Tesa Tape Asia Pacific Pte Ltd v Wing Seng Logistics Pte Ltd
[2006] SGHC 73

Case Number : Suit 209/2005

Decision Date : 03 May 2006

Tribunal/Court : High Court

Coram : Choo Han Teck J

Counsel Name(s) : Richard Kuek and Stephanie Wong (Gurbani & Co) for the plaintiff; Anparasan s/o Kamachi and Sharifa Nadia Almenoar (KhattarWong) for the defendant

Parties : Tesa Tape Asia Pacific Pte Ltd — Wing Seng Logistics Pte Ltd

Tort – Negligence – Duty of care – Containers stored on defendant's land falling into plaintiff's adjoining land and causing damage to plaintiff's property during thunderstorm – Whether defendant owing plaintiff duty of care to ensure containers did not fall into plaintiff's land and cause damage to plaintiff's property – Whether defendant breaching duty of care – Whether defence of force majeure applicable

Tort – Negligence – Res ipsa loquitur – Containers stored on defendant's land falling into plaintiff's adjoining land and causing damage to plaintiff's property during thunderstorm – Whether plaintiff may reasonably be expected to explain collapse of containers that caused it to suffer damage

Tort – Nuisance – Neighbouring properties – Containers stored on defendant's land falling into plaintiff's adjoining land and causing damage to plaintiff's property during thunderstorm – Whether defendant's use of land unreasonable – Whether defendant's stacking of containers unsafe

Tort – Rule in rylands v fletcher – Containers stored on defendant's land falling into plaintiff's adjoining land and causing damage to plaintiff's property during thunderstorm – Whether defendant's use of land amounting to non-natural use – Whether collapse of containers into plaintiff's land amounting to escape of containers from defendant's land – Whether foreseeable damage and injury might be caused should containers fall into plaintiff's land

3 May 2006 *Judgment reserved.*

Choo Han Teck J:

1 The plaintiff and the defendant occupied adjoining premises at Gul Circle which belonged to the Jurong Town Corporation. The former is a company that manufactured adhesive tapes, and the latter operated a container storage depot and had been occupying the said premises as such since 1977.

2 The defendant’s business required it to repair and store containers. There are two sizes of containers, internationally known as 20-foot and 40-foot containers respectively. The defendant dealt only with the 40-foot ones. The full measurements of a 40-foot container are as follows. Each has a length of 12.2m, a width of 2.4m, and a height of 2.9m. An empty container weighed about 3.8 tonnes. The defendant’s containers were stacked one on top of the other, up to seven containers high. Each of these will be referred to as a column. There were many columns stacked nose-to-nose (that is, width-to-width). Thus, depending on the space available, a row of these containers might have as many as ten columns. The defendant also stacked several rows side-by-side, thus creating a huge mono-block of containers. The two highest rows were stacked up to seven tiers. Those were the rows nearest the perimeter fence separating the plaintiff and defendant’s properties. The third

row from the fence was five tiers high. The fourth row was also five tiers high. About 12.45pm on 14 October 2002, several containers from the mono-block fell across the perimeter fence (also referred to at trial as "the boundary fence") between the parties' premises. This was a metal chain-link fence measuring two metres. Stacking containers in the mono-block formation described was not an unusual practice. It was the standard practice in all container depots. Some circumstances differ, however, from depot to depot, and it was in regard to such differences that counsel took issue, namely, as to whether the defendant in this case ought to be made culpable.

3 The fallen containers caused damage to the plaintiff's property and consequently, the plaintiff commenced this action against the defendant in an action founded on negligence, nuisance as well as under the rule in *Rylands v Fletcher* (1868) LR 3 HL 330. The plaintiff also relied on the doctrine of *res ipsa loquitur*. The defendant denied each of the claims, and in addition, pleaded the defence of "act of God". Some theists might not attribute such destructive phenomena to him (or her), and atheists might regard this as an inappropriately named defence. In dealing with this part of counsel's submissions I shall, therefore, be using the more neutral sounding term "*force majeure*" to denote the defence based on an uncontrollable event, instead of "act of God".

