Anwar Patrick Adrian and another *v* Ng Chong & Hue LLC and another [2014] SGCA 34

Case Number	: Civil Appeal No 138 of 2013
Decision Date	: 29 May 2014
Tribunal/Court	: Court of Appeal
Coram	: Chao Hick Tin JA; Andrew Phang Boon Leong JA; V K Rajah JA
Counsel Name(s)	: Tan Cheng Han SC (instructed), P Balachandran and Luo Ling Hui (Robert Wang & Woo LLP) for the appellants; Michael Khoo SC, Josephine Low and Andy Chiok (Michael Khoo & Partners) for the respondents.
Parties	: Anwar Patrick Adrian and another — Ng Chong & Hue LLC and another

Contract – implied contract

Tort – negligence – duty of care

[LawNet Editorial Note: This was an appeal from the decision of the High Court in [2013] SGHC 202.]

29 May 2014 Judgment reserved.

Andrew Phang Boon Leong JA (delivering the judgment of the court):

Introduction

1 The present appeal centres on the alleged liability of a lawyer and his law firm ("the Respondents") in an action brought by two brothers ("the Appellants"). The Appellants' action is premised upon two possible bases which are independent of each other:

(a) in contract, the breach of an alleged implied retainer that existed between the Appellants and Respondents and;

(b) in tort, the breach of a duty of care said to be owed by the lawyer concerned ("the Second Respondent") and, consequently, his law firm ("the First Respondent"), to the Appellants.

2 In the court below, the High Court judge ("the Judge") found in favour of the Respondents, holding that the Second Respondent did not have a solicitor-client relationship with the Appellants and that the Respondents did not owe a duty of care in tort to the Appellants. The Judge's grounds of decision can be found in *Anwar Patrick Adrian and another v Ng Chong & Hue LLC and another* [2013] SGHC 202 ("the Judgment").

3 Whilst the basic issues, characterised in the way that we have, might appear straightforward, they raise important issues of law. Of particular importance is the relevance (if any) of the seminal House of Lords decision in *White v Jones* [1995] 2 AC 207 ("*White*") under the overarching duty of care framework in Singapore as set out in *Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency* [2007] 4 SLR(R) 100 ("*Spandeck*"). There is also, parenthetically and in addition to the aforementioned issues in contract and tort, a third basic issue concerning the legal entitlement of the Appellants to the reliefs (in the form of damages) claimed, assuming that they can establish the liability of the Respondents in contract and/or tort in the first place.

4 This case is also complicated by the peculiar factual circumstances which the Appellants say give rise to a claim by them against the Respondents. The connection between the Appellants and Respondents is the Appellants' father, Agus Anwar ("Agus"), with whom the Respondents have had a long-standing professional relationship. It was in the course of advising Agus that the Respondents took on the contractual and/or tortious duties to the Appellants, or so the latter claim. There is no doubt, as the Judge also noted (see the Judgment at [13]), as to Agus's deep involvement in the relevant events that transpired and to which the Appellants are now referring in order to establish their claim against the Respondents. As we shall see, Agus's role is of potentially important legal significance even though he is not technically a party to the action.

5 With that in mind, we proceed with a background of the salient facts of this case.

The facts

The parties

6 The Second Respondent is Ng Soon Kai ("Ng"), a lawyer of 21 years standing. He practises in, and is also one of, the directors of Ng Chong & Hue LLC ("NCH"), the First Respondent. As nothing turns on a separation of Ng and NCH's individual identities and as the dispute involves allegations against Ng primarily, unless the circumstances necessitate otherwise, our reference to Ng is generally a collective reference to the Respondents.

7 Ng met Agus, the chief protagonist in the entire dispute, sometime in 2000 or 2002, at which point Agus became his client and a client of NCH. Agus was an astute investor who used to have numerous investments. He is also extremely familiar with the world of finance and banking, having been in the top management in banks previously. In his own words, he was a "well-known businessman".

8 Patrick Adrian Anwar ("Adrian"), the First Appellant, and Andrew Francis Anwar ("Francis"), the Second Appellant, are Agus's sons. When Agus approached Ng in 2008 to assist him in relation to the financial difficulties he was facing, Adrian was 28 years old and Francis was 25 years old. Adrian had already begun working but Francis was still schooling in the US.

The Four Properties

9 Ng had been assisting Agus in numerous transactions over the years, including representing Agus in a dispute in Indonesia, as well as in the purchase of other properties. One matter which Ng advised Agus on was the purchase of five properties in 2006 and 2007. Save for one property, the other four properties were purchased in the names of his two sons and two other companies in the following manner:

(a) 57A Devonshire Road, #21-03 was held by Adrian;

(b) 57A Devonshire Road, #18-03 was held by Francis;

(c) 8 Scotts Road, #35-08 was held by Scotts Island Trust Pte Ltd ("SITPL") of which Adrian is the sole shareholder and director; and

(d) 8 Scotts Road, #36-04 was held by Scotts Skyline Trust Pte Ltd ("SSTPL") of which Adrian is the sole shareholder and director.

10 There is no dispute that the instructions to purchase these properties came from Agus. The four properties listed above will be referred to collectively, where necessary, as "the Four Properties".

11 The subject-matter of the action concerns the mortgage of the Four Properties to the Singapore branch of Société Générale Bank & Trust ("SGBT"). SGBT is a wholly-owned subsidiary of the French banking group, Société Générale SA.

Dispute with SGBT

12 Agus had a credit facility with SGBT. As part of the credit facility, Agus pledged, amongst other things, certain Singapore shares. When the stock markets crashed in July 2008, the market value of his collateral likewise crashed. Around July 2008, SGBT requested Agus to provide additional collateral. At the same time, other institutions which Agus had credit facilities with also requested that Agus make good on the shortfall which resulted from the economic turmoil. Needless to say, Agus did not find himself in a satisfactory situation.

13 In October 2008, with global share prices still falling, SGBT sold off some of Agus's pledged shares. He was informed of this personally by a letter from SGBT's solicitors, Allen & Gledhill LLP ("A&G"), on 6 October 2008. However, the sale was insufficient to meet the shortfall which had snowballed to approximately US$8m. SGBT demanded Agus pay this sum or provide collateral of the same value by 9 October 2008.

Early to mid-October 2008

14 Agus approached Ng to act for him. On 7 October 2008, on Agus's instructions, Ng wrote to A&G and informed them that Agus would provide further collateral in the form of mortgages over the Four Properties. Negotiations then took place between A&G and Ng. There were also separate negotiations between Agus and SBGT's officers directly which Ng was not involved in. On 10 October, A&G informed Ng of a new proposal by SGBT under which:

(a) Agus would pay SGBT $4m or provide additional collateral of an equivalent value by 15 October 2008;

(b) Agus would procure mortgages over the Four Properties by 13 October 2008; and

(c) Adrian, Francis, SITPL and SSTPL being owners of the Four Properties would provide personal and corporate guarantees, respectively, by 15 October 2008.

15 On 14 October 2008, Ng, on Agus's instructions, informed A&G that Agus was agreeable to the proposal *except* for the condition that the Appellants each provide personal guarantees. Agus said that his sons would "hardly [be] able to provide any real security to your clients" as they were just "2 young boys".

16 In A&G's reply on 14 October 2008, SGBT essentially agreed to put the personal guarantee requirement on hold *on condition* that Agus satisfied the other requirements by 15 October 2008. Agus was unable to do so, and, on 16 October 2008, A&G informed Ng that SGBT would "proceed as necessary". On that same day, SGBT sent a letter to Agus informing him that as he had defaulted on the credit facility, SGBT was demanding repayment of approximately $17m immediately.

20 October 2008 and SGBT's change of position

17 On 20 October 2008, Ng, again on the instructions of Agus, informed A&G of a new proposal which included the provision of additional security in the form of a mortgage over another property, Agus's Ferrari, as well as authorisation to sell shares pledged by Agus and held by SGBT. SGBT deemed Agus's latest proposal inadequate through a reply by A&G on that same day.

18 However, A&G conveyed to Ng that SGBT would hold its hand if Agus, amongst other things, furnished even more security which included mortgages over other properties in addition to the Four Properties, and corporate guarantees from the companies which were the legal owners of the relevant properties. There was no requirement that the Appellants provide personal guarantees in this latest counter-proposal. On the surface, this was a significant change of position.

19 Agus could not meet some of the requirements, resulting in further back-and-forth negotiations between A&G and Ng.

Further negotiations and the Forbearance Agreement

20 The further negotiations came to a head on 22 October 2008 when A&G sent a draft agreement to Ng for execution by Agus, Adrian, Francis, SITPL and SSTPL. Under this draft agreement, SGBT would forbear from taking immediate legal action against Agus provided that Agus satisfied the conditions – which had been the subject-matter of the prior negotiations – set out in the agreement ("the Forbearance Agreement"). Again, as had been set out in the 20 October 2008 correspondence, the Appellants were *not* required to give personal guarantees under this draft Forbearance Agreement.

21 As with all previous correspondence from A&G, Ng forwarded the letter to Agus. In the cover letter, Ng briefly explained the contents of the draft Forbearance Agreement. One of the points highlighted concerned the guarantees which were required from SITPL and SSTPL. Thereafter, a couple of further minor amendments were made to the draft Forbearance Agreement, including an offer by Agus to replace the Appellants as the directors of SITPL and SSTPL so that the signing of the relevant documents involving the two companies could be expedited.

22 Eventually, by 30 October 2008, the draft Forbearance Agreement and the other relevant documentation were signed and executed by all the relevant parties.

23 It is apposite, at this juncture, to mention that at least some of the communications between Agus and his sons were facilitated by Agus's staff. For example, it was one of his staff who sent the Forbearance Agreement and the necessary documents to Francis for his signature. Communications between Agus and Ng were also sometimes effected through Agus's staff.

The Security Documents

24 Two of the relevant documents which were signed by the Appellants are the Mortgage Document and the Deed of Assignment ("the Security Documents"). These covered the mortgage of the two Devonshire properties under the Appellants' respective names (see above at [9]). The Mortgage Document and the Deed of Assignment each contains a clause providing that the mortgagor of the property shall pay SGBT on demand all sums due and owing to SGBT by Agus ("the Personal Guarantee Clause").

25 How and why this clause came to be in the Security Documents without warning from A&G or SGBT despite earlier intimations that the Appellants would not be made to give personal guarantees is effectively the cause of the present action. It is Ng's failure to advise the Appellants of the existence

and implication of this clause – which Ng does not dispute he did not do – that the Appellants are claiming amounts to a breach of an implied retainer or, alternatively, a breach of a duty of care in tort.

26 The Security Documents were prepared by Tan Peng Chin LLC ("TPC"), another law firm engaged by SGBT. They were sent to Ng on 23 October 2008. Ng forwarded the documents the next day by personal service to Agus's office for the attention of the owners of the Four Properties, *ie*, Adrian, Francis, SITPL and SSTPL. It is common ground that it was Agus's staff who then forwarded the documents to the Appellants. Ng's cover letter referred to the Security Documents and set out the portions of the documents where Adrian, Francis and Agus should append their signatures. As mentioned above, the Security Documents were eventually signed by Adrian, Francis as well as Agus.

27 Despite the provision of additional security under the Forbearance Agreement, Agus still could not meet his obligations under the credit facility to SGBT. This led to a suit in April 2009 by SGBT against Agus, the Appellants, as well as SITPL and SSTPL for the outstanding sums due under the credit facility. SGBT's claim against the Appellants, which was premised on the Personal Guarantee Clause, was settled for US$1m in April 2011.

28 The Appellants then commenced this action against the Respondents for failing to bring the Personal Guarantee Clause to their attention and/or advising them on the clause before they signed the Security Documents.

29 In the meantime, Agus was unable to settle his debts and was adjudged bankrupt on 3 March 2011, and remains undischarged to date.

The parties' pleaded cases

Appellants' pleaded claims

30 The basis of the Appellants' contractual claim is an implied retainer between the Appellants and Ng (and consequently, NCH) which imposed on Ng certain duties that he failed to carry out. The second cause of action pleaded was tortious, namely, that as Ng was advising Agus in the course of the negotiations with A&G, he should have known that the Appellants would rely on him to look after their interests and he (and consequently, NCH) therefore owed a duty of care to take certain steps to protect the Appellants, which was not done.

31 The Appellants aver that Ng, pursuant to either his contractual or tortious duty, ought to have done but failed to do the following:

(a) take reasonable steps to ensure that the Security Documents did not contain the Personal Guarantee Clause;

(b) adequately read through the Security Documents before forwarding them to Agus for onward execution by the Appellants;

(c) consider the possibility that Security Documents were standard forms which might contain the Personal Guarantee Clause;

(d) take steps to safeguard against the risk that Agus would tell the Appellants that they would not suffer any personal liability by signing the Security Documents;

(e) query TPC on the presence of the Personal Guarantee Clause which was inconsistent with SGBT's earlier position that it would not insist on requiring personal guarantees from the Appellants;

(f) draw the Personal Guarantee Clause to the attention of the Appellants or Agus, and explain and advise the effect of the clause before they signed the Security Documents; and/or

(g) take steps to rescind or rectify the Security Documents when SGBT sought to enforce the Personal Guarantee Clause.

32 The Appellants claim that they would not have signed the Security Documents had they been aware of and appreciated the effect of the Personal Guarantee Clause. The losses which they are claiming in the action comprise:

(a) the US$1m settlement payment;

(b) legal fees paid to the Respondents for work done in connection with the Security Documents and legal fees incurred in defending SGBT's claim; and

(c) Adrian's loss of business opportunity as a result of summary judgment being entered against him at an earlier stage of the action.

Respondents' pleaded defence

33 Ng admits that he was instructed by Agus on specific matters but these did not extend to matters related to Agus's family and their companies generally. Any instructions by Agus were for himself personally and not on behalf of his family members. At all material times, Ng was only acting on behalf of Agus, and not the Appellants.

