Indeed, in *Seasons Park* at [40], this court required the appellant to point to the "specific provisions" in the relevant Acts or rules which supported the statutory non-

delegable duty asserted. In this regard, we found that the language of the BCA was clear – the duties imposed on builders and architects were limited in the manner described at [33] above. Nevertheless, in light of the MCST's written submissions, we also considered whether the broader statutory scheme and object of the BCA justified a broader view of the duties imposed under the BCA.

Objectives of the BCA

35 We agreed with the MCST that: (a) under the BCA, the builder and the architect (as opposed to their sub-contractors) were two key parties upon whom legal responsibility for the proper construction of a building lay; (b) an important objective of the BCA was to protect the occupiers/owners of the premises; and (c) the BCA sought to maintain and promote high standards of professionalism, competence and quality among construction professionals in Singapore. These factors alone, however, were not sufficient to support a finding that the Proposed Non-Delegable Duty existed. This was because the BCA only sought to impose legal responsibility and protect building occupiers and owners in respect of *building and structural safety*, and *not* in relation to other aspects of the construction such as workmanship or aesthetic flaws. That this is so was clear from the express provisions of the BCA, as discussed above. Additionally, the Parliamentary debates leading to the enactment of the BCA also lend support to this view.

Parliamentary debates

36 The present BCA was enacted in 1989 to "ensure that... buildings [were] designed, checked, constructed and maintained to safe standards" (*Singapore Parliamentary Debates, Official Report* (30 March 1988) vol 50 ("*1988 Parliamentary Debates*") at col 1739 (S Dhanabalan, Minister for

National Developmment)). Mr Dhanabalan further explained that the Building Control Bill sought to:

> (a) enhance the powers of the Building Authority in relation to regulation of building works and safety of buildings; and
>
> (b) implement a system of independent checking of structural plans by accredited checkers.

(see the *1988 Parliamentary Debates* at col 1739)

37 The intended singular focus on structural soundness and safety, to the *exclusion* of other aspects of the construction such as poor workmanship, was evident in Mr Dhanabalan's speech (*1988 Parliamentary Debates* at col 1757):

> I think if we can concentrate on controlling the quality of buildings at the design and construction stage, we would have gone a long way to ensure that buildings are sound structurally for a long, long time. This is what the new Bill will do, ie, design checked, constructed and maintained to safe standards.
>
> As to how poor workmanship is covered by the Bill, the Member said that *there is a gap in the Bill*. It is true. *We are concerned not with the aesthetics*. But we are concerned with the structural soundness of the building under the Act. Poor workmanship can be quite a subjective and contentious issue. What appears to be poor workmanship to some people may be acceptable to others. And what appears to be acceptable at one time may not be acceptable at another time. Many people in Singapore were quite prepared to accept buildings of poor workmanship, *poor tiling, poor finishes*, when there was a boom because people thought they could buy and sell the flat or the house within a few months and they were getting a building or a house or a flat at a good price so they did not bother about poor workmanship. Once, of course, the real estate market collapsed, then people became very conscious about workmanship.

> It is very *difficult to legislate good workmanship. It is something that buyers must demand and be intelligent and discerning consumers when they buy homes. …*
>
> [emphasis added]

38 It is thus clear that the BCA, when first enacted, was intended to deal exclusively with the structural soundness of buildings, and not with poor workmanship or aesthetics. Poor workmanship included things like "poor tiling" and "poor finishes" – the kind of building defects which were the subject of S 563/2011. Indeed, the Minister emphasised that poor workmanship was "difficult to legislate", and that it was incumbent on the *buyers themselves* to be "intelligent and discerning consumers" when buying their homes.

39 Parliament maintained its focus on structural safety and soundness of buildings in the 2007 debates on amendments to the BCA. The then Minister of State for National Development, Ms Grace Fu Hai Yien, opened her speech in support of the amendment bill by citing the Nicoll Highway collapse in 2004 as a "wake-up call for the construction industry" (*Singapore Parliamentary Debates, Official Report* (20 September 2007) vol 83 ("*2007 Parliamentary Debates*") at col 2054). She concluded her opening speech by emphasising that "building safety cannot be left to chance, and complacency has no place in any construction project" (*2007 Parliamentary Debates* at col 2062). Parliament's continued concern about structural safety was also clearly evident in the remaining speeches given during the *2007 Parliamentary Debates*. Significantly, there was no evidence that Parliament intended to extend the scope of the BCA to deal with poor workmanship, which had nothing to do with structural soundness.

40 Finally, we should mention that the latest Parliamentary debates on the BCA took place in 2012 (see *Singapore Parliamentary Debates, Official Report* (10 September 2012) vol 89), where the key concern was improving energy efficiency in the building sector. Thus, while it is fair to say that the BCA has expanded its focus beyond issues of structural safety, to include concerns of environmental sustainability, issues of poor workmanship have never, to date, been included as part of the *raison d'être* of the BCA.

Conclusion on statutory non-delegable duties

41 To conclude, we found that there was no basis for the submission that the BCA imposed a wide-ranging statutory duty, which extended beyond structural soundness, on the Main Contractor or the Architect. Both the express statutory language and the relevant Parliamentary debates clearly show that it was Parliament's intention for the BCA to have a far narrower focus.

