Ho See Jui (trading as Xuanhua Art Gallery) *v* Liquid Advertising Pte Ltd and another [2012] SGHCR 11

Case Number : Suit 959 of 2009 (NA 26 of 2012)

Decision Date : 08 August 2012

Tribunal/Court : High Court

Coram : Chew Yi-Ling Elaine AR

Counsel Name(s) : Kelvin Poon Kin Mun, Kue Tit Yin Melissa and Chong Kah Kheng (Rajah & Tann LLP) for the plaintiff; Audrey Chiang Ju Hua, Calvin Lim Yew Kuan, Choo Zhengxi (Rodyk & Davidson LLP) for the first defendant; Adam Muneer Yusoff Maniam (Drew & Napier LLC) for the second defendant.

Parties : Ho See Jui (trading as Xuanhua Art Gallery) — Liquid Advertising Pte Ltd and another

Damages – Assessment

8 August 2012

AR Chew Yi-Ling, Elaine:

1 The plaintiff's claim in this action is for damages suffered as a result of ingress of water into his premises.

Background

2 At the material time, the plaintiff was the sole proprietor of an art gallery ("the gallery"), which sold Chinese ink paintings ("ink paintings"), located on the ground floor of a two-storey URA conservation shophouse. The first defendant was the tenant and occupier of the unit directly above the gallery. The second defendant had been hired by the first defendant to install and maintain a water dispensing unit in the first defendant's office.

3 In the evening of 24 September 2008, a water inlet hose that carried water to the water dispensing unit ruptured. Water seeped through the flooring of the first defendant's unit and into the plaintiff's gallery. This was not discovered until the plaintiff arrived at the gallery on the morning of 25 September 2008.

4 Upon inspection, the plaintiff realised that the floor and some ink paintings hanging on the gallery wall were wet. Further inspection revealed that water had soaked into a custom-made paintings cabinet ("the cabinet") where most of the ink paintings that were not on display were kept stacked one on top of another. The cabinet had five drawers in total. The top four drawers were completely filled with water on the morning of 25 September 2008. The fifth drawer was partially filled.

5 Having traced the source of water to the unit above, the plaintiff called the first defendant's office to inform its employees of the occurrence. After the call, some of the first defendant's employees arrived at the gallery and helped to drain the water from the drawers of the cabinet and to dry the floor. They did so by using cups to scoop out water from the drawers, and also by using towels to soak up the liquid.

6 After as much water as possible had been scooped out, the drawers were removed from the cabinet and placed at an angle against a wall to drain excess moisture. It was at this point that the plaintiff tried to separate the ink paintings that had been kept in top four drawers of the cabinet only to find they were stuck together and could not be easily separated. The plaintiff subsequently called two persons whom he knew were in the business of restoring paintings for assistance. One had a prior engagement and was unable to assist. The other, Ho Bee Tiam ("Ho"), also had other matters to attend to but agreed to come down to the art gallery later in the day.

7 As mentioned earlier, the bottommost drawer of the cabinet was only partially soaked in water. The ink paintings stored there were not completely wet. Consequently, the plaintiff was able to separate the ink paintings stored in the bottommost drawer by carefully lifting each sheet using the dry portions. After separation, due to space constraints within the gallery, the plaintiff could not spread the ink paintings flat to dry but instead hung them on top of other unaffected framed paintings on the wall to dry.

8 At about 3.00pm that day, Ho arrived at the gallery. He realised that the damage done was more serious than he had anticipated. He left the gallery to obtain materials for carrying out salvage works. Ho returned to the gallery at about 4.00pm with a brush, a stack of rice paper and a rod, and commenced the process of separating the wet ink paintings that were stuck together.

9 To separate the ink paintings that were stuck together, Ho would first place a dry piece of rice paper over the topmost sheet. He then used a brush to smoothen the rice paper on top of the ink painting to soak up excess water. Thereafter he placed a rod midway across the ink painting covered with the rice paper, carefully lifted the ink painting and draped it over the rod. He would then gently lift the rod with the rice paper covered ink painting draped over it, lay the ink painting flat on top of the cabinet and place another sheet of dry rice paper over the uncovered side of the wet painting to soak up more excess water. A similar process was repeated with each ink painting in the stack. The only variation related to the top sheet in each stack. As the ink painting at the top of each stack tended to be driest, no rice paper would be applied to its face before Ho used the rod to separate it.

10 Ho eventually contacted two more persons who were in the same line as him as there were too many wet ink paintings to salvage. After these two persons arrived at the gallery, the three worked together to separate the ink paintings in the manner described above. The separation process was only completed about 11.30pm the same day.

11 Ho advised the plaintiff to use a hair dryer to dry each of the separated ink paintings. Over the next three days after the incident, the plaintiff, his family members and friends, and the first defendant's employees used hair dryers to dry the paintings in gallery. The protective sheets of rice paper would be removed from each ink painting before it was dried using the hair dryers held at a distance away.

12 Between 25 September 2008 and 8 October 2008, the gallery remained closed while the plaintiff dealt with the aftermath of the incident. 314 paintings had been affected by the water ("the Affected Paintings"). Most of these were works that the plaintiff had bought to sell in the gallery. Some comprised part of the plaintiff's private collection. The plaintiff subsequently restored 60 of the 314 Affected Paintings ("the Restored Paintings") and attempted to market them online as well as in his gallery. He did not manage to sell any of the Restored Paintings and eventually stopped trying at the end of 2010. No further attempt was made at restoration as the plaintiff believed the Affected Paintings would not be saleable even after restoration given that no one had expressed interest in the Restored Paintings.

13 Subsequent to the incident, the plaintiff brought the present claim in tort against the first and second defendant. At the trial on liability, the issue of causation was not contested (see *Ho See Jui Trading as Xuanhua Art Gallery v Liquid Advertising Pte Ltd and another* [2011] SGHC 108 ("*Ho See Jui*") at [21]). The judge held that the first defendant and the second defendant were liable in tort for the damage caused by the water seepage in the proportion 30:70 (*Ho See Jui* at [81]). The judge ordered the plaintiff's claim for damages to be assessed.

14 On 14 May 2012, the plaintiff duly took out a Notice of Appointment for Assessment of Damages. The assessment hearings were conducted over two tranches from 21 May 2012 to 22 May 2012 and from 18 June 2012 to 28 June 2012. Closing and reply submissions were exchanged. On 3 August 2012, parties made submissions on costs. On 6 August 2012, parties were recalled for clarification. A total of four witnesses were called to the stand. The plaintiff and Ho were the witnesses of fact. The plaintiff further called an expert witness, Chan Wai Kong Kelvin ("Chan"). The defendants' sole witness was their jointly appointed expert, Lim Sew Yong ("Lim").

