IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2017] SGCA 65

Civil Appeal No 156 of 2016

Between

Grace Electrical Engineering Pte Ltd

… *Appellant*

And

Te Deum Engineering Pte Ltd

… *Respondent*

JUDGMENT

[Tort] — [Negligence] — [*Res ipsa loquitur*]

[Tort] — [Breach of Statutory Duty] — [Duties imposed by statute] — [Fire Safety Act (Cap 109A, 2000 Rev Ed)]

Version No 1: 27 Oct 2020 (22:40 hrs)

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Grace Electrical Engineering Pte Ltd
v
Te Deum Engineering Pte Ltd

[2017] SGCA 65

Court of Appeal — Civil Appeal No 156 of 2016
Sundaresh Menon CJ, Tay Yong Kwang JA, and Steven Chong JA
07 July 2017

27 November 2017 Judgment reserved.

Steven Chong JA (delivering the judgment of the court):

Introduction

1 On 6 September 2012, just after 2.00am, a fire broke out at 141 Kallang Way ("the appellant's premises") and spread to the adjoining property at 143 Kallang Way ("the respondent's premises"), causing considerable damage to both properties and four other adjacent properties.[1]

2 At the time of the fire, the appellant's premises were licensed for use as a factory. Although the premises were not authorised for use as a dormitory, it is not disputed that the appellant converted part of the premises for use as accommodation for its foreign workers and permitted them to cook their meals on the premises. Following the fire, the appellant was charged and subsequently

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[1] CB Vol 2 at pp 70-71.

convicted of various breaches of the Fire Safety Act (Cap 109A, 2000 Rev Ed) ("FSA").

3 The respondent sued the appellant in negligence for the damage caused to its premises and property.[2] The appellant's primary defence was that the fire started on the respondent's premises. And on that basis, the appellant brought a counterclaim against the respondent for the damages caused to its premises by the fire. The appellant's defence and counterclaim were specifically rejected by the High Court judge ("the Judge") in *Te Deum Engineering Pte Ltd v Grace Electrical Engineering Pte Ltd* [2016] SGHC 232 who found at [88]–[89] that the fire had instead started on the appellant's premises and spread to the respondent's premises. The Judge relied on the evidential rule of *res ipsa loquitur* and found the appellant liable in negligence for causing the damage to the respondent's premises. The appellant sought to deny the application of the rule *vis-à-vis* the respondent's claim on the basis that the appellant's premises were not under its exclusive control. Although this was pleaded, it was not seriously pursued below.

4 For the appeal, the appellant instructed new counsel, Mr Tay Yong Seng, who adopts an entirely different approach to challenge the decision below. Significantly, Mr Tay quite sensibly accepts that the fire had indeed started on the appellant's premises. This was in fact the appellant's *original* pleaded position before it amended its pleadings on 27 April 2016[3] (more than three years after the fire) to allege that the fire had instead started on the respondent's premises. In abandoning its primary defence below, the appellant had

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2 ROP Vol 2 at pp 70–71.

3 ROP Vol 2 at p 67.

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essentially backtracked to its initial position with respect to the genesis of the fire. The appellant's fresh challenge focuses on one principal submission – that the rule of *res ipsa loquitur* was wrongly invoked by the Judge. Interestingly, the appellant had itself sought to rely on the rule against the respondent in support of its counterclaim below that the fire had started on the respondent's premises. The appellant's argument below that the rule does not apply *vis-à-vis* the appellant because the premises were not under its exclusive control at the time of the fire has also since been abandoned.

5 The appellant argues on appeal that the rule does not apply because the expert reports before the court identified possible causes of the fire and, given this evidence, it must follow that the cause of the fire was not unknown and/or did not preclude the possibility of a non-negligent cause. What is unique about this case is that in the court below, both parties in their respective reliance on *res ipsa loquitur* accepted that the rule was applicable to the occurrence of the fire. The dispute was therefore only on the question of whether the rule should be invoked against the appellant *or* the respondent. On appeal, however, the appellant seeks to avoid the application of the rule altogether. Its position on appeal is not free from difficulty not least because in the court below, the appellant actually *denied* the very same possible causes which it now seeks to rely on in aid thereof.

