IN THE GENERAL DIVISION OF
THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2021] SGHC 26

District Court Appeal No 14 of 2020

Between

Munshi Mohammad Faiz

… *Appellant*

And

(1) Interpro Construction Pte Ltd
(2) K P Builder Pte Ltd
(3) Hwa Aik Engineering Pte. Ltd.

… *Respondents*

District Court Appeal No 15 of 2020

Between

(1) Interpro Construction Pte Ltd
(2) K P Builder Pte Ltd

… *Appellants*

And

Munshi Mohammad Faiz

… *Respondent*

JUDGMENT

[Tort] — [Negligence]

[Tort] — [Negligence] — [Contributory negligence]
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2, 16 October 2020

3 February 2021 Judgment reserved.

Dedar Singh Gill J:

1 These cross-appeals arise from District Court Suit No 265 of 2017 ("Suit"). The Suit concerned an industrial accident in which the plaintiff, Munshi Mohammad Faiz, was injured by an excavator operated by one Sujan Abdur Razzak Sikder ("Sujan"). In the court below, the District Judge ("DJ") found the first and second defendants jointly and severally vicariously liable to the plaintiff for Sujan's negligence. They were ordered to bear 100% liability for the accident. The DJ dismissed the Suit against the third defendant. District Court Appeal No 14 of 2020 ("DCA 14") is the plaintiff's appeal against the DJ's decision while District Court Appeal No 15 of 2020 ("DCA 15") is the first and second defendants' appeal against the same.

Dramatis personae **and material facts**

2 The second defendant in the Suit, K P Builder Pte Ltd ("2D"), was engaged as the main contractor for a construction project at 22 Grove Crescent ("Project"). At the material time, the 2D engaged the first defendant, Interpro Construction Pte Ltd ("1D"), as its sub-contractor to carry out general construction works, including certain excavation works, at the Project's worksite. The two companies share a common director.

3 The plaintiff was a construction worker in the employment of the 1D. The 1D also appointed one Panchanathan Santhosh Kumar ("Santhosh") as the foreman and site safety supervisor for the Project. Santhosh reported to one Ong Siaw Meng ("Ong"), the Project's project manager and an employee of the 1D. In respect of the excavation works for the Project, the 1D deployed Santhosh as the site supervisor and foreman and five other workers (including the plaintiff) to work under Santhosh's supervision.

4 For the excavation works at the Project's worksite, the 2D also engaged the third defendant, Hwa Aik Engineering Pte. Ltd. ("3D"), to supply an excavator and a trained and qualified excavator operator at a daily rate of $300. Pursuant to this arrangement, the 3D provided an excavator and an excavator operator, that being Sujan. Sujan was to work under the directions of the 1D at the worksite. Outside of this arrangement, the 3D was Sujan's general employer.

5 Before turning to the accident, it is helpful to explain the "banksman system" which was allegedly put in place by the 1D during the excavation works. As explained by Santhosh in his affidavit of evidence-in-chief ("AEIC"), the "banksman system" is a simple system of signals meant to direct the movement of an excavator. A person on the ground, known as a "banksman", would be responsible for giving signals to the person operating the excavator.

For example, upon the banksman blowing his whistle once and showing the appropriate hand-signal to the excavator operator, the latter would stop the excavator and bring the excavator's bucket to rest on the ground. The operator was to ensure that the excavator remained stationary until the banksman blew the whistle twice and showed the appropriate hand-signal for the excavator operator to move the excavator again.

6 Based on the DJ's Grounds of Decision ("GD"), the DJ pieced together the following version of events in respect of the accident on 31 May 2016. Around 4.30pm that day, a certain area at the Project's worksite had just been excavated. At that time, only Santhosh (*ie,* the foreman), the plaintiff and Sujan (*ie,* the excavator operator) were in the immediate vicinity of the excavated pit. The DJ accepted that Santhosh had first instructed the plaintiff to direct Sujan to stop the excavator. The plaintiff accordingly blew his whistle once and gave the appropriate hand-signal to Sujan. Sujan then brought the excavator's bucket to rest on the ground and stopped operating the excavator. The DJ stated that Santhosh then went into the excavated pit and noted that there was "still [some] earth in the innermost parts within the pit which had to be removed by the use of a spade". Hence, "Santhosh…instructed [the plaintiff] to fetch a spade from the toolbox near the entrance of the Project's worksite". Thereafter, the plaintiff went to fetch the spade. He walked near the excavator on his way to fetching the spade, at which point the excavator (operated by Sujan) moved and collided into him. The plaintiff was pinned under the metal wheel-track of the excavator and suffered various personal injuries including a spinal fracture.

7 At the hearing below, the plaintiff claimed that the 1D and 2D were directly liable to him for negligence and breach of various statutory duties. The plaintiff also claimed that all three defendants were vicariously liable for Santhosh's and/or Sujan's negligence during the accident.

Decision below

8 At the trial below, the parties disputed the circumstances under which the excavator had moved. It appears that soon after the accident in June 2016, Sujan left Singapore to return to his home country. He was not called as a witness by any of the parties and critical evidence from him on this score was therefore not available. Further, none of the parties conducted an investigation into the accident or adduced an investigation report before the DJ. Ultimately, the DJ was only able to rely on the plaintiff's and Santhosh's unchallenged evidence. The DJ found that, during the accident, there was no signal given to Sujan for him to move the excavator. On this basis, the DJ concluded that the accident had occurred because Sujan had moved the excavator despite not having received any signal to do so (GD at [21]).

9 The DJ went on to consider the following issues:

(a) Whether Sujan had been negligent in operating the excavator, resulting in the accident.

(b) If the answer to the preceding issue is "yes", whether any of the defendants were vicariously liable for Sujan's negligence.

(c) Whether Santhosh was negligent when he instructed the plaintiff to retrieve the spade during the accident.

(d) If the answer to the preceding issue is "yes", whether the 1D was vicariously liable for Santhosh's negligence.

(e) Whether the 1D and 2D were liable for being negligent in failing to provide the plaintiff with:

(i) the requisite training to act as a banksman;

(ii) competent workmen (in particular, a competent foreman) to work with; and

(iii) a safe workplace (in particular, by cordoning off the worksite appropriately).

(f) Whether the plaintiff was contributorily negligent.

10 The DJ made the following findings:

(a) A reasonably competent excavator operator would not move the excavator unless given a signal to do so by the banksman (GD at [24]–[25]). Sujan was therefore negligent.

(b) The 1D and 2D, but not the 3D, were jointly and severally vicariously liable for Sujan's negligence (GD at [38] and [52]).

(c) Based on Santhosh's unchallenged evidence that he had instructed the plaintiff to retrieve the spade only *after* instructing the plaintiff to direct Sujan to stop operating the excavator, Santhosh was not negligent during the accident (GD at [45]).

(d) The 1D was accordingly not vicariously liable for any alleged negligence of Santhosh.

(e) The 1D and 2D were not liable in negligence for allegedly failing to provide the plaintiff with:

(i) the requisite training as a banksman, as there was no evidence to suggest that the accident was caused by the plaintiff's failings in performing that role (GD at [46]);

(ii) competent workmen (in particular, a competent foreman) to work with (GD at [49]); and

(iii) a safe workplace (*ie,* by cordoning off the worksite appropriately) (GD at [50]).

(f) There was no evidence to show that the plaintiff was contributorily negligent (GD at [51]).

11 In summary, the DJ held that the 1D and the 2D were jointly and severally vicariously liable for Sujan's negligence. She entered interlocutory judgment against them for 100% liability for the accident with "damages to be assessed and costs reserved to the Registrar". The plaintiff's claim against the 3D was dismissed with costs to the 3D to be taxed if not agreed.

Parties' cases on appeal

12 The plaintiff's case in these cross-appeals is as follows:

(a) Santhosh was negligent when he asked the plaintiff to retrieve the spade during the accident. The 1D and the 2D are jointly vicariously liable for Santhosh's negligence.

(b) The 1D and the 2D were directly negligent in failing to provide the plaintiff with a safe workplace by cordoning off the worksite appropriately.

(c) All three defendants should be vicariously liable for Sujan's negligence. The 1D and the 2D should jointly and severally bear 85% of the liability for the accident and the 3D should bear 15%.

13 The 1D and 2D's case in these cross-appeals is as follows:

(a) The DJ was correct to find that Santhosh was not negligent during the accident and that the 1D and 2D were accordingly not vicariously liable for his actions.

(b) The DJ was correct in finding that there was no evidence to show that cordoning off the excavation work area could have been carried out and that doing so would have prevented the accident.

(c) The 3D is vicariously liable for Sujan's negligence and ought to bear 100% of the liability for the accident. Alternatively, even if more than one defendant should be held vicariously liable, liability ought to be apportioned between 1D and 3D in equal shares and the 2D ought not to be liable at all.