34 Ng also avers that he did not conduct himself in any way that led or would lead the Appellants to believe that he was acting for them, or would be looking after their interests. Apart from a single instance of forwarding the Security Documents to Agus's office for onward transmission to the Appellants for their execution, Ng had no other dealings and communications with the Appellants. This act of forwarding the Security Documents, Ng says, was part of his duty to Agus as his solicitor.

35 Ng denies that Agus conveyed to him that the Appellants were not to incur personal liability. Further, Ng claims that neither he nor NCH was ever instructed to advise the Appellants on the effect of the Security Documents. The scope of his duties to Agus only extended to implementing the Security Documents as required under the Forbearance Agreement; Agus never instructed him to provide advice to the Appellants. Hence, he did not owe the Appellants any duty nor was he under any obligation to check or advise on the Security Documents for the purposes of protecting the interests of the Appellants.

36 Ng also claims that, in any event, the Appellants were aware of the obligations in the Security Documents, and had signed the documents with full knowledge and understanding of the risks involved. In other words, the Appellants were not looking to Ng or anyone else in NCH's employ to provide any advice. Ng also points out that when Agus and the Appellants were sued by SGBT, their original defence was related to problems with the financing of another of Agus's property. Neither Agus nor the Appellants had put any blame on Ng for his role in the execution of the Security Documents. The present proceedings were an afterthought.

37 Liability for the settlement sum, legal fees and Adrian's alleged loss of business opportunity was also denied.

The decision in the court below

38 As there was a substantial amount of dispute on the facts, the Judge made it a point to note that he found Agus's and the Appellants' evidence to be self-serving and unreliable. He gave examples showing that the Appellants were capable of giving and did in fact give, contradictory evidence at different points in the proceedings against SGBT, depending on whether it suited them. He also found Agus's testimony unusually convenient; he was clear and forceful in matters that aided his sons' claims, but, where they did not, he suffered acute bouts of amnesia (see [12] of the Judgment).

39 Consequently, and in tandem with the documentary evidence before him, the Judge was of the view that the Ng did not have a solicitor-client relationship with the Appellants, and that there was therefore no retainer which was breached by Ng. Agus was the sole person who had instructed Ng. The Judge also held that Ng also did not owe the Appellants a duty of care in tort.

40 Notwithstanding the above, the Judge made two observations. The first was that Ng could have done more to make clear who he really acted for. The second was that Ng was not careful in spotting the inclusion of the Personal Guarantee Clause. The Appellants perhaps perceived this as an invitation to appeal, and that was what they did.

The parties' cases on appeal

Appellants' case

41 In so far as the issue of a breach of contract under an alleged implied retainer is concerned, the Appellants submit that there must have been and was in fact a solicitor-client relationship between Ng and the Appellants during the relevant period, given the following facts:

(a) Ng had acted for the Appellants in the purchase of the Devonshire properties in 2006 and the sub-sale in 2009. In fact, Ng had billed the Appellants, not Agus, for work done in relation to the Devonshire properties in 2009.

(b) TPC, who acted for SGBT in relation to the execution of the Security Documents, also thought that the Ng was acting for the Appellants. Ng accepts that TPC had such an impression.

(c) Ng signed off on the mortgage documents as solicitor for the mortgagor. As the Appellants were the mortgagors, it follows that Ng was the solicitor for the Appellants, and the Appellants were entitled to think so.

(d) Ng did not advise the Appellants to obtain independent legal advice. If he was not their lawyer, he should have informed them that they should obtain independent legal advice.

42 In so far as the existence of an alleged tortious duty of care is concerned, the Appellants submit that there was such a duty which was breached because the law imposes a duty of care on a solicitor towards a third party in circumstances where the solicitor's client intended to confer a benefit on the third party. Agus intended to confer a benefit on the Appellants inasmuch as he did not want the Appellants to have any personal liability. This formed part of Ng's instructions. Such a duty of care towards the Appellants is also justified by the *Spandeck* framework of factual foreseeability, proximity, and the absence of negativing policy reasons.

43 Finally, on the issue of damages, the Appellants are no longer pursuing the claim with regard to Adrian's loss of business opportunity. Focusing their submissions, instead, on the reasonableness of the US$1m which they had paid to SGBT as a settlement, the Appellants contend that US$1m was reasonable, given that the difference between SGBT's proof of debt and the value of the remaining assets held as collateral was in the region of $7.6m. Further, although the US$1m was raised with the help of gifts by third parties, that did not prevent the Appellants from claiming against the Respondents.

44 Together with $325,287.71 claimed as total legal fees expended, the Respondents are potentially liable for up to the aggregate of US$1m and $325,287.71 in this appeal.

Respondents' case

45 On the contractual allegations, the Respondents submit there was no solicitor-client relationship between the Appellants and himself as:

(a) Ng's only client was Agus. The execution of the Security Documents was unconnected to the Appellants' purchase or subsequent sub-sale of the Devonshire properties.

(b) Even if TPC was misled by the Ng's representation, it had nothing to do with the Appellants. It is not their case that they had relied on Ng's representation to TPC and that their reliance somehow founds a contractual retainer.

(c) Ng only signed off as the solicitor for the Appellants *qua* mortgagors as he was assisting Agus to perfect the Forbearance Agreement.

(d) Ng did not advise the Appellants to seek independent legal advice because there was no obligation for Ng to have given such advice to the Appellants in the first place. It was not, for instance, a case of conflict of interest.

(e) There was never any direct communication between Ng and the Appellants. The Security Documents were sent to Agus's office and it was his staff that liaised with the Appellants on their execution. Neither Agus nor the Appellants ever informed Ng that they did not understand the contents of the Forbearance Agreement (or the Security Documents) or that they objected to the terms in those documents.

(f) In their defence against SGBT's claim, the Appellants never once made any adverse claims against the Respondents, even after they were alive to the possibility of negligence by the Respondents. Instead, they preferred to allege undue influence and misrepresentation against their father, Agus.

46 On the tortious claim, the Respondents submit that there was no duty of care towards the Appellants as:

(a) There was no proximity between the parties, given that the Appellants had not relied on Ng in the course of deciding whether to execute the Security Documents. They had agreed to such execution because they were told to do so by Agus.

(b) Ng was not aware of the negotiations between SGBT and Agus, in particular, the fact that SGBT had agreed to withdraw their demand that the Appellants would not have any personal liability. He thought that SGBT had not shifted from its original position that the Appellants should

be personally liable as well.

(c) The Appellants signed the Security Documents because Agus told them that he needed the Devonshire properties as collateral. They did not verify any of the details with Ng. The Appellants neither treated Ng as their solicitor nor relied on him.

47 Last but not least, on the issue of damages, Ng submits that the loss claimed by the Appellants was provided by third parties and that to award the Appellants damages for this loss would offend the principle against double recovery. The settlement sum of US$1m was also not reasonable because the Appellants have not demonstrated what their liability would otherwise have been and why such a figure was realistic.

The issues in this appeal

48 As framed by both sets of submissions, the main issues before the court are as follows:

(a) whether there was a contractual solicitor-client relationship between the Appellants and Ng;

(b) whether Ng owed the Appellants a duty of care in tort (and, if so, whether there was a breach of that duty of care); and

(c) if there is liability either in contract and/or tort, whether the damages claimed by the Appellants are recoverable.

Our decision

Was there an implied retainer between the Appellants and Ng?

49 The considerations which should feature in a question of the existence of implied retainer can be found in the Singapore Court of Three Judges' decision in *Law Society of Singapore v Ahmad Khalis bin Abdul Ghani* [2006] 4 SLR(R) 308 ("*Ahmad Khalis*") at [66]. The court cited with approval the following summary in *Cordery on Solicitors* (Anthony Holland gen ed) (LexisNexis UK, 9th Ed, 1995, 2004 release) at para E 425:

> [A] retainer may be implied where, on an objective consideration of all the circumstances, an intention to enter into such a contractual relationship *ought fairly and properly to be imputed to* ***all the parties*** . The implication would have to be so *clear that the solicitor ought to have appreciated it*. Circumstances to be taken into account might include, where appropriate, who is paying the [solicitor's] fees, who is providing instructions, and whether a contractual relationship existed between the parties in the past. [emphasis added in italics and bold italics]

50 The solicitor in *Ahmad Khalis* was held by the court to have been engaged under an implied retainer because of a variety of reasons, one of which was that he had given express advice on the relevant documents to the putative clients (see *Ahmad Khalis* at [67]). The present facts are perhaps even more similar to those in the English Court of Appeal decision of *Dean v Allin & Watts* [2001] 2 Lloyd's Rep 249 ("*Dean*"). In that case, the solicitor did not give any advice to the putative client, and only had minimal communication with the putative client. It was held that there was no implied retainer.

51 It is undisputed that Ng did not directly advise the Appellants. However, we are not persuaded

that the inquiry should end there. Although the absence of giving of advice, or even the absence of any meaningful contact, is in many cases helpful in enabling the court to infer that no implied retainer had arisen on those facts, that fact alone cannot be decisive.

52 The reason is simple. The giving of advice is itself part of the duty under an implied retainer. If a solicitor gives advice to a third party, there is a strong inference that the solicitor and the third party had regarded themselves as being in some kind of contractual relationship. However, the fact that the solicitor did not give advice cannot give rise to the converse inference. The absence of any proof of advice given could equally be evidence of a breach of an implied retainer *if* the other objective evidence points towards the existence of an implied retainer. Therefore, in circumstances such as these where the allegation is that the solicitor ought to have given advice directly to the Appellants *because* there was an implied retainer, it would be putting the cart before the horse to rely solely on the fact that no advice was provided.

53 The crux of the matter, as the court in *Ahmad Khalis* observed, is whether the circumstances are such that a contractual relationship "ought fairly and properly" be imputed to all the parties. In our judgment, we agree with the Appellants that there was an implied retainer for a very specific and limited purpose, that is, to act as solicitors for the Appellants in the mortgaging of the respective properties that they held pursuant to the Forbearance Agreement.

54 Despite its apparent simplicity, having regard to the relevant facts and circumstances, we find that an implied retainer ought properly and fairly be imputed to all the parties. First, Ng conceded that he signed off on the Security Documents as "solicitor for the mortgagors" on the Certificate of Correctness which formed part of the Security Documents. The immediate inference when a solicitor signs off on an official, formal record is that he means what he says. Ng's defence was that he did so in the course of his retainer as Agus's solicitor; to him, the Appellants were only holding the properties as Agus's nominees.

55 Secondly, whilst we acknowledge that what Ng claimed at the end of the preceding paragraph might sometimes be the case, especially when the solicitor is advising the patriarch of a close-knit family, this was not any ordinary official record. The Certificate of Correctness is an instrument prescribed by the Land Titles Act (Cap 157, 2004 Rev Ed) ("LTA") that must be filed before a dealing with land will be recognised under the LTA. One of the implications of the certificate is that the matters set forth in the underlying instrument dealing with land are substantially correct (see s 59(2)(*b*) of the LTA). More importantly for our present purposes, the certificate *must* be signed by a solicitor *if* one has been employed by a party to the instrument (see s 59(3) of the LTA). The Certificate of Correctness therefore bore not just Ng's signature, but also the signature of SGBT's solicitors.

56 The effect of a solicitor's signature on the Certificate of Correctness is spelt out in s 59(3A) in no uncertain terms:

> Where any instrument is executed by an attorney [definition omitted] for a party to the instrument, the certificate by the attorney shall imply representations that, to the best of the belief of the attorney or (as the case may be) the solicitor employed, the attorney has the authority to act as agent for and on behalf of the party in respect of the instrument.

57 We cannot overstate the importance of the Certificate of Correctness. As was noted by G P Selvam J in the Singapore High Court decision of *United Overseas Finance Ltd v Victor Sakayamary and others* [1996] 2 SLR(R) 20 at [97], an accurate certificate of correctness for registration is of paramount importance because the Registrar of Titles and the public place enormous

faith on it – especially when it emanates from an advocate and solicitor.

58 From the perspective of the solicitor, Ng, a seasoned solicitor, must be taken to have known of the importance of his signing the Certificate of Correctness for the purposes of the mortgage of the properties held by the Appellants. From any objective standpoint, he must have thought that he had the authority to act for the Appellants, and that he was their agent. In fact, he *was* their solicitor for the mortgage; there is no other way of characterising it. He may, in his own mind, have thought that he was their solicitor for the mortgage *only because* he was advising Agus on the broader transaction, but that does not detract from the fact that he must have held the view that he was officially the Appellants' solicitor for the mortgage.

59 From the perspective of the clients, the Appellants would also have legitimately considered Ng to be their solicitor. This is not premised solely on his signing off as their solicitor on the Certificate of Correctness. More than that, they knew that he was involved in the execution of this particular document; he was the *only legally* trained person on their side (*ie*, Agus and the Appellants) involved in the execution and the other side had a solicitor representing them as well. Indeed, this was a mortgage transaction that was part of a larger commercial transaction that ostensibly had legal implications which therefore required legal expertise. Looked at in its totality, the Appellants must have thought – or at any rate were entitled to think – that Ng was their solicitor on record (which he was). He was the one who would help them through this transaction.

60 Therefore, we find against Ng (and consequently, NCH) in relation to the Appellants' claim based on an implied retainer. Accordingly, in so far as the issue of liability are concerned, the appeal should be allowed.

61 Nonetheless, as the Appellants' alternative case in tort presents novel and intricate questions of law in the Singapore context, it would be beneficial to consider what the situation would be if there had been no implied retainer.

Did Ng owe the Appellants a duty of care in tort?

Duty of care in tort and contract

62 Although the Judge appears to have adopted a contrary approach, the absence of a contractual retainer does not of itself conclude the issue of the Respondents' potential legal liability in tort for negligence. Indeed, the whole point of the law of negligence (which has its modern genesis in the landmark decision of the House of Lords in *Donoghue v Stevenson* [1932] AC 562) was that it enabled liability to be fixed on the defendant in a principled fashion and (more importantly) in a situation where there would not otherwise be liability in contract for the simple reason that there was no contractual relationship between the defendant and the plaintiff in the first place.