4 The containers along the perimeter fence were placed parallel to, and about 1.2m from, the fence. That is to say that the length of the container (the long side) was parallel to the fence as opposed to laying the containers perpendicular to the perimeter fence, that is, with the width (the shorter front and back) of the container against the fence. According to Mr Wang Chi Tung, the plaintiff's managing director, the perimeter fence was about 2m high. With each container about 2.9m (about 9.5ft) high, a column of seven containers would have reached a height of 18.9m (about 60ft). There was no dispute that about the time the containers fell onto the plaintiff's premises, there was a heavy thunderstorm in the area. Mr Tan Yong Piu, the head of Climatology and Marine Meteorological Services Division of the National Environment Agency, was called to testify on behalf of the plaintiff. His evidence was that on 14 October 2002 there were "moderate to heavy showers with occasional lightning/thunder between 1230 hours and 1330 hours" around the Gul Drive area. The wind speed was noted as "variable 15-25 km/h" but "winds may have occasionally gust to 60km/h or more during the storm". Mr Tan was a conservative witness who did not venture to state more than his data allowed him. His records showed that gusts of more than 90km/h occurred only twice in the previous four years. I shall revert to the evidence of wind speed by the other witnesses shortly.

5 The word nuisance and the tort of nuisance share strong common elements in annoyance and inconvenience caused by one neighbour to another. However, they have important differences that distinguish tortious and non-tortious acts of nuisance. Some practices that one might find to be annoying might not be actionable in nuisance as a tort. A man cannot sue his neighbour because he finds his poor piano rendition of Bach to be annoying. On the other hand, a tree branch overhanging the neighbouring land can be held to be a nuisance in tort. The prefatorial passage from *Clerk & Lindsell on Torts* (The Common Law Library) (Anthony M Dugdale & Michael A Jones, eds) (Sweet & Maxwell, 19th Ed, 2006) ("*Clerk & Lindsell*") at para 20-01 is a useful reminder of the difficulties involved in determining nuisance in tort:

> The essence of nuisance is a condition or activity which unduly interferes with the use or enjoyment of land. In common parlance, stenches and smoke and a variety of different things may amount to a nuisance in fact but whether they are actionable as the tort of nuisance will depend upon a variety of considerations and a balancing of conflicting interests. An actionable nuisance is incapable of definition[.]

It is no wonder that some cases in the law of nuisance are often found to be irreconcilable with others. Fine examples of such might be found in cases involving the question of abatement. Although

the courts in modern times have shown a greater inclination towards recognising an occupier's duty to abstain from or abate sources of danger or annoyance to his neighbours, the circumstances of each individual case can be so diverse that it would be difficult to draw any general consensus as to whether an actionable nuisance had arisen. It would be relevant to consider the type of premises as well as the user of it. What might be an act of actionable nuisance in a residential property might not be in an industrial one. One other general problem concerning the tort of nuisance lies in the occasional trespass into its territory by the tort of negligence and, it is sometimes claimed, the rule in *Rylands v Fletcher*. In *Allan William Goldman v Rupert William Edeson Hargrave* [1967] 1 AC 645 at 657, Lord Wilberforce observed that in some cases of nuisance negligence plays no part, whereas in others it can play the decisive part.

6 In the present case, what else might a container depot do if not to store containers? If a container depot were to store containers, could it not store them by stacking them? The defendant leased its premises for use as a depot and was given the requisite approval to do so. Its premises were within an industrial zone and its neighbours including the plaintiff also leased their premises for industrial and commercial purposes. The only live issue was how high the containers should reasonably be stacked. What would be reasonable is a question that ought, naturally, take into account what is a safe height for them. I shall revert to this issue shortly. Thus, I do not think that the mere storage of containers in the premises should be regarded as an unreasonable use of the premises for the purposes of ascertaining whether there was liability under the tort of nuisance. In the broad context of nuisance, the storage of containers itself would attract no liability. I am of the opinion that, assuming for the moment that there was no fault of the defendant, the collapse of the containers into the plaintiff's premises, *in itself*, attracted no liability in nuisance. Liability would attach only if the stacking of the containers as done by the defendant was unsafe in the circumstances. In this regard, the point will be considered below together with the plaintiff's claim in negligence.

7 I next turn to the question of the applicability of the rule in *Rylands v Fletcher*. There is no standard definition of this rule, so I shall refer to the judgment of Blackburn J in *Fletcher v Rylands* (1866) LR 1 Exch 265 at 279. The relevant passage from the *locus classicus* reads:

> We think that the true rule of law is, that the person who for his own purposes brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and, if he does not do so, is primâ facie answerable for all the damage which is the natural consequence of its escape.