42 In this regard, we could not agree with the submission of the MCST that it was artificial or arbitrary to draw a distinction based on whether the subcontractor's negligence resulted in non-compliance with the building regulations *etc*. First, the focus of the BCA was on structural soundness and safety, to the exclusion of workmanship defects. Second, even if a case could be made out that such a focus was unduly narrow, this was a distinction drawn by Parliament and it was not for the court to question or undermine that distinction.

Common law non-delegable duty

43 The MCST's main case on appeal was that construction professionals should be subject to certain *common law non-delegable duties*. Specifically,

the submission was that the Main Contractor and Architect should be subject to a common law non-delegable duty to build and design The Seaview with reasonable care. We thus had to consider whether such a duty could be brought under the existing categories of common law non-delegable duties, and if not, whether the categories of common law non-delegable duties should be expanded to impose such a duty on construction professionals.

44 The Singapore courts have not, to date, fully explored the basis and scope of common law non-delegable duties in Singapore law. This gap in our jurisprudence may, however, be a consequence not just of a lack of opportunity, but of the difficulties in propounding a coherent theoretical basis to delineate the nature and scope of these duties. This court observed in *Seasons Park* at [39] that "no general principle can be deduced as to the circumstances under which such non-delegable duty arises in common law", and did not attempt to rationalise the relatively established categories under which non-delegable duties arose. Indeed, as John Murphy opined in his article, "Juridical Foundations of Common Law Non-Delegable Duties" (published in Jason W Neyers *et al* eds, *Emerging Issues in Tort Law* (Hart Publishing, 2007) at p 369), despite the "fairly sizeable number of well-settled instances in which non-delegable duties have been imposed", there remained "conceptual uncertainty behind which such duties seem to be veiled".

The discrete categories of non-delegable duties

45 We will first consider the "well-settled instances" in which non-delegable duties were thought to arise. In Singapore, as the Judge observed (the Judgment at [18]), non-delegable duties have mainly been considered and established in the area of *employee safety*. In *The Lotus M*, a few of the appellant's employees were working on board the respondent's ship. As a

result of the respondent's negligence, an explosion occurred on board the ship and the appellant's employees suffered serious injuries. In determining whether the appellant was entitled to an indemnity from the respondent, the court had to consider whether the appellant could be held legally liable to its employees for the accident (*The Lotus M* at [27]). In finding that the appellant could be held legally liable on the basis that it was subject to a non-delegable duty as an employer, the court observed (*The Lotus M* at [22] and [30]):

> 22 … There is also no denying that in law [the appellant] has a duty to take reasonable care to provide a safe system of work for Ang when working on the *Lotus M*. It is settled law that such a duty of care is either personal or non-delegable meaning, "that if (the duty) is not performed, it is no defence for the employer to show that he delegated its performance to a person, whether his servant or not his servant, whom he reasonably believed to be competent to perform it. Despite such delegation the employer is liable for the non-performance of the duty – *per* Lord Brandon in *McDermid v Nash Dredging & Reclamation Co Ltd* [1987] AC 906 at 919C–D…
>
> 30 We cannot emphasise too strongly that the duty to take reasonable care to provide a safe system of work rests on the employer and that it is non-delegable. …

46 The employer's non-delegable duty to take reasonable care for its employees' safety was reaffirmed in *Chandran a/l Subbiah v Dockers Marine Pte Ltd* [2010] 1 SLR 786 at [17] and [19]:

> 17 A distinctive feature of an employer's duty of care to his employees for their safety is that it is *personal* and therefore *non-delegable*. This means that the employer cannot escape liability simply by baldly asserting that another party was negligent and responsible for the employee's injury. …
>
> 19 This much can now be emphatically stated. An employer cannot wash his hands off all responsibility for the safety of his employees simply because the employees are sent to work at a site controlled by others. The law continues to place on an employer an obligation to take reasonable care for its employees' safety. …
>
> [emphasis in original]

47 For completeness, we should mention that in other jurisdictions, non-delegable duties have also been recognised to arise in several other contexts:

(a) Hospitals and health authorities have been observed to owe non-delegable duties to their patients (see for instance, *Cassidy v Ministry of Health* [1951] 2 KB 343 at 363–365, per Denning LJ; and *X (Minors) v Bedfordshire County Council and other appeals* [1995] 2 AC 633 at 740, per Lord Browne-Wilkinson). Indeed, the Singapore High Court recently considered the possibility of non-delegable duties arising in the hospital-patient context. In *Hii Chii Kok v Ooi Peng Jin London Lucien and another* [2016] 2 SLR 544 ("*Hii Chii Kok*"), the High Court had to consider whether the National Cancer Centre of Singapore Pte Ltd owed non-delegable duties to a patient who eventually underwent surgery at the Singapore General Hospital. While the learned judge found that a non-delegable duty was not owed on the facts, he observed that "the existence of a non-delegable duty of a hospital for the functions it undertakes *turns centrally on the responsibility for the care, supervision and control that it has assumed* for those functions in relation to the patient, a vulnerable person who has placed himself under the hospital's direct care, supervision and control" [emphasis added] (*Hii Chii Kok* at [70]). The possibility of a non-delegable duty arising in this context was therefore left open.