63 The distinction in the modern view between a finding of duty of care in contract and tort may be stated thus (see the English Court of Appeal decision of *Jarvis v Moy, Davies, Smith, Vandervell & Co* [1936] 1 KB 399 at 405):

> … where the breach of duty alleged arises out of a liability independently of the personal obligation undertaken by contract, it is tort, and it may be tort even though there may happen to be a contract between the parties, *if the duty in fact arises independently of that contract*. … [emphasis added]

64 The question, thus, is whether there can be a duty of care in tort owing by Ng to the

Appellants that is *independent of* any implied retainer.

The position under English law

(1) *Hedley Byrne*: the pre-*White* position

65 We now know that in the broader context of solicitor's negligence under English law, since at least the 1980s, a solicitor could owe a non-client a duty of care. This was the consequence of the decision of the English High Court in *Ross v Caunters* [1980] 1 Ch 297 ("*Ross*"), where Sir Robert Megarry VC confirmed that not only was there no rule that a solicitor owed a duty in respect of professional work solely in contract, but also that a solicitor could be liable in negligence to a client, as well as to a third party, where a *prima facie* duty of care to the latter could be established (see also *Charlesworth & Percy on Negligence* (Christopher Walton gen ed) (Sweet & Maxwell, 12th Ed, 2010) ("*Charlesworth & Percy*") at para 9-219).

66 In *Ross*, solicitors who prepared a will failed to warn the testator, when they sent it to him for execution, that it must not be witnessed by the spouse of a beneficiary. One of the witnesses was the husband of a residuary beneficiary. The gift to the beneficiary was rendered void as a result. When sued, the solicitors accepted that they had been guilty of negligence, but argued that they only owed that duty to the testator, and not the claimant who was the dissatisfied beneficiary. The court held that liability to the beneficiary was made out.

6 7 *Ross*, however, was doubted in *White* by both the majority and minority (at 260–261 and 268 *per* Lord Goff of Chieveley; and at 282–283 *per* Lord Mustill), even though the outcome in *White* was the same as in *Ross*. A view exists that the trend in *Ross* culminated in *White* but that in our view is not strictly correct because the reasoning in *White* was clearly different and in some ways opposed to that in *Ross* (see in this regard the succinct analysis by Dawson J in *Hill v Van Erp* (1997) 188 CLR 159 ("*Van Erp*") at 174–175, a decision of the High Court of Australia).

68 Before we delve deeper into the analysis and reasoning in *White*, it is apposite to briefly mention the relevance of *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465 ("*Hedley Byrne*"), the seminal House of Lords decision which held (at 486) that a reasonable man who, knowing that he was being trusted or that his skill and judgment were being relied on, gives the information or advice sought without any qualification of responsibility, will be taken to have accepted some responsibility for his answer being given carefully, or to have accepted a relationship with the inquirer which requires him to exercise such care as the circumstances require.

6 9 *Hedley Byrne* has undoubtedly been accepted by our courts as forming part of Singapore law. More importantly, it can be and has been explained under the *Spandeck* framework. This was done in the decision of this court in *Go Dante Yap v Bank Austria Creditanstalt AG* [2011] 4 SLR 559 ("*Go Dante Yap*"). Thus, if the *Hedley Byrne* principle applied to the present facts, there would be no real point of controversy.

70 The problem is that *Hedley Byrne* is not *directly* engaged on the facts; indeed, that may be why the Appellants did not cite that authority in support of their position. The twin criteria for the *Hedley Byrne* principle to apply are: (a) an assumption of responsibility (sometimes referred to as voluntary assumption of responsibility (although we think such terminology to be *ex abundanti cautela*)) by the defendant; and (b) reliance by the plaintiff (see *Go Dante Yap* at [32] and [39]).

71 Applying the *Hedley Byrne* principle to our facts and indeed to similar fact patterns generally, it would be pushing the boundaries of sensible argument to suggest that a solicitor in advising his client,

with such advice potentially being of benefit to a third-party associate of the client, had undertaken to *that third party* a responsibility to take care in the giving of his advice. Similarly, it would strain the realm of reasonableness to argue that such a third party who might have been ignorant of the solicitor's existence (as was the case in *White*) had *in fact* relied on the solicitor's exercise of due care and skill in advising his client. However, this does not necessarily mean that the concept of assumption of responsibility as such has no legal significance for the present case whatsoever – a point to which we will return in a moment when discussing the actual analysis in *White* itself.

(2) The principle in *White*

72 These limits of *Hedley Byrne* were adverted to by Lord Goff in *White* who, for precisely those reasons, held (at 262 and 268) that *Hedley Byrne* was *not* an authority in support of the beneficiaries who had sued the defendants (a legal executive and the solicitors firm which had been instructed) for the latter's negligence in preparing a will for its client, the testator.

73 In essence, the testator had given his solicitors instructions to prepare a will under which his two daughters would receive £9,000 each. The legal executive did nothing to implement those instructions and the testator died without the will having been executed. The daughters then sued and were given judgment for £9,000 each by a majority of the House of Lords.

74 It is clear from Lord Goff's analysis that he found the circumstances of the case unique and not addressed squarely by any existing authority. Lord Goff objected to the wide proposition established by *Ross* on the ground that "it would be impossible to place any sensible bounds" (see *White* at 257). In other words, he was concerned about the prospect of indeterminate liability that might follow. His other concern was that in providing relief for pure economic loss, *Ross* had departed from orthodox tortious principles which placed strict restrictions on claiming for pure economic loss (see *White* at 257). Cases of assumption of responsibility falling under the *Hedley Byrne* principle were, at that time, one of the very few exceptions that did not offend the general prohibitions against relief for pure economic loss (see *White* at 257).

75 Yet, notwithstanding these conceptual difficulties, Lord Goff was clearly persuaded that the disappointed beneficiaries in these situations had to have a remedy. The law had a lacuna which needed to be filled (see *White* at 259–260). The remedy to be "fashion[ed]" ultimately took the form of an *extension* (in contradistinction to application) of the *Hedley Byrne* principle. The concept of liability for assumption of responsibility should be, he held (at 268):

> … in law to extend to the intended beneficiary who (as the solicitor can reasonably foresee) may, as a result of the solicitor's negligence, be deprived of his intended legacy in circumstances in which neither the testator nor his estate will have a remedy against the solicitor. …

76 That said, we must read *White* in its proper context. Whilst it was a momentous decision and remains so, that a solicitor can be sued by a third party beneficiary is actually an exception rather than a general principle. As Lord Goff explained in that very case (at 256):

> [W]hen a solicitor is performing his duties to his client, he will generally owe no duty of care to third parties. Accordingly, as Sir Donald Nicholls V-C pointed out in the present case, a solicitor acting for a seller of land does not generally owe a duty of care to the buyer ... Nor, as a general rule, does a solicitor acting for a party in adversarial litigation owe a duty of care to that party's opponent … Further it has been held that a solicitor advising a client about a proposed dealing with his property in his lifetime owes no duty of care to a prospective beneficiary under the client's then will who may be prejudicially affected. …

77 It should also be noted that the actual decision in *White* itself was by a bare majority decision of three to two. That having been said, the minority (comprising Lord Mustill and Lord Keith of Kinkel) focused on the fact that to permit the third party beneficiaries in that case a remedy would be to confer on them a benefit which they would not otherwise have received because of the doctrine of privity of contract (although it should also be pointed out that Lord Mustill rejected the extension of *Hedley Byrne* because he adopted viewed the concept of voluntary assumption of responsibility as being a *direct* one (see *White* at 289)).

78 With respect, though, this is precisely one of the main issues before the court: could practical justice be done in light of the fact that the doctrine of privity of contract would otherwise preclude any remedy in favour of the plaintiffs in that case? This, in turn, raised the issue as to whether or not a remedy lay in the law of tort instead (which was, as we have seen, the approach adopted by the majority). As we shall see, there is yet another issue – whether or not there could nevertheless be an (alternative) remedy in the *contractual* sphere (see below at [102]–[114]).

Rationalising the principle in White v Jones

79 Looking at the judgments in *White*, there is unfortunately, and we say this with respect, not much explanation on what is meant by the *extension* of the concept of assumption of responsibility (see above at [75]). There are two possible (and alternative) analyses and bases for the principle in *White*:

(a) first, in addition to owing a duty of care to the client, the solicitor also owes a duty of care to the third party, having assumed responsibility to the third party to exercise care in the performance of the underlying substantive obligation owed to the client; or

(b) secondly, the duty of care is still owed only to the client, but that the *enforcement* of that duty of care is extended to the third party.

80 We derive these two equally possible views from the *ratio decidendi* of *White* which can be found in Lord Goff's judgment (at 268):

> … The present case is, if anything, a fortiori, since the nature of the transaction was such that, if the solicitors were negligent and their negligence did not come to light until after the death of the testator, there would be no remedy for the ensuing loss unless the intended beneficiary could claim. In my opinion, therefore, your Lordships' House should in cases such as these ***extend*** to the intended beneficiary a remedy under the *Hedley Byrne* principle by holding that the *assumption of responsibility by the solicitor towards his client should be held in law to* ***extend*** *to the intended beneficiary who* (as the solicitor can reasonably foresee) may, as a result of the solicitor's negligence, be deprived of his intended legacy in circumstances in which neither the testator nor his estate will have a remedy against the solicitor. … [emphasis added in italics and bold italics]

81 The main reason for the two possible interpretations can be ascribed to just one word: "extend". In particular, a remedy extending the solicitor's assumption of responsibility to the client to the third party could mean either finding that the solicitor has assumed responsibility directly to the third party *or* that the client's remedy for a solicitor's breach of duty is extended to the third party. We cannot conclude with confidence which of the two interpretations was intended by Lord Goff.

82 This ambiguity is, with respect, unfortunate, occurring as it does in an otherwise excellent as well as forward-looking judgment. That having been said, looking at both the language and context of

White itself, Lord Goff was more likely than not referring to the *first* interpretation or characterisation. As we shall see, this particular interpretation is not a wholly untenable one and can be (perhaps, better) rationalised (albeit *somewhat differently*) within the two-stage test laid down by this court in *Spandeck*. However, as we shall also see, whether Lord Goff intended it or not, there is *another alternative* interpretation that has its roots, instead, in *contract* (*instead of* tort), and which is, in fact, *a rationalisation of the second interpretation* just mentioned (see below at [102]–[114]).

83 We do not, strictly speaking, have to decide this particular issue, that is, which of the two bases is more coherent. This is because the parties in our present case have presented their submissions on the basis that *White* stands for the proposition that a duty of care may be owed by the solicitor to the third party directly. Ng does not dispute this principle; his contention is that the requisite proximity or nexus between him and the Appellants is not made out. In his submissions, Ng helpfully concedes that whether a duty of care and liability for a breach of that duty is visited upon him will be determined by the principles in the case of *Spandeck*. He agreed that the "the decision [in *White*] is correct given that the intended beneficiary would suffer the loss of an inheritance if an intended will is not provided".

84 We do, however, want to make some observations on *White*, in part, because it might provide some guidance for the future. We also think that some attempt at clarification may assist other courts and commentators who have been divided on which is the better view to take.

(1) Duty of care owed to third party

85 It is safe to say that the *first* characterisation, which clearly locates the relevant legal principle in the context of the law of *tort* and which results in a duty of care being owed by the defendant to the plaintiff in the law of negligence, probably has stronger support. This can be inferred from the fact that the preponderance of authorities still view the remedy in *White* as tortious, in the sense that the solicitor owes the third party a duty of care *directly*: see, for example, the English decisions of *Groom v Selby* [2001] Lloyd's Rep Med 39 at 42; *Robinson v PE Jones (Contractors) Ltd* [2011] 1 BLR 206 at [72]; and *JD (FC) v East Berkshire Community Health NHS Trust and Others* [2005] Lloyd's Rep Med 263 at [36]. The leading treatises, *Charlesworth & Percy* (at paras 9-217–9-229) and *Clerk & Lindsell on Torts* (Sweet & Maxwell, 20th Ed, 2010) ("*Clerk & Lindsell*") (generally at paras 10-112 to 10-118), to name but a few, also categorically consider *White* as a case of professional negligence in tort. It should be mentioned, at this juncture, that the *second* interpretation or characterisation referred to above *also* locates (in the first instance at least) the relevant legal principle in the context of the law of *tort*, although this particular characterisation renders it more awkward – thus suggesting a *contractual* approach instead and which is a point which is dealt with below (see below at [102]–[114]).

86 The English Court of Appeal decision of *Carr-Glynn v Frearsons (a firm)* [1999] 1 Ch 326 ("*Carr-Glynn*") provides one of the clearest examples of the first characterisation. That case concerned a claim by a legatee against solicitors who had been allegedly negligent in advising the testatrix. The testatrix had executed a will drawn up by the defendant solicitors in which she left the plaintiff legatee her share in a property which she jointly owned with her nephew. However, the testatrix died without severing the joint tenancy, with the result that her share in the property automatically vested in her nephew. The gift to the plaintiff therefore became ineffective. The plaintiff sued the defendants for breach of a duty of care owed to *her* (the plaintiff), to ensure that the testatrix was properly advised of the need to severe the joint tenancy in order for the gift in her will to take effect.