The element of a "non-natural use" of the land added to the rule by Lord Cairns ([3] *supra* at 338–340) had at various times been adopted as a necessary part of the rule, and at other times, an undue narrowing of the scope of the rule. Counsel for the defendant, Mr Anparasan, submitted that the storage of containers in on industrial property does not come within the ambit of "non-natural user" in the *Rylands v Fletcher* sense. That by itself was not a sufficient exclusion. It will be recalled that in *Hale v Jennings Brothers* [1938] 1 All ER 579, fixing a "chair-o-plane" on a fair ground was considered a non-natural user. And also, in *Cambridge Water Co v Eastern Counties Leather Plc* [1994] 2 AC 264 ("*Cambridge Water*") at 309, Lord Goff of Chieveley formed the view that "the storage of substantial quantities of chemicals on industrial premises should be regarded as an almost classic case of non-natural use". In that case, chlorinated solvent from the defendant's leather factory seeped into the ground and contaminated water in the plaintiff's borehole 1.3 miles away. However, the defendant was found not liable under the rule in *Rylands v Fletcher* because foreseeability of the harm of the relevant type was a prerequisite to recovery, and that he had failed to prove. Ultimately, avoiding extreme circumstances, each case depended on its facts. I am inclined in this case, to rule that the stacking of containers of such weight and size as those on the defendant's premises, seven tiers high, was a non-natural use of the land, industrial or otherwise.

8 Another important issue concerned the question of the true nature of *Rylands v Fletcher*. Lord Goff in *Cambridge Water* at 298 referred to Prof F H Newark's article, "The Boundaries of Nuisance" (1949) 65 LQR 480 at 488 for assistance in understanding the development of this rule:

> But the profession as a whole, whose conceptions of the boundaries of nuisance were now becoming fogged, failed to see in *Rylands v. Fletcher* a simple case of nuisance.

This issue was discussed in the Australian case of *Burnie Port Authority v General Jones Pty Ltd* (1994) 120 ALR 42 ("*Burnie Port*"). The High Court of Australia, by a majority decision, rejected *Rylands v Fletcher* as an independent tort and regarded it as a cause of action that had been absorbed into the tort of negligence. The English House of Lords in *Cambridge Water* on the other hand, accepted Prof Newark's analysis that Blackburn J himself did not regard *Rylands v Fletcher* as a revolutionary decision, and thus preferred to have the rule absorbed into the tort of nuisance, from where it was thought to have emerged. Lord Goff held thus at 299:

> In my opinion it is right to take as our starting point the fact that, as Professor Newark considered, *Rylands v. Fletcher* was indeed not regarded by Blackburn J. as a revolutionary decision: see, e.g., his observations in *Ross v. Fedden* (1872) 26 L.T. 966, 968. He believed himself not to be creating new law, but to be stating existing law, on the basis of existing authority; and, as is apparent from his judgment, he was concerned in particular with the situation where the defendant collects things upon his land which are likely to do mischief if they escape, in which event the defendant will be strictly liable for damage resulting from any such escape. It follows that the essential basis of liability was the collection by the defendant of such things upon his land; and the consequence was a strict liability in the event of damage caused by their escape, even if the escape was an isolated event. Seen in its context, there is no reason to suppose that Blackburn J. intended to create a liability any more strict than that created by the law of nuisance; but even so he must have intended that, in the circumstances specified by him, there should be liability for damage resulting from an isolated escape.

Both *Cambridge Water* and *Burnie Port* were considered in the House of Lords in *Transco plc v Stockport Metropolitan Borough Council* [2004] 2 AC 1 ("*Transco*"). Lord Bingham of Cornhill in that case very quickly affirmed *Cambridge Water* in so far as he regarded the rule in *Rylands v Fletcher* as "a sub-species of nuisance", and having thus classified it, voted to retain the rule (at 10). It is not necessary to marshal all the academic and judicial arguments on this point presently, and I think that it will be sufficient for me to mention the main ones that persuaded me to lean in favour of preserving the rule in *Rylands v Fletcher* as part of the tort of nuisance than to see it absorbed as part of the overladen and overworked tort of negligence. I can do no better than to adopt the reasoning of Lord Bingham in *Transco* at 8. Furthermore, liability in negligence is naturally fault based whereas that is not so in all cases in nuisance, nor in *Rylands v Fletcher*. Finally, the concepts reasonable foresight and reasonable care in the law of negligence have already engendered much difficulty and a sea of ink in debate over the definition and application of these concepts. The assimilation of *Rylands v Fletcher* into negligence as in *Burnie Port* would probably also necessitate following the Australian courts in differentiating diverse degrees of negligence. In my view, the English approach provided a simpler formula for ascertaining liability than that envisaged in *Burnie Port.* Simplicity also bears a closer affinity to consistency. The underlying basis for liability under *Rylands v Fletcher* might be traced to the remark of Holt CJ in *Tenant v Goldwin* 1 Salk.21, 360; 91 ER 20 cited by Blackburn J in *Fletcher v Rylands* at 284:

> So a man shall not lay his dung so high as to damage his neighbour, and the reason of these cases is because every man must so use his own as not to damnify another.