The plaintiff's case

15 The plaintiff's claim for damages comprised the following heads:

(a) losses incurred as a result of the damage and/or destruction of the [Affected Paintings].

(b) S$493.80, being the cost incurred between 25 September 2008 and 22 November 2008 in engaging specialists and procuring the necessary materials to salvage the [Affected Paintings];

(c) S$2,730.00 being the cost of restoration of the [Affected Paintings] incurred between 4 October 2008 and 31 July 2010;

(d) S$2,328.90 being the rent and utilities incurred by the Plaintiff in closing his business for approximately two weeks from 25 September 2008 for the inspection, separation and drying of the soaked [Affected Paintings];

(e) S$1,600.00, being the cost of the cabinet which contained the [Affected Paintings] that was irreparably damaged by the water.

In respect of item (a), the plaintiff sought to persuade me that I should accept Chan's assessment that the market value of the works in their undamaged state in September was S$2,266,300.00, but post-incident, there was only a salvage value of $264,915.00. He submitted that he had proven his losses and he had taken reasonable steps to mitigate those losses. In any event, the defendants were not entitled to raise at the assessment stage the argument that they had not caused the plaintiff's loss. In respect of items (b) – (e), the plaintiff submitted that the invoices supporting those claims were not seriously challenged by either defendant and ought to be allowed.

The first defendant's case

16 The first defendant did not challenge items (b), (c) and (e). In respect of (a), the first defendant submitted that as the plaintiff had failed to mitigate his losses, he should only be entitled to the cost of repairs to the Affected Paintings and the diminution in value of the Restored Paintings. The first defendant also submitted that in any event, the plaintiff had not proven that the alleged damage to the Affected Paintings had been caused by the water seepage. Furthermore, the alleged damage was too remote. Even if the alleged damage had been proven, Lim's evidence that the loss to

the Affected Paintings was between $253,445 to $357,720 was to be preferred over Chan's. In respect of (d), the first defendant submitted that the item should not be allowed as these were the sums the plaintiff would have incurred in any event given his existing lease agreement with his landlord.

The second defendant's case

17 The second defendant also did not challenge items (b), (c) and (e). In respect of (a), it submitted that no damages should be allowed for three reasons. First, the plaintiff had failed to prove its loss. Second, the losses claimed in relation to the tearing and smudging of the Affected Paintings were too remote. Third, the plaintiff had failed to mitigate his losses. Its alternative submission was that even if the plaintiff had proven his loss, he should only be allowed the costs of restoring the Affected Paintings and the diminution of the value of the Restored Paintings as the plaintiff had failed to mitigate his losses. In calculating the diminution of the value of the Restored Paintings, Lim's evidence was to be preferred.

My decision

18 During the assessment, the parties informed me that settlement had been reached on 34 out of the 314 Affected Paintings (Affected Paintings 65, 70, 76, 88 – 89, 90, 102, 112, 120, 122, 141 – 142, 218 – 219, 221, 226 – 227, 229, 259, 278, and 301-314). I thus gave judgment only in respect of the remaining 280 Affected Paintings. Having heard the evidence, and read the submissions of parties, I directed that the first and second defendants were liable (in the ratio 30:70) to pay the plaintiff damages in the sum of $567,040.40. I now give my reasons.

Damage sustained by the Affected Paintings

19 It is trite law that the general principle, as stated in *Livingstone v Rawyards Coal Co* (1880) 5 App. Cas 25 at 39 is that damages refers to "that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation". Having committed a tort against the plaintiff, the defendants are required to put the plaintiff in the same position he would have been had the tort not been performed.

20 The plaintiff's claim for damages is largely based on assessing the diminution of the market value of the Affected Paintings at the dealer to consumer level, *ie*, the consumer value. I had some reservations as to whether this was an appropriate measure of damage because an award based on the consumer value would assume either that all 314 Affected Paintings were sold as of the day the water seepage incident occurred or that they would have been sold within a reasonable time but for the defendants' wrongful acts. I would have thought that the more appropriate measure of damage to award, in order to restore the plaintiff to the position he was in prior to the tort, might have been the cost price of replacing the Affected Paintings, *ie*, the dealer value. That would enable the plaintiff to acquire replacements for sale in his gallery without risk of an unexpected windfall. This would especially be appropriate given that the plaintiff had claimed at para 29 of his 2 March 2012 affidavit that his customers would never purchase the Affected Paintings. However, the defendants did not approach this line of argument. Lim also gave evidence that "the best starting point to valuing an art work is to examine the likely Dealer Value, and then to adjust it upwards to reflect a reasonable price at which the gallery owner can sell the paintings to his customers (i.e. Consumer Value)". As the defendants appear to accept, albeit implicitly, that all the Affected Paintings would have been sold but for the tort, I assessed the loss suffered by the plaintiff based on the consumer value.

Whether Chan's or Lim's evidence to be preferred on degree of severity of damage to Affected

Whether Chan's or Lim's evidence to be preferred on degree of severity of damage to Affected Paintings

21 Lim had set out in her report, an assessment of the severity of the damage to each of the Affected Paintings, expressed as a percentage of the original value of the work ("Figure 1"). Chan had, by comparison, set out what he assessed in percentage terms to be the salvage value of the Affected Paintings post-incident. To obtain a value that I could compare with Lim's assessment, I applied the following formula to Chan's figures: 100% - Salvage Value = Severity of Damage ("Figure 2"). A comparison of Lim's Figure 1 and Chan's Figure 2 is set out below:

Affected Painting	**Figure 1 (%)**	**Figure 2 (%)**
1	30	90
2	30	90
3	50	90
4	30	95
5	50	100
6	50	90
7	100	95
8	50	90
9	50	90 (orally revised to 80)
10	50	95
11	30	90
12	100	90
13	50	95
14	50	90
15	50	90
16	50	90
17	50	90
18	30	90
19	100	90
20	50	95
21	50	90
22	100	90
23	30	90
24	50	90
25	30	80

26	100	80
27	30	80
28	30	80
29	30	85
30	30	90
31	100	90
32	50	100
33	30	80
34	30	85
35	30	85
36	50	90
37	30	90
38	30	90
39	50	90
40	100 (no variance)	
41	50	95
42	30	90
43	10 – 20	90
44	100	90
45	50	90
46	100	90
47	30	80
48	30	90
49	30	85
50	10 – 20	95
51	30	95
52	10 – 20 (orally revised to 50)	95
53	50	90
54	10 – 20	85
55	50	85
56	100 (no variance)	
57	50	90