14 The 3D's case (as set out in its Respondent's Case for DCA 14 and its submissions) is as follows:

(a) The DJ erred in finding that Sujan was negligent in moving the excavator without a signal because this was not a version of facts pleaded by the plaintiff.

(b) Even if Sujan was negligent, the plaintiff was also contributorily negligent. Furthermore:

(i) only the 1D and 2D, and not the 3D, should be held vicariously liable because Sujan was the employee *pro hac vice* of the former two; and

(ii) alternatively, if all three defendants are held to be vicariously liable for Sujan's negligence, then the 3D ought to

bear no more than 15% of the liability for the accident, with the 1D and 2D bearing the remaining 85%.

Issues on appeal

15 The following issues arise for my consideration:

(a) **Issue 1:** Whether Santhosh was negligent when he instructed the plaintiff to retrieve the spade during the accident. If "yes", whether the 1D and/or 2D were vicariously liable for his negligence.

(b) **Issue 2:** Whether the 1D and/or 2D were directly negligent in failing to provide the plaintiff with a safe workplace (in particular, by cordoning off the worksite appropriately).

(c) **Issue 3:** Whether the DJ had erred in finding Sujan to be negligent based on a version of facts allegedly not pleaded by the plaintiff.

(d) **Issue 4:** Whether the plaintiff was contributorily negligent.

(e) **Issue 5:** If Sujan was negligent, to what extent (if any) are each of the defendants vicariously liable for his negligence. This comprises the following sub-issues:

(i) **Issue 5.1:** As a matter of law, is it permissible to hold multiple defendants vicariously liable for the negligence of a single primary tortfeasor (this is hereinafter referred to as "dual VL").

(ii) **Issue 5.2:** On the facts, which defendants ought to be held vicariously liable for Sujan's negligence.

Issue 1 - Santhosh's alleged negligence and the 1D's and 2D's alleged vicarious liability

16 At the trial below, Santhosh's evidence was that he had instructed the plaintiff to retrieve the spade only *after* instructing the plaintiff to direct Sujan to stop operating the excavator. The DJ accepted this evidence as it was unchallenged (see GD at [45]). She thus found that Santhosh was not negligent during the accident.

17 The plaintiff argues, however, that based on Santhosh's own evidence there was a period of four to five minutes of inactivity when the plaintiff went to retrieve the spade. Within this period, there was no one acting as a banksman to supervise Sujan and to direct his operation of the excavator. It is said that Santhosh ought to have waited for the plaintiff to return with the spade before going into the pit. He ought to have filled in the role of banksman during the intervening period so as to ensure that Sujan did not move the excavator for whatever reason. In particular, Santhosh ought to have made sure that the excavator was switched off before asking the plaintiff to retrieve the spade and entering the pit himself. Alternatively, Santhosh ought to have stood within Sujan's line of sight so that he could react promptly if the excavator moved in a way that put the plaintiff at risk.

18 I am unable to agree with the plaintiff's arguments above. Even if Santhosh had stood in as banksman while the plaintiff had gone to fetch the spade, the question is what a reasonable banksman in his position would have done. The answer is "nothing". Just moments before, the plaintiff had already signalled to Sujan to stop the excavator, which the latter did. Santhosh had then told the plaintiff to fetch the spade. While waiting for the plaintiff to return, there was simply nothing that a reasonable banksman could have done to

prevent the accident. Santhosh could not be expected to predict Sujan's sudden and unilateral act of moving the excavator without a signal.

19 Further, I do not think that Santhosh had been negligent in omitting to direct that the excavator engine be turned off while waiting for the plaintiff to fetch the spade. This is not a situation where Santhosh had left an unattended piece of heavy machinery running even though it was no longer needed. On the contrary, Santhosh had Sujan in control of the excavator during the entire time. Sujan had been briefed on the banksman system, which was meant precisely to ensure that the stationary excavator did not move without a signal. In these circumstances, it is neither practical nor reasonable to expect Santhosh to have the excavator engine turned off immediately simply because there was a momentary pause in its use.

20 In a similar vein, I do not think Santhosh was negligent in not standing in Sujan's line of sight. Given the system of signalling in place, there was no reason for Santhosh to think that Sujan would spontaneously move the excavator on his own. In any event, even if Santhosh had stood in Sujan's line of sight, Santhosh could not have done anything that would have prevented Sujan's sudden and unilateral act of moving the excavator without warning.

21 As I find that Santhosh did not act negligently during the accident, the question of the 1D's and/or 2D's vicarious liability for his alleged negligence does not arise.

Issue 2 – Whether the work area should have been cordoned off

22 The DJ found that there was a lack of evidence showing that cordoning off the excavation work area could have been carried out and would have

prevented the accident (GD at [50]). She thus found that there was no negligence by the 1D and/or 2D in omitting to take such measures.

23 On appeal, the plaintiff contests the abovementioned finding. He asserts that "notwithstanding the space constraint", the accident could well have been avoided had there been a proper system of "demarcation, delineation, signage and/or visible drawn lines". Apart from being vague, the plaintiff's assertion does nothing to make up for the lack of evidence which the DJ pointed out. I am not persuaded that it was reasonable or practical to cordon off the excavation work area and that these measures would have made a difference. On the contrary, the only available evidence is Ong's testimony that such measures were not possible given the dimensions of the pit and the size of the Project's worksite. In the circumstances, I see no reason to interfere with the DJ's finding on this issue.

Issue 3 – Whether Sujan was negligent

24 At the trial below, there was a dispute as to whether, prior to the accident, the plaintiff had been formally appointed as the banksman for the excavation works in question. Relying on Santhosh's and Ong's evidence, 1D and 2D said that he had. On the other hand, the plaintiff denied that such a role was formally assigned to him. The DJ found that ultimately, it was not important whether the plaintiff was formally tasked with the role. Based on the available evidence, it was clear that the plaintiff did act as the *de facto* banksman at the time of the accident and "did as instructed" (see GD at [43]). The DJ thus concluded that nothing turned on whether the plaintiff had been formally appointed to this role or not.

25 The 3D in its Respondent's Case for DCA 14 disagrees with the DJ and argues that the identity of the banksman was fundamental to the plaintiff's

pleaded case. Its argument is as follows. The DJ had erred in finding that the accident was caused by Sujan's negligence in moving the excavator without a signal. This version of facts was simply not pleaded by the plaintiff. The plaintiff's case, as set out in the Statement of Claim (Amendment No 2) ("SOC2") at paras 9.37 and 9.38, was only that *Santhosh* was the banksman and Santhosh had failed to direct the excavator to stop moving when he instructed the plaintiff to retrieve the spade. Therefore, for the plaintiff to succeed, he must first establish that Santhosh was the banksman. At trial, however, the plaintiff's own evidence was that there was no such "[banksman] system of signals and whistles". The plaintiff hence failed in proving his pleaded case.

26 To my mind, the above argument is based on an incomplete reading of the plaintiff's pleadings. In the SOC2, the plaintiff also pleaded the following:

(a) All three defendants were themselves negligent in, *inter alia*:

> 9.6. Failing to take any or reasonable care to ensure that the excavator operator had carried out his work in a safe manner so as not to endanger the safety of the Plaintiff;

(b) The 1D and 3D were vicariously liable for, *inter alia*:

> 9.40 Negligence on the part of the excavator operator in failing to keep any proper lookout …
>
> …
>
> 9.42. Negligence on the part of the excavator operator in failing to manage or control the excavator in a safe manner so as to avoid hitting the Plaintiff;
>
> …
>
> 9.45. Negligence on the part of the excavator operator in exposing the Plaintiff to a risk of damage or injury by failing to drive and/or operate the excavator in a safe manner;

27 It is clear from the above that the plaintiff *did* plead that Sujan had not operated the excavator in a safe manner. Each of the above allegations was an independent strand of the plaintiff's pleaded case. None of them were expressed to be dependent on who the banksman was. The unchallenged evidence of the plaintiff and Santhosh at trial pointed to the fact that no signal had been given (*ie,* in the form of a whistle, hand signal or otherwise) when Sujan moved the excavator. On the basis of this evidence, it was entirely open to the DJ to reach her finding that Sujan had been negligent in "moving the excavator even though he had not been given any signal [to do so]", thereby injuring the plaintiff. I therefore reject the 3D's argument.

28 At this juncture, I digress to address a point not raised by any of the parties. It is apparent from [26(a)-(b)] above that there is a gap in the pleadings. Specifically, nowhere is it stated in those two extracts (or anywhere else in the SOC2) that the 2D was *vicariously liable* for Sujan's negligence. The pleading quoted at [26(a)] is premised on 2D breaching its *own* duty of care, rather than it being vicariously liable for Sujan's breach of duty. The pleading referred to in [26(b)] above only alleges that the *1D and the 3D*, not the 2D, are vicariously liable for Sujan's negligence.