That would sound just a little more consonant with the language of nuisance than negligence. More importantly, nuisance and *Rylands v Fletcher* are not "fault-based" liabilities whereas negligence is. The law of negligence is beset with problems of foreseeability without further complication by the inclusion of the "reasonable user" test in *Rylands v Fletcher*.

9 Turning to consider the rule in *Rylands v Fletcher* as such, it would still be necessary for the plaintiff to prove that there was an escape of the thing brought upon the land. But a stack of containers cannot escape into a neighbouring land any more than water can. *Escape* in the tort sense of *Rylands v Fletcher* has a nuance, which, when translated into common terminology, would mean a situation in which things on one's land find themselves in the neighbouring land. The process by which they move or are moved from one property to the other constitutes an *escape* under the rule. In the light of *Hale v Jennings Brothers*, I would hold that the collapse of the containers into the plaintiff's yard constituted an escape within the meaning of the rule. *Hale v Jennings Brothers* had, however, brought a new factor into account, namely, whether the thing brought onto the land was "dangerous in itself". For some time that seemed to be a vexed question of law. The Court of Appeal in that case thought that a "chair-o-plane" was inherently dangerous – inasmuch as water was in *Rylands v Fletcher*. Scott LJ summarised the court's approach thus at 584:

> The fundamental rule of the principle is that liability attaches because of the occupier of land bringing on to the land something which is likely to cause damage if it escapes.

I am of the opinion that damage and injury were foreseeable should the defendant's containers fall onto the neighbouring land, and thus the collapse of the containers into the plaintiff's premises attracted the application of the rule in *Rylands v Fletcher*. Fault of the occupier was not an issue when this rule applied. Fault was, however, relevant in the plaintiff's alternative claim in negligence. It is to that aspect that I now turn.

10 The foremost question in the tort of negligence is whether the defendant owed a duty of care to the plaintiff. A cause of action arises only after a duty has been identified, and without which it would not be necessary to enquire, whether there was a breach. The duty of care in the law of negligence was stated by Lord Atkin in *Donoghue v Stevenson* [1932] AC 562 at 580 in these terms: "You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour." Lord Atkin went on to provide the answer to the attendant question "who is my neighbour?" as follows (*ibid*):

> [P]ersons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.

The plaintiff in the present case before me was factually, that is to say, physically, a neighbour of the defendant. But was he also a legal neighbour in the sense intended by Lord Atkin? Lord Atkin, as did AL Smith LJ in *Le Lievre v Gould* [1893] 1 QB 491 at 504 accepted that the rule was not confined to physical proximity but would include situations in which one person was in close personal relations with the other. I should mention in passing that both those learned judges were careful to avoid any exuberance in the formulation and application of this rule, and thus emphasised that the relationship that constituted one as a neighbour of the other, was an important factor in this tort. The question whether the plaintiff was a neighbour in the Atkinian sense is best answered after some material facts are established. I accept that the stacks of containers were about 1.3m from the perimeter fence, and that the plaintiff's diesel tanks were about 2.7m from that common fence. Given the dimensions of each container and the stacking of the containers seven tiers high, the probability of a container landing on the diesel tanks should it fall was, in my view, extremely high. But were the chances of a

container falling as it did foreseeable?

11 There was important evidence from the defendant's general manager, Mr Ho Chee Kuan, and its expert witness, Mr Sharafdeen. Mr Ho acknowledged that shortly after the plaintiff moved into the adjoining premises, on 12 October 2001, the defendant received a visit from one Mr Ramas from the Ministry of Manpower ("the Ministry"). He was acting on the plaintiff's complaint against the way the defendant stacked its containers. As a result of that visit, the defendant wrote a letter to the Ministry, three days later, on 15 October 2001. I set out the contents in full for convenience:

> Reference is made to the meeting with you at the above-mentioned premises on 12th October 2001 afternoon regarding the stacking of containers next to the fencing.
>
> We hereby confirm our agreement with you to lower the height for the two rows of containers stacked next to the fencing. The first row immediately next to the fencing to be reduced from the present 7 container high to 6 container high and the second row from 8 container high to 7 container high. We will only stack 8 container high beyond these two rows.
>
> Please be informed that we have already implemented the agreed stacking arrangement.