58	10 – 20	95
59	50	95
60	50	90
61	10 – 20	95
62	10 – 20	90
63	10 – 20	90
64	50	90
65	Settlement reached	
66	50	90
67	100	95
68	50	70
69	30	70
70	Settlement reached	
71	30	70
72	30	70
73	30	70
74	100	70
75	100	70
76	Settlement reached	
77	50	70
78	100	70
79	100	70
80	30	70
81	100	70
82	50	70
83	50	70
84	100	70
85	100	70
86	50	70
87	100	70
88	Settlement reached	
89	Settlement reached	

90	Settlement reached	
91	30	70
92	100	70
93	100	70
94	30	70
95	100	70
96	30	70
97	50	70
98	50	70
99	100	90
100	100	90
101	10 – 20	85
102	Settlement reached	
103	10 – 20	90
104	10 – 20	90
105	10 – 20	90
106	10 – 20	80
107	10 – 20	90
108	100	85
109	10 – 20	95
110	10 – 20	95
111	100 (orally revised to 30)	95
112	Settlement reached	
113	50	95
114	10 – 20	95
115	10 – 20	95
116	50	95
117	10 – 20	95
118	30	95
119	30	90
120	Settlement reached	
121	30	90

122	Settlement reached	
123	30	85
124	100 (no variance)	
125	100	80
126	100	95
127	100	85
128	100	85
129	100 (no variance)	
130	100	90
131	50	80
132	100	85
133	133	85
134	100	80
135	100	80
136	50	80
137	50	95
138	50	95
139	50	95
140	10 – 20	80
141	Settlement reached	
142	Settlement reached	
143	100	80
144	50	80
145	100	90
146	10 – 20	90
147	10 – 20	90
148	10 – 20	85
149	50	100
150	100	90
151	100 (no variance)	
152	100	90

153	100 (no variance)	
154	30	80
155	30	80
156	50	80
157	50	80
158	100	90
159	100 (no variance)	
160	50	90
161	50	90
162	10 – 20	80
163	10 – 20	80
164	10 – 20	95
165	10 – 20	95
166	10 – 20	95
167	10 – 20	90
168	10 – 20	90
169	50	90
170	100 (no variance)	
171	10 – 20	85
172	10 – 20	85
173	50	90
174	50	90
175	10 – 20	80
176	10 – 20	100
177	10 – 20	80
178	100	95
179	50	100
180	10 – 20	95
181	10 – 20	95
182	10 – 20	95
183	50	90
184	100	95

185	30	95
186	30	95
187	30	95
188	30	95
189	30	95
190	30	95
191	30	95
192	100 (no variance)	
193	100	95
194	30	95
195	30	95
196	30	95
197	50	95
198	30	95
199	30	95
200	50 (orally revised to 30)	90
201	30	95
202	30	95
203	30	100
204	100	90
205	30	85
206	30	95
207	30	95
208	30	95
209	30	95
210	100	95
211	50	95
212	100 (no variance)	
213	10 – 20	90
214	100 (no variance)	
215	100	95

216	10 – 20 (orally revised to 100)	100 (no variance post-revision)
217	10 – 20 (orally revised to 100)	100 (no variance post-revision)
218	Settlement reached	
219	Settlement reached	
220	10 – 20	95
221	Settlement reached	
222	10 – 20	95
223	10 – 20	95
224	10 – 20	95
225	10 – 20	95
226	Settlement reached	
227	Settlement reached	
228	30	100
229	Settlement reached	
230	10 – 20	90
231	10 – 20	90
232	10 – 20	90
233	10 – 20	100
234	100	90
235	10 – 20	80
236	10 – 20	95
237	100	95
238	10 – 20	90
239	100	90
240	100	95
241	30	80
242	100	90
243	100	85
244	100	90
245	100 (no variance)	

246	100	80
247	100	90
248	100	85
249	10 – 20	90
250	50	90
251	100	90
252	100	85
253	100	90
254	30	80
255	30	85
256	100	95
257	100	95
258	100	95
259	Settlement reached	
260	10 – 20	80
261	10 – 20	80
262	100	90
263	50	100
264	50	95
265	10 – 20	95
266	10 – 20	95
267	10 – 20	95
268	10 – 20	95
269	10 – 20	95
270	10 – 20	95
271	10 – 20	95
272	10 – 20	95
273	10 – 20	95
274	10 – 20	95
275	10 – 20	90
276	50	90

277	10 – 20	90
278	Settlement reached	
279	100 (no variance)	
280	100 (no variance)	
281	50	90
282	100 (no variance)	
283	100	95
284	50	90
285	50	90
286	100	90
287	10 – 20	80
288	50	90
289	100	90
290	50	90
291	50	90
292	10 – 20	95
293	10 – 20	90
294	10 – 20	90
295	10 – 20	90
296	10 – 20	90
297	10 – 20	90
298	10 – 20	90
299	100	90
300	100	90
301	Settlement reached	
302	Settlement reached	
303	Settlement reached	
304	Settlement reached	
305	Settlement reached	
306	Settlement reached	
307	Settlement reached	
308	Settlement reached	

309	Settlement reached
310	Settlement reached
311	Settlement reached
312	Settlement reached
313	Settlement reached
314	Settlement reached

22 Out of the 280 remaining Affected Paintings that had not been settled, Lim's and Chan's figures matched on 16 items (Affected Paintings 40, 56, 124, 151, 153, 159, 170, 192, 212, 214, 216, 217, 245, 279, 280, and 282). I accepted the experts' figures for those 16 items as being an accurate reflection of the percentage of damage that the Affected Paintings had sustained, no evidence to the contrary having been adduced. As for the rest of the items, in many instance, the variance in Lim's and Chan's valuations would be so wide that one expert would opine that the Affected Painting's value had hardly been diminished and the other would opine that the Affected Painting had been effectively rendered worthless (see *eg*, Affected Paintings 43, 58, 61 – 63, 103 – 107, 109, 110, 114 – 115, 117, 146 – 147, 164 – 168, 176, 180 – 182, 213, 220, 222 – 225, 230 – 233, 236, 238, 249, 265 – 275, 277 and 292 – 298).

23 Given that there was no way to reconcile the differences in Lim's and Chan's valuations, at the end of the day, the issue of the degree of severity of the damage suffered by the Affected Paintings turned on a finding as to which expert's evidence on this point was to be preferred. Neither Chan nor Lim had a consistent way of evaluating the percentage of depreciation in the value of the Affected Paintings. Certainly there was no literature adduced on how damaged ink paintings could be evaluated. To the contrary, both Chan and Lim emphasised that they had drawn on their experience with the art market in giving their valuations.