6 It is thus immediately apparent that the appellant's case on appeal is not only entirely new but indeed a *volte-face* from the defence which it ran below. What then is the impact of the appellant's change of position for the purposes of the appeal? The appellant, having run its defence below on the basis that the fire started on the respondent's premises, simply could not and in fact did not lead *any* evidence on how the fire started on its own premises and how, in

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respect of that cause, it had exercised the requisite care and control. In fact, the appellant specifically pleaded in the alternative that the cause of the fire was *unknown*, which is one of the essential requirements for the application of the rule. In response to these evidential shortcomings, the appellant's case on appeal is that the court should nonetheless take cognisance of the possible causes identified in the expert reports which in themselves would render the maxim inapplicable.

7 *Res ipsa loquitur* has variously been described as a "rule of evidence", "an evidential principle of common sense" and "an exotic although convenient phrase" to permit the court to infer negligence from the very nature of the accident or injury in the absence of direct evidence on its cause. These descriptive terms are entirely in sync with its translation into English from the original Latin that "the thing speaks for itself". Despite the simplicity seemingly inherent in the maxim, not infrequently, the thing does not really speak for itself. This may explain why it has also been described as "the source of much misunderstanding and confusion in the tort of negligence" (see Francis Trindade and Tan Keng Feng, "*Res Ipsa Loquitur*: Some Recent Cases in Singapore and its Future" [2000] SJLS 186 ("*Trindade and Tan*") at p 188). Does it cease to speak for itself because there is a possibility of some hypothetical competing cause? Must that hypothetical cause be of a non-negligent nature in order to displace the inference of negligence? Who has the burden to prove or disprove the competing causes and on what standard? These are some of the core questions which will be examined in this judgment.

Material background facts

8 Te Deum Engineering Pte Ltd, which is the respondent on appeal and the plaintiff below, was at all material times the lessee and occupier of the unit

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at 143 Kallang Way (*ie*, the respondent's premises).[4] Grace Electrical Engineering Pte Ltd, which is the appellant on appeal and the defendant below, was at all material times the occupier of the unit at 141 Kallang Way (*ie*, the appellant's premises).[5] Both the appellant's and the respondent's premises are single-storey terrace units with a mezzanine floor.[6] The two premises are adjacent to each other and each have a backyard.

9 The appellant is an electrical contractor[7] and uses its premises as a factory to assemble, test, and commission electrical cables and equipment, as well as to repack electrical cables.[8] The ground floor of the appellant's premises was used as a store and work area.[9] The premises was also converted into a dormitory to house the appellant's foreign workers.[10] It is not disputed that the workers cooked their meals on the premises and that the appellant knew and permitted this.[11]

10 On 6 September 2012, between 2.00am and 2.20am,[12] the appellant's workers discovered a fire at the rear of the appellant's premises.[13] The Singapore Civil Defence Force ("SCDF") received a call at 2.29am from one of the

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4 Judgment at [8].

5 CB Vol 2 at pp 80–83.

6 Judgment at [1]; CB Vol 2 at p 133

7 ROP Vol 3F at p 4 (para 5).

8 Judgment at [10]; ROP Vol 3F at p 5 (para 11).

9 Judgment at [10]; ROP Vol 3F at p 5 (para 12).

10 Respondent's SCB Vol 1 at p 104; ROP Vol 3F at p 6 (para 14).

11 Judgment at [11]; ROP Vol 3F at p 6 (para 14)

12 CB Vol 2 at pp 26, 31, 56; Judgment at [112].

13 CB Vol 2 at p 56.

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appellant's workers, Manickasamy Ravi ("Ravi"), with the message "Cables inside store on fire".[14] The SCDF arrived at the scene at 2.34am.[15] The fire was reportedly brought under control within two hours, but was only extinguished at about 6.00am.[16] Both the appellant's and the respondent's premises were damaged by the fire, together with four other properties nearby.[17]

11 A series of reports (collectively, "the expert reports") were generated by the SCDF, Approved Forensics Sdn Bhd ("Approved"), and Dr J H Burgoyne & Partners (International) Ltd ("Burgoyne") following the incident. Reference will be made to the contents of these reports as and when relevant in the course of this judgment.