87 The plaintiff's claim was allowed by the court. Chadwick LJ (with whom Butler-Sloss and Thorpe LJJ agreed) had this to say (at 337):

> The key, as it seems to me, is to recognise that, in a case of this nature, the duties owed by the solicitors are limited by reference to the kind of loss from which they must take care to save harmless the persons to whom those duties are owed. … The duty owed by the solicitors *to the testator is a duty to take care that effect is given to his testamentary intentions*. …
>
> The duty owed by the solicitors ***to the specific legatee*** is not a duty to take care to ensure that the specific legatee receives his legacy. *It, also, is a duty to take care to ensure that effect is given to the testator's testamentary intentions*. The loss from which the specific legatee is to be saved harmless is the loss which he will suffer if effect is not given to the testator's testamentary intentions. That is the loss of the interest which he would have had as a beneficiary in an estate comprising the relevant property.
>
> [emphasis added in italics and bold italics]

88 The imposition on the solicitor of a duty of care which is owed to the third party (the legatee under a will in that case) cannot be any clearer. The third party, therefore, has a freestanding cause of action in tort against the solicitor. This was also the position taken in a recent New South Wales Court of Appeal decision, *Vagg v McPhee* [2013] NSWCA 29 at [48]. The language used there was "duty of care *to the beneficiaries*" [emphasis added].

89 Nevertheless, the first characterisation is, with respect, problematic, not least because there is no real explanation for how this new obligation arises. One possible explanation is that the assumption of responsibility towards the client is *transferred* to the third party. Arguably, that is what Lord Goff might have meant when he justified his decision on an *extension* of *Hedley Byrne*. If that is so, Lord Goff appears to have ignored the conceptual difficulties as to how the solicitor can be said to have assumed responsibility to the third party or how the latter can be said to have relied on the skill and expertise of the solicitor (see above at [71]). Indeed, it is clear that the concept of assumption of responsibility set out in *White cannot*, looked at in this light, be a *direct or conventional* one (which is one reason why Lord Mustill differed from the views of the majority (see *White* at 289 as well as above at [77]); reference may also be made to Gary Chan Kok Yew & Lee Pey Woan, *The Law of Torts in Singapore* (Academy Publishing, 2011) ("*Chan*") at paras 04.082 and 04.084). That this is the case is confirmed in *White* itself, where it was conceded that this *extension* of *Hedley Byrne* did *not* entail a (corresponding) *reliance* by the third party beneficiaries on the solicitor concerned (see, for example, *per* Lord Browne-Wilkinson in *White* at 275; reference may also be made to *Chan* at para 04.082).

90 At least one commentator takes the view that Lord Goff "himself found it impossible to divine an assumption of responsibility [to the beneficiaries]" (see Jonathan Morgan, "The Rise and Fall of the General Duty of Care" (2006) 22(4) PN 206 at p 208).

91 We do not think that simply stating that the extension is a legal imperative, necessitated by the need to do practical justice or fill what was perceived to be an undesirable lacuna, suffices to get around the conceptual difficulties inherent in recognising that a solicitor in the circumstances of *White* as well as the present case had assumed responsibilities towards a third party. At this juncture, it would be appropriate to note that this concern in *White* to do practical justice, whilst laudable and needful on the facts of the case itself, can raise other concerns. For example, it was observed in *Jackson & Powell on Professional Liability* (Sweet & Maxwell, 7th Ed, 2012) ("*Jackson & Powell*") (at para 17-071, note 460) that "care needs to be taken in applying [the] principle [in *White*]" as "*White v Jones* was an exceptional case in which the House of Lords fashioned a remedy in order to avoid injustice".

92 More pertinently, perhaps, Assoc Prof Gary Chan, in his seminal work on the law of tort in Singapore, not only viewed *White* as involving a "fairly unique scenario" (see *Chan* at para 04.180) but also suggests that the focus of the majority in that case on practical justice entailed a core reasoning from *policy* (see *Chan* at paras 04.180 and 03.065). Whilst such a view is very interesting and not without force, we will suggest below that the decision in *White* (and, indeed, the present case) is not merely premised on what is the second stage in the two-stage test in *Spandeck* but can, instead, be rationalised along rather more conventional reasoning which focuses on the *first* stage of that test instead (relating to *proximity*; see also generally below at [115]–[181]). We pause to observe that this approach is preferable as it is inadvisable (given its very nature) to focus on policy in the first instance, although it still has a role to play under the second stage of the two-stage test in *Spandeck*.

93 Nevertheless, in our view, the outcome in *White* can be justified on principles of the law of negligence that are more developed and nuanced than they were when *White* was decided in 1995. We are constantly and aptly reminded by the observation by Lord Walker of Gestingthorpe in the House of Lords decision of *Customs and Excise Commissioners v Barclays Bank plc* [2007] 1 AC 181 at [69] that the development of the tort of negligence has never been steady and will probably continue to be bumpy:

> … The development of the tort of negligence since the seminal case of *Donoghue v Stevenson* [1932] AC 562 has not been one of steady advance along a broad front. It has been a much more confused series of engagements with salients and beachheads, and retreats as well as advances. It has sometimes been only long after the event that it has been possible to assess the true significance of some clash of arms. …

94 The tortious nature of the remedy in *White* will become clearer when we explain the general fact pattern in *White* under the two-stage test in *Spandeck* which focuses on factual foreseeability and proximity followed by policy considerations (see below at [115]–[167]). Indeed, as we shall see, the two-stage test in *Spandeck* (in particular the requirement of *proximity*) better accommodates even Lord Goff's first interpretation (centring on assumption of responsibility), albeit in a somewhat modified form (see below at [146]–[162]).

95 It will suffice for the present time to note that, to the extent that the concept of assumption of responsibility is merely a factor to be considered pursuant to the application of the first stage of the two-stage test in *Spandeck* (in relation to the requirement of *proximity*), this approach which locates assumption of responsibility within the overarching concept of proximity is, with respect, preferable to that adopted in *White* (see also below at [159]). To elaborate, in *White*, the concept of assumption of responsibility was taken as *a legal test in and of itself*. With respect, this constitutes a less satisfactory approach – not least because of the various difficulties briefly set out above (especially at [89]).

(2) Duty of care owed to client but enforceable by third party

96 Turning, then, to the second interpretation or rationalisation, we do find that particular characterisation attractive as well. It also has its supporters. The decision of Neuberger J (as he then was) in the English High Court decision of *X (an infant) v Woollcombe Yonge (a firm)* [2001] Lloyd's Rep PN 274, in particular, cannot be ignored. With typical clarity, he said (at 277):

> The proper analysis of the decision of the House of Lords in *White v Jones* is that, in a case such as this, the ***only*** *duty owed by a solicitor* ***is to the testator*** , but if (a) he was in breach of that duty, and (b) a claimant did not receive a benefit under the testator's will which he or she would

have received if the defendant had not been in breach of that duty, then at least, on the face of it, *the claimant [third party] may have a claim for damages arising out of the* ***defendant's breach of duty to the testator*** . [emphasis added in italics and bold italics]

97 Neuberger J also referred to the following exposition of *White* in Chadwick LJ's judgment in the decision of the English Court of Appeal of *Worby and Ors v Rosser* [1999] PNLR 972 at 977:

> The remedy fashioned on [*sic*] *White v Jones* was needed to fill a lacuna. The remedy is provided in circumstances in which it can be seen that there is a *breach of duty by the solicitor* ***to the testator*** in circumstances in which the persons who have suffered loss from that breach will have no recourse unless they can sue in their own right. In a case like *White v Jones* the disappointed beneficiary suffers loss but the estate does not because nothing that the solicitor has done or failed to do causes any diminution in the estate. [emphasis added in italics and bold italics]

98 There are also others who have proposed the same rationalisation. In so far as *White* is concerned, the following extract in *Professional Negligence and Liability* (Mark Simpson QC and Lord Hoffmann eds) (Informa, 2013) at para 9.52 may be usefully noted:

> … strictly speaking, it may not be the law that a duty is owed directly to the intended beneficiary in such a case. Lords Nolan and Browne-Wilkinson took the view that a duty was owed directly to the intended beneficiary. Lords Goff, Mustill and Keith (the latter two law lords dissenting in the result) held that no duty was owed directly to the intended beneficiary. *The duty is owed* ***to the testator*** *, but – anomalously – an intended beneficiary injured by a breach of that duty may recover damages from the negligent solicitor*. ... [emphasis added in italics and bold italics]

99 Notwithstanding this, the learned authors of *Professional Negligence and Liability* concede that the tortious, first characterisation of *White* is dominant. Immediately following the above extract is the following passage:

> … The question whether a duty is ***directly owed to the intended beneficiaries, or*** *instead whether the intended beneficiaries may recover damages in respect of a breach of duty* ***owed to the testator*** *, may be of little more than academic interest*. In many of the cases discussed below the court has treated *White v Jones* as establishing the ***existence of a duty of care owed by the solicitor to the intended beneficiaries*** . [emphasis added in italics and bold italics]

100 The extracts just quoted illustrate the difficulties in deciding, in principle, which of the two characterisations is more appropriate.

101 In any event, like the first characterisation, this second characterisation also has its own problems. In the main, there is great uncertainty over which area of law the remedy would fall under. Where the solicitor does not owe a duty of care to the third party, and the latter's right is not premised on a breach of a duty by the solicitor to him, some mental and intellectual gymnastics would be required to declare the third party's claim one based on negligence. But if it is not a claim premised on the law of tort, what could it be?

(3) A *possible* ***contractual*** analysis?

102 This brings us then to a third possible way of construing the remedy, that is, *White* may arguably be more appropriately situated within the domain of *contract* law. Indeed, looked at from another perspective, this third characterisation is merely one way of *explaining or rationalising the second interpretation, albeit by way of the contractual (instead of the tortious) route.* We should

caution before proceeding further that our views on this point are at this juncture only tentative as we have not had the benefit of full arguments in this particular regard. In any event, given our analysis below (at [115]–[181]), it is unnecessary, on the facts of the present case, to arrive at a definitive conclusion with respect to this particular approach.

103 This so-called third characterisation (or, as the case may be, *explanation of* the *second* interpretation referred to above) was not possible at the time the case was decided because of the rootedness of the doctrines of privity (and consideration) (see below at [108]). Many commentators have pointed to English law's traditional, restrictive doctrine of privity as the principal explanation for the expansion of the tort of negligence in the field of pure economic loss in the late 20th century (see, for example, Basil Markesinis, "An Expanding Tort Law – the Price of a Rigid Contract Law" (1987) 103 LQR 354 and Simon Whittaker, "Privity of Contract and the Tort of Negligence" (1996) 16 OJLS 191 (although it should be noted that the latter author does acknowledge (at p 217) that possible reform could be effected via *legislative* means instead)). Dr Janet O'Sullivan certainly seems to think that the court in *White* were obvious in using the law of tort to get around the strictures of privity (see Janet O'Sullivan, "Suing in Tort Where No Contractual Claim Will Lie – A Bird's Eye View" (2007) 22(3) PN 165 at p 172).

104 Subsequent developments in the law of contract that took place in the UK after *White*, namely, the 1999 Contracts (Rights of Third Parties) Act (c 31) ("the CRTPA"), now make this alternative contractual interpretation possible, at least more so than in 1995 when *White* was decided. Singapore has its own Contracts (Rights of Third Parties) Act (Cap 53B, 2002 Rev Ed) which, for all intents and purposes, is similar to its UK counterpart.

105 The relationship to the CRTPA should be obvious by now. If *White* is seen as a case giving a right of enforcement to third parties who had a benefit accruing to them pursuant to the relationship between two other contracting parties, that would almost but not entirely be analogous to the law under the CRTPA which confers on a third party the right to enforce a contractual term if the term purports to confer on him a benefit.

106 The reason, however, why it may not be *entirely* analogous is because it has been said that the distinction between the situation in *White* and the CRTPA is that the retainer between the client and the solicitor does not itself "purport to confer a benefit" on a third party directly, but is, rather, "a contract to enable the client, at his discretion to confer a benefit" (see Andrew Burrows, "Reforming Privity of Contract: Law Commission Report No 242" [1996] LMCLQ 467 at p 473). Under the CRTPA, the right of a third party to enforce a term is predicated on the contract expressly providing that he may or if that term "purports to confer a benefit on him". An *incidental* accrual of benefit is therefore insufficient to engage the CRTPA (in this regard, see Yeo Tiong Min, "When do Third Party Rights Arise Under the Contracts (Rights of Third Parties) Act 1999 (UK)?" (2001) 13 SAcLJ 34 at p 49).

107 Thus, in its Report on the reform of the doctrine of privity, the Law Commission of England and Wales ("the Law Commission") considered but rejected changing the prerequisite of conferment of benefit to allow a third party to avail itself of the CRTPA as long as the contract contains a promise that is *of benefit* to the third party (see Law Commission, *Privity of Contract: Contracts for the Benefit of Third Parties* (Law Com No 242, 1996) ("*Law Commission 1996*") at para 7.25). The Law Commission thought that *White* was sufficient in itself and had obviated the need for separate statutory reform. However, had the House of Lords decided against the beneficiaries, the Law Commission intimated (at para 7.27) that it would have "seriously contemplated a separate provision – outside [their] general reform – giving prospective beneficiaries a right to sue the negligent solicitor for breach of contract".

108 What is interesting is the Law Commission's view that, on a theoretical level, the right of the prospective beneficiaries in situations such as *White* more properly belongs within the realm of contract than tort (see *Law Commission 1996* at para 7.27). A contractual characterisation of *White* is not, in fact, far off from what Lord Goff had originally contemplated. The possibility that the remedy could be fashioned under the law of *contract* was something that had evidently crossed his mind. He even found that solution "simpler" and "attractive" (see *White* at 266). What stopped him, however, were the shackles of the doctrine of consideration and privity which he considered to be fundamental and best left to Parliament to legislate. One wonders if Lord Goff might have changed his mind in the light of the observations of the subsequent Law Commission Report (see *Law Commission* at Part IV on the issue of consideration), and the subsequent enactment of the CRTPA.

109 Admittedly, this question is somewhat speculative in light of Lord Goff's rejection of the possible application of a common law exception referred to below (at [111]), although this might have been due to his view that, on the *facts* of *White* itself, this exception was not applicable (see *White* at 266–267). That having been said, we note that there has been a persuasive critique of Lord Goff's rejection of this particular exception in *White* itself – a point to which we shall return after we have briefly set out the nature and scope of the common law exception just mentioned (see below at [113]).