Mr Sharafdeen was called as the defendant's expert because he was the chairman of the Container Depot Association (Singapore), and also a director of a company operating a similar business as that of the defendant. He testified that his business was, in fact, larger than that of the defendant's. He testified that the industry practice, presently, was to stack containers up to eight tiers high; and that was only because the container stacking equipment could not reach any higher. This seemed to indicate that the industry practice was motivated by the desire for optimal loading only. No evidence was adduced to indicate what safety considerations were taken into account in respect of the height of stacked containers. This aspect of Mr Sharafdeen's evidence was therefore considered with circumspection, taking into account his experience, the logic of his evidence, and his personal interests. The more important aspect of Mr Sharafdeen's evidence was that there had been known incidents of falling containers previously, although not at the defendant's yard.

12 The plaintiff's diesel storage tanks damaged by the falling containers were about 2.7m from the perimeter fence. Even if I accept that it was impractical to apply locking devices such as those mentioned at trial, the fact that such devices were available and had been used elsewhere indicated at least that the danger of containers falling was a foreseeable event. The evidence was stronger than this. There had been known cases, in other container depots, of falling containers caused by sudden gusts of wind. From the evidence, it appeared that there were two ways to minimise the danger of containers falling from the defendant's premises onto the plaintiff's. First, as the Ministry suggested, the containers near the perimeter should not be stacked too high. I had chosen the word "suggested" because the defendant's witnesses denied any stronger or compelling word such as "directed" or "ordered". No one from the Ministry was called to testify so this point could not be taken any further, but what appeared to be reasonably clear was that it was not a good idea to stack more than seven containers next to the perimeter fence. It might also be inferred that the Ministry thought that seven tiers was a reasonable number. Although I think that that might be a fair inference, I do not think that one could conclude that so long as the defendant kept the stack to seven tiers, no liability would have incurred. There is a distinction between establishing a duty and its breach.

13 The fact that a cap was placed on the number of tiers of containers was an indication that an obligation exists such as to confer a duty on the part of the defendant to take reasonable precautions and measures to ensure that the plaintiff was not injured by containers falling from the defendant's premises onto the plaintiff's and damaging his goods or property. That was a separate

question as to what sort of measures he ought to take, which is a question concerning the standard of care. In my opinion, the danger posed by falling containers stacked as they were in container depots was reasonably foreseeable, if not by common sense, then by the knowledge of such incidents that operators in that industry possessed. In determining whether a duty of care exists, one does not calculate the probabilities of the event occurring alone. The costs of averting the danger, as well as the degree of severity of harm, or damage that might result should the event occur are other factors to be considered. I am of the opinion that the defendant as a container depot operator, owed a duty of care to his neighbour in the adjoining premises to exercise reasonable care in stacking his containers such that they do not fall and cause harm or damage to that neighbour. It is not necessary for me to consider what duties there might be to persons within the defendant's own premises. I thus proceed to the issue of whether there was a breach of the duty that I have so found.

14 The danger above described could be minimised, if not averted, in a number of ways. First, the containers need not be stacked in as many tiers so near the neighbour's property. Although the defendant and the Ministry might have decided that seven was a reasonable number, the ultimate decision as to whether that was adequate in the circumstances, is a decision of the court. Secondly, various safety locking devises could be used to lach or fasten the containers so as to prevent them from toppling. Thirdly, the oblong-shaped containers could be stacked perpendicularly to the perimeter fence. The defendant's witnesses testified that it was reasonably safe to stack the containers up to seven tiers. The same witnesses testified that it was inconvenient, if not impossible, to use locking devices. As to the reason for not stacking the containers perpendicular to the perimeter fence, Mr Ho Chee Kuan testified, "it would be operationally difficult to reach a particular container for it to be removed from the stack and released to the shipper". However, looking at the rows of stacked containers and size of the compound, I do not think that stacking the containers perpendicular to the perimeter fence would have created any difficulty in retrieving the containers. It might mean that the defendant might not be able to stack as many containers that way, but that would not be a physical difficulty. It might only result in a drop in profits for it, but there was no evidence of that before me. As Mr Ho further explained, "[it would lead] to a slowdown in the Defendant's operations". The perimeter fence thus did not just separate the plaintiff's premises from that of the defendant's, but it also signified a confrontation between principle and expediency; a clash between the duty of an occupier to use his property with regard to the safety of his neighbour's land, and his right to ensure his business's commercial viability. So, while the former symbolises moral rectitude, the latter hints predominantly of cold economic gain. Nonetheless, a businessman need not impoverish himself, or his business, just to mollify the fears of potential harm from the business activities on his land. But that is a separate question relating to the standard, and breach, of care, and not in respect of whether a duty of care exists. In regard to the latter question, I am of the opinion that in the circumstances of the present case, a person who stores 3.8mt of containers stacked high, and next to his neighbour's land and property, must owe a duty to that neighbour to so stack his containers in such manner as would avoid harm caused by such containers as might reasonably be foreseen.