29 In *V Nithia (co-administratrix of the estate of Ponnusamy Sivapakiam, deceased) v Buthmanaban s/o Vaithilingam and another* [2015] 5 SLR 1422, the Court of Appeal explained that:

> 38 …**[T]he general rule is that parties are bound by their pleadings** and the court is precluded from deciding on a matter that the parties themselves have decided not to put into issue. …
>
> 40 [However,] **the law permits the departure from the general rule in limited circumstances, where no prejudice is caused to the other party in the trial or where it would be clearly unjust for the court not to do so**. In Singapore, the

> law was reiterated by this court in *OMG Holdings* at [18] as follows:
>
> > … It is trite law that the court may permit an unpleaded point to be raised if no injustice or irreparable prejudice (that cannot be compensated by costs) will be occasioned to the other party (see *Lu Bang Song v Teambuild Construction Pte Ltd* [2009] SGHC 49 ('*Lu Bang Song*') at [17] and *Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Ltd* [1995] 3 MLJ 331 ('*Boustead Trading*') at 341–342). In the same vein, **evidence given at trial can, where appropriate, overcome defects in the pleadings provided that the other party is not taken by surprise or irreparably prejudiced** (see *Lu Bang Song* at [17]).
>
> [emphasis added in bold]

30 Given that the plaintiff has failed to plead that the 2D is vicariously liable for Sujan negligence, the question is whether he should exceptionally be allowed to depart from his pleadings. In my view, he may be allowed to do so. It is clear from the 1D and 2D's Opening Statement below that from the outset, counsel had run their case to address the issue of the 2D's vicarious liability for Sujan's negligence. The issue was again argued in the 1D's and 2D's Closing Submissions (dated 1 April 2020). In fact, the DJ had proceeded on the basis that this was a live issue between the parties. Evidence was adduced in this regard and the DJ went on to make a finding on it (see [10(b)] above). The 1D's and 2D's counsel has also not taken any objection in respect of the defect in the plaintiff's pleadings. In the circumstances, I do not think that there is any material prejudice to the 1D and 2D which would preclude the plaintiff's departure from his pleaded case.

31 As far as the 3D is concerned, I cannot see how it would be prejudiced by the plaintiff being allowed to hold the 2D vicariously liable for Sujan's negligence. In any case, it is clear from the 3D's Opening Statement (dated 7 January 2020) and Closing Submissions (dated 1 April 2020) below that the 3D

had actively sought to shift the vicarious liability for Sujan's negligence to both the 1D and 2D.

32 I thus have no reason to think that any of the defendants have been irreparably prejudiced by the plaintiff's departure from his pleaded case. In the circumstances, I need not say any more on this point.

33 There is also another related argument by the 3D in respect of the DJ's finding that Sujan's negligence caused the accident. It is argued that in reaching this finding, the DJ had erred in failing to consider the inconsistencies in the plaintiff's evidence and in omitting to draw adverse inferences against him. Specifically, it was apparently "unrealistic" that Santhosh would have instructed the plaintiff to fetch the spade from the toolbox when (a) this instruction would have required the plaintiff to take a "circuitous route requiring a 10 to 15 minute walk to retrieve [the spade]"; and (b) Santhosh was himself standing less than ten metres from the toolbox.

34 I do not think this argument has much merit. Whilst it is true that the plaintiff's testimony as regards the accident is difficult to follow in many aspects, the DJ's finding that Santhosh had instructed the plaintiff to fetch the spade was also supported by *Santhosh's unchallenged evidence* to that effect (see GD at [45]). It is entirely unclear what the 3D is saying might have happened instead if no such instruction was given. This challenge against the DJ's finding also fails.

Issue 4 – Whether the plaintiff was contributorily negligent

35 The 3D contends that even if Sujan was negligent, the plaintiff should be held contributorily negligent for the accident and be awarded no more than 50% of the assessed damages. This is given that, on the plaintiff's own evidence,

(a) he was aware that the excavator was turned on at the time of the incident and could potentially move at any time; and (b) it is not even clear whether Sujan had been informed that the plaintiff was going to retrieve the spade for Santhosh. It is said in these circumstances, it was "curious how [the plaintiff] could have…allowed himself…to stand [so] close to the excavator at only 2 feet away and to enter the excavator's blind spot".

36 On the issue of the plaintiff's contributory negligence, the DJ had stated (at [51] of the GD) that:

> As I have already found that nothing turns on P's failings or not as a banksman, there is no evidence to show that P was contributorily negligent in the circumstances.

With respect, I am unable to agree. Even if there was no evidence showing that the plaintiff's failings as a banksman contributed to the accident, this does not address the point made by the 3D on appeal (and below) that the plaintiff was contributorily negligent in having ventured so close to the excavator.

37 I thus proceed to consider the 3D's argument on the merits. The 3D bears the burden of establishing the defence of contributory negligence. I am, however, not persuaded that it has discharged this burden. The plaintiff did in fact give evidence that at the time of the accident, he was standing "2, 3 feets just behind [the] excavator". However, even though the excavator engine may have remained turned on at the time, the other surrounding circumstances must also be taken into consideration.

38 By the time that the plaintiff had gone to fetch the spade, Sujan had already been directed to (and did in fact) stop the excavator. For all intents and purposes, the excavator's operation had been paused so that a spade could be obtained to manually remove the remaining earth in the excavated pit. In these

circumstances, it was not unreasonable for the plaintiff to think that the excavator would remain stationary (especially in the absence of any signal to move). Furthermore, it was Santhosh who had told the plaintiff to fetch the spade. Even if Sujan himself was not expressly informed that the plaintiff had left to perform this task, it was reasonable for the plaintiff to expect that *Santhosh* would not direct Sujan to move the excavator for no good reason. Sujan's spontaneous act of doing so without a signal is difficult to understand even at present. I do not think the plaintiff should be faulted for not having foreseen Sujan's somewhat inexplicable conduct. I hence reject the defence of contributory negligence.

Issue 5 –The defendants' vicarious liability for Sujan's negligence

39 Before outlining the parties' cases on this issue, it is useful to discuss the current state of Singapore law on vicarious liability. In *Ng Huat Seng and another v Munib Mohammad Madni and another* [2017] 2 SLR 1074 ("*Ng Huat Seng*"), the Court of Appeal explained (at [42] and [44]) as follows:

> 42 … [**T]here are two separate inquiries to be undertaken when determining whether vicarious liability should be imposed**. The first examines the nature of the relationship between the defendant and the tortfeasor. **While the law does not confine this to a relationship of employment, it remains necessary to establish a relationship of sufficient closeness such as would make it fair, just and reasonable to impose liability on the defendant for the tortious acts of another**.
>
> …
>
> 44 **The second inquiry to be made when deciding whether vicarious liability should be imposed is whether there is a sufficient connection between the relationship between the defendant and the tortfeasor on the one hand, and the commission of the tort on the other.** Has that relationship created or significantly enhanced the risk of the tort being committed? This is a second and distinct part of the analysis which is only reached if the claimant can first establish the

> existence of a special relationship between the defendant and the tortfeasor. …
>
> [emphasis added in bold]

40 As set out above, the court applies a two-stage test ("general test") to determine whether vicarious liability ought to be imposed on a defendant for the negligence of a primary tortfeasor. Both requirements, as set out below, must be satisfied:

(a) First, the relationship between the primary tortfeasor and defendant must be sufficiently close so as to make it fair, just and reasonable to impose vicarious liability on the defendant for the primary tortfeasor's acts.

(b) Second, there must be sufficient connection between the defendant's relationship with the primary tortfeasor on the one hand and the commission of the tort on the other. In particular, the question is whether the relationship created or significantly enhanced the risk of the tort being committed.

41 In *Ng Huat Seng,* the Court of Appeal further referred to the UK Supreme Court's holding in *Various Claimants v Catholic Child Welfare Society and others* [2012] 3 WLR 1319 ("*Christian Brothers*"). Specifically, the UK Supreme Court had (at [35]) identified a number of policy factors that would usually make it fair, just and reasonable for vicarious liability to be imposed in employment relationships. These were as follows:

(a) That the employer would be more likely than the employee to have the means to compensate the victim and could be expected to have insured itself against that liability.

(b) That the tort would have been committed as a result of activity undertaken by the employee on behalf of the employer.

(c) That the employee's activity would likely be part of the business activity of the employer.

(d) That the employer, by employing the employee to carry out the activity, would have created the risk of the tort being committed by the latter.

(e) That the employee would, to a greater or lesser degree, have been under the control of the employer at the time the tort was committed.

The UK Supreme Court added that even if the defendant and tortfeasor were not bound by an employment contract, vicarious liability could still be imposed where the relationship had the same incidents so that it was "akin to [an employment relationship]" (*Christian Brothers* at [47], cited in *Ng Huat Seng* at [54]). The Court of Appeal in *Ng Huat Seng* accepted (at [62] read with [54(a)]–[54(e)]) that these factors "help to guide the court in determining the types of relationships within which it would be fair, just and reasonable to impose [vicarious] liability".