110 On the whole, we think that this approach might deserve further consideration and exploration at an appropriate juncture in the future, particularly as contract and tort law are much more developed and sophisticated than 20 years ago. But until another case with fuller arguments comes before the courts, that task is best left to academics and law reform committees. Suffice it to state that, given the conceptual problems that afflict the tort characterisation, profit may be had in exploring a different characterisation. A contractual analysis may avoid some of those problems, but we hasten to emphasise that this is only one possibility. There could yet be others.

111 We pause to note briefly that a possible contractual analysis could entail the development of a n *entirely new* exception at common law. However, it is also possible that a court might have recourse to an *existing* exception which is embodied within the line of English House of Lords decisions (which include *The Albazero* [1977] AC 774; *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd* [1994] 1 AC 85; and *Alfred McAlpine Construction Ltd v Panatown Ltd* [2001] 1 AC 518 (reference may also be made to the English Court of Appeal decision of *Darlington Borough Council v Wiltshier Northern Ltd* [1995] 1 WLR 68)) and which has also been considered by this court (see *Prosperland Pte Ltd v Civic Construction Pte Ltd and others* [2004] 4 SLR(R) 129 and *Family Food Court (a firm) v Seah Boon Lock and another (trading as Boon Lock Duck and Noodle House)* [2008] 4 SLR(R) 272 ("*Family Food Court*")).

112 This particular exception has been discussed elsewhere (see generally *The Law of Contract in Singapore* (Academy Publishing, 2012) at paras 15.087–15.109). It comprises two grounds – the narrow ground and the broad ground, respectively – and was described as follows in *Family Food Court* (at [31]):

> To this end, the English courts have formulated *two exceptions*, which we will refer to as "the narrow ground" and "the broad ground" respectively, to the general rule that the plaintiff/promisee can only recover nominal damages for a breach of contract where it has suffered no loss (for instance, where the substantial loss is suffered by the third party who is the intended beneficiary of the contract). These exceptions may possibly avail the agent (who is the plaintiff/promisee) in a situation involving an undisclosed principal. The narrow ground permits the plaintiff/promisee to recover substantial damages on behalf of *the third party*. In *contrast*, the broad ground permits the plaintiff/promisee to recover substantial damages for its own benefit on

the basis that it is recovering for *its own* loss. "Substantial damages" in this context simply means damages which are more than nominal damages. It should also be noted that it may be a misnomer to describe the broad ground as an "exception" since it is in fact consistent with the basic rationale of contract law. [emphasis in original]

113 It has, however, already been noted (see above at [108]) that Lord Goff did in fact consider and reject the exception just mentioned in *White* itself. This was, presumably, based on the facts in *White*. However, as also noted above, there has been a persuasive critique in a characteristically perceptive note on *White* by Tony Weir, who observed as follows (see Tony Weir, "A *Damnosa Hereditas*?" (1995) 111 LQR 357 at pp 358–359; *cf* also Peter Benson, "Should *White v Jones* Represent Canadian Law: A Return to First Principles" in *Emerging Issues in Tort Law* (Hart Publishing, 2007) (Jason W Nyers, Erika Chamberlain & Stephen G A Pitel eds), at pp 171–189):

> We shall leave till later the question whether the holding was exceptional or principled, and ask whether the case was extraordinary for the reason given. More than 300 years ago Thomas Hobbes thought not: "*damaging* and *injury* are often disjoyn'd: for if a Master command his Servant, who hath *promis'd* to obey him, to pay a summe of money, or carry some present to a third man; the Servant, if lie doe it not, hath indeed *damag'd* this third party, but he *injur'd* his Master onely" (*De Cive*, III.4). Hobbes's example is unnervingly close to our case, in which, indeed, Lord Mustill virtually echoed him: "Take the simple case where A, knowing that B would like to have a gift delivered to C, undertakes to convey it for him ... but does absolutely nothing else. Would he be liable in damages to C? ... As I see it, the position is precisely the same in the present case."
>
> In such situations, one may object, Hobbes's Master and Lord Mustill's B may have suffered a loss as well as an injury, whereas in our case, as Lord Goff says, the testator has suffered no loss. But is this quite accurate? First, as Lord Goff himself stated, if a *life-time* gift goes to the wrong person as a result of the solicitor's negligence, the client can sue him for the money he would in any case have given away. If this is true, then surely such a claim would survive for the client's estate? If so, then why should the client's estate have no claim if the erroneous disposition occurs or was to occur after death? Secondly, in 1979 the House of Lords allowed a plaintiff to recover money he could never have enjoyed but could only have given away, because (owing to the defendant's tort) he was going to be dead when he would have earned it. Lord Scarman said this: "The logical and philosophical difficulties of compensating a man for a loss arising after his death emerge only if one treats the loss as a non-pecuniary loss—which to some extent it is. But it is also a pecuniary loss—the money would have been his to deal with as he chose, had he lived" *(Pickett v British Rail Engineering Ltd* [1980] A.C. 136 at p 170). If a person is prevented from benefiting whom he chooses, can it matter whether this is because the wherewithal has been suppressed, as in *Pickett*, or because his instructions have been ignored, as in *White*?
>
> [emphasis in original]

It is clear, however, that the precise fact situation will be of the first importance (a point which prompted Weir to also note, in fairness, the difficulties in applying a contractual approach). It should also be borne in mind that this particular exception to the doctrine of privity of contract at common law is also subject to one important prerequisite – that the contracting party concerned is *willing* to sue the party in breach in the first place (with such party being also willing to then transfer the damages obtained from the party in breach to the third party).

114 However, unless and until *White* is regarded as embodying a contractual remedy, the tortious explanation remains the legal position (in this regard, see also Hannes Unberath, *Transferred Loss:*

Claiming Third Party Loss in Contract Law (Hart Publishing, 2003) at p 15). That is also the route which we shall adopt, not only because the parties have treated *White* as such, but also because the case is consistent with and can be accommodated within the two-stage test in *Spandeck* – to which our attention now turns. Before proceeding to do so, however, we note that there is at least one decision in the Singapore context (which *antedated* the House of Lords decision in *White*) in which it was held that a legal assistant had assumed the responsibility of acting as a solicitor for a plaintiff and her husband even though he had not met them and had not raised any bill against them (see the Singapore High Court decision of *Lee Siew Chun v Sourgrapes Packaging Products Trading Pte Ltd and others* [1992] 3 SLR(R) 855 at [81]). This decision by Michael Hwang JC was, in many ways, ahead of its time. However, it must now be read in light of the two-stage test in *Spandeck* which, as we shall see, furnishes a coherent legal basis for the establishment of a duty of care in this particular area of the law of negligence for pure economic loss in the Singapore context.

Did Ng owe the Appellants a duty of care under the Spandeck test?

1 1 5 *Spandeck* undoubtedly represents the modern interpretation of the law of negligence in Singapore. As with any major decision, *Spandeck* has been discussed, applied and elaborated on in several subsequent cases. A comprehensive examination of this branch of the law is captured in a recent compendious and insightful article by Assoc Prof David Tan and Asst Prof Goh Yihan entitled "The Promise of Universality – The *Spandeck* Formulation Half a Decade on" (2013) 25 SAcLJ 510 ("*Tan & Goh*"). We will return to this article in due course.

116 A more succinct description of the two-stage *Spandeck* test which is sufficient for our present purposes can be borrowed from this court's decision in *Go Dante Yap* where it was observed as follows (at [28]):

> In *Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency* [2007] 4 SLR(R) 100 ("*Spandeck*"), this court laid down a single test to determine the imposition of a duty of care in all claims arising out of negligence in the context of pure economic loss ("the *Spandeck* test"), and rejected the English approach of a general exclusionary rule against the recovery of pure economic loss (which, incidentally, appeared to have influenced Stanley Brunton LJ's view in *Robinson v Jones* [[2011] EWCA Civ 9] at [94] that a contractual duty of care did not give rise to a tortious duty of care (see [20] above)). That the losses suffered by the Appellant in this case were purely economic was therefore a relevant, but not overriding, consideration. In addition, the *Spandeck* test was held to be a two-stage test comprising first, proximity, and second, policy considerations, which were together preceded by the threshold question of factual foreseeability. This court also made clear that the *Spandeck* test was to be applied incrementally with reference to analogous cases.

117 The core of the test lies in the first stage, a consideration of the proximity and nexus between the parties; and in the second stage, policy considerations. Significantly, the test of proximity (which is a *legal* one) could be applied on the basis of a number of possible criteria. These criteria include the concepts of reliance as well as assumption of responsibility. We also pause to note that, *before* the two-stage test in *Spandeck* is administered, there is a *threshold* requirement that there is factual foreseeability – a requirement that, in the nature of things, is (as is the case here) virtually always satisfied.

118 Before we address any issue of factual foreseeability of harm to the third party, the specific alleged duty of care owed by Ng to the Appellants ought to be formulated with care. In our view, the correct formulation can be found in *Carr-Glynn*. There, the solicitor's duty *to the third party* was to take reasonable care to ensure that the *client's* instructions are carried into effect (see above at

[87]).

119 At a higher level of generality, the solicitor's duty to the third party in these situations is to take reasonable care in performing his original undertakings to the client. It is, in other words, the same duty of care that the solicitor owed to their client. This makes eminent sense for it is the solicitor's failure to carry out his client's instructions, or to perform his undertakings with care, that results in the harm to the third party. The only expectation that the third party can reasonably have as against the solicitor is for the latter to take reasonable care in carrying out his duties owed to the client. Put simply, the *content* of the duty of care owed by the solicitor to the third party must – in the absence of an express or implied retainer between them – necessarily be ascertained by reference to the duty of care which the solicitor owes to the client itself (*cf* also *Jackson & Powell* at para 11-053).

120 What then is the breach of duty to *Agus* that the Appellants are saying is *also* owed to *them*? This is essentially an incidental question as to the scope of the solicitor's undertakings and obligations to the client.

(1) Incidental question: existence and scope of Ng's retainer with Agus

121 On the Appellants' case, Ng's instructions included advising Agus of the existence and effects of the Personal Guarantee Clause. In our judgment, Ng did owe Agus this obligation.

122 The *scope* of a solicitor's contractual duties to his client is informed by the terms of the retainer between the solicitor and the client. Whilst there is a need to ensure the highest standards in the legal profession, it is also well-established at the same time that the duties of a solicitor to his client are confined to the retainer between them (see, for example, the English High Court decision of *Midland Bank Trust Co Ltd v Hett, Stubbs & Kemp* [1979] Ch 384 at 402). The retainer, in turn, is to be defined by reference to what the solicitor is instructed to do by the client and how he is expected to discharge his responsibilities in accordance with the notion of a reasonably competent solicitor (see, for example, the Singapore High Court decision of *Lie Hendri Rusli v Wong Tan & Molly Lim (a firm)* [2004] 4 SLR(R) 594 ("*Lie Hendri*") at [45]).

123 By way of illustration, in the Privy Council decision of *Pickersgill v Riley* [2004] PNLR 31, R owned M Ltd and guaranteed its liabilities under a 28-year lease. When R wanted to sell M Ltd, he was unsuccessful in persuading the landlord to release him from the guarantee. R then sold his shares in M Ltd to a third party for £125,000 and obtained a counter indemnity from the third party indemnifying him if he became liable under his guarantee to the landlord. The solicitor who was sued acted for R in the sale of his shares to W.

124 At the time of the sale both the solicitor and R thought W was a company of substance but neither carried out any checks on W's financial status. A few years later, M Ltd became insolvent and R had to pay the landlord £56,152 under his guarantee. R looked to W but found that W had always been a shell company with no assets. R then sued the solicitor for negligence.

125 At the time of the sale, R admitted that his solicitor had told him that getting an indemnity from a corporation meant that if the corporation ever became insolvent, then R would become a creditor and suffer like anyone else. The solicitor had also said that if the corporation divested itself of its assets, given the long lease, then it could avoid paying on the guarantee. R succeeded at first instance and before the Court of Appeal in Jersey. They held that the solicitor had a duty either to investigate W Ltd or to advise R the risk he would be running if that were not done.

126 The Privy Council reversed the decision of the Jersey Court of Appeal and held that the solicitor had discharged his duty in advising R about the risk of taking a guarantee from a corporation. The solicitor's duty did not extend to advising on the commercial wisdom of obtaining the indemnity from W Ltd or advising R to investigate the financial substance of W Ltd. R could not extend the solicitor's role from that of his solicitor acting on his instructions to that of being his commercial adviser or to that of being his insurer against his commercial misjudgment.

127 The Privy Council stated that the scope of a lawyer's duty to his client would depend upon the content of the instructions given and also on the particular circumstances of the case. It is a duty that is not helpful to describe in the abstract and it may vary depending on the characteristics of the client. A youthful client, unversed in business affairs, might need explanation and advice from his solicitor before entering into a commercial transaction that would be pointless or even impertinent if given to an experienced businessman.

128 The Privy Council also quoted with approval the following passage from *Jackson and Powell on Professional Negligence* (Sweet & Maxwell, 5th Ed, 2002) as correctly stating the position:

> In the ordinary way a solicitor is not obliged to travel outside his instructions and make investigations which are not expressly or impliedly requested by the client.

129 The Privy Council also cited with approval a passage from its earlier decision in *Clark Boyce v Mouat* [1994] 1 AC 428 ("*Clark*") that states as follows (at 437):

> When a client in full command of his faculties and apparently aware of what he is doing seeks the assistance of a solicitor in the carrying out of a particular transaction, that solicitor is under no duty to go beyond those instructions by proffering unsought advice on the wisdom of the transaction. …

130 The present case is less straightforward because the Appellants have not made clear, by way of primary evidence, what contractual obligations Ng undertook in relation to the dispute with SGBT which first arose in 2008. No letter of engagement was tendered as evidence by them. For that matter, Ng too did not tender any letter of engagement. The omission by Ng is itself surprising because if there was a written agreement which states that Ng's duties did not encompass advising Agus on the execution of the Security Documents, Ng would be exonerated. Agus's evidence is also unhelpful as it does not delineate the scope of the Ng's duties towards him.