24 I noted that Lim had an impressive career in the arts and her expert evidence had been accepted in a previous unrelated matter: *Polar Arts of Asia Pte Ltd v Hotline KTV Karaoke Lounge Pte Ltd and another* [2004] SGHC 53. However, as noted by the Court of Appeal in *Tan Mui Teck v Public Prosecutor* [2003] 3 SLR(R) 139 at [11]:

> it is often far more productive to look at other considerations such as the methodology by which an expert had reached his or her conclusions and the demeanour of the expert, rather than merely comparing the pedigree of their *curriculum vitae*.

In the present instance, having read Lim's affidavits and heard her oral evidence, I had a number of difficulties with her valuation of the degree of the damage sustained by the Affected Paintings.

25 First, it emerged in cross-examination that Lim had not physically examined at least 93 of the 314 Affected Paintings but had relied on photographs taken by her assistants. The remaining 221 Affected Paintings were inspected over 3 hours only. This would mean that she had spent less than a minute examining each Affected Painting. I was therefore not able to say that Lim had carefully inspected the Affected Paintings. Lim had given evidence that given her experience, she did not need to spend as much time on the Affected Paintings as the less experienced Chan did. She could assess the damage to the paintings with a "glance". However, despite making this point, during examination, Lim had felt compelled to revise her figures for Affected Painting 111 (downwards) and Affected Painting 216 (upwards) based on the second look she had at the works during the assessment

hearing. I therefore did not find that her explanation was credible.

26 Second, there were significant errors in her report. For example, in her written report, Lim had opined that 100% compensation should be awarded for Affected Painting 19 because it was torn at the corner. However, she admitted upon visual inspection of the physical work during cross-examination that in reality there was no such tear. Conversely, she had also stated in her report that Affected Painting 52 was "not damaged" when in fact there was a tear at the bottom of the work, as she admitted after visual inspection during cross-examination. Whether the above discrepancies were due to oversight in the preparation of the report or because of the limitations of the photographic medium which Lim relied upon, the end result remained unchanged – the evidence contained in her report was not entirely reliable and it was not possible to tell which figures were inaccurate and which were not.

27 Third, Lim's figures were based on an unrealistic assumption of the attitudes of the plaintiff's clientele. I had noticed that despite the presence of tears and fading, Lim had valued some of the Affected Paintings as requiring 30% or less compensation. As such, I posed Lim the question why she was of the view that the Affected Paintings could be resold even after being affected by the water seepage incident. Her answer was that a collector who genuinely appreciated a work would acquire it, even if it had imperfections, just as a person could love a cripple and thus overlook her physical limitations. However, I did not think it was reasonable to expect that every client of the plaintiff's would be so high minded. It was more likely that at least some of the plaintiff's clients purchased works for investment purposes and may well be put off by defects. In the circumstances, the estimate Lim had given of the depreciation of the Affected Painting's value would be too low.

28 Chan's evidence was not without difficulty either. First, as a witness, Chan tended to be given to exaggeration and not all his statements added up. For example, he insisted that his memory was so good that in 2011, five years after he had attended at the plaintiff's gallery in 2006, he could still recall his impressions of all the paintings there. However, he had also made a passing remark on a different day of the assessment that he had a bad memory. He asserted with great confidence that he had seen some of the Affected Paintings in their undamaged state but when challenged, could not pick out which works those were. He took the view that an artist would use distinctive shades and tones without variation between paintings, but was later obliged to concede that there could be some differences. In respect of Affected Painting 54, although the entire work had been submerged in water, he asserted that one side of the work had faded but the other had not. However, he could not explain entirely satisfactorily how that could have happened. Second, Chan had difficulty defining with clarity technical terms, for example, the differences between restoration and restretching. Third, it was unfortunate that Chan had allowed the plaintiff to point out what he perceived as damage during his inspection of the Affected Paintings. Fourth, Chan had also not seen fit to disclose in his affidavits that the plaintiff used to be his client.

29 Despite the above difficulties, however, I held that on a balance of probabilities, Chan's estimation of the severity of the damage done to the Affected Paintings, *ie*, Figure 2 was reasonable and preferable to Lim's estimates. This was mainly because unlike Lim, he had carried out a physical inspection of all the Affected Paintings and I was able to confirm visually that most of the defects that Chan had described in his report were indeed visible. In particular, when Affected Paintings and undamaged paintings in the same style drawn by artists such as Du Ying Qiang, Gong Yao Min and Liu Er Gang were compared, it was clear that the colour of the paper on which the damaged work had been drawn had discoloured and there was some fading of the vibrancy of the ink. Lim had suggested that the Affected Paintings were in the *xie yi* category such that they were meant to be appreciated from a distance, and there was no need to be concerned about damage that could only be seen when viewed up close. However, as earlier mentioned, I accepted Chan's evidence that even slight

imperfections could affect the value of an ink painting given the vast number equivalent works available on the market. The plaintiff would likely find it harder to sell a damaged work than an undamaged equivalent. Therefore, Chan's generally higher estimates was not unreasonable even if the Affected Paintings were of the *xie yi* style as Lim opined

30 The defendants sought to persuade me that I should discount Chan's evidence as he was not impartial, being a spokesperson and advocate of the plaintiff's cause within the meaning of *Vita Health Laboratories Pte Ltd and others v Pang Seng* Meng [2004] 4 SLR(R) 162 at [82] – [83]. I would accept that Chan may have been over-enthusiastic about demonstrating the veracity and validity of his report, to the point of exaggeration at times, but I would not go so far as to hold that he had evolved into a spokesperson for the plaintiff nor become an advocate of the plaintiff's cause as the second defendant submitted in closing. If that were so, Chan would not have pointed out that the plaintiff had added the pencil marks on the Affected Paintings. Moreover, there was no evidence to show that the percentage he had assigned as the salvage value of the Affected Paintings had been suggested by the plaintiff. If Chan had taken on board in his report defects in the Affected Paintings that had been pointed out by the plaintiff, these were nonetheless objective in the sense that one could view these Affected Paintings and see for oneself if indeed such defects had occurred.