42 The application of the general test is relatively straightforward in situations where a plaintiff only seeks to hold *a single defendant* vicariously liable for the tort of another. There are, however, situations where a person Z, who is under the general employment of X, is "lent" or "hired out" to another employer Y for a particular purpose or occasion. This is often described as the "borrowed employee" situation. X is known as the "general employer" whilst Y is known as the "temporary employer". Where the employee Z goes on to commit a tort, a plaintiff may wish to sue both *X and Y* as being vicariously

liable for the same tortious act of Z. Historically, this "borrowed employee" situation has been resolved by resort to the principle espoused in the English case of *Mersey Docks and Harbour Board v Coggins & Griffith (Liverpool) Limited* [1947] AC 1 ("*Mersey Docks*") (at 12-13). In that case, the House of Lords held that as a general rule, the general employer of a worker is *prima facie* vicariously liable for the worker's negligence. Nonetheless, it was recognised that:

> … [I]t is always open to [a general] employer to show, if he can, that he has for a particular purpose or on a particular occasion temporarily transferred the services of one of his general [workers] to another party [*ie,* the temporary employer] so as to constitute him pro hac vice the servant of that other party with consequent [vicarious] liability for [the worker's] negligent acts. The burden is on the general employer to establish that such a transference has been effected.

43 I will refer to the above principle as the "*pro hac vice* principle". The phrase "*pro hac vice*" simply means "for this occasion". In deciding whether the general rule is displaced, the court inquires into whether the worker has *on the particular occasion giving rise to the tort* become the employee of the temporary employer instead (such that the temporary employer bears the vicarious liability for the worker's negligence rather than the general employer). This principle was applied by the Court of Appeal in *BNM (administratrix of the estate of B, deceased) on her own behalf and on behalf of others v National University of Singapore and others and another appeal* [2014] 4 SLR 931 ("*BNM*"). As observed by Rix LJ in the important English case of *Viasystems (Tyneside) Ltd v Thermal Transfer (Northern) Ltd and others* [2006] QB 510 ("*Viasystems*") (at [56] and [68]), the *pro hac vice* principle in *Mersey Docks* appears to assume that vicarious liability is to be found in either one employer or the other, but *not both*. The learned Lord Justice noted, however, that "although the background of *Mersey Docks* may have reflected [such an assumption] …, it is not a decision to that effect". I will return to the cases of

BNM, Viasystems and *Mersey Docks* later below. At this point, it suffices to note that these comments are relevant because we are essentially concerned here with a "borrowed employee" (*ie,* Sujan) whose negligence the plaintiff seeks to hold multiple defendants vicariously liable for.

Parties' cases

44 To recapitulate, after finding that Sujan was negligent, the DJ went on to examine which of the defendants ought to be held vicariously liable for his tort. At [26]–[38] of the GD, the DJ's approach was to apply the general test in *Ng Huat Seng* to each defendant. She found (at [36]) that:

> …[**T]he relationship that is of sufficient closeness such as would make it fair, just and reasonable to impose liability for the tortious acts of Sujan is that between D1 and D2 on the one hand and Sujan on the other**. **It is also this relationship that created or significantly enhanced the risk of the negligent act or tort being committed** as Sujan who was engaged by D2 for the excavation works at the Project's worksite, was acting under the instructions, control and supervision of D1's employees. **Other than the supply of the excavator and a qualified excavator operator, D3 was not even remotely involved at all.** …
>
> [emphasis in bold added]

The DJ concluded that the 1D and the 2D, but not the 3D, were jointly and severally vicariously liable for Sujan's negligence. She accordingly entered interlocutory judgment against them for 100% liability for the accident.

45 In these cross-appeals, there are two main issues that arise in connection with the DJ's finding set out above:

(a) As a matter of law, is it permissible to hold multiple defendants vicariously liable for the negligence of a primary tortfeasor (*ie,* the principle of dual VL)?

(b) Depending on the answer to the preceding question, which of the present defendants ought to be held vicariously liable for Sujan's negligence?

(1) Plaintiff's case

46 The plaintiff takes the following position in these cross-appeals:

(a) As a matter of law, the principle of dual VL ought to be recognised in Singapore.

(b) Vicarious liability ought to be imposed on *all three defendants*. The DJ erred in not holding the 3D vicariously liable at all. Applying the general test in *Ng Huat Seng* and the *pro hac vice* principle in *Mersey Docks,* the 1D and the 2D should be jointly and severally vicariously liable for 85% of the liability for the accident and the 3D should be liable for the remaining 15%.

47 The plaintiff relies on, *inter alia,* the following grounds to support his case:

(a) All three defendants had shared control of Sujan. The excavation works involved a task that required the coordination of workers with different skills and responsibilities (*ie,* Santhosh and Sujan) and it was this failure in coordination that resulted in the accident. Further, Sujan was "integrated into the organisational structure of [all three defendants'] businesses" and economically benefited all of them. His relationship with all three defendants created or enhanced (to varying overlapping degrees) the risk of the tort being committed.

(b) The 3D was the general employer of Sujan. It paid his monthly salary and was in the business of hiring out excavators and operators to third parties like the 1D and 2D. Further, the 3D had the right to discipline and dismiss Sujan. The 3D should thus be *prima facie* vicariously liable for Sujan's negligence. The 3D has, however, failed to shift the entire responsibility to the 1D and 2D. Neither the 1D nor 2D had the authority to tell Sujan *how* to operate the excavator. The 1D's Santhosh was limited to telling Sujan only *what* to do with the excavator. Whilst Santhosh did have some say over the movement of the excavator that Sujan was operating (*ie,* through the banksman system), this was restricted to starting/stopping the excavator and the positioning of the excavator in performing the excavation works. Although Santhosh also had authority over certain other matters (*ie,* Sujan's work schedule), none of these had anything to do with how the excavator was to be operated.

(c) The DJ erred in finding that "other than the supply of the excavator and a qualified excavator operator, D3 was not even remotely involved at all". The 3D was involved in other ways that ought to have been given weight, as follows:

(i) The 3D selected which operator was to be hired out under its contract with the 2D.

(ii) The 3D provided the excavator that Sujan used in the excavation works.

(iii) The 3D was responsible for ensuring that Sujan had the necessary training and qualifications to operate the excavator.

(iv) The 3D profited from the business of hiring out equipment and skilled labour and bore the risks of running it.

(d) Further, the 3D is in a better position than the 1D and 2D to deter the risk of future harm. The "specific technical expertise" of operating excavators lay with the 3D. Unlike the other two defendants, the 3D was in the business of owning, renting and operating excavators. It was responsible for Sujan's training and qualification as an excavator operator. Further, the 3D was in charge of disciplining Sujan. As a matter of victim compensation, none of the three defendants have any known signs of financial impecuniosity.

(2) 1D's and 2D's case

48 The 1D and 2D do not appear to argue that the principle of dual VL ought not to be recognised as a matter of law. Instead, they submit as follows:

(a) The correct approach is to apply the *pro hac vice* principle in *Mersey Docks.* As the general employer of Sujan, the 3D is *prima facie* vicariously liable for Sujan's negligence. The burden is on the 3D to prove that Sujan was the 1D's and 2D's employee *pro hac vice*. Having failed to discharge this burden, the 3D is vicariously liable.

(b) Dual VL is not "applicable" in the present case. The principle of dual VL requires there to be "shared control" and that it be "just" to impose vicarious liability on the defendant in question. Here, only the 3D had control over Sujan's negligent act. Thus, the 1D and 2D ought not to be made liable at all.

(c) Even if there should be dual VL in the present case, liability for the accident ought to be apportioned severally between 1D and 3D in equal shares and the 2D ought not to be liable at all.

49 In support of their case above, the 1D and 2D rely on, *inter alia,* the following arguments:

(a) The 3D was Sujan's general employer and there was a "special relationship" between them. The 3D is *prima facie* vicariously liable for Sujan's negligence and it failed to displace this presumption. In particular, the 3D failed to show that the 1D and 2D had "entire and absolute control" over Sujan.

(b) The 1D's Santhosh was overall in charge of the excavation works. However, his ability to direct Sujan (through the banksman system) to start and stop the excavator's movements was merely limited to controlling *when* Sujan was to operate the excavator, and not *how* he did so.

(c) The 2D exercised absolutely no control over Sujan. None of its staff were at the worksite on the day of the accident. The 2D merely engaged the 3D to supply an excavator and a trained excavator operator. It was the 3D that eventually selected and deployed Sujan to operate the excavator at the worksite.

(d) It was the relationship between Sujan and the 3D (not the 1D and 2D) that created or significantly enhanced the risk of the tort being committed. It was the 3D that:

(i) agreed to supply the excavator and an excavator operator to the 2D;

(ii) selected and deployed Sujan as the excavator operator;

(iii) chose not to conduct any inspection of the Project's worksite; and

(iv) chose not to conduct its own risk assessment.