15 The next relevant issue involved the question, what caused the containers to collapse? This question is directly connected to the consideration of the standard of care and breach of duty. Mr Richard Kuek, counsel for the plaintiff, submitted that the containers fell because of "improper stacking" by the defendant. In regard to Mr Kuek's theory, there was no direct evidence that any of the containers were negligently stacked, other than the disputed issue as to whether stacking them up to seven tiers was itself an act of negligence in the circumstances. Mr Anparasan disputed that there was any negligence in the way or manner the containers were stacked, and argued instead, that the containers fell because of a sudden gust of wind. He further argued that as such wind speed was unusual, the event ought to be regarded as a *force majeure*. The evidence of wind speed and its

effect on such containers was not much more enlightening. First, in spite of evidence from all the experts, it was not known precisely what wind speed was whipped up at the crucial moment just before the containers fell, and whether the wind had any effect on the containers' toppling over. Secondly, the defendant's expert, Mr Tay Yew Huat ("Mr David Tay"), was an engineer by training and his expertise appeared to be closer to that of a metal corrosion expert than that of an expert on the effect of hurricane on containers. The plaintiff had called two experts. One was Assoc Prof Matthias Roth ("AP Matthias Roth"), a lecturer with the Department of Geography, National University of Singapore. He was also a certified consulting meteorologist. The other was Mr Yew Kian Chee, who was also an engineer by training, but as a professional risk manager, he appeared to have done a little more work on the regulations and rules affecting the storage of containers. The relevant evidence of these witnesses regarding the prevailing wind conditions were as follows. Mr David Tay testified that the containers were subjected to localised gale wind blowing at a speed of 86.4 km/h or 24 m/s (metre per second) at the time of the event in question. Mr Tay's evidence as he testified under cross-examination, was that a wind speed of less 24 m/s would be sufficient to topple the containers. Mr Anparasan submitted that Mr Tay had made a miscalculation and that speed ought to have been stated as 125 km/h or 34.8 m/s. AP Matthias Roth's evidence was that the highest speed recorded in Singapore was 40.1 m/s obtained at a height of 16.6m. He was of the view that a gust of 31 m/s was possible but infrequent. He also explained that wind gust can sometimes exceed prediction for a number of reasons. One of which is that because wind is "unsteady", that is it fluctuates at short time scales, one-second gusts may not be recorded when they occur. Values taken were usually based on three-second gusts. Site location and localised wind characteristics were the other relevant factors.

16 There are three issues relating to wind speed. The first was a factual one as to what the wind speed was. From the evidence summarised in the preceding paragraph, it appeared that the evidence was inconclusive. Although Mr Tan was from the Meteorological Department, his evidence was sparse, but that might not be his fault since his testimony was strictly limited to the data he possessed from routine monitoring. AP Matthias Roth's evidence was more helpful in terms of detail and clarity. The second issue was whether the containers could have been toppled by a gust of wind. Thirdly, if so, whether that was foreseeable. In this regard, there were two aspects of foreseeability. One concerned the foreseeability of the containers toppling over, and the other concerned the foreseeability of the containers toppling over by reason of a wind gust. I shall revert to this point shortly. Considering the evidence of the wind speed, I am of the view that although strong gales were infrequent, they occurred often enough to be expected. It seemed to me that it was not crucial to determine what the precise wind speed was at the defendant's premises at the material time because in the absence of any other reasonable evidence, I would find on a balance of probabilities, that the collapse of the stacks of containers was substantially, if not solely, caused by a sudden gust of strong wind during the thunderstorm that occurred at the material time.

17 The question whether the danger of the containers collapsing in strong wind was a foreseeable danger was a narrower question than the broader one of whether the danger of the containers stacked the way they did was a reasonably foreseeable danger. It was, therefore, necessary, first, to determine the more general question whether the collapse of the defendant's containers was a foreseeable danger, and the issues of the standard of care and breach from the broader perspective before proceeding to the narrower one. In a letter dated 12 October 2001 to the Building and Construction Authority, the plaintiff complained about the fear its employees had that the seven-tier high containers might collapse. In this letter, the danger of the containers collapsing in a windstorm was mentioned as a reason for the fear. I shall set out this letter in full for convenience:

> We are a manufacturing plant situated at 164 Gul Circle. We wish to bring to your attention that the company next to our factory, Wing Seng Logistics Pte [Ltd] has been stacking empty

containers along our common fencing. We are particularly concerned because up to seven containers are placed on top of one another, running in parallel rows along the entire length of the fencing. ([P]lease see photograph attached.) The height of the containers is very alarming, reaching well above the roof of our building. Since the containers are so close to our driveway, this may pose a safety hazard to our employees.