31 The defendants also sought to persuade me that Chan was not qualified to give evidence as an expert in this case as he had no experience in valuing ink paintings. Chan's curriculum vitae set out at Annex 1 of his 2 March 2012 affidavit did not contain any explicit mention of valuation experience. It also appeared that he did not have any art-related academic qualifications. Rather, from his affidavit and oral evidence, it would seem that his work predominantly revolved around art advertising, brokering deals for private collectors and acting as media partner at art fairs. However, in the cases of *PP v Mohamed Sulaiman* [1982] 2 MLJ 320 and *Leong Wing Kong v PP* [1994] 1 SLR(R) 681, it was established that a person may be an expert by virtue of his experience and not qualification. Taking into account (a) Chan's oral testimony that he had handled a USD 1 million acquisition of museum quality Chinese ink paintings, (b) Chan's oral testimony that his art consultancy services did include valuing artworks, (c) Lim's concession that she regarded Chan as an expert, albeit one with less experience than herself, and (d) Lim's remark that apart from herself and Chan it was unlikely anyone else in the room understood ink paintings, I did not find that on a balance of probability it had been proven that Chan was unqualified as an expert witness.

Whether plaintiff proved that the severity of damage to the Affected Paintings were caused by the defendants' tort

32 Chan had classified the alleged damage caused to the Affected Paintings largely as fading, smudging, staining, tears, crumpling or non-visible damage. The defendants' case was that the plaintiff had failed to prove that these were caused by the water seepage incident as there were other plausible causes that could have resulted in such phenomena occurring. The first defendant in particular pointed out that there is no evidence as to what each of the Affected Paintings had looked like prior to coming into contact with water.

33 The Court of Appeal opined in Robertson Quay Investment Pte Ltd v Steen Consultants Pte Ltd and another [2008] 2 SLR(R) 623 ("*Robertson Quay*") at [27]:

> … it is impossible to law down any *general* rules or principles as to what constitutes adequate proof of damage since the *particular* factual circumstances can take, literally, a myriad of forms.
>
> 28 The law, however, does not demand that the plaintiff prove with complete certainty the exact amount of damage that he has suffered. Thus, the learned author of *McGregor on*

Damages continues as follows (at para 8-002):

> [W]here it is clear that some substantial loss has been incurred, the fact that an assessment is difficult because of the nature of the damage is no reason for awarding no damages or merely nominal damages. As Vaughan Williams L.J. put it in *Chaplin v Hicks*[1911] 2 KB 786, the leading case on the issue of certainty: "The fact that damages cannot be assessed with certainty does not relieve the wrongdoer of the necessity of paying damages." *Indeed if absolute certainty were required as to the precise amount of loss that the claimant had suffered, no damages would be recovered at all in the great number of cases. This is particularly true since so much of damages claimed are in respect of prospective, and therefore necessarily contingent, loss*. [emphasis added]

…

30 Accordingly, a court has to adopt a flexible approach with regard to the proof of damage. Different occasions may call for different evidence with regard to certainty of proof, depending on the circumstances of the case and the nature of the damages claimed. There will be cases where absolute certainty is possible… On the other hand, there will be instances where such certainty is impossible… The correct approach that a court should adopt is perhaps best summarised by Devlin J in the English High Court decision of *Biggin & Co Ld v Permanite, Ld* [1951] 1 KB 422 ("*Biggin*"), where he held (at 438) that:

> [W]here precise evidence is obtainable, the court naturally expects to have it. Where it is not, the court must do the best it can.

Following this decision, the question arose in the present case was whether the plaintiff had furnished precise evidence where such was obtainable.

34 It was not disputed that the Affected Paintings were soaked in water overnight due to the water seepage incident. The plaintiff had also given evidence in his 2 March 2012 affidavit that after the Affected Paintings were dried, he found they were crumpled, torn and stained, and that he observed further damage to the Affected Paintings upon further inspection and restoration. The plaintiff engaged an expert to catalogue the damage caused. The plaintiff gave evidence that even the Restored Paintings retained watercolour and ink smudges, discolouration, dirt stains and water marks. The defendants' expert, Lim, also gave evidence that she had observed water stains, tears, fading, colour runs, wrinkling, and dirt on the Affected Paintings. In light of these, I made the finding that the plaintiff had met his legal burden of proof. There was no evidence that the plaintiff had access to more precise evidence, whether documentary or otherwise, but had chosen not to adduce it. To the contrary, it was the defendants who did not met their burden of proof. Pursuant to s 105 of the Evidence Act (Cap 97, 1997 Rev Ed), the burden of proof as to any particular fact "lies on that person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person". The defendants alleged that each instance of damage to the Affected Paintings was not caused by their tort but by some other circumstance, whether intentional or otherwise, but only showed at best that on a balance of probabilities, there *could* have been some other cause of the damage. That is not sufficient. In the circumstances I found that the alleged damage to the Affected Paintings as catalogued in Chan's report had indeed been proven to be caused by the water seepage incident.

Whether Chan's or Lim's evidence to be preferred on valuation of market price in 2008

35 As with the point on degree of severity of damage done to the Affected Paintings, Chan's and

Lim's evidence on the market value of each work in September 2008 tended to vary widely. The table below sets out some examples:

Affected Painting	**Chan's valuation (S$)**	**Lim's valuation (S$)**
6	12,000	1,500
61	17,600	2,500
146	22,000	2,000
162	8,800	1,800
172	16,800	3,000
234	13,200	5,000

36 Chan based his valuations on the premise that ink paintings were commonly priced by size, on a per "Chinese square feet" basis ("psf basis"). He asserted in his report that in assessing the value of ink paintings, a main determinative factor was the identity of the painter. Other factors included the subject matter of the painting, when the painting was completed and whether the painter was still alive. In support of his view, Chan had referred to four periodicals published in China between 2008 and 2009 that listed the names of ink painters and the psf price that each artist could command. Chan also gave evidence that he did not solely rely on the four periodicals but had adjusted his final recommended psf prices based on his experience in the market. For example, in making price shifts, he had taken into account that ink paintings that sold in Singapore would command higher prices as there were costs involved such as freight charges that would have to be built in.

37 Lim's evidence, by contrast, was that to value an ink painting, the best starting point was to examine the likely dealer value then adjust it upwards to reflect a consumer value. There was no fixed formula to calculate how much a painting should be valued at. The skill and technique applied by the artist to each work, the originality and rarity of the artist's work, the subject matter of the work, the popularity of the artist and the standing of the artists amongst his peers or background were other factors Lim cited that allegedly could affect the value of a work. In particular, Lim emphasised that there was no one factor that could be conclusive. The quality of each work had to be assessed on its own merits even if it was done by a famous artist.