(3) 3D's case

50 The 3D's position is as follows:

(a) Even if Sujan was negligent, the DJ was correct to hold only the 1D and 2D, and not the 3D, vicariously liable. The *pro hac vice* principle in *Mersey Docks* focusses on the issue of who had *control* over the relevant act of the primary tortfeasor. In *Viaystems*, however, Rix LJ also thought that it had to be *just* to make multiple defendants liable for the negligence of a single tortfeasor. Applying the "shared control" test and the "just" test, only the 1D and 2D (and not the 3D) should be vicariously liable for Sujan's negligence.

(b) Alternatively, if all three defendants are held to be vicariously liable for Sujan's negligence, then the 3D ought to bear no more than 15% of the liability for the accident, with the 1D and 2D bearing the remaining 85%.

51 In support of its case, the 3D makes, *inter alia,* the following submissions:

(a) Following the DJ's reasons in the GD as listed below, Sujan was the employee *pro hac vice* of the 1D and 2D:

(i) The 1D had deployed the plaintiff and Sujan to work under Santhosh's supervision. It was part of Santhosh's duties as a site safety supervisor and foreman to ensure that Sujan was a trained and qualified excavator operator.

(ii) The 2D had left Sujan to work under the supervision and control of the 1D's Santhosh.

(iii) Santhosh had "oversight and supervision of the excavation works, including how Sujan was to operate the excavator based on specific instructions". Santhosh was also in charge of giving instructions to the plaintiff and Sujan as regards the banksman system.

(iv) Apart from Sujan, no employee from the 3D was present on-site. The excavation works were carried out without the 3D's involvement.

(b) In fact, the 1D and 2D had "absolute" control of Sujan given, *inter alia,* the following points:

(i) The banksman (whether it was Santhosh or the plaintiff) was the employee of the 1D. The control exercised by the banksman (through the banksman system) over Sujan was "absolute". The banksman system was put in place by the 1D with no input from the 3D.

(ii) Contrary to the plaintiff's claim, the skills involved in operating the excavator were "simple" and not "unique". Even if Sujan's expertise was unique, it had nothing to do with Sujan's alleged negligence in moving the excavator without a signal.

That act fell within the ambit of control exercised by Santhosh over Sujan through the banksman system.

(iii) The safety briefings, safety plans and risk assessment plans were handled by the 1D and 2D without any input from the 3D.

(c) While the 3D trained and selected operators for assignment, the evidence was that Santhosh independently verified Sujan's qualifications. Implicit in this was that the 1D and 2D had the final discretion to reject Sujan if they were not satisfied as to his qualifications.

(d) The fact that the 3D provided the excavator does not take the plaintiff very far. That a general employer had contracted to lend a machine "does not have much bearing on whether control had transferred" unless the accident was caused as a result of neglect to maintain the machine. There is no suggestion that the accident was caused by the excavator's mechanical faults.

(e) The 3D is not in the business of hiring out excavators and excavator operators. It is in the business of demolition and had hired out Sujan and the excavator to the 2D on a one-off basis.

(f) As regards the "enterprise liability" rationale for imposing vicarious liability, it is the party that enjoys all (or a greater share) of the economic benefits which ought to bear all (or a greater share) of vicarious liability. 1D and 2D enjoyed the bulk of the economic benefits for the Project with a contract value in excess of $900,000. In contrast, the 3D only obtained a mere $300 per day for hiring out the excavator and an excavator operator.

5.1 Whether dual vicarious liability ought to be recognised as a matter of law

52 In deciding that the 1D and 2D were both vicariously liable for 100% of the loss arising from the accident, the DJ appears to have assumed that dual VL is permissible at law. The issue was, in any event, not discussed in the GD. On appeal, the plaintiff submits that the principle of dual VL ought to be recognised under Singapore law. As is apparent from the parties' cases above, none of the defendants object to this.

53 Having considered the parties' submissions and the relevant authorities, I am persuaded that at law, it is permissible to hold multiple defendants vicariously liable for the negligence of a single tortfeasor.

54 As a matter of authority, the issue has not yet been expressly decided by the Court of Appeal. *Ng Huat Seng* (cited at [43] above) was not concerned at all with the imposition of dual VL.

55 In *BNM*, the plaintiff's husband drowned in a swimming pool owned by the first defendant ("NUS"). The plaintiff brought an action in the name of her deceased husband's estate against NUS and the second defendant, Hydro, the company engaged by NUS to supply lifeguards and provide maintenance services for the pool. The High Court judge below found that Hydro's lifeguards had been negligent in the discharge of their duties and that NUS was vicariously liable for *Hydro's* negligence. As the Judge found that causation had not been proved, however, the claim was dismissed. On appeal, the Court of Appeal proceeded on the basis that the lifeguards were negligent. It went to elaborate (at [20]–[21]):

> 20 … [W]e should make a salient observation as to the proper approach in analysing the vicarious liability of the lifeguards'

> negligence. In our view, **for the purposes of attributing vicarious liability to either Hydro or NUS or <u>even both</u> in respect of the lifeguards' negligence, the correct inquiry should be to evaluate the question of control which NUS had exercised *over the lifeguards* and *not over Hydro*. This is clear from *Mersey Docks*...**
>
> 21 **Here, there is no dispute that the lifeguards were employed by Hydro**. ***Prima facie*, Hydro would be vicariously liable for the negligence of its own employees, the lifeguards, and the proper approach should have been to consider whether that presumption has been displaced.** We therefore disagree with the Judge's approach of focusing on NUS's control over Hydro. Having said that, this was how the issue was addressed by the parties in the court below, and we go on to consider whether the Judge's finding was correct.
>
> [emphasis in italics original; emphasis in bold and bold underline added]

56 Although the text in bold underline above suggests that the Court of Appeal may have accepted that imposing dual VL is permissible at law, it appears (from [17] of *BNM*) that the plaintiff in that case *did not actually contend* that NUS and Hydro were vicariously liable for the negligence of the lifeguards. As far as vicarious liability was concerned, the plaintiff's position was only that NUS was "vicariously liable for the negligence of Hydro, its agents and/or servants". It was in this context that the Court of Appeal opined that for the purpose of attributing vicarious liability for the lifeguard's negligence, the proper analysis required an examination of the relationship between NUS *and the lifeguards*, not Hydro. Applying the *pro hac vice* principle in *Mersey Docks,* the Court of Appeal went on to indicate (at [21]) that as the general employer, Hydro would *prima facie* be vicariously liable for the lifeguard's negligence. It eventually concluded (at [33]) that had it been necessary to decide the issue of vicarious liability, it would have found Hydro to have control over the lifeguards, and not NUS. In light of the foregoing, I do not interpret the *ratio decidendi* of *BNM* to include the holding that, as a matter

of law, dual VL is permissible. The principle of dual VL does not appear to have been argued or discussed in *BNM*.

57 There is one High Court case, *Chen Qiangshi v. Hong Fei CDY Construction Pte Ltd and another* (2014) SGHC 177 *(*"*Chen Qiangshi*"*)*, which accepts that imposing dual VL is permissible as a matter of law. It should be noted that this case pre-dates *Ng Huat Seng*. In *Chen Qiangshi*, the plaintiff was a construction worker who suffered physical injuries during the construction of a building. The second defendant was the main contractor. The first defendant was the sub-contractor and the employer of the plaintiff. The accident occurred when the construction workers at the worksite attempted to relocate a rebar cage that had been incorrectly installed. The rebar cage collapsed during the attempt, injuring the plaintiff. George Wei JC (as he was then) held that the signalman/rigger who was present, one Mr Masum, had been negligent.