(b) Schools and school authorities have been found to owe non-delegable duties to their students (see for instance *Woodland*, discussed at [56]–[59] below, and *Introvigne* at 269–270, per Mason J).

(c) Non-delegable duties have also been held to arise in cases involving extra-hazardous operations (see *Honeywill & Stein Ltd v*

Larkin Bros (London's Commercial Photographers) Ltd [1934] 1 KB 191 at 197).

48 The examples listed above are *non-exhaustive* of the different instances in which non-delegable duties have been found to arise in other jurisdictions. While we broadly agree that these categories of non-delegable duties are sensible and instructive in guiding the development of Singapore law, whether and to what extent Singapore law should recognise a non-delegable duty in *each* of the above scenarios was not a question that arose on the facts before us and remains to be decided should the appropriate case come before our courts.

Rationalising the discrete categories

49 In 1967, Prof P S Atiyah observed that there was a general lack of success in finding a unifying theme which would explain all the cases in which the courts have imposed liability on an employer for the acts of independent contractors (P S Atiyah, *Vicarious Liability in the Law of Torts* (Butterworths, 1967) at p 336). More than forty years later, the UKSC observed in the same vein that "English law has long recognised that non-delegable duties exist, but it does not have a single theory to explain when or why" (*Woodland* at [6]). Indeed, the High Court of Australia has generally also taken a critical attitude towards the lack of conceptual unity underlying the doctrine of non-delegable duties (*Lepore* at [152], [153], [246], [247] and [289]; *Leichhardt Municipal Council v Montgomery* [2007] 230 CLR 22 ("*Leichhardt*") at [142], [155], [156] and [187]).

50 Notwithstanding the multitude of critical voices, attempts have been made to identify a common element or rationale which can justify or explain

the established categories of non-delegable duties. These attempts have broadly coalesced into a *single*, if slightly amorphous, account of non-delegable duties, which has now come to be widely accepted. Borrowing the words of Kirby J in *Leichhardt* at [123], the element thought to be common across the categories of non-delegable duties is that the duty bearer has *undertaken or assumed responsibility* to the claimant in circumstances where the relationship involves a kind of "special dependence" or "particular vulnerability".

51 We start by considering the jurisprudence from the High Court of Australia. In *Introvigne* at 271, the High Court of Australia (per Mason J) observed that "the law has, for various reasons, imposed a special duty on persons in certain situations to take particular precautions for the safety of others". This general statement was concretised and further refined by Mason J himself in *Kondis v State Transport Authority* [1984] 154 CLR 672 ("*Kondis*") at 687:

> … However, when we look to the classes of case in which the existence of a non-delegable duty has been recognized, it appears that there is *some element in the relationship between the parties* that makes it appropriate to impose on the defendant a duty to ensure that reasonable care and skill is taken for the safety of the persons to whom the duty is owed. As I said in *Introvigne* "the law has, for various reasons imposed a special duty on persons in certain situations to take particular precautions for the safety of others". …
>
> The element in the relationship between the parties which generates a special responsibility or duty to see that care is taken may be found in one or more of several circumstances. … In these situations the special duty arises because *the person on whom it is imposed has undertaken the care, supervision or control of the person or property of another or is so placed in relation to that person or his property as to assume a particular responsibility for his or its safety, in circumstances where the person affected might reasonably expect that due care will be exercised.* …
>
> [emphasis added]

52 This authoritative exposition of the common "element in the relationship between the parties" across the categories of non-delegable duties was subsequently cited with approval in *Burnie Port Authority v General Jones Pty Ltd* [1992–1994] 179 CLR 520 ("*Burnie Port Authority*"). The majority of the High Court of Australia added that this common element could be referred to as "the central element of control" , and that "[v]iewed from the perspective of the person to whom the duty is owed, the relationship of proximity giving rise to the non-delegable duty of care in such cases is marked by special dependence or vulnerability on the part of that person" (*Burnie Port Authority* at 550–551). Subsequently, in *Leichhardt* at [78], Kirby J described Mason J's attempt to "describe, categorise and explain the common elements of the non-delegable duties of care accepted by Australian law" as an "influential attempt".

53 It should be added, however, that Mason J's attempt to identify an underlying rationale or common element across *all* categories of non-delegable duties has achieved, at best, a qualified success. In *Lepore* at [255], Gummow and Hayne JJ observed that the presence of the common characteristics identified in *Kondis* did not *necessarily* import a non-delegable duty:

> Several categories of cases in which the duty to take reasonable care is non-delegable were identified by Mason J in *Kondis* ... [e]ach is identified as a relationship in which the person owing the duty either has the care, supervision or control of the other person or has assumed a particular responsibility for the safety of that person or that person's property. *It is not suggested, however, that all relationships which display these characteristics necessarily import a non-delegable duty.* [emphasis added]

54 Further, Kirby J observed in *Leichhardt* at [78] that Mason J himself conceded that relationships giving rise to non-delegable duties may rest on

"different foundations". Rather than having found a *complete* account of non-delegable duties, Kirby J opined that Mason J was merely suggesting "elements of a coherent theory" (*Leichhardt* at [85]). In his judgment, Kirby J adopted John Murphy's suggestion that an "assumption of responsibility" in relationships involving "particular vulnerability" or "special dependence" was the defining characteristic of cases in which non-delegable duties arise (*Leichhardt* at [117], [122] and [123]). It should be noted, however, that the other members of the High Court in Australia in *Leichhardt* were generally pessimistic about the possibility of establishing a sound doctrinal foundation or finding conceptual unity amongst the categories of non-delegable duties (per Gleeson CJ at [24], per Hayne J at [142], [155] and [156], and per Callinan J at [187]).