38 After hearing the evidence and considering the submissions of parties, I found that on a balance of probabilities, the plaintiff had not discharged its burden of proof that the valuation of the Affected Paintings should be on a psf basis as Chan had suggested. First, as the defendants submitted, the relevant price consideration ought to be the market value of the Affected Paintings *in Singapore, around September 2008*. Chan has not established that the psf basis is a common method of valuation in Singapore. Certainly, if that were so, at the very least, I would have thought that the plaintiff might have given factual evidence that the prices set in his gallery utilised this method, but there was no such assertion. Rather, Chan went one step further and gave the admission that his pricing of the Affected Paintings was "not based in Singapore". Chan says that is because the plaintiff was not confined to marketing his goods in Singapore. However, there is no indication that the plaintiff ever sought to market his goods beyond the local market. There is also no indication that the China and Singapore markets were similar even though both Chan and Lim took the prices in the China market as the starting point of their valuations.

39 A second reason why the plaintiff has failed to discharge his burden on this point is because

Chan admitted that the psf basis was an approach usually applied in the artist to dealer market and not to the dealer to consumer market, whereas in this assessment, parties have proceeded on the understanding that the relevant pricing is the dealer to consumer market. It was also not entirely clear whether the recommended psf prices in the four periodicals reflected consumer values or dealer values.

40 Third, the listed prices in the periodicals Chan cited in support of his report depended on (a) the artist's own valuation of the market price of his works, (b) prices provided by an art gallery, or (c) auction prices. As to (a) and (b), I make the observation that both the artist and gallery owner would have self-serving and not unbiased interests in pricing the works. As to (c), both Chan and Lim appear to agree, but for different reasons, that auction prices are not reliable indicators of the market price of an ink paintings. Moreover, I had no way of assessing whether these four periodicals were reputable periodicals given that Chan had admitted that a multitude of periodicals were published within China. I also took note of the fact that the periodicals had disclaimers stating that the views expressed were those of the individual authors and not the publishers.

41 Fourth, not all the artists whose works comprised the Affected Paintings were contained within the four periodicals Chan had exhibited. Out of the 30 artists, only 11 were featured. As for the remaining 19, Chan claims that he relied on his own personal knowledge and exposure to the art industry for pricing purposes. However, if the psf basis was indeed an established method for pricing works in the consumer market, I would have expected that Chan would have exhibited periodicals in relation to those artists as well so that the court would have some basis for assessing the credibility of his psf pricing. No such periodicals were produced.

42 Fifth, Chan's valuation lacked consistency. Chan had cited the periodicals as evidence that the market priced ink paintings on a psf basis. However, Chan himself had departed from the values in the periodicals. No explanation was provided in his report. Neither did he have a convincing explanation under cross-examination why in some instances he had assigned a higher psf value than that listed in the periodicals (in the case of the artist Chen Yong Qiang) and why in other instances he had assigned a lower psf value (in the case of the artist Liu Da Wei). Under cross-examination, he referred to the possibility that he had departed from the psf price listed in the periodicals because the Affected Painting in question was of a different size, genre or series. However, given these possibilities were not previously contained in his report, and taking into account the quality of his answers and his demeanour, I could only conclude that his explanations were created on the spot to account for the inconsistencies in his valuation.

43 Sixth, Chan had cited the periodicals as a reliable gauge of the psf price. He also gave evidence that if there were discrepancies in the prices provided by the different periodicals, he would follow the majority. However, in the case of the artist Liu Er Gang, Chan adopted the minority's pricing. He did not provide any convincing explanation for that either. In short, even if one were to assume that the psf basis was a common method for valuing paintings, it could not be said with any certainty that the periodicals were an accurate reflection of the psf price or that Chan had applied the right psf price.

44 Given my finding that Chan's method of valuation had not been proven on a balance of probabilities, I adopted Lim's evidence on the market price of the Affected Paintings. While there were weaknesses in Lim's methodology as well (addressed in the plaintiff's closing submissions), it could at least be said that her prices formed a minimum measure of the value of the Affected Paintings as her prices had been admitted by the defendants to be a fair valuation, provided the damage was not too remote and the plaintiff had taken reasonable steps to mitigate his losses.

Whether the damaged alleged was too remote

45 After the first tranche of the assessment hearings, three summonses were filed. Summons No 2995 of 2012 was the plaintiff's application to amend its Statement of Claim "to clarify the issue of cost incurred". As both defendants consented to the application, I need say no more except that order in terms was granted.

46 The other two summonses were applications to amend the Defences filed. Summons No 2389 of 2012 ("SUM 2839") was the first defendant's application. Summons No 2841 of 2012 ("SUM 2841") was the second defendant's application. In both applications, the nature of the proposed amendments could be broadly divided into two categories. The first related to whether the plaintiff had reasonably mitigated his losses. The plaintiff had no serious objections to this category. The second related to whether sufficiently qualified personnel had been appointed to salvage the Affected Paintings and whether the damage had been caused by soaking in water or due to rough handling in the separation process. The plaintiff objected to this category on the basis that it amounted to a plea of contributory negligence that should have been raised at the liability stage and not the assessment of damages stage. The defendants submitted that the amendments did not amount to a plea of contributory negligence but rather, went towards the issue of remoteness. Given that SUM 2839 and SUM 2841 were being heard during the second tranche, midway through the assessment, to minimise further disruption to the proceedings, I directed that the proposed amended Defences be filed, with objections, if any, to be taken up in closing submissions. It is to the second category of amendments that my attention now turns.

47 The Court of Appeal defined contributory negligence in *Parno v SC Marine Pte Ltd* [1999] 3 SLR(R) 377 at [59] as "a man's carelessness in looking after *his own* safety. He is guilty of *contributory* negligence if he ought reasonably to have foreseen that, if he did not act as a reasonable prudent man, he might be hurt himself". By contrast, the Court of Appeal defined remoteness in tort in *Robertson Quay* at [71] as a test of reasonable foreseeability. The Court of Appeal accepted Lord Reid's observations in *Koufos v C Czarnikow* [1969] 1 AC 350 at 385 – 386 that the defendant:

> will be liable for any type of damage which is reasonably foreseeable as liable to happen even in the most unusual case, unless the risk is so small that a reasonable man would in the whole circumstances feel justified in neglecting it.