Indeed, many employees have expressed fear in walking along the driveway, as they have read press reports of containers being dislodge[d] by strong winds.

We would be most grateful if you could advise us what we should do in the above situation.

Reasonable foresight, in tort, is not necessarily proved just because the plaintiff had expressed a fear of harm from the defendant's activity. Whether the danger was one that could reasonably have been foreseen depended on the facts of the case. One ought to look for a reasonable apprehension of fear and not any fear. I am of the view that with the wall of containers so close to the perimeter fence it would not be surprising that the plaintiff's employees fear walking by it. There can be no doubt that lives would be in danger should that wall of containers collapse. That no life was lost on the occasion in question was purely fortuitous. "Standard practice" is always a relevant consideration, but it is not always a good defence. Mr Anparasan relied on the authorities referred to in Tab 2 of his bundle of authorities, and quoted from Walton, Cooper & Wood, *Charlesworth & Percy on Negligence* (The Common Law Library) (Sweet & Maxwell, 10th Ed, 2001) at para 6-32 thus: "a defendant charged with negligence can clear [himself] if he shows that he has acted in accord with general and approved practice". However, in the footnote to the same reference, Lord MacDermott was attributed to have said, in *Whiteford v Hunter* [1950] WN 553, "such expressions beat the air and are meaningless unless used in relation to some particular condition or state of affairs". The case as reported did not have Lord MacDermott's speech, but it was not important who said that, but that those were words of common sense observation with which I readily agree. Hence, while I accept that it might have been the standard practice in container depots to stack containers up to seven or eight tiers, I had to take into account not merely the standard practice or the height of the columns, but also how the columns were placed with regard to persons or property that might be in the path of danger, and also, whether safety devices could and should have been used. Mr Kuek referred me to *Safety and Health in Ports. ILO Code of Practice* (International Labour Office, Geneva, 2005). Although this code is not legally binding, it reflected what I think was a common sense view. The relevant cll 7 and 8 at p 264 read as follows:

7. Containers should not be stacked more than one high within 6 m of a building where there is a risk to persons in the building if a container is mishandled or subjected to high winds.

8. Consideration should be given to the possible effects of high winds on container stacks. This may include the orientation of containers in line with prevailing winds. Where necessary, containers should be secured by twist-locks or otherwise.

On the facts, I am led to the conclusion that the danger of the wall of containers collapsing was a danger that was readily apparent and foreseeable. The standard practice of stacking containers was, therefore, a factor that had to be examined in the context of safety and the foreseeability of danger from mishaps arising from a collapse of the stacks. That being the case, could the defendant legitimately expect the plaintiff to prove not only the specific cause of the collapse, but that it was also a foreseeable cause? This issue was also relevant in respect of the *force majeure* defence.

18 The complexities in causation at common law, of which much learning has been published (see, for instance, H L A Hart & Tony Honoré, *Causation in the Law* (Oxford University Press, 2nd Ed,

1985). The relationship between the foreseeability of harm and the precise cause can be complex in some ways, and complicated by the unique facts of the individual case. Although I find the following comment of Laws LJ in *Rahman v Arearose* [2001] Q B 351 at [31]–[32] profound in its simplicity, and while I agree entirely with what he said, I am far from being reassured that there is any simple way of connecting the foreseeability of harm and the foreseeability of the cause of that harm:

> Once it is recognised that the first principle is that every tortfeasor should compensate the injured claimant in respect of that loss and damage for which he should justly be held responsible, the metaphysics of causation can be kept in their proper place: of themselves they offered in any event no hope of a solution of the problems which confront the courts in this and other areas. The law has dug no deeper in the philosophical thickets of causation than to distinguish between a causa sine qua non and a causa causans. The latter is an empty tautology. The former proves everything, and therefore nothing: if A kills B by stabbing him, the birth of either of them 30 years before is as much a causa sine qua non of the death as is the wielding of the knife. So the law makes appeal to the notion of a *proximate* cause; but how proximate does it have to be? As a concept it tells one nothing.
>
> So in all these cases the real question is, what is the damage for which the defendant under consideration should be held *responsible*. The nature of his duty (here, the common law duty of care) is relevant; causation, certainly, will be relevant – but it will fall to be viewed, and in truth can only be understood, in light of the answer to the question: from what kind of harm was it the defendant's duty to guard the claimant?
>
> [emphasis in original]

The broadness of that last question was, in a sense, both a solution and a problem. It reasserted, by implication, the importance of a finding on the individual circumstances of the case as the answer; and at the same time, it presented the problem in the form of a different question. A foreseeability of the type of harm is not the same thing as a foreseeability of the cause of that harm. Thus, the fact that one might readily apprehend that should a stack of containers collapse, people might be injured does not imply that the cause of such collapse was irrelevant.