58 On the issue of vicarious liability, Wei JC noted (at [192]) that "Mr Masum's negligent acts were performed while he was an employee of the first defendant and in the course of his employment by the first defendant". Nonetheless, it did not necessarily follow that the first defendant was vicariously liable. Under the *pro hac vice* principle in *Mersey Docks,* the first defendant was only *prima facie* liable for the negligence of Mr Masum and it could show that Mr Masum's employment had been transferred *pro hac vice* to the second defendant. On the facts, Wei JC was satisfied (at [196]) that at the material time, Mr Masum was indeed the second defendant's employee *pro hac vice.*

59 Although the disputing parties in *Chen Qiangshi* did not address the issue of dual VL, Wei JC accepted (at [200]) that in principle, "vicarious liability can be borne by two employers in the appropriate cases". In reaching

this view, he relied upon the English case of *Viasystems*, which I mentioned earlier. At [197]–[198], the learned Judge commented:

> 197 **There is English authority that in appropriate cases, two employers may be dually vicariously liable for an employee's negligence. In *Viasystems*** *(Tyneside) Ltd v Thermal Transfer (Northern) Ltd and others* [2006] QB 510 ("*Viasystems*") **the English Court of Appeal held that liability for a worker's negligence was shared by two employers**.
>
> 198 In *Viasystems*, X had supplied to Y a worker on a labour-only basis to carry out some ducting work. The work was carelessly performed and resulted in damage to a factory. The English Court of Appeal held that it was possible for X and Y to be dually vicariously liable for the negligence of the worker. In doing so, the English Court of Appeal considered (at [31] of *Viasystems*) a Privy Council case which was on appeal from Singapore: *Karuppan Bhoomides v Port of Singapore Authority* [1978] 1 WLR 189 ("*Karuppan v PSA*"). In *Karuppan v PSA*, the Privy Council appears to have assumed that where an employee is "loaned" by one employer to another, then either one or the other – but not both – will be subject to vicarious liability. May LJ in *Viasystems*, however, pointed out that the possibility of dual vicarious liability was not argued (nor was it possible on the facts) before the Privy Council in *Karuppan v PSA*. **In short, the English Court of Appeal was of the view that there was no binding authority in England against dual vicarious liability.**
>
> [emphasis in bold added]

60 As stated above, the UK Court of Appeal in *Viasystems* recognised the principle of dual VL. The two-member *coram* comprising Rix and May LJJ held that the "essence" of dual VL was shared control. As observed by Wei JC in *Chen Qiangshi* (at [199]), however, the two Lord Justices were divided as to whether there was a superadded requirement that the imposition of dual VL be "just" in the circumstances. Rix LJ expressed scepticism as to whether dual VL was only concerned with the question of control and suggested further (at [79]) that:

> …one is looking for…a situation where **the employee** in question, at any rate for relevant purposes, **is so much a part of the work, business or organisation of both employers**

> **that it is just to make both employers answer for his negligence**…
>
> [emphasis in bold added]

61 Returning to *Chen Qiangshi,* Wei JC took guidance from the above reasoning in *Viasystems.* At [201]–[202], Wei JC found that although Mr Masum was the second defendant's employee *pro hac vice,* the first defendant retained sufficient control to attract vicarious liability for Mr Masum's negligence. Further, if it was also required that the imposition of dual VL be "just", this was so on the facts of *Chen Qiangshi*. Wei JC therefore concluded that the first and second defendants were both vicariously liable to the plaintiff.

62 The holding in *Viasystems* has since been approved by the UK Supreme Court in *Christian Brothers*. In *Christian Brothers*, the sole issue on appeal was whether a Catholic teaching order ("the Institute"), which assigned its members to teach at various schools, could be held vicariously liable for acts of physical and sexual abuse committed by its members during their assignment at a boys' residential school in England. The trial judge had held below that the diocesan bodies responsible for the management of the school were vicariously liable for the same abuse. Lord Phillips of Worth Matravers, with whom the other members of the *coram* agreed, held (at [44]–[45]) that dual VL was permissible and expressed a preference for Rix LJ's approach. On the facts of that case, it was found that the Institute ought to share vicarious liability with the diocesan bodies for the abuse committed.

63 From the foregoing, it is clear that there is robust authority before me supporting the recognition of the principle of dual VL. Although Wei JC's acceptance of the principle in *Chen Qiangshi* is strictly speaking *obiter* (as the issue was not expressly argued before him), his views are nonetheless persuasive.

64 More importantly, based on first principles, I do not see why dual VL ought not to be permissible. Vicarious liability is a form of secondary liability imposed by a policy of the law upon an employer, even though the employer is not personally at fault. Jurisprudentially, there are several underlying rationales for imposing such secondary liability. These rationales include the following:

(a) Ensuring effective compensation for the victim as an employer is likely to have deeper pockets than the primary tortfeasor (*ie,* the victim compensation rationale) (*Skandinaviska Enskilda Banken AB (Publ), Singapore Branch v Asia Pacific Breweries (Singapore) Pte Ltd and another and another appeal* [2011] 3 SLR 540 ("*Skandinaviska*") at [76]).

(b) Deterring future harm by encouraging an employer, who has the relevant control over the employee or the activities undertaken, to take steps to reduce the risk of such harm (*ie,* the deterrence rationale) (*Skandinaviska* at [76]).

(c) That an employer who stands to generate profits from an employee's activities ought to also bear the potential liability arising therefrom (*ie,* the enterprise liability rationale) (see *Viasystems* at [55] per Rix LJ).

(d) That an employer is better able than an employee to spread the risk of loss, such as through pricing and insurance (*ie,* the loss distribution rationale) (see *Viasystems* at [55] per Rix LJ).

These rationales broadly correspond to the factors that the Court of Appeal in *Ng Huat Seng* accepted as being relevant to the application of the general test (see [41(a)]–[41(e)] above).

65 To my mind, all of the above rationales are generally applicable to both multiple-defendant and single-defendant cases. Where, for example, there are two employers who share control of the primary tortfeasor-employee, both may be in a position to take steps to reduce the risk of harm. Similarly, where both employers are profiting from the employee's activities, both arguably ought to share in the potential liabilities arising from that activity. In this vein, I share Rix LJ's view at [77] of *Viasystems:*

> 77 **…[I]f consideration is given to the function and purposes of the doctrine of vicarious liability, then the possibility of dual responsibility provides a coherent solution to the problem of the borrowed employee. Both employers are using the employee for the purposes of their business. Both have a general responsibility to select their personnel with care and to encourage and control the careful execution of their employees' duties, and both fall within the practical policy of the law which looks in general to the employer to organise his affairs in such a way as to make it fair, just and convenient for him to bear the risk of his employees' negligence.** I am here using the expression "employee" in the extended sense used in the authorities relating to the borrowed employee. The functional basis of the doctrine of vicarious liability has become increasingly clear over the years. The Civil Liability (Contribution) Act 1978 now provides a clear and fair statutory basis for the assessment of contribution between the two employers. In my judgment, the existence of the possibility of dual responsibility will be fairer and will also enable cases to be settled more easily.
>
> [emphasis in bold added]

I only add that under Singapore law, where two employers have been held vicariously liable to a victim for a single employee's negligence, either one may be entitled to recover contribution from the other under ss 15 and 16 of the Civil Law Act (Cap 43, 1999 Rev Ed) ("CLA"). This goes towards mitigating any unfairness (as between defendants) that may result from the operation of the principle of dual VL.

66 I am reinforced in my preceding view by the Canadian authority of *Blackwater v Plint* [2005] 3 SCR 3 ("*Blackwater*"). In that case, the Government of Canada and the United Church of Canada operated a school in which children had been subject to repeated sexual assaults. A dormitory supervisor was found liable for sexually assaulting six plaintiffs. The Canadian Supreme Court held that both the Government of Canada and the United Church of Canada were jointly vicariously liable for the wrongful acts of the supervisor, there being a "partnership" between the two entities. On the issue of dual VL, the court explained (at [36]–[38]):

> [36] The third reason, and the one that seems to drive the decision of the Court of Appeal on the Church's vicarious liability, is discomfort with the idea that two defendants can be vicariously liable for the same conduct.
>
> [37] This concern, however, may be misplaced. There is much to support the view of P. S. Atiyah in *Vicarious Liability in the Law of Torts* (1967), that "[t]here is, of course, no reason why two employers should not jointly employ a servant, and this would normally be the case with the employees of a partnership. Here the servant is the servant of each partner and of all jointly, and they are all jointly and severally liable for the servant's torts": p. 149. Thus, joint vicarious liability is acceptable where there is a partnership.
>
> [38] In this case, the trial judge specifically found a partnership between Canada and the Church, as opposed to finding that each acted independently of the other. **No compelling jurisprudential reason has been adduced to justify limiting vicarious liability to only one employer, where an employee is employed by a partnership. Indeed, if an employer with *de facto* control over an employee is not liable because of an arbitrary rule requiring only one employer for vicarious liability, this would undermine the principles of fair compensation and deterrence**. I conclude that **the Church should be found jointly vicariously liable with Canada for the assaults**, contrary to the conclusions of the Court of Appeal.
>
> [emphasis in bold added]

It suffices to say that the above is consistent with my view that based on the underlying rationale of the doctrine of vicarious liability, there is no reason in principle that vicarious liability can only be imposed on one employer.

67 For the above reasons, I accept that the imposition of dual VL is permissible under Singapore law. Given the absence of opposing arguments from the defendants' counsel, I say no more on this issue.