48 Having read the Defences filed on 19 June 2012, I agreed with the defendants that on the facts, the second category of amendments fell within the ambit of remoteness. In essence, I was being asked to rule whether it was reasonably foreseeable that given the tort had occurred, unqualified personnel would be appointed to oversee the salvage process and rough handling would occur. I did not agree, however, that the plaintiff's claim for damages in respect of the Affected Painting should be rejected on the ground of remoteness. First, there was no proof that there were more qualified personnel that the plaintiff knew of but did not call in to help with the salvage works. Second, there was no proof that the tears and smudging to the Affected Painting were caused by rough handling. Lim had suggested the rough handling of the Affected Paintings had resulted in tears and smudges. However, I agreed with the plaintiff that Lim's expertise lay in valuation and not art restoration, and as such, her evidence on this point should be given little weight. While she had observed restoration works being carried out in China, she did not have any person experience with such tasks. Third, even if the tears and smudges were created during the separation process, the plaintiff had acted reasonably in engaging the most qualified person he knew who could attend at short notice to salvage the Affected Paintings. It was reasonably foreseeable that the damage caused by the water seepage incident would require prompt corrective action and the plaintiff would not have the luxury of time to source for and engage the best restorers. It was also reasonably foreseeable that paper that had been soaked in water overnight and were stuck together could tear

or smudge when attempts are made to separate them.

Whether plaintiff reasonably mitigated his losses

49 The defendants made the submission that the plaintiff had not reasonably mitigated his losses because he had not sent all the Affected Paintings for restoration and had not tried to market them beyond 2010. I did not agree. It was the plaintiff's uncontradicted evidence that he had chosen the best 60 of the 314 Affected Paintings for restoration. He marketed them on his website and in the gallery but stopped at the end of 2010 as no interest had been expressed by buyers and he had replacement works by then. In that light, the plaintiff was not acting unreasonably when he did not attempt further restoration works. There was no evidence that he would have been able to sell the Affected Paintings if he had continued to display them longer or if he had restored works other than the Restored Paintings. I further accept that the continuous marketing of damaged paintings in the gallery would not be a reasonable course of action to require of the plaintiff as it would damage the goodwill and reputation of the gallery.

Amount awarded for damage to Affected Paintings

50 Taking into account my findings above, I awarded the sum of $529,435 as damages for the diminution of the value of the Affected Paintings as a result of the defendants' tort. This figure was arrived at by multiplying Figure 2 by Lim's Consumer Value as follows:

Affected Painting	**Figure 2 (%)**	**Lim's Consumer Value (S$)**	**Damages awarded (S$)**
1	90	2000	1800
2	90	2000	1800
3	90	2000	1800
4	95	2000	1900
5	100	2000	2000
6	90	1500	1350
7	95	1200	1140
8	90	1200	1080
9	80	1200	960
10	95	1800	1710
11	90	1800	1620
12	90	800	720
13	95	1200	1140
14	90	800	720
15	90	800	720
16	90	800	720

17	90	800	720
18	90	900	810
19	90	900	810
20	95	800	760
21	90	4000	3600
22	90	4000	3600
23	90	1600	1440
24	90	3500	3150
25	80	1600	1280
26	80	1600	1280
27	80	1600	1280
28	80	2500	2000
29	85	2500	2125
30	90	2500	2250
31	90	4500	4050
32	100	2500	2500
33	80	2000	1600
34	85	1500	1275
35	85	2500	2125
36	90	2500	2250
37	90	2500	2250
38	90	2500	2250
39	90	3500	3150
40	100	3500	3500
41	95	3500	3325
42	90	3500	3150
43	90	2500	2250
44	90	3200	2880
45	90	2500	2250
46	90	2500	2250
47	80	2500	2000
48	90	2500	2250

49	85	2500	2125
50	95	2500	2375
51	95	2500	2375
52	95	2500	2375
53	90	2500	2250
54	85	2500	2125
55	85	2500	2125
56	100	2500	2500
57	90	2500	2250
58	95	2500	2375
59	95	2500	2375
60	90	2500	2250
61	95	2500	2375
62	90	2500	2250
63	90	2500	2250
64	90	2500	2250
66	90	2500	2250
67	95	1000	950
68	70	1000	700
69	70	1000	700
71	70	1000	700
72	70	1000	700
73	70	1000	700
74	70	1000	700
75	70	1000	700
77	70	1000	700
78	70	1000	700
79	70	1000	700
80	70	1000	700
81	70	1000	700
82	70	1000	700
83	70	1000	700

84	70	1000	700
85	70	1000	700
86	70	1000	700
87	70	1000	700
91	70	1000	700
92	70	1000	700
93	70	1000	700
94	70	1000	700
95	70	1000	700
96	70	1000	700
97	70	1000	700
98	70	1000	700
99	90	8000	7200
100	90	8000	7200
101	85	2000	1700
103	90	2000	1800
104	90	2000	1800
105	90	1000	900
106	80	1000	800
107	90	2000	1800
108	85	1000	850
109	95	1000	950
110	95	1000	950
111	95	1000	950
113	95	1000	950
114	95	1000	950
115	95	1000	950
116	95	1000	950
117	95	1000	950
118	95	1000	950
119	90	1000	900

121	90	1000	900
123	85	1000	850
124	100	1000	1000
125	80	1000	800
126	95	1000	950
127	85	1000	850
128	85	1000	850
129	100	2000	2000
130	90	2000	1800
131	80	2000	1600
132	85	1000	850
133	85	1000	850
134	80	1000	800
135	80	1000	800
136	80	1000	800
137	95	1000	950
138	95	1000	950
139	95	1000	950
140	80	2000	1600
143	80	5500	4400
144	80	6000	4800
145	90	55000	49500
146	90	2000	1800
147	90	2000	1800
148	85	2000	1700
149	100	1000	1000
150	90	4000	3600
151	100	1200	1200
152	90	1800	1620
153	100	1200	1200
154	80	1000	800
155	80	1000	800

156	80	1000	800
157	80	1000	800
158	90	1000	900
159	100	300	300
160	90	1200	1080
161	90	3000	2700
162	80	1800	1440
163	80	1800	1440
164	95	1200	1140
165	95	1200	1140
166	95	1200	1140
167	90	1200	1080
168	90	1200	1080
169	90	3000	2700
170	100	3000	3000
171	85	3000	2550
172	85	3000	2550
173	90	3000	2700
174	90	3000	2700
175	80	1800	1440
176	100	3000	3000
177	80	1800	1440
178	95	1800	1710
179	100	1800	1800
180	95	2000	1900
181	95	2000	1900
182	95	1200	1140
183	90	1200	1080
184	95	1500	1425
185	95	1000	950
186	95	1000	950
187	95	1000	950

188	95	1000	950
189	95	1000	950
190	95	1000	950
191	95	1000	950
192	100	1000	1000
193	95	1000	950
194	95	1000	950
195	95	1000	950
196	95	1000	950
197	95	1000	950
198	95	1000	950
199	95	1000	950
200	90	500	450
201	95	1000	950
202	95	1000	950
203	100	1000	1000
204	90	40000	36000
205	85	1200	1020
206	95	1200	1140
207	95	1200	1140
208	95	1200	1140
209	95	800	760
210	95	800	760
211	95	3000	2850
212	100	3000	3000
213	90	3000	2700
214	100	3000	3000
215	95	3000	2850
216	100	3000	3000
217	100	3000	3000
220	95	2000	1900
222	95	2000	1900