131 The absence of the terms of the retainer between Ng and Agus is not in itself fatal. The totality of the circumstances is paramount. First, it is not disputed that Agus was experienced in dealing with bankers, having held top positions in a handful of banks in his career before 2008. Yet, he decided to engage Ng to assist him in his dispute with SGBT. Agus needed legal help. Ng did help. He *did* provide legal advice to Agus. He also received and made proposals on Agus's behalf at certain points. There is no suggestion at all that Ng was neither competent nor diligent in his discharge of these duties and instructions. He was Agus's adviser from the beginning to the end.

132 Secondly, although there were pockets of time when Agus appeared to have negotiated directly with SGBT, these were not significant enough to break the nexus between Ng and Agus. Moreover, there is no suggestion by Ng or anyone else that Ng was other than deeply involved in the dispute and was advising Agus when the Security Documents were provided to Agus. On the evidence, he was similarly involved when they were executed. There was therefore no cleavage in the relationship between Ng and Agus.

133 By all accounts, Ng was not a passive mouthpiece through whom Agus communicated his intentions. Ng was retained to and did provide advice to Agus in relation to his dispute with SGBT.

134 In a typical solicitor-client relationship, the duty to explain documents is basic (see *Clerk & Lindsell* at paras 10-133 and 10-136), and all the more so whenever the transaction involves the client signing documents. Although only in passing, V K Rajah JC (as he then was) in *Lie Hendri* observed (at [52] and [55]) that solicitors acting for multiple parties in conveyancing transactions had the following duties:

> 52 In dealing with *standard* banking documentation in straightforward loan arrangements, there will usually be no potential or actual conflict of interests *provided* ***that the solicitor clearly and adequately explains to the parties the ambit and purport of the documentation generating their responsibilities and liabilities*** *.* …
>
> …
>
> 55 This is not to say that a solicitor advising multiple clients in a standard loan transaction performs a purely routine or ministerial task discharged by merely greeting clients and reciting a standard incantation. ***He ought to use his discretion, in every case, on the degree of detail, wealth of explanation and extent of advice required to bring home the ramifications of the legal documentation*** . …
>
> [original emphasis in italics; emphasis added in bold italics]

135 Not every minutiae needs to be explained. However, Ng's duty to explain documents, as a reasonable solicitor in his position, must have included the duty to draw Agus's attention to any pitfall, particularly any hidden pitfall, that the documents might contain. As Sir Thomas Bingham MR observed in the English Court of Appeal decision of *Reeves v Thrings & Long* [1996] PNLR 265 at 275:

> It will always be relevant to consider what the solicitor is asked to do, the nature of the transaction and the standing and experience of the client. Thus on the facts, [Sheppard] was not retained to advise on the wisdom of offering the price [Reeves] had informally agreed to pay … *But it was in my view [Sheppard's] duty to draw [Reeves's] attention to any pitfall, particularly any hidden pitfall, the contract might contain*. [emphasis added]

136 The duty to bring to light any term which is out of place in the documents is a basic one, and flows from the duty of the solicitor to be responsible for the documents which his client will ultimately sign. It does not mean that the solicitor must hold his client's hand and walk him through every line. For some cases that may be necessary, but for others it may not. It depends on the circumstances of each case.

137 Nevertheless, the basic principle undergirding all instances by way of a general principle is the recognition that it is the solicitor's duty to ensure that his client *understands* the document that he is committing his name to. If adverse terms are not highlighted, it cannot, in our view, be said that the client had appreciated the effect of what he was signing. Viewed in this light, Ng's case that his duty to Agus was only to implement the Forbearance Agreement, period, without any corresponding duty to check through the Security Document, cannot, with respect, be right.

138 It would be very different if the alleged failure here concerns advice given (or the lack thereof) on the commercial merits of a transaction or on the wisdom of a particular course where the client is in full possession of his faculties and apparently aware of what he is doing. It has been held in *Clark*

that a solicitor does not generally owe such an extensive duty in such a situation.

139 In the circumstances of the present case, even though the scope of the retainer was not captured in a written document, we are satisfied that Ng must have at the minimum been retained and instructed to (a) explain to Agus the contents of correspondence and proposals from SGBT and its lawyers and (b) advise Agus generally on the consequences of the contents. This duty necessarily encompasses advising on the contents and effects of the terms in the Security Documents.

140 Accordingly, Ng was obliged to advise Agus of the contents and effects of the terms in the Security Documents, which includes the Personal Guarantee Clause. Together with the general rule that solicitors are bound to exercise a reasonable degree of care, skill and knowledge in *all* legal business that they undertake (*Charlesworth & Percy* at para 9-213), it follows that Ng owed Agus a duty to take reasonable care in advising him of the contents and effects of the Security Documents, especially the Personal Guarantee Clause.

141 We now consider if the circumstances are such as to justify the imposition of this duty of care on Ng *vis-à-vis the Appellants* as well. We begin this inquiry with an assessment of the first stage of the *Spandeck* test.

(2) Factual foreseeability and proximity

(A) Foreseeability of loss

142 It is patently foreseeable that a solicitor's failure to take reasonable care in performing instructions under a retainer which, if performed properly would provide a benefit or negative a detriment to a third party, will result in harm to the third party. The connection between the undertaking and the third party is so direct and strong that a failure to perform the undertaking with care would in most, if not all, cases some form of harm to the third party.

143 There can be no doubt that it was factually foreseeable that should Ng fail to take reasonable care in advising Agus of the contents of the Security Documents, in particular the existence and effect of the Personal Guarantee Clause, loss to the Appellants would be occasioned. This preliminary threshold of factual foreseeability is therefore crossed.

(B) Proximity

144 Factual foreseeability of harm is of course only one part of the first requirement under the *Spandeck* test. The Appellants will also need to establish that there is the requisite degree of proximity between them and Ng. It is insufficient for the Appellants to show that Ng owes Agus a duty of care by reason of their solicitor-client relationship, as the basis of the Appellants' claim in tort, following *White*, is that a duty of care is owed by the solicitor to *the third party*.

145 The emphasis of proximity is on the "closeness" and "directness" of the relationship between the parties (see *Spandeck* at [77]–[78]). In the case of an implied retainer which we have found exists between Ng and the Appellants, except in exceptional cases, it would generally be the case that a solicitor and client who have between them a contractual retainer for a specific purpose would have the sufficient closeness and directness necessary to impose tortious liability. Indeed, it is difficult to imagine a stronger case of proximity; the very fact that a *contractual relationship* (which is itself legal in nature) exists between the parties means that there must, *ex hypothesi*, be a sufficient relationship of proximity.

146 *Leaving aside* the situation of an implied retainer for the sake of argument, we are still of the view that there is sufficient proximity. Where a solicitor's instructions from a client include or has as its *effect* the conferment of a benefit or negativing a detriment to a third party, and the solicitor undertakes *to the client* to fulfil that instruction, he would have brought himself into a direct relationship with the third party, even if the latter may not have personal knowledge of the transaction or the solicitor.

147 There are at least two levels of proximity at play in the present case. The first is relational or circumstantial proximity. The relationship between the solicitor and client on the one hand and with the third party on the other is direct and close because of the nature of the instructions from the client. The client's wish to benefit the third party can only be effected through the solicitor's careful performance of his legal services to the client.

148 Ng was keenly aware that at least a part of his services was retained *precisely* to ensure that *the third parties'* (*ie*, the Appellants') interests were taken care of. He knew of the relationship between Agus and his sons, including the fact that his sons were young and subservient to their father's wishes. He was also alive to Agus's concern that his sons not have to personally guarantee his debts. Ng's particular knowledge of the state of affairs at play supports a finding of proximity (for the possibility of knowledge as a "standalone" proximity factor, see *Tan & Goh* at para 26).

149 The second level of proximity at play is causal proximity in the sense that Ng was plainly cognisant of the direct repercussions of his actions, or inaction, on the Appellants' interests. Ng was in a position where his advice or the lack thereof to Agus would have inevitable knock-on effects on the interests of the Appellants. It is true that causal proximity might on this reasoning be found in all such tripartite situations. However, it should be axiomatic by now that the determination of proximity is always an exercise of assessing the *degree* of directness and closeness between the parties in the specific circumstances that they found themselves in, having regard to the precise facts and circumstances of the case.

150 In our view, the relational or circumstantial proximity and causal proximity extant in this case can each independently found a duty of care under stage one of *Spandeck*. Additionally, there is also physical proximity in our present case that was not present in *White*, and which buttresses the imposition of the duty of care on Ng. The physical proximity extant between Ng and the Appellants alone renders the imposition of a duty of care stronger in our case as compared to *White.*

151 In *White*, the third party was *technically* invisible; the solicitor knew of the beneficiaries but the converse was not true. There was no contact between the beneficiaries and the solicitor. In our case, on the other hand, the third parties were *known* to the solicitor. Ng did, in fact, provide instructions to the Appellants – who knew that Ng was advising their father, Agus – on how and where they should append their signatures to the Security Documents.

152 We think that the authors of *Tan & Goh* have in mind the same idea, albeit under a different label, when they talk about the element of "control" as a proximity factor. They say this (at para 31):

> Control is often discussed in relation to the defendant's control over the *source of the risk of harm to the claimant or a class of individuals of which the claimant is a member*. For example, in scenarios where one serves alcohol to an individual, with the result that either the intoxicated individual subsequently injures himself/herself or someone else, courts may focus their inquiry on *whether the server had control over the risk of harm* (a first-stage *Spandeck* proximity issue) … [emphasis added]

153 Their reference to the House of Lords decision of *Reeves v Commissioner of Police of the Metropolis* [2000] 1 AC 360 is illuminating. In that case, an inmate who the police were informed was a suicide risk hanged himself in a prison cell. The plaintiff, who was the administratrix of the inmate's estate, argued that the police were in breach of a duty of care to take reasonable steps to prevent the inmate's suicide. Although the existence of a duty to the inmate to take reasonable care to prevent him from committing suicide was conceded by the Commissioner of Police, Lord Hoffmann alluded (at 369) that he would, in any case, have found that such a duty existed. Such a duty of care to the inmate, although very unusual, arises "from the complete control which the police or prison authorities have over the prisoner, combined with the special danger of people in prison taking their own lives".

154 There may not be complete symmetry, but we think that the same reasoning centred on the degree of control applies (in this regard, see also Susan Watson & Andrew Willekes, "Economic Loss and Directors' Negligence" [2001] JBL 217 at pp 236–237). Ng was, in many ways, in complete control over the actions of the client (and in this case, also the Appellants). Borrowing a phrase from *Tan & Goh* (at para 31), Ng's "capacity … to control the situation that might give rise to the risk of harm" is a critical consideration. The authors also opined that the vulnerability of the plaintiff is relevant; we agree and need only say that, on the basis of the foregoing, it is relatively clear that the Appellants were relatively vulnerable. They depended on Ng to perform his obligation of advising Agus of the existence and effects of the Personal Guarantee Clause which, had it been done, would unquestioningly have resulted in the Appellants *not* signing the Security Documents.

155 Although we have identified various connections of proximity between Ng and the Appellants, we remain hesitant to use the language of assumption of responsibility *to the third party* in assessing proximity between the parties here – at least in its *direct* sense. In general, it is sufficient in our view to say that the solicitor's assumption of responsibility to the client to perform the specific instructions – which is incontrovertible – sets the stage and creates the environment necessary to the incidental but direct and close relationship to the third party.

156 Based on the above analysis of the various proximity factors in such third party situations, we are of the view that we would have arrived at the same conclusion as the majority of the House of Lords did in *White*, that is, to impose a duty of care on the solicitors. Given that the relationship between Ng and the Appellants was closer and more direct than that of the solicitor and beneficiaries in *White*, there is no doubt in our minds that the situation here was an *a fortiori* one to that in *White*, and that there was therefore sufficient proximity between Ng and the Appellants to impose on Ng *vis-à-vis* the Appellants the same duty to take care in his advice to Agus. This is so even in the absence of an implied retainer.

157 Notwithstanding this, the significance of some form of assumption of responsibility should not be discounted entirely. It is this assumption of responsibility *to the client* to perform the client's instructions which confers a benefit or negatives a detriment to a third party and which serves as the foundation for the identification of proximity to the third party that justifies the imposition of a duty of care under the first stage of the *Spandeck* test. It is not *direct* in the sense of being the basis of the duty of care; as we have shown above, the basis is better rationalised by reference to the relational or circumstantial, causal or physical proximity that exists between the solicitor and the third party.

158 In this regard, we gratefully refer to the observation of Lord Griffiths in the House of Lords decision of *Smith v Eric S Bush* [1990] 1 AC 831 at 862:

> … the phrase "assumption of responsibility" can only have any real meaning if it is understood as

referring to the circumstances in which the law will deem the maker of the statement to have assumed responsibility *to the person who acts upon the advice*. [emphasis added]

159 If, however, the court was minded to adopt, as the basis of its decision, the concept of assumption of responsibility, this could *not* (as already explained above at [89]) be effected in the *direct or conventional* sense. That is why, as also explained above, there could be *no* (corresponding) concept of *reliance* operating in a simultaneous fashion. Looked at in this light, such a (*modified*) conception of the concept of assumption of responsibility is, in fact, more consistent with the two-stage test in *Spandeck* than with the then existing (or even present) English law. Correlating this particular conception of the concept of assumption of responsibility with the two-stage test in *Spandeck* would in fact be useful from at least two points of view.