55 Moving on to the position in the United Kingdom, the present legal position on non-delegable duties has been authoritatively set out in the recent UKSC decision, *Woodland*. Indeed, this is the authority which the parties and the Judge (see the Judgment at [20]–[23]) primarily relied on as authoritatively setting out the law on non-delegable duties. *Woodland* has also been cited and followed in other Singapore High Court decisions such as *BNM (administratrix of the estate of B, deceased) on her own behalf and on behalf of others v National University of Singapore and another* [2014] 2 SLR 258 at [55]–[62] and *Hii Chii Kok* at [63]–[71].

56 In *Woodland*, the question was whether the respondent education authority was responsible for the appellant's injuries, which were sustained during swimming lessons organised by the school. The school had arranged for an independent contractor to provide swimming lessons for its students. In finding that the appeal provided a "useful occasion" for reviewing the law on "non-delegable duties of care" (*Woodland* at [2]), the UKSC considered the

key categories of non-delegable duties established in common law jurisdictions and attempted to derive general principles therefrom.

57 Noting that English law did not have a "single theory to explain when or why" non-delegable duties existed in common law (see [49] above), Lord Sumption JSC observed that there were "two broad categories of case[s] in which such a duty has been held to arise" (*Woodland* at [6]):

(a) The first is where "the defendant employs an independent contractor to perform some function which is either inherently hazardous or liable to become so in the course of his work" (*Woodland* at [6]).

(b) The second concerns cases with three critical characteristics (*Woodland* at [7]):

> First, it arises not from the negligent character of the act itself but because of an antecedent relationship between the defendant and the claimant. Second, the duty is a positive or affirmative duty to protect a particular class of persons against a particular class of risks, and not simply a duty to refrain from acting in a way that foreseeably causes injury. Third, the duty is by virtue of that relationship personal to the defendant.

58 After considering the various scenarios in which the courts have held that non-delegable duties under the second category arise, Lord Sumption JSC identified five defining features of such cases (*Woodland* at [23]):

(a) The claimant is a patient or a child, or for some other reason is *especially vulnerable or dependent on the protection of the defendant* against the risk of injury. Other examples are likely to be prisoners and residents in care homes.

(b) There is an antecedent relationship between the claimant and the defendant, independent of the negligent act or omission itself, (i) which places the claimant in the actual *custody, charge or care* of the defendant, and (ii) from which it is possible to impute to the defendant the *assumption of a positive duty to protect the claimant from harm*, and not just a duty to refrain from conduct which will foreseeably damage the claimant. It is characteristic of such relationships that they involve an *element of control* over the claimant, which varies in intensity from one situation to another, but is clearly very substantial in the case of schoolchildren.

(c) The *claimant has no control* over how the defendant chooses to perform those obligations, ie whether personally or through employees or through third parties.

(d) The defendant has delegated to a third party some function which is an integral part of the positive duty which he has assumed towards the claimant; and the third party is exercising, for the purpose of the function thus delegated to him, the defendant's custody or care of the claimant and the element of control that goes with it.

(e) The third party has been negligent not in some collateral respect but in the performance of the very function assumed by the defendant and delegated by the defendant to him.

59 *Woodland* thus did not purport to find a *single* unifying theory for *all* the instances of non-delegable duties. Nevertheless, the UKSC did attempt to delineate the general features of *most* categories of non-delegable duties, leaving out only the cases involving "extra hazardous" operations, which Lord Sumption JSC described as a "large, varied and anomalous class of cases"

found on "arbitrary distinctions between ordinary and extraordinary hazards" (*Woodland* at [6]).

60 From the above, it can be seen that the collective wisdom of the courts leans towards the conclusion that while there does not exist a *single* theory which can explain *every* category of non-delegable duties, there are certain defining features which characterise *many* of the established instances in which non-delegable duties arise. We agreed. In coming to this conclusion, we were cognisant of the "obvious dangers... in elevating historical categories into a genus that is no more than retrospective rationalisation" (*Leichhardt* at [116], per Kirby J). Indeed, the categories of non-delegable duties might have developed in a piecemeal manner in response to necessity and the overriding demand of justice in particular cases. Nevertheless, to forge a principled path forward, we found it helpful and necessary, as far as was possible, to identify the underlying normative threads running across the different categories of non-delegable duties.

61 In this regard, it seemed to us that Lord Sumption JSC's detailed exegesis of the defining features of cases in which a majority of the non-delegable duties arise (see [57(b)] and [58] above) was a good *starting point* for the development of the law on non-delegable duties in Singapore. Not only were the parties in agreement that this should be so, we were of the view that the principles laid down in *Woodland* were sensible and were capable of explaining the existing circumstances in which Singapore courts have recognised non-delegable duties (in particular, in the employer-employee context (see [45]–[46] above)).