5.2 Which defendants ought to be vicariously liable for Sujan's negligence

68 Bearing in mind my preceding conclusion, I now consider which of the defendants ought to be held vicariously liable for Sujan's negligence. I will decide the issue by applying the general test in *Ng Huat Seng* to each of the defendants. Where more than one defendant satisfies the test, dual VL will simply be the result. This approach is in line with that taken by the UK Supreme Court in *Christian Brothers.* In preferring Rix LJ's wider approach in *Viasystems* to May LJ's (see [62] above), the UK Supreme Court commented as follows (at [41]—[45]):

> 41 **At para 16 [of *Viasystems*], May LJ, applying the *Mersey Docks* case [1947] AC 1, held that the inquiry should concentrate on the relevant negligent act and then ask whose responsibility it was to prevent it.** Who was entitled, and perhaps theoretically obliged, to give orders as to how the work should or should not be done? The answer on the facts of the case was both the second and the third defendants. There was dual control and thus there should be dual vicarious liability.
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> 42 **Rix LJ reached the same conclusion, but his reasoning was not the same.** At para 55, he commented that the basis of vicarious liability was, generally speaking, that those who set in motion and profit from the activities of their employees should compensate those who are injured by such activities, even when performed negligently. Liability was extended to the employer on the practical assumption that because he could spread the risk through pricing and insurance, he was better

> organised and able to bear the risk and was, at the same time, encouraged to control the risk.
>
> 43 Dealing with the test of control, Rix LJ observed, at paras 59 and 64, that the right to control the method of doing work had long been an important and sometimes critical test of the master/servant relationship. The courts had, however, imperceptibly moved from using the test of control as determinative of the relationship of employer and employee to using it as the test of vicarious liability of a defendant. **At para 79, he questioned whether the doctrine of vicarious liability was to be equated with control**. **Vicarious liability was a doctrine designed for the sake of the claimant, imposing a liability incurred without fault because the employer was treated at law as picking up the burden of an organisational or business relationship which he had undertaken for his own benefit. Accordingly, what one was looking for was:**
>
> > **"a situation where the employee in question, at any rate for relevant purposes, is so much a part of the work, business or organisation of both employers that it is just to make both employers answer for his negligence."**
>
> 44 The brothers who taught at the school were not contractually employed by the institute; they were contractually employed by or on behalf of the Middlesbrough defendants. By this appeal the Middlesbrough defendants seek to establish dual vicarious liability. The question arises of whether the approach of May LJ or that of Rix LJ should be applied in determining whether the institute is also vicariously liable for the brothers' torts.
>
> 45 **The test that May LJ applied was that applied in the *Mersey Docks* case [1947] AC 1**. I do not consider that there is any justification for applying this stringent test when considering whether there is dual vicarious liability. ***Where two defendants are potentially vicariously liable for the act of a tortfeasor it is necessary to give independent consideration to the relationship of the tortfeasor with each defendant in order to decide whether that defendant is vicariously liable.*** **In considering that question in relation to each defendant the approach of Rix LJ is to be preferred to that of May LJ.**
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> [emphasis in bold and bold italics added]

69 In this vein, I share Rix LJ's view in *Viasystems* (at [77]) that "the [permissibility] of dual responsibility [at law] provides a coherent solution to

the problem of the borrowed employee" (see [65] above). In any particular situation, if it is found that both the general employer and the temporary employer satisfy the general test, I do not see any reason why both should not be held vicariously liable. In taking this approach, however, I emphasise that it is not in every case that multiple defendants will be held vicariously liable for the acts of a single tortfeasor. The question of whether any particular defendant is vicariously liable for the tort of another is fact specific. There will be cases which justify the imposition of vicarious liability only on a single employer and cases where it is fair and just to hold multiple employers responsible. Ultimately, all relevant circumstances have to be taken into account.

70 I turn then to examine the present facts. Starting with the 2D, my view is that the first stage of the general test in *Ng Huat Seng* has not been satisfied. The 2D's only involvement here is that it had (a) engaged the 3D to supply an excavator and a qualified excavator operator; and (b) sub-contracted the excavation works to the 1D, leaving whichever excavator operator was deployed by the 3D to work under the 1D's supervision. Far from having "absolute" control of Sujan as the 3D suggests, the 2D had no say in training or selecting the excavator operator to be deployed, what the excavator operator was supposed to do on-site or how the excavator operator was to operate the excavator. No one from the 2D was even present at the Project worksite to exercise any meaningful form of control through the banksman system or otherwise. The 1D was in charge of the excavation works and Santhosh was its employee, not the 2D's. The 2D's position seems to me to be far removed from Sujan. I hence do not find it fair, just or reasonable to subject it to vicarious liability.

71 Moving onto the 1D, I am persuaded that the first stage of the test in *Ng Huat Seng* is fulfilled. As the DJ observed, the evidence of the 1D's Ong (the

project manager) was that the 1D had control of the Project's worksite and Santhosh was in charge of supervising the excavation works (in respect of which Sujan was deployed). This was corroborated by Santhosh. Santhosh further stated in his AEIC that his duties as a site safety supervisor and foreman included making sure that Sujan was a trained and qualified excavator operator.

72 More importantly, it seems to me that the 1D did have considerable control over Sujan *specifically* in respect of the excavator's operation during the excavation works. It was Santhosh who put in place and managed the banksman system. Whether or not there was any formal assignment of the role of banksman to the plaintiff, it is clear that at the time of the accident, Santhosh had (a) instructed Sujan that the excavator was only to move in accordance with the plaintiff's signals; and (b) told the plaintiff when to give the signal to Sujan to start or stop the excavator. The 1D and 2D (as well as the plaintiff) argue that although Santhosh had the authority to tell Sujan *what* to do with the excavator, he could not tell Sujan *how* to operate it (see [47(b)] and [49(b)] above). It is said that Santhosh's say over the movement of the excavator was merely restricted to starting and stopping the excavator and no more. I accept that Santhosh was not in a position to tell Sujan how to shift the gears of the excavator, apply the brake or otherwise operate the excavator's controls. Nonetheless, being overall in charge of the banksman system, Santhosh could and did control (through the plaintiff's signals as the banksman) where the excavator was positioned as well as when and where it moved/stopped. Sujan's negligent act in moving the excavator unilaterally was precisely the sort of act that the banksman system was meant to control. It is hence clear that the 1D bore a very close relationship with Sujan for the purposes of the first stage of the general test.

73 In this vein, the policy factors mentioned in *Ng Huat Seng* (as listed at [41(a)]–[41(e)] above) are also relevant. Although the 1D did not hire Sujan directly, the excavation works were undertaken as part of the 1D's construction business. The 1D was in charge of the said works and had deployed Sujan in a particular role as part of those works. The tort was committed directly as a result of the role that Sujan played, over which the 1D exercised significant control. These all go toward establishing the factors listed at [41(b)]–[41(e)] above. It suffices to say that the 1D is also clearly in a better position than Sujan to compensate the victim (*ie,* the factor at [41(a)] above). In the circumstances, it would be fair, just and reasonable for the 1D to be held vicariously liable for Sujan's negligence.

74 Turning to the second stage of the general test, I find that the 1D's relationship with Sujan also created or significantly enhanced the risk of the tort being committed. The 1D's use of Sujan (as an excavator operator) put Sujan directly in a position where he might negligently injure others with the excavator if he was not careful. I therefore hold the 1D vicariously liable for Sujan's negligence.

75 As for the 3D, its relationship with Sujan is also sufficiently close to satisfy the first stage of the general test. I accept that the 3D did not have any other personnel present at the Project's worksite to supervise Sujan at the material time. Nonetheless, the fact remains that the 3D was Sujan's general employer. The 3D squarely admits that it was responsible for training and selecting excavator operators for assignment. To that extent, it had control over how its operators (including Sujan) actually operated their excavators when undertaking excavation works. The 3D cannot completely abdicate its responsibility simply by arguing that it did not hire out a supervisor to

accompany and manage what was already meant to be a fully qualified and trained excavator operator.

76 The 3D's manager, Mr Tan Gim Peow, has given affidavit evidence that the 3D's main business is in carrying out demolition works. The 3D's counsel further submits that the hiring out of an excavator operator and the excavator to the 2D was merely on a "one-off basis". There is, however, little evidence from the parties showing whether this submission is in fact true. In particular, Mr Tan's AEIC does not contain an express statement to that effect. Nonetheless, even if the hiring arrangement between the 2D and 3D was on a "one-off" basis, the 3D still charged fees for hiring out Sujan's skilled labour. This was undertaken as part of the 3D's wider business enterprise, notwithstanding that it may not have been a part of the 3D's main business. Ultimately, I do not think that this overrides the significant fact that the 3D was still responsible for training the excavator operator which it had contracted to provide.

77 The policy factors listed at [41(a)]–[41(e)] above further reinforce my finding. Sujan's negligence resulted from his operation of the excavator – this was an activity undertaken for the 3D's purposes as part of its business contract with the 2D. The 3D profited from this arrangement and ought to bear the attendant risks that it had created. As just explained, the 3D also had control over Sujan's operation of the excavator inasmuch as it had trained him for such a task. It is also more likely than Sujan to have the means to compensate the victim. Taking everything together in the round, I find that it is fair, just and reasonable to hold the 3D vicariously liable for Sujan's negligence.