160 First, it would avoid treating assumption of responsibility as a kind of legal fiction (as to which, see, for example, Hugh Evans, *Lawyers' Liabilities* (Sweet & Maxwell, 2002) at para 1-06) inasmuch as it would have substantive as well as normative significance from a legal perspective (being tied, as it were, to the requirement of *proximity* under the first stage of the two-stage test in *Spandeck*). Secondly, as also noted above (at [95]), such an approach would also render the concept of assumption of responsibility merely *a factor* in determining whether or not there was sufficient proximity pursuant to the first stage of the two-stage test in *Spandeck* – as opposed to (as was the case in *White*) treating the concept of assumption of responsibility as *a legal test, in and of itself*.

161 The concept of *reliance*, however, remains elusive. We are unable to accept an argument that third parties who did not even know that they were third parties, as is the case of beneficiaries under a will not made known to them, can be said to have placed reliance on the solicitor's care and skill (a point which was also acknowledged in *White* itself (see also above at [89] and below at [162]). That argument remains one step too far. Lord Goff's "extension" of the *Hedley Byrne* basis of liability which rests on the twin criteria of assumption of responsibility and reliance is therefore, in our view, better explained by an assumption of responsibility (to the client) that provides the foundation for proximity between the solicitor and the third party. Reliance plays no part in this analysis.

162 It may well be argued that reliance need *not* be present in limited situations and that the *White* fact pattern is one of those. Such an argument is certainly not untenable (see for example, *per Browne-Wilkinson* in *White* at 275 as well as above at [89] and [161]), although we would defer addressing this very interesting issue to a more appropriate case.

163 Finally and before we leave the issue of proximity, we note that the term(s) of the contract between the solicitor and client may be relevant to the question of a duty of care between the solicitor and the third party. However, as this point does not arise on the facts of the present case, no further elaboration is required at the moment.

(3) Policy considerations and conclusion

164 We have thus far been dealing only with the (threshold) requirement of factual foreseeability as well as the *first* requirement of the two-stage test in *Spandeck* of *proximity*. In this last-mentioned regard, it is clear that the inquiry is a heavily *fact-centric* one. In so far as the *second* requirement in relation to policy considerations is concerned, we are of the view (for the sake of completeness) that there are no policy factors which would negate the specific duty of care that we have found has arisen. That is so both in the presence and absence of an implied retainer.

165 The conclusion is obvious when there is a contractual relationship between the parties. It is so self-evident that the court assumes (as a matter of law) that there is (as already mentioned) a duty

of care owed by the defendant to the plaintiff *concurrently* in both contract as well as in tort. We note that the preponderance of authority in favour of concurrent liability is overwhelming (see, for example, *Charlesworth & Percy* at para 9-213).

166 We do not see any generally applicable policy reason to hold differently in the absence of a retainer but where the circumstances are such as in *White* or the present case. Indeed, if there are any relevant policy factors, they would point in the *opposite* direction. Upholding high standards of competence and diligence should be an ambition that a noble profession such as ours should strive towards and be proud of. The imposition of a duty on solicitors to exercise reasonable care even towards third parties in particular situations advances that desirable policy. We must, however, caution against thinking that the bar is set impossibly high (for lawyers) to the extent that lawyers and law firms have little choice but to transfer those costs downstream to their clients, thereby decreasing access to justice. This is a policy reason, no doubt, but one that is more properly located in an assessment of the appropriate *standard* of care.

167 Therefore, the first stage of factual foreseeability and proximity and the second stage of policy considerations point towards the imposition on Ng of a duty to the Appellants to take care in advising Agus of the existence and effects of the Personal Guarantee Clause.

(5) Standard of care and breach

168 Liability is not strict, but should be found only if the solicitor failed to take reasonable care in discharging his obligations. The standard of care and skill which can be demanded from a solicitor is that of a reasonably competent and diligent solicitor (see, for example, *Charlesworth & Percy* at para 9-232).

169 The third question therefore is whether Ng had taken the same care that a reasonably competent and diligent solicitor would in discharging his obligation to advise Agus of the contents of the Security Documents, in particular the existence and effects of the Personal Guarantee Clause? The answer is, unfortunately for Ng (and consequently, NCH), in the *negative*. As the Judge also observed (at [14] of the Judgment), in the main, the failure to advise Agus was plainly an oversight by Ng.

170 Ng's case is that he was not aware of Agus's position on the issue of personal guarantees by the Appellants after 16 October 2008 when SGBT rejected Agus's proposals and terminated the credit facility. He therefore assumed that everything in the Security Documents was consistent with what Agus had agreed in direct negotiations with SGBT.

171 This submission, with respect, misses the point. It is irrelevant what Ng thought of the terms of the Security Document. The issue is whether pointing out to Agus the existence of the Personal Guarantee Clause was something that he ought to have done, and if he did not do so, whether was it because he had not taken reasonable care.

172 It is more likely than not, in our view, that Ng simply failed to spot the Personal Guarantee Clause. First, it is not enough for Ng to say that he thought that Agus had agreed to reinsert the Personal Guarantee Clause. From a quick perusal of the Forbearance Agreement which is no longer than six pages, it is clear from cl 1.5 of the Forbearance Agreement that the only guarantors under the agreement were SSTPL and SITPL. The Appellants' names were absent from the clause on guarantees. This fact should have operated on Ng's mind when he received the Security Documents from TPC. Moreover, Ng was aware that the guarantees which had to be procured were an integral element of the Forbearance Agreement. In an earlier letter to Agus, he had specifically highlighted

that only SSTPL and SITPL had to issue corporate guarantees.

173 Secondly, the submission that Agus must have known what "first legal open mortgage" in the Forbearance Agreement meant and therefore Ng had no real reason to think that the existence of the Personal Guarantee Clause was suspicious is unpersuasive. In the first place, "first legal open mortgage" is certainly not a term that can be said to be commonly used and understood in conveyancing transactions. Further, we do not think that Ng's argument that Agus knew what a "first legal open mortgage" was because TPC had explained it to him before in a letter on a previous occasion in July 2008 carries his case very far. TPC's letter refers to "all moneys legal mortgage", not "first legal open mortgage". Superficially, the two already look like different concepts. Even if they are substantively similar, it cannot be so readily assumed that Agus must have known what a "first legal open mortgage" is, such that Ng was justified in thinking that the Personal Guarantee Clause was consistent with what Agus had agreed to. A reasonably competent and diligent solicitor would do well to err on the side of caution particularly in relation to the understanding of a legal term which he has never provided direct advice on.

174 Ng's case gives the impression that he had seen the Personal Guarantee Clause but thought it unnecessary to flag it out because that was what Agus already knew and agreed to. That is rather inconsistent with the case theory in the Respondents' pleadings (see above at [35]). But there are other more serious issues, the chief of which is that Ng's correspondence with Agus and the Appellants on the Security Documents does not quite bear that out.

175 In his cover letter to the Appellants sent to Agus's office, Ng explained the various documents and gave specific guidance on who needed sign which document. Under one section headed "Guarantees", the explanation and instruction was:

> Two (2) Guarantees, each to be signed by:-
>
> (a) Scotts Skyline Trust Pte Ltd [SSTPL]; and
>
> (b) Scotts Island Trust Pte Ltd [SITPL].
>
> * The Director and Director/Secretary of [SSTPL], please sign on page 15 at the places marked "X" …
>
> * Mr Patrick Adrian Anwar (as Director of [SITPL]), please sign on page 15 of the Guarantee.

176 In many ways, Ng was simply following the layout of the cover letter which he received from TPC. Consistent with the Forbearance Agreement, TPC's letter also had a "Guarantees" section which only listed SSTPL and SITPL as the two guarantors. A powerful argument might therefore be made that Ng was not negligent; the Personal Guarantee Clause was completely unexpected given cl 1.5 of the Forbearance Agreement and TPC's cover letter. However, looked at in another way, Ng accepted TPC's cover letter as accurately representing the description of the contents of the Security Documents. He then used it and assumed that only SSTPL and SITPL needed to give guarantees.

177 On balance, a reasonably competent and diligent solicitor going through the Security Documents with the knowledge that those documents were integral to his client's interests and the interests of third parties affiliated to his client would probably have picked up the Personal Guarantee Clause. Of significant importance too is the fact that Ng knew that Agus had previously intimated to SGBT that he did not want his sons to have any personal liability. A reasonably competent and diligent solicitor in the same circumstances would probably have thought, at minimum, that the

existence of the Personal Guarantee Clause was noteworthy enough to be flagged to the client.

178 Ng might have a stronger case if the Personal Guarantee Clause was hidden amongst some fine print in the Security Documents, or was sandwiched in the middle of a long paragraph across several pages. It is conceivable that a reasonably competent and diligent solicitor may, in very exceptional circumstances including but not limited to absurd time pressures and copious amount of paperwork, fail to notice an adverse clause.

179 The present facts are far from that sort of exceptional situation. The Personal Guarantee Clause was in the first line under the first section titled "Covenants and Conditions". The first line reads as follows:

> The Borrower and the Mortgagor HEREBY JOINTLY AND SEVERALLY COVENANT with the Mortgagee as follows:
>
> 1. (i) To pay to the Mortgagee on demand all sums of money now due and owing under the Facilities and such sums of money which are now or shall from time to time or at any time hereafter be owing or remain unpaid to the Mortgagee by the Borrower in any manner …

180 With all due respect to Ng, the line is quite difficult to miss. The Judge was perhaps being kind in his observation that Ng was "not careful" (see the Judgment at [14]).

181 In conclusion on this particular issue of tortious liability, Ng had a duty to take reasonable care in advising Agus of the contents of the Security Documents. This duty was owed not just to Agus but also to the Appellants on account of the close proximity between Ng and the Appellants, and the foreseeability of harm should Ng fail to take reasonable care (coupled with the absence of any policy factor to the contrary). Had he taken reasonable care in scrutinising the Security Documents, he would have spotted the Personal Guarantee Clause and without a doubt would have informed Agus (and possibly even the Appellants) of the existence of the clause. His failure to do so is a breach of his duty of care the Appellants for which liability in tort under the principle in *White* can be imposed (even in the absence of a contractual relationship between him and the Appellants).

(4) Coda (1) – *Van Erp*

182 There is at least one other judgment that we have seen that has adopted similar reasoning. In *Van Erp*, a solicitor prepared a will for a client upon the client's instructions that it was to include a testamentary disposition to a friend of the client, one Mrs Van Erp. When the will was being executed, the solicitor asked the husband of Mrs Van Erp to attest it which under a written law had the effect that the disposition was null and void. After the death of the client, Mrs Van Erp sued the solicitor for damages in negligence.

183 The High Court of Australia (with only McHugh J dissenting) held that the solicitor was in breach of a duty of care owed to the third party beneficiary. But it is the judgment of Dawson J that is illuminating. He said (at 184):

> In my view, the relationship between the solicitor, Mrs Hill, and the intended beneficiary, Mrs Van Erp, was *one of proximity* which did give rise to a duty of care on the part of Mrs Hill towards Mrs Van Erp. *No single factor, such as an assumption of responsibility by the solicitor, leads me to that conclusion*. The relevant circumstances are more complex than that. [emphasis added]

184 He went on to elaborate (at 186) on what we have explained as the assumption of

responsibility in an *indirect* sense:

> Thus, when a solicitor accepts responsibility for carrying out a client's testamentary intentions, he or she cannot, in my view, be regarded as being devoid of any responsibility to an intended beneficiary. The responsibility is not contractual but arises from the solicitor's undertaking the duty of ensuring that the testator's intention of conferring a benefit upon a beneficiary is realised. In a factual, if not a legal sense [footnote omitted], that may be seen as assuming a responsibility not only to the testatrix but also to the intended beneficiary.

185 The learned judge also, like us, had difficulty with placing emphasis on the aspect of reliance by Mrs Van Erp (at 186):

> In the present case there was *no reliance* upon the solicitor by Mrs Van Erp nor did she request her to do anything for her. Mrs Van Erp did not change her position in reliance upon anything said or done by the solicitor. It is true that Mrs Van Erp was told that she was a beneficiary under the will and took no steps to protect her position. In that way it might be said that she relied upon the solicitor to carry out the testatrix's instructions carefully. However, I make no point of that in the present case [footnote omitted] [emphasis added].

186 Dawson J rounded off his judgment with a caveat that may be obvious but is nonetheless worth repeating (at 188–189):

> For all of these reasons, I am of the view that a solicitor retained to draw up and attend to the execution of a will is in a relationship of proximity with an intended beneficiary under the will. That relationship gives rise to a duty to exercise reasonable skill and care in the performance of those tasks. That will be so whether or not the intended beneficiary knows of the bequest. The duty arises from the special considerations involving testamentary dispositions which I have discussed above. *There is nothing in what I have said which is intended to convey the view that whenever a person's performance of a contractual obligation may, if performed negligently, injure a third party's economic interests, that person owes the third party a duty of care. Nor is anything I have said intended to convey the view that, other than in a case of the present kind, a solicitor owes a duty of care to persons other than his client whose interests may be affected by the solicitor's performance of his or her duties to the client. The duty of care which I would recognise in the present case* ***arises from the particular relationship between the parties, that relationship being analogous to other relationships of proximity in which a duty of care has been held to arise*** . It is that which, in addition to the foreseeability of harm, provides the basis in this case for the recognition of tortious liability for negligence. [emphasis added in italics and bold italics]

187 It should, however, be noted that the law relating to negligence for pure economic loss in the Australian context is premised, in the main at least, on a *multi-factorial* approach and is thus different from the two-stage test in *Spandeck* which represents the relevant law in the Singapore context. That this is the case is evident, for example, from the fact that, whilst not wholly dispensing with the *concept* of proximity, it was clear that the court in *Van Erp* did *not* (unlike the law in the Singapore context) endorse it as a fundamental *principle* as such. Nevertheless, all this does not detract in any way from the *general* reasoning of the court in *Van Erp* with regard to the concept of assumption of responsibility as described briefly in the preceding paragraphs.

(5) Coda (2) – *Spandeck* and *White*: a summary

188 We have already sought to locate *White* within the legal framework furnished by the two-stage

test in *Spandeck*. It might therefore be appropriate to summarise the various points which have been made in this particular regard before proceeding to consider the next (and final) main issue in this appeal, namely, whether the Appellants are entitled to the reliefs claimed.