62 In our judgment, moving forward, to demonstrate that a non-delegable duty arises on a particular set of facts, a claimant must *minimally* be able to

satisfy the court either that: (a) the facts fall within one of the established categories of non-delegable duties; *or* (b) the facts possess *all* the features described at [58] above. However, we would hasten to add that (a) and (b) above merely lay down *threshold* requirements for satisfying the court that a non-delegable duty exists – the court will additionally have to take into account the fairness and reasonableness of imposing a non-delegable duty in the particular circumstance, as well as the relevant policy considerations in our local context.

63 We would nevertheless emphasise that we agreed with the High Court of Australia that non-delegable duties are and should remain *exceptional*, and that its development should proceed only "on the basis of a clear analogy to a recognised class and then only for compelling reasons of legal principle and policy" (*Leichhardt* at [104], per Kirby J). This is especially because, as observed by Gleeson CJ in *Leichhardt* at [23], non-delegable duties are in many instances duties which the duty bearer cannot fulfil:

> … A "special" responsibility or duty to "see" or "ensure" that reasonable care is taken by an independent contractor, and the contractor's employees, goes beyond a duty to act reasonably in exercising prudent oversight of what the contractor does. *In many circumstances, it is a duty that could not be fulfilled.* How can a hospital ensure that a surgeon is never careless? If the answer is that it cannot, what does the law mean when it speaks of a duty to ensure that care is taken? … [emphasis added]

Thus, due consideration must be given to the burden that a non-delegable duty imposes on the duty-bearer.

Non-delegable duties for construction professionals

64 We turn now to the facts of the present case. The key issue was whether construction professionals – here, the Main Contractor and the

Architect – should generally be subject to a non-delegable duty to build and design buildings with reasonable care. As mentioned at [29] above, this duty would effectively place legal responsibility on the Main Contractor and Architect to ensure that *all* aspects of the building and design of the condominium, and not just building structural soundness and safety, were completed with reasonable care. The Main Contractor and the Architect would, under the duty, become the insurers against all kinds of defect.

65 Mr Ang did not contend that the Proposed Non-Delegable Duty fell within any existing, established category of non-delegable duties; nor did he submit that a similar duty has previously been recognised in any past judicial decision, whether local or foreign. He submitted, however, that the creation of a new category of non-delegable duties for construction professionals was justifiable and desirable on both legal principle and general policy grounds. He also submitted that creating this new category of common law non-delegable duties would be consistent with the object and spirit of the BCA.

66 Based on Mr Ang's submissions, the following sub-issues arose for consideration:

(a) Should non-delegable duties be owed in respect of pure economic loss?

(b) Would the creation of the Proposed Non-Delegable Duty be consonant with the object and spirit of the BCA?

(c) Would the creation of the Proposed Non-Delegable Duty be in line with the existing common law principles on non-delegable duties?

(d) Were there compelling policy reasons to accept the Proposed Non-Delegable Duty?

Pure economic loss

67 On behalf of the Architect, Mr Thio Shen Yi, SC ("Mr Thio") submitted that based on the existing authorities, non-delegable duties were created to protect vulnerable persons from *physical harm or injury*; protection from pure economic loss was a "long way removed" from this.[15] It is undoubtedly correct that the existing cases (in the employment, school or hospital context *etc*) on non-delegable duties have *largely* concerned *personal injury* (see [45]–[47] above). But are there compelling reasons to restrict *a priori* the categories of non-delegable duties to only cases concerning personal injury? We did not think so.

68 First, the existing authorities do not restrict non-delegable duties to only cases concerning personal injury. The High Court of Australia has observed that non-delegable duties were not restricted to safeguarding persons from personal injury. As noted above at [51], Mason J held the following in *Kondis* at 687:

> As I said in *Introvigne* "the law has, for various reasons imposed a special duty on persons in certain situations to take particular precautions for the safety of others". That statement should be expanded by adding a reference to *safeguarding or protecting the property of other persons*, a matter which did not present itself for consideration in *Introvigne*. [emphasis added]

While Mason J did not expressly state that such a duty could extend to include safeguarding a person from sustaining pure economic losses, this observation

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[15] Second Respondent's Case at para 78

demonstrates at least that personal injury is not the sole form of harm which non-delegable duties may arise to protect.

69 Second, as noted at [23] above, the non-delegable nature of a duty has nothing to do with the *content* of the duty, *ie*, the level of care required by the duty, but relates instead to whether the duty, whatever it may be, can be completely discharged by a reasonable delegation of the task to a third party. This in turn depends generally on the nature of the relationship between the parties and what the duty bearer has undertaken to do (see [50] above). In our view, if the requisite relationship and undertaking exists, then even if the loss relates solely to a vulnerable victim's economic well-being, a non-delegable duty could arise.

70 Third, and finally, we accepted Mr Ang's submission that because Singapore does not have an exclusionary rule in respect of pure economic loss (unlike English law), there should not be an *absolute bar* to the creation of non-delegable duties in respect of pure economic loss. In *RSP Architects Planners & Engineers v Ocean Front Pte Ltd and another appeal* [1995] 3 SLR(R) 653 ("*Ocean Front*") at [27], [74] and [75], this court recognised that even if the only loss arising from the negligent construction of a building was pure economic loss, such loss was nevertheless recoverable. This was also the holding of the court in *RSP Architects Planners & Engineers v MCST Plan No 1075* [1999] 2 SLR(R) 134 ("*Eastern Lagoon*"), which affirmed *Ocean Front* (see the discussion at [16]–[32]). Therefore, short of a compelling justification, we found no reason to revive the exclusionary rule when considering the question of non-delegable duties.