223	95	2000	1900
224	95	2000	1900
225	95	2000	1900
228	100	2000	2000
230	90	2000	1800
231	90	2000	1800
232	90	2000	1800
233	100	2000	2000
234	90	5000	4500
235	80	800	640
236	95	800	760
237	95	800	760
238	90	800	720
239	90	800	720
240	95	800	760
241	80	800	640
242	90	800	720
243	85	800	680
244	90	800	720
245	100	800	800
246	80	800	640
247	90	800	720
248	85	800	680
249	90	800	720
250	90	800	720
251	90	800	720
252	85	800	680
253	90	800	720
254	80	1000	800
255	85	1000	850
256	95	1000	950
257	95	1000	950

258	95	1000	950
260	80	3000	2400
261	80	3500	2800
262	90	6000	5400
263	100	1500	1500
264	95	300	285
265	95	3000	2850
266	95	3000	2850
267	95	3000	2850
268	95	3000	2850
269	95	3000	2850
270	95	3000	2850
271	95	3000	2850
272	95	3000	2850
273	95	3000	2850
274	95	3000	2850
275	90	3000	2700
276	90	3000	2700
277	90	2400	2160
279	100	1000	1000
280	100	1500	1500
281	90	2500	2250
282	100	2000	2000
283	95	2000	1900
284	90	2000	1800
285	90	2000	1800
286	90	2000	1800
287	80	2000	1600
288	90	2000	1800
289	90	2000	1800
290	90	300	270

291	90	1600	1440
292	95	1600	1520
293	90	1600	1440
294	90	1600	1440
295	90	1600	1440
296	90	1600	1440
297	90	1600	1440
298	90	1600	1440
299	90	1600	1440
300	90	1600	1440
Total			**529,435**

As Figure 2 was given on the basis that restoration works would be carried out on all the Affected Paintings, I also held that the plaintiff was entitled to a sum of $30,452.70 being the pro-rated costs of restoring the Affected Paintings (other than the Restored paintings) less those that had been settled between parties. The original sum proposed by Chan for the 254 Affected Paintings that had not been restored was $35,000.

Other damages

51 As mentioned above, of the heads of damages listed at [15], the defendants did not dispute items (b), (c) and (e). Item (d) was for rent and utilities the plaintiff incurred during the two weeks when he had to close his gallery to deal with the aftermath of the water seepage incident. The defendants disputed (d) on the basis that these were sums the plaintiff would have had to incur in any event, there being an existing lease between the plaintiff and his landlord. The defendants submitted that the correct measure of the plaintiff's loss ought to have been his loss of business over the two weeks, in respect of which no evidence had been adduced. The defendants did not cite any authority to support their position.

52 Going back to the fundamental principle that the purpose of an award of damage is to restore the victim, so far as monetarily possible, to the position that he would have been in had the tort not occurred, I held that the plaintiff was entitled to the sums claimed for loss of rent and utilities. It was undisputed that the plaintiff had to close his gallery as a result of the water seepage incident. What was the plaintiff's loss in this regard? Essentially, the plaintiff had lost the opportunity to keep his gallery open for the two weeks that it was closed. Awarding the plaintiff his loss of business would be an even more speculative measure than what was claimed in item (d). There is no certainty how much business the plaintiff would have lost as a consequence of the closure of the gallery.

Conclusion

Damages awarded

53 Taking into account all the above, I held that the first and second defendants were liable (in the ratio 30:70) to pay the plaintiff the following sums:

Losses incurred as a result of damage to the Affected Paintings	$529,435.00
Cost of restoring the Affected Paintings	$30,452.70
Cost of engaging specialists and procuring the necessary materials to salvage the Affected Paintings	$493.80
Cost of restoring the Restored Paintings	$2,730.00
Rent and utilities incurred when gallery was closed for two weeks	$2,328.90
Cost of replacing the cabinet	$1,600.00
Total:	**$567,040.40**

Costs

54 On 3 August 2012, parties made oral submissions on costs. Taking into account the submissions of parties, especially on the length of the trial and the various delays and costs thrown away, I ordered the first and second defendants to pay (in the ratio 30:70) the costs of the assessment fixed at $110,000 with reasonable disbursements to be taxed if not agreed. I further ordered costs of $1,500 to the plaintiff for each of the two amendment applications – SUM 2839 and SUM 2841.

55 After disposing of the matter of the plaintiff's costs, the first defendant informed me that it had made an Offer to Contribute up to the sum of $270,000 to the second defendant at the close of the assessment hearing but the offer was not accepted. The first defendant submitted that in light of the Offer to Contribute, pursuant to O 22A r 11(2) of the Rules of Court (Cap 332 R 5, 2006 Rev Ed), the second defendant should pay the first defendant's costs and indemnify it against such parts of the plaintiff's costs as the first defendant was liable for.

56 O 22A r 11 provides:

> (1) Where 2 or more defendants are alleged to be jointly or jointly and severally liable to the plaintiff in respect of a claim, any defendant may make to any other defendant an offer to contribute in Form 36 towards a settlement of the claim.
>
> (2) The Court may take into account an offer to contribute in determining whether another defendant should be ordered —
>
> (a) to pay the costs of the defendant who made the offer; or
>
> (b) to indemnify the defendant who made the offer for any costs he is liable to pay to the plaintiff,
>
> or to do both.
>
> (3) Rules 2 to 12 shall apply to an offer to contribute as if it were an offer to settle.

57 The first defendant relied on O 22A r 11(3) read with O 22A r 9 and submitted that I should make the cost order that the second defendant pay the first defendant's cost on a standard basis up to the date of the Offer to Contribute and on an indemnity basis thereafter. However, I noted that the word "may" in O 22A r 11(2) gives the court discretion whether or not to order costs.

58 In light of (a) the fact that the first defendant's liability in respect of the damages and costs awarded fell far short of $270,000, (b) the fact that the Offer to Contribute had been served very late in the day, at the close of the assessment hearing, (c) the fact that the only work done after the Offer to Contribute was served would have been in respect of closing and reply submissions, and (d) the fact that I had ordered costs to the plaintiff in the sum of $110,000, I ordered the second defendant to bear the first defendant's costs to the extent of $15,000. I declined to order that the second defendant indemnify the first defendant in respect of costs payable to the plaintiff as the Offer to Contribute had been served late in the day.

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