189 The *governing principles* are to be found in the two-stage test in *Spandeck*. Indeed, this particular test applies across the relevant Singapore legal landscape and this is demonstrated in the governing law in related areas such as nervous shock and occupiers' liability (see the decisions of this court in *Ngiam Kong Seng and another v Lim Chiew Hock* [2008] 3 SLR(R) 674 and *See Toh Siew Kee v Ho Ah Lam Ferrocement (Pte) Ltd and others* [2013] 3 SLR 284, respectively). These governing principles are, in fact, consistent with the *decision* in *White*. However, they *differ from* the actual *principle* applied in *White* itself. In *White*, the majority of the court applied a *modified* version of the concept of assumption of responsibility inasmuch as it entailed *neither* a *direct* undertaking from the defendant to the third party *nor reliance* by the third party on the defendant. More importantly, the concept of assumption of responsibility constituted *a legal test, in and of itself*, in so far as the decision rendered in *White* was concerned.

190 The concept of assumption of responsibility (in its more direct and conventional form) is nevertheless *still relevant* in the *Singapore* context, *but only* as *a factor* in ascertaining whether or not there was sufficient *proximity* between the defendant and the plaintiff (including a third party) pursuant to the *first stage* of the two-stage test in *Spandeck*; *unlike White*, it does *not* constitute *a legal test, in and of itself*.

191 Finally, it bears reiterating that *the governing law in the Singapore context is the two-stage test in Spandeck*. Needless to say, the *precise facts* of each case are very important.

Are the Appellants entitled to the reliefs claimed?

192 The Respondents' only defence to the damages representing the settlement sum of US$1m and legal fees of $325,287.71 rests on two planks:

(a) first, in relation to only the settlement sum, that it was not reasonable; and,

(b) second, that, in any event, the Appellants did not suffer any loss because both the settlement sum and the legal fees which they are claiming were paid for by others.

193 We shall deal with the second plank first.

Source of the Appellants' funds

194 It is a fact that the legal fees arising from the dispute with SGBT were paid for by Agus "on behalf of the [Appellants]". As for the settlement sum, it is also apparent from the Appellants' submissions that at least a sizeable proportion of that sum was paid by other parties including Agus and the Appellants' mother. The Appellants' personal contribution was relatively small in comparison, and there is no allegation by the Appellants that the sums paid on their behalf are loans. The question therefore is whether the Appellants can claim the settlement sum and legal fees as damages for their losses even though those sums were paid for unconditionally by others.

195 The submission put forward by the Appellants is that the existence of third party beneficiaries does not preclude the Appellants from claiming the losses which they would otherwise have had to pay. This submission draws from the principle established in the House of Lords decision in *Parry v Cleaver* [1970] AC 1, and has since come to be known as the "benevolence principle". Its rationale is

simply that it is better to allow double recovery than to allow the tortfeasor to escape liability because of the benevolence of others (see, for example, the House of Lords decision of *Hussain v New Taplow Paper Mills Ltd* [1988] 1 AC 514 at 527–528). This court recognised the applicability of the "benevolence principle" under Singapore law in *The "MARA"* [2000] 3 SLR(R) 31 at [28].

196 Ng does not advance any meaningful submission against the adoption of the benevolence principle in the present case. In truth, there is no strong cause for departing from the application of this principle *if* liability is found against him (and consequently, NCH).

197 Hence, in so far as the legal fees are concerned, the sum of $325,287.71 claimed by the Appellants is allowed, although, for the reasons set out below, it should not be paid out to the Appellants as yet (see below at [213]). We now turn to consider if the claim for the settlement sum of US$1m should also be allowed.

Reasonableness of settlement

198 Both sides accept the principle that a settlement sum can be claimed as damages under a contractual claim or tortious claim. Their point of disagreement was on the reasonableness of the settlement. The decision of this court in *Britestone Pte Ltd v Smith & Associates Far East, Ltd* [2007] 4 SLR(R) 855 ("*Britestone*") was referred to by both sides as support for their respective positions.

199 In *Britestone*, the court held that in determining whether a settlement sum is reasonable depends on whether a reasonable businessman might have done the same in the same circumstances. The court also set out a summary of the relevant considerations the court would have regard to as follows (at [54]):

> It will be helpful to summarise the relevant factors to be employed in assessing whether a settlement would pass muster as being reasonable. When a downstream claimant seeks to subsequently rely on an earlier settlement as reflecting the actual loss which he now claims against an upstream defendant, the courts should usually consider the following matters in determining whether he has acted as a responsible and reasonable businessman in arriving at the settlement:
>
> (a) the duration or period of negotiations as well as their general content;
>
> (b) whether there are any customs of trade or previous business dealings between the parties and/or whether there are any legitimate business considerations or contractual requirements (*eg*, dispute resolution clauses, *etc*) enjoining a settlement;
>
> (c) whether the negotiations were conducted *bona fide*;
>
> (d) the assessment which could properly be made at the time of settlement of the prospects of success or failure of the claim based on materials then available;
>
> (e) the availability of and/or reliance on legal advice, expert advice or independent survey reports taking into account considerations of cost and time;
>
> (f) whether the actual settlement itself was arrived at arm's length;
>
> (g) whether there was an opportunity accorded to the third party/ultimate payor to be involved in the negotiations;

(h) whether there was a positive reception of complaints by the third party/ultimate payor;

(i) whether the settlement amount has been paid, and, if so, how and when;

(j) the bargaining strengths of the parties involved in the settlement, taking into account (among other things) alternative means by which the dispute could have been concluded;

(k) whether, in the round, the settlement figure was objectively assessed and properly calibrated against the context of the entire factual matrix; and

(l) the practical consequences of the decision on reasonableness.

200 The thrust of the Appellants' main argument that the settlement was reasonable centres on the proportion of the settlement sum in relation to the outstanding sum for which Agus (and consequently they) were liable to SGBT for. The value of SGBT's initial claim against Agus and the Appellants was in excess of $17m. In November 2009, Steven Chong JC (as he then was) granted summary judgment in favour of SGBT to the tune of more than $14.9m, although that decision was reversed on appeal in April 2010. As at the date of settlement, inclusive of interest, the proof of debt filed by SGBT against Agus was more than $18.9m.

201 We note that the Judge did not express a concluded view as to the question of reasonable settlement or the reasonableness of the settlement in view of his decision that there was no liability on Ng's part. However, given our findings above on Ng's liability, this issue now falls to be determined. In the interests of fairness to Ng (and consequently, NCH), and, as importantly, to also furnish the Appellants an opportunity to prove the reasonableness of their loss by reference to the list of factors in *Britestone*, this specific issue of determining the reasonableness of the settlement should be remitted to the Judge, and we so order. Nevertheless, we think it appropriate to furnish some guidance from the perspective of principle on this issue, although we would emphasise that the Judge is free to apply these principles according to the facts and circumstances of this case and to take further evidence if he is of the view that it is necessary to do so.

202 We would only observe at this juncture that given the clear wording of the Personal Guarantee Clause, it would seem that settling for US$1m was a commercially sensible decision. On the other hand, there are some aspects of the transaction which may merit further consideration by the Judge, such as:

(a) the possibility of a discount being applied to the original claimed sum by SGBT which might not have been tested or scrutinised as vigorously as it would have been had the matter gone to trial;

(b) the possibility that the original outstanding sum might have been set off against the collateral held by SGBT; and

(c) the manner in which the settlement was arrived at, in particular:

(i) the availability of and/or reliance on legal or other expert advice taking into account considerations of cost and time (see *Britestone* at [54(e)]). A settlement made under legal advice tends to negative the hypothesis that the party acted unreasonably in settling (see the High Court of Australia decision of *Unity Insurance Brokers Pty Ltd v Rocco Pezzano Pty Ltd* (1998) 192 CLR 603 at [6]); and

(ii) whether there was an opportunity accorded to the third party/ultimate payor to be involved in the relevant negotiations (see *Britestone* at [54(g)]).

203 In addition to the above circumstances that we have highlighted, there are yet other relevant considerations as identified in Wayne Courtney, "Settlements Following Breach of Contract" [2013] LMCLQ 157 ("*Courtney*") at p 170, such as whether the claim was adequately investigated, whether there was sufficient material available to make an informed decision to settle, and whether the Appellants demonstrated an appropriate degree of strategic thinking and fortitude in negotiating the settlement (see also *Unity Insurance* at [131]; and the English Court of Appeal decision of *Comyn Ching & Co Ltd v Oriental Tube Co Ltd* (1979) 17 BLR 47 at 89).

204 It should be noted, at this juncture, that *Britestone* did not furnish guidance with respect to the legal position in the event that a settlement is found to be unreasonable. This is because the court in that case found the settlement concerned to be reasonable. We will therefore proceed to elaborate upon this particular issue which will simultaneously furnish not only the Judge in the present case but also future courts with some guidance. In this regard, whilst certain theoretical issues might need to be further elaborated upon in future cases, we will endeavour to furnish what we consider to be basic (and, more importantly, *practical*) guidance in relation to this particular area of the law.

205 The purpose of considering the reasonableness of the settlement is that such reasonableness is a necessary condition for adopting the amount of the settlement as the measure of loss. This was enunciated in the seminal English Court of Appeal decision of *Biggin & Co Ld v Permanite Ld and Others* [1951] 2 KB 314 at 321. If this is correct, which we think it is, then the consequence of an unreasonable settlement must be that the settlement amount cannot be taken as the measure of the plaintiff's loss (see the English High Court decision of *John F Hunt Demolition Ltd v ASME Engineering Ltd* [2008] Bus LR 558 ("*ASME*") at [67]; see also *Courtney* at p 174).

206 For instance, where the plaintiff settles a suit (in which he was the defendant) despite having an impossibly strong defence, the plaintiff cannot say that the loss, namely the settlement sum, was caused by the defendant's breach of his duty, contractual or otherwise. This court alluded to this causation-based reasoning in *Britestone* where it was stated thus (at [55]):

> … Further, if it can be shown that the settlement of a claim was wholly unreasonable, the upstream defendant can also plausibly assert that there has been a ***break in the chain of causation*** *, thereby precluding the downstream party's claim in any form whatsoever*. These are important considerations that businessmen and their advisers must bear in mind when they attempt to reach *ad hoc* settlements in a multiparty setting. [emphasis added in italics and bold italics]

207 In addition to the approach from *causation* (as to which, see also the observations by Akenhead J in the English High Court decision of *AXA Insurance UK Plc v Cunningham Lindsey United Kingdom (an unlimited company)* [2007] EWHC 3023 (TCC) at [273] and by Colman J in the English High Court decision of *General Feeds Inc Panama v Slobodna Plovidba Yugoslavia* [1999] 1 Lloyd's Rep 668 ("*General Feeds Inc*") at 691), there is also an approach from *mitigation* (which was *also* referred to by Colman J in *General Feeds Inc*, *ibid*). Indeed, that the doctrines of causation and mitigation are not unrelated is demonstrated in the following observations by Sir John Donaldson MR (as he then was), delivering the judgment of the English Court of Appeal in *Sotiros Shipping Inc and Aeco Maritime SA v Sameiet Solholt* [1983] 1 Lloyd's Rep 605 at 608:

> A plaintiff is under *no duty* to ***mitigate*** his loss, *despite* the habitual use by the lawyers of the phrase "duty to mitigate". He is completely free to act as he judges to be in his best interests.

> On the *other hand*, a defendant is *not* liable for all loss suffered by the plaintiff *in consequence of his so acting.* A defendant is only liable for *such part* of the plaintiff's loss as is properly to be regarded as ***caused*** *by* the defendant's breach of duty. [emphasis added in italics and bold italics]

208 Regardless, however, of the precise approach adopted, it is our view that where, *notwithstanding* the fact that the settlement has been found to be unreasonable, if the plaintiff is nevertheless (and otherwise) able to adduce sufficient evidence of its loss (other than by reference to the settlement sum), there is no reason in principle why it ought not to be awarded damages to the extent that such loss can be proved.

209 There is also a qualification which might also salvage part of the unreasonable settlement sum in the context of a specific situation (assuming that causation-based reasoning is in fact adopted). Where the global settlement sum is said to be unreasonable because the sum was reasonable for claims A, B and C but not D, the plaintiff should be allowed to claim the lesser sum which covers claims A, B and C. The break in causation for claim D can be severed from the others which were reasonably settled.

210 Such a qualification was suggested by Coulson J in *ASME* at [68]. We do not see any objection against such severance both in principle and on policy. In fact, severance in these cases furthers the desirable policy of encouraging reasonable settlements. To disregard discrete claims which were reasonably settled as part of a global settlement that had other claims which were not reasonably settled would be throwing the baby out together with the bathwater. We would also observe that (consistently with the analysis proffered above) a similar result could possibly be arrived at utilising the approach from mitigation instead. However, as this particular issue does not arise in the context of the present appeal, we will say no more about it at the present time.

Conclusion

211 For the reasons set out above, the appeal is allowed with regard to the issue of liability on the ground that Ng (and consequently, NCH) was in breach of the implied retainer entered into between him and the Appellants. Additionally, Ng (and consequently, NCH) failed to take reasonable care in advising Agus of the contents of the Security Documents. This duty was owed not just to Agus but also to the Appellants, with the consequence that the Appellants' claim based on negligence succeeds against Ng (and consequently, NCH).

212 We, however, remit the question of the reasonableness of the settlement entered into between the Appellants and SGBT to the Judge for his decision.

213 We further order that any sum awarded to the Appellants should not be paid to the Appellants, pending an investigation by the Official Assignee to ascertain whether the funds should, instead, constitute part of Agus's estate and be used to satisfy any outstanding debts owed by Agus to his creditors pursuant to his status as an undischarged bankrupt.

214 The costs both here as well as in the court below are reserved pending the decision of the Judge on the issue which has been remitted to him for his decision.