Object and spirit of the BCA

71 While Mr Ang did not pursue the argument that the respondents were subject to a statutory non-delegable duty to build and design The Seaview with reasonable care, he submitted that it would be consistent with the object and spirit of the BCA to impose such a non-delegable duty in common law on the respondents. Mr Ang emphasised that ss 8(1)(*a*) and (*c*) of the BCA specifically required the appointment of builders and architects, and that the BCA imposed significant responsibilities on them in respect of the building and design of the condominium.

72 In our judgment, the reasons for our conclusion that there was no basis for finding a broad statutory non-delegable duty to build and design The Seaview with reasonable care similarly justified rejecting this alternative submission. As mentioned at [41] above, we found that the express statutory language and the Parliamentary debates clearly showed that the BCA was never intended to deal with poor workmanship, but only with the structural safety and soundness of a building (and now, also environmental sustainability). In the circumstances, it was difficult to see how imposing a broad non-delegable duty of care on construction professionals, which extended far beyond ensuring structural safety and soundness of a building, would be consistent with the object and spirit of the BCA. In fact, given Parliament's clear intention *not* to impose statutory duties on builders and architects in relation to poor workmanship and to place the responsibility on buyers to be discerning, it could even be said that establishing such a broad non-delegable duty of care would be *inconsistent* with Parliament's intentions.

Consistency with existing common law principles

73 As mentioned at [61] above, the *Woodland* principles serve as a good starting point to consider whether the creation of a new category of non-delegable duties would be justified. Indeed, the parties in their submissions were in agreement that this was the right way forward.

74 Mr Ang submitted that the defining features of the second category of non-delegable duties identified in *Woodland* (cited at [58] above) were present in the relationship between the MCST and the respondents:

(a) There was an antecedent relationship or assumption of duty towards the MCST by the Main Contractor and the Architect by reason of their agreement to be appointed as the required "competent professionals" under the BCA. The MCST is the developer's successor and should not be viewed differently from the developer.[16]

(b) The MCST could be regarded as a "vulnerable claimant" because the MCST relied on the respondents to do their job well and was in no position to negotiate directly with them to protect itself contractually.[17]

(c) The MCST had no control over how the respondents performed their duties.[18]

(d) The respondents had subcontracted the very tasks which they have undertaken and assumed responsibility for.[19]

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[16] Appellant's case at para 81(1)

[17] Appellant's case at paras 83–87

[18] Appellant's case at para 81(2)

75 We began by considering the relationship between the MCST and the respondents. In this regard, we noted that there was *no direct contractual relationship* between them. The Main Contractor and the Architect individually contracted with the *developer*, and *not with each other (or the MCST)*. At that stage too, the MCST had not yet come into existence. That said, this did not automatically foreclose the possibility of an assumption of responsibility. In this regard, the observations of this court in *Eastern Lagoon* at [38] were germane and instructive:

> ... RSP were involved in the development of the condominium right from the start. They were engaged by the developers to design and supervise the construction of the condominium including the common property and *the developers relied on the exercise of reasonable care and skill of their architects and they (the architects) undertook such responsibilities*. RSP as the architects were aware at that time that the developers would apply for subdivision of the units and upon completion of the construction of the units they would apply to register a strata title plan and apply for the issue of separate subsidiary strata certificates of title to the units. They were also aware that upon the registration of the strata title plans the management corporation would come into existence. *Vis-à-vis* the developers there was an assumption of responsibility of professional competence on the part of the architects and the architects knew that the developers would be relying on their exercising reasonable care and skill. *The management corporation which later came into existence was merely a statutory creation and was a successor to the developers with respect to the common property. In respect of such common property the architects knew that the management corporation would be in charge and would be managing the common property and would depend on their care and skill in the design and supervision of the construction of the common property.* In such a situation there was *sufficient degree of proximity in the relationship between the management corporation and the architects* as would give rise to a duty on the part of the architects to avoid the loss as sustained by MCST in this case. [emphasis added]

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[19] Appellant's case at para 81(3)

76 As can be seen from the passage cited above, the court reached the conclusion that the architects did assume responsibility to the management corporation (even though they contracted with the *developers* only and not the management corporation) on the following grounds:

(a) The architects assumed responsibility *towards the developers* because the developers relied on the architects' exercise of reasonable care and skill.

(b) The management corporation was the *successor to the developers* with respect to common property.

(c) The architects knew that the management corporation would come into existence, manage the common property, and whatever duty the architects owed to the developer would be transmitted to the management corporation.

The same reasoning should apply, in our view, to builders (*ie*, the Main Contractor).

77 It thus could be said that there was a degree of proximity and assumption of responsibility in the relationship between the MCST and the respondents. Having said that, it is important to note that the discussion in *Eastern Lagoon* took place in the context of establishing a *duty of care in negligence*. The question which therefore remained was whether the degree of proximity and assumption of responsibility, although sufficient for establishing an ordinary tortious duty of care, was sufficient for establishing a *non-delegable duty of care*.