19 Mr Anparasan submitted that based on the defendant's witness, Mr David Tay, as well as the plaintiff's expert, AP Mathias Roth, the probable cause of the collapse was an unusually strong wind prevailing at the time. As I had indicated, I am of the opinion that that was probably the direct cause of the collapse. However, Mr Anparasan's submission went further and he argued that unusually strong wind such as this was unforeseeable and constituted a *force majeure*. He relied on Mr David Tay's evidence that the sudden gust of strong wind was very localised and could have hit a small area, creating a force "like the water spout". Mr Tay may well be right, but I think that the point would be missed if we do not consider the evidence in context. I should first mention that a sudden gust of wind of the sort that Mr Tay had in mind, although infrequent, was not so unusual that would surprise anyone the way the tsunamis in Asia did. The defence of *force majeure* generally applied in "cataclysms of nature as earthquakes or inundations following tidal surges of unprecedented heights". The preceding passage taken from *Clerk & Lindsell* ([5] *supra*) at para 21-21 was made in reference to this defence's application to a claim under the rule in *Rylands v Fletcher*, but I am of the view that the same considerations applied in respect of claims under nuisance and negligence. There would be no rational basis to hold that the same should not hold true in nuisance and negligence. In the present case, the sudden gust of wind might have been unusual, and even – if I might use a description generously, in the defendant's favour – extraordinary, in itself, but in conjunction with the way the defendant had stacked its containers, it was not so extraordinary that I would regard it as an event of *force majeure*.

20 The fact was that the stack of containers had collapsed; and consequently, the question to be asked was whether it was an event that could have been foreseen and sufficient to create a duty of care on the part of the defendant. There were three precautions that could have been taken. First, the containers need not be stacked up to so many tiers. Container depots might have stacked their containers up to seven or eight tiers high, but the safeness of that practice would depend on a number of other factors such as the proximity of people or property within the containers' range in the event of collapse, and whether safety devices were used. Secondly, locking devices could have held them in place. A locked stack of monolith may be less likely to dislodge than individual containers loosely stacked one upon the other, because, the stability of unlocked containers depend on the proper and precise stacking. In the present case, there was no proper system in which the defendant inspected its containers to see that they were properly stacked. All the evidence showed was that the director visually looked at them from ground level each morning. The impression of his evidence to me was one of a casual and unsystematic inspection. That was not adequate. Thirdly, the containers could have been stacked perpendicular, instead of parallel, to the perimeter fence with the plaintiff's property. The design and planning of how and which direction the containers should have been stacked required little effort but its benefit in terms of overall safety would be vastly increased, even if its financial profit might have decreased. I am of the view that had the containers been stacked perpendicularly to the fence they would probably not have collapsed because the wind direction (or condition) would not have affected them in the same way at the crucial, brief moment; and even if the containers would have collapsed, they would not have fallen onto the plaintiff's property had they been stacked perpendicular to the perimeter fence.

21 Lastly, I should address the plaintiff's reliance on the doctrine of *res ipsa loquitur*. The doctrine described by the editors of *Clerk & Lindsell* ([5] *supra*) at 8-151 from the judgment of Erle CJ in *Scott v The London and St Katherine Docks Company* (1865) 3 H & C 596; 159 ER 665, as applying where:

> (1) the occurrence is such that it would not have happened without negligence and (2) the thing that inflicted the damage was under the sole management and control of the defendant, or of someone for whom he is responsible or whom he has a right to control. If these two conditions are satisfied it follows, on a balance of probability, that the defendant, or the person for whom he is responsible, must have been negligent. There is, however, a further negative condition: (3) there must be no evidence as to why or how the occurrence took place. If there is, then appeal to *res ipsa loquitur* is inappropriate for the question of the defendant's negligence must be determined on that evidence.

This doctrine shifts the burden of proof from the plaintiff to the defendant in cases where the plaintiff cannot reasonably be expected to explain the occurrence of the accident in which he became injured. This basic principle required no elaboration. The only question here was whether the circumstances fit the doctrine. There being ample evidence as to causation which had formed the bulk of my judgment above, I am of the view that the doctrine did not apply in this case.

22 For the reasons above, I am satisfied that the plaintiff had proved its case in nuisance; under the rule in *Rylands v Fletcher*; and in negligence. I am not satisfied that the defence of *force majeure* was proved. Accordingly, there will be judgment for the plaintiff with damages to be assessed. Costs shall follow the event and be taxed if not agreed.

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