78 Further, the second stage of the general test is also met. It cannot be gainsaid that the risk of accident was created by the 3D's (a) employment and training of Sujan as an excavator operator; and (b) subsequent selection of Sujan

(pursuant to the contract with the 2D) to operate the excavator as part of the Project's excavation works. The 3D's relationship with Sujan plainly contributed to the risk of the tort being committed. The 3D should therefore also be held vicariously liable for Sujan's negligence.

79 Having found both the 1D and 3D to be vicariously liable for Sujan's negligence under the approach mentioned at [68] above, I next consider an alternative approach. I am cognisant that the parties' cases either rely on or acknowledge the applicability of the *pro hac vice* principle in "borrowed employee" situations such as the present. Under this principle, the starting point is that the 3D, as the general employer of Sujan, is *prima facie* vicariously liable for the latter's negligence. Nonetheless, the 3D may show that it has for a particular purpose or occasion transferred the services of Sujan to the 1D or 2D, such that Sujan is *pro hac vice* the employee of the 1D or 2D instead.

80 I have accepted the possibility that at the end of the day, multiple defendants can be held vicariously liable for a single tortfeasor's acts. In these circumstances, I do not think that the application of a different starting point under the *pro hac vice* principle would yield a different outcome. Applying the said principle, I am satisfied that the 3D has established that Sujan was *pro hac vice* the employee of the 1D (but not the 2D) for broadly the same reasons set out at [70]–[74] above. Simply put, Sujan could not have been the employee *pro hac vice* of the 2D as it had no real control over him in respect of the operation of the excavator. On the other hand, the 1D did have such control. By virtue of his deployment as an excavator operator within the banksman system put in place by the 1D, Sujan had become so integrated into the 1D's work processes that the latter ought to be held responsible for him. At the same time, it is clear for the reasons set out at [75]–[78] above that the 3D also had control over how Sujan operated the excavator (see *Chen Qiangshi* at [201]). As explained, this

is because the 3D was the party responsible for training and selecting him for assignments. In the premises, even if I begin from the *prima facie* position set out by the *pro hac vice* principle, I would reach the same eventual outcome – that the 1D and 3D should *both* be held vicariously liable for Sujan's negligence.

81 Having concluded that the 1D and the 3D should both be held vicariously liable for Sujan's negligence, the question then arises as to how their liability ought to be structured. The parties' submissions on this issue have been set out at [46(b)], [48(c)] and [50(b)] above. I repeat them here for ease of reference:

(a) According to the plaintiff, the 1D and the 2D should be jointly and severally vicariously liable to the plaintiff for 85% of the liability for the accident and the 3D should be liable for the remaining 15%.

(b) According to the 1D and 2D, liability for the accident ought to be apportioned severally between the 1D and the 3D in equal shares. The 2D ought not to be liable to the plaintiff at all.

(c) According to the 3D, the 1D and 2D ought to bear 85% of the liability for the accident whilst it should bear only 15% at the most.

82 As is obvious, the first and last of the abovementioned submissions are no longer relevant as I have absolved the 2D of vicarious liability. The greater difficulty with the parties' submissions is this. None of them appear to appreciate the distinction between:

(a) the defendants' liability *vis-à-vis* the plaintiff; and

(b) the apportionment of liability as between defendants only.

83 What the parties effectively seek to do here is have the court find two or more defendants vicariously liable in distinct, unequal shares (*ie*, 85:15, or 50:50) *vis-à-vis the plaintiff*. However, none of the parties have cited any authority to support the structuring of liability in this manner. In all the cases cited by counsel in which dual VL has been imposed, none appear to involve the court holding multiple defendants liable in unequal shares *vis-à-vis* the plaintiff:

(a) In *Viasystems* (at [49]–[50] and [53]), May LJ held both the second and third defendants in the case "severally" vicariously liable for the same damage. Although Rix LJ was less explicit, he appears (at [81]) to similarly hold that both employers would be "fully liable to the claimant".

(b) In *Christian Brothers* (at [94]), the diocesan bodies had appealed to the UK Supreme Court on the ground that the Institute should share "joint vicarious liability" for the abuse committed. The court allowed the appeal, holding that the Institute ought to "share with [the diocesan bodies] vicarious liability for the abuse".

(c) In *Blackwater* (at [38]), the Canadian Supreme Court held that the two defendants (*ie,* the Government of Canada and the United Church of Canada) were jointly vicariously liable for the wrongful acts of the primary tortfeasor.

(d) In *Chen Qiangshi* (at [203]), after holding the first and second defendants in that case vicariously liable, Wei JC did not need to determine the "relative proportion of their responsibility" as counsel took the position that no distinction was to be drawn between the two.

84 In fact, the approach taken (at least in *Viasystems* and *Blackwater*) appears to be that the multiple employers were held liable to the plaintiff for 100% of the loss arising from the tort. I am therefore not prepared to hold that *vis-à-vis* the plaintiff, the 1D and 3D can be liable in unequal shares. Instead, I find both of them to be vicariously liable to the plaintiff for 100% of the loss arising from the accident.

85 This then brings me to the second stage of the analysis identified in [82(b)] – namely, if and how liability should be apportioned *as between defendants*. The difficulty here is that neither the 1D nor the 3D has brought contribution proceedings against the other party (*ie,* under ss 15 and 16 of the CLA). In *Viasystems* (at [50]–[53] and [81]–[85]), after Rix and May LJJ had found the two defendants vicariously liable to the plaintiff, the learned Lord Justices went on to determine the extent of contribution between the defendants under ss 1(1) read with 2 of the Civil Liability (Contribution) Act 1978 (c 47) (UK). This was despite the fact that contribution proceedings between the two defendants had not been pursued before the court. Although the learned Lord Justices in *Viasystems* found it appropriate to decide the question of contribution despite there being no contribution proceedings, I do not identify any basis to take the same approach here (see, for example, the similar situation in *Manickam Sankar v Selvaraj Madhavan (trading as MKN Construction & Engineering) and another* [2012] SGHC 99 at [85]). I therefore make no orders in this regard.

Conclusion

86 In summary, I hold as follows:

(a) On Issue 1, Santhosh was not negligent and the 1D and 2D were accordingly not vicariously liable for his acts.

(b) On Issue 2, the 1D and 2D were not negligent in not cordoning off the Project's worksite.

(c) On Issue 3, the DJ did not err in finding that Sujan's negligence had caused the accident.

(d) On Issue 4, the plaintiff was not contributorily negligent.

(e) On Issue 5, the 1D and 3D (but not the 2D) are vicariously liable to the plaintiff for 100% of the loss arising from the accident.

87 On account of my finding on Issue 5, the plaintiff's appeal in DCA 14 is allowed in part and the 1D's and 2D's appeal in DCA 15 is allowed. Interlocutory judgment is to be entered against the 1D and the 3D for 100% of the liability arising from the accident. Damages are to be assessed by the Registrar of the State Courts.

88 As to the issue of the costs below, the DJ had ordered that the costs of the plaintiff's claim *vis-à-vis* the 1D and the 2D be reserved to the Registrar of the State Courts. Having dismissed the plaintiff's claim against the 3D, the DJ awarded costs to the 3D to be taxed if not agreed. This requires some adjustments given that I have reached a different conclusion. None of the defendants appear, however, to deal with the issue of the costs below. In submissions, the plaintiff argued that if his appeal in DCA 14 is successful, he ought to be awarded costs from all three defendants. If, however, his appeal is unsuccessful in that the 3D is held not vicariously liable for Sujan's negligence, the plaintiff says that he will seek a Sanderson order for the 1D and 2D to bear the 3D's full costs and disbursements. It is apparent that this submission does not directly address the situation at hand. Whilst the plaintiff has succeeded in holding the 3D vicariously liable for Sujan's negligence in DCA 14, the 2D has

also successfully appealed in DCA 15 against its vicarious liability for the same. In the circumstances, parties are directed to file written submissions within seven days of the date of this judgment to set out their respective positions on the costs below.

89 On the costs of the appeals, I note the following:

(a) The plaintiff has failed on Issues 1 and 2.

(b) The 3D's contentions on Issues 3 and 4 in its Respondent's Case in DCA 14 have failed.

(c) The plaintiff's appeal in DCA 14 on Issue 5 is only partly successful insofar as the 3D's vicariously liability is concerned. The 1D and 2D have succeeded on the same issue insofar as the 2D has been absolved of vicarious liability.

90 Again, none of the parties' submissions are directed towards the outcome I have arrived at. I thus order that in their written submissions directed at [88] above, parties are to also submit on the appropriate costs orders for the appeals.

Dedar Singh Gill
Judge of the High Court

Han Hean Juan and Neo Jie Min Jamie (Hoh Law Corporation) for the appellant in DCA 14 of 2020 and the respondent in DCA 15 of 2020;
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