78 We did not think it was. We noted that a number of the key features identified in *Woodland* were not present in the relationship between the MCST and the respondents. First, and most importantly, the MCST was in no sense ever in the "custody, care and charge" of the respondents (see point (2) at [58] above). Unlike the relationship between a school and its students, a hospital and its patients, or an employer and its employees, where it could meaningfully be said that the latter was in the "custody, care and charge" of the former, the MCST was never under the guardianship of the Main Contractor and/or the Architect. Indeed, it must be borne in mind that the MCST only came into existence *after* the Main Contractor and the Architect had finished their job.

79 This point was underscored by the fact that neither of the respondents ever exercised any *control* over the MCST. It is worth repeating that the High Court of Australia in *Burnie Port Authority* at 551 found the "element of control" to be the defining feature of the relationships from which non-delegable duties arise (see [52] above). The most that could be said was that the Main Contractor and/or the Architect undertook their roles in the construction project *reasonably foreseeing* that any negligence by it or its subcontractors may cause harm to the MCST. This falls far short of the type of custodial relationships necessary to give rise to non-delegable duties. As Mason J observed in *Kondis* at 687, "[t]he foreseeability of injury is not in itself enough to generate the special duty". We agreed. In our judgment, the reasonable foreseeability of harm was a threshold requirement for establishing a basic tortious duty of care, and could not possibly be a *sufficient basis* for inferring an undertaking to indemnify the plaintiff from an independent contractor's negligence.

80 Second, we found that the MCST was not "especially vulnerable or dependent on the protection of the [respondents] against the risk of injury" (*Woodland* at [23], see also point (1) at [58] above). The "risk of injury" to the MCST in this case was the risk of pure economic loss arising from building defects in the common property. It was clear to us that the MCST was entirely able to protect itself against such a risk, independent of the respondents. As Mr Chelliah pointed out in his submissions,[20] the MCST had alternative avenues of recourse, including a claim for breach of the contract against the developer, as well as a claim under the contractual warranties it has *vis-à-vis* the Main Contractor. Indeed, we would point out that in this case, the only reason why the MCST would not be able to recover substantial damages in contract against the developer (even if contractual breach is proved) was its *own failure*, and/or that of the relevant subsidiary proprietors, to join all the consenting subsidiary proprietors as parties to the suit prior to the expiry of the relevant limitation period (see *Management Corporation Strata Title Plan No 3322 v Mer Vue Developments Pte Ltd* [2016] SGCA 38). Further, Parliament's intention, as revealed in the Parliamentary debates, was to place the responsibility on buyers themselves to be discerning consumers and to take adequate measures to protect themselves against poor workmanship (see [38] above). Bearing all these circumstances in mind, we found that the MCST was in no sense especially vulnerable or dependent on the respondents for protection against the risk of economic loss arising from building defects in the common property.

81 Third, we would point out that but for the fact that the developer had a claim in contract against the respondents, even the developer itself might not be able to defeat the defence of independent contractor if the claim of the

[20] First Respondent's Case at para 73

developer against the respondents were entirely in tort. The developer was certainly not in the "custody, care and charge" of the respondents. It was free to contract with any builder and was free to set its own terms in relation to the construction of the project. It was particularly significant that the construction contract entered into between the developer and the Main Contractor expressly contemplated that the Main Contractor would engage sub-contractors of various trades and that the developer would accept the warranty certificates issued by the sub-contractors. All these were clearly inconsistent with the alleged idea that the Main Contractor was to be responsible for the wrongdoings of the sub-contractors. Looking at the transaction in its entirety, it was wholly commercial. No party was especially vulnerable or dependent such as to require any special protection of the law. If the developer truly wanted to hold the Main Contractor liable for the negligence of its sub-contractors, it could have insisted on a contractual clause to that effect. Perhaps, it was all a matter of costs. If, however, no contractor was prepared to accept such a clause, then surely that would only mean the industry was not prepared to accept the extended liability. In the case of the Architect, the same rationale should apply.

82 In the result, we found that nothing on the present facts satisfied the features elucidated in *Woodland* for a non-delegable duty of care to arise. We would also add that we could not see how the position of the MCST, being, as it asserted, the successor of the developer, could be any better than that of the developer.

Policy considerations

83 Finally, Mr Ang submitted that there were compelling policy reasons for recognising the Proposed Non-Delegable Duty:

(a) Industry practice and expectations were that the respondents would take responsibility for building defects, even if the works were performed by a subcontractor.[21]

(b) Holding the respondents responsible to the MCST for building defects would simplify the legal process for the MCST by removing the need for protracted pre- or post-action commencement discovery to identify the correct defendants.[22] The respondents, who have been paid a substantial fee to organise the building and design of the condominium, would be familiar with which sub-contractors were involved at different phases of the project.[23]

(c) Due consideration should be given to the fact that larger, well-insured organisations have started outsourcing their duties to poorer and under insured sub-contractors.[24]

(d) There could be insufficient proximity between the MCST and the sub-contractors downstream who were negligent.[25]

84 Policy considerations have no doubt been relevant to the development of this area of the law. In *Leichhardt* at [91], Kirby J observed that the "imposition of legal liability for the acts of others" was a category of liability which "has always been accepted as being based on considerations of legal

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[21] Appellant's case at paras 94–95

[22] Appellant's case at para 99, 101

[23] Appellant's case at para 100

[24] Appellant's case at paras 103-104

[25] Appellant's case at para 106

policy". In *Farraj and another v King's Healthcare NHS Trust and another* [2010] 1 WLR 2139 ("*Farraj*") at [91], Dyson LJ observed:

> … I think that it is better to acknowledge that the question whether an employer owes a non-delegable duty of care to his employees to provide a safe system and whether a hospital generally owes a non-delegable duty to its patients *is one of policy for the courts to determine by reference to what is fair, just and reasonable*. … [emphasis added]

85 Indeed, going back to the origins of non-delegable duties in the employer-employee context, it has been recognised that the development of those duties was motivated by the policy consideration of avoiding the problems created by the doctrine of common employment (*Farraj* at [74], per Dyson LJ; *Liechhardt* at [155], per Hayne J; and *Lepore* at [250], per Gummow and Hayne JJ). It would thus not be a stretch to say that the creation of the categories of non-delegable duties was largely motivated by considerations of policy. This would explain the common critical view that the doctrine lacked a sound doctrinal foundation (*Leichhardt* at [142], per Hayne J), or that the cases were "no more than pragmatic responses to perceived injustices" (*Lepore* at [246], per Gummow and Hayne JJ).

86 The historical relevance of policy considerations to the development of non-delegable duties is thus undeniable. Moving forward, we agree that policy considerations ought to remain relevant. We would not venture any firm view as to whether it can ever be justified in the future to develop new categories of non-delegable duties on an *ad hoc* basis. By its very nature, this is a fact-sensitive question. The case for it must be very compelling. Caution must be the order of the day. It is vital to ensure that there is coherence and consistency in the doctrine. As we mentioned at [63] above, there is much to say in favour of the view that the development of new categories of non-delegable duties should proceed only "on the basis of a clear analogy to a recognised class and

then only for compelling reasons of legal principle and policy" (*Leichhardt* at [104], per Kirby J). Policy has to operate within the confines of legal principle.

87 In the present case, for the reasons set out above, we found that existing legal principles simply did not permit the introduction of the Proposed Non-Delegable Duty. We also found that the policy considerations raised by Mr Ang were hardly compelling to justify an extension of the existing principles governing non-delegable duties.

88 We did not consider Mr Ang's submission on industry practice and expectations persuasive. He did not produce *any evidence* to support his case that industry practice and expectations were that the builder and/or architect would take responsibility for all building defects. Further, even if industry practice and expectations were indeed as he described, we did not think that this compelled the recognition of the Proposed Non-Delegable Duty. As noted above (at [81]), the imposition of liability on the builder and/or architect could be attained *via* contractual arrangements which the industry players were free to enter into, and did not justify what would be, in our view, an unprincipled expansion of the categories of non-delegable duties.

89 The slightly more weighty policy argument, in our view, was that imposing liability on the builder and/or architect would enhance and facilitate the recourse which management corporations would have for building defects in common property. This essentially related to the points made at [83(b)]–[83(d)] above. While we recognised that without a non-delegable duty imposed on the builder and architect, management corporations might have to take up additional applications to ascertain the correct defendant, and might even end up suing a defendant who could not meet the full judgment sum, we found that this was part and parcel of any litigation and was an ordinary risk

endemic in any investment, including the purchase of a property. In addition, the fear that there might not be sufficient proximity between the sub-contractor whose negligence actually caused the MCST loss was, in our judgment, completely unfounded and Mr Ang did not surface to us any case in which this was a problem. Finally, we would reiterate the point we made at [80] above that the MCST had alternative avenues of recourse in contract. The purported need to simplify the legal process of recovering damages for the MCST was not persuasive.

90 On the whole, therefore, we did not think that the MCST had made out a case for the imposition of the Proposed Non-Delegable Duty on the Main Contractor and/or the Architect. Furthermore, given the increasing specialisation in the construction industry, which necessitates sub-contracting, it would be excessively onerous to impose legal liability on the respondents for defective building works which they might not even be equipped or qualified to undertake and/or supervise.

Conclusion

91 To sum up, having considered the BCA, the relevant common law principles, as well as the policy concerns at play, we found that there was no basis to establish the Proposed Non-Delegable Duty. We therefore dismissed the appeal of the MCST in Civil Appeal No 37 of 2016. Costs of the appeal were awarded to the respondents.

Chao Hick Tin	Andrew Phang Boon Leong	Steven Chong
Judge of Appeal	Judge of Appeal	Judge

Samuel Seow and Jolene Lim (Samuel Seow Law Corporation); Ang Cheng Hock, SC, Ramesh Kumar and Benjamin Koh (Allen & Gledhill LLP) (instructed) for the appellant;
Ravi Chelliah, Sally Kiang and Edmund Chain (Chelliah & Kiang LLC) for the first respondent;
Thio Shen Yi, SC, Melvin Chan Kah Keen, Koong Len Sheng and Tan Tho Eng (TSMP Law Corporation) for the second respondent.