12 After the fire, the SCDF charged the appellant for breaches of ss 24(1) and 30(1) of the FSA. The appellant faced a total of eight charges. This was not the first time the appellant had breached the FSA. It first received notices of fire safety offences in October 2009.[18] They related to the unauthorised change of use from factory space to workers' quarters and cooking and resting areas. It was again charged for these offences on 25 May 2012.[19] On both occasions, fines were imposed and paid.[20] In particular, the 2012 notices required the

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14 CB Vol 2 at pp 66, 69; Judgment at [12].

15 CB Vol 2 at p 69.

16 Judgment at [12]; ROA Vol 5B at pp 45, 92; Singapore Civil Defence Force, "Fire at No. 141, 143, 145, Kallang Way 1" (6 September 2012) < https://www.scdf.gov.sg/content/scdf_internet/en/general/news/news_releases/2012/fire_at_no_141_143145kallangway1.html> (accessed 1 November 2017).

17 CB Vol 2 at pp 70–71.

18 Respondent's SCB Vol 2 at pp 165–168.

19 Respondent's SCB Vol 2 at pp 169–172.

20 Judgment at [101]; Respondent's SCB Vol 2 at pp 169–172.

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appellant to stop using the factory as workers' quarters.[21] Nonetheless, the contravention continued till the day of the fire (*ie*, 6 September 2012).[22]

The decision below and the relevant findings

13 The Judge found that the fire started on the appellant's premises and spread to the respondent's premises. She also found that it was more probable than not that the appellant's negligence caused the fire and that the damage caused to the respondent's premises was the sort of damage expected to occur from the appellant's breach of its duty of care to the respondent.[23]

14 The Judge held that the inference of negligence on the appellant's part arose from the application of *res ipsa loquitur*. She found that the three requirements required to invoke the rule were made out:[24]

(a) First, the appellant's premises were under its care and control. On the night of the fire, the appellant's workers were in physical occupation of the premises.[25]

(b) Second, the accident would not have happened, in the ordinary course of things, if proper care had been taken. The Judge emphasised the fact that the appellant was fully aware that its use of factory space to house workers was an unauthorised use contrary to s 30(1) of the FSA and that the appellant was a repeat offender.[26] The appellant was fined

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21 Judgment at [102]; Respondent's SCB Vol 2 at pp 169, 171.

22 Judgment at [102].

23 Judgment at [116].

24 Judgment at [115].

25 Judgment at [107].

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for a breach of s 30(1) because it had, by using the factory space as a workers' dormitory, changed the use of its premises such that it "cause[d] the existing fire safety measures to become inadequate" and it had made such a change without the approval of the Commissioner of Civil Defence ("the Commissioner").[27] Yet, the appellant "did nothing" to address the SCDF's concerns that the existing fire safety measures were inadequate for worker's quarters.[28] The appellant also knew that the workers cooked their meals in the backyard of its premises and that there were large quantities of combustible materials in the area.[29] Yet, no fire extinguishers were installed in the area.[30] The nearest fire extinguishers and fire hose reels were limited to those inside the appellant's premises.[31] Ravi also confirmed that cooking was done on the night of the fire.[32] The evidence showed, *inter alia*, that the electrical wirings and cooking appliances were badly burned.[33] The Judge was therefore of the view that the appellant, despite repeated warnings from the SCDF, took no reasonable care to reduce the risk of fire notwithstanding the foreseeability that such environmental conditions created a fire hazard on the premises.[34]

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26 Judgment at [98] – [102].

27 Judgment at [98].

28 Judgment at [104].

29 Judgment at [107] – [108].

30 Judgment at [108].

31 Judgment at [104].

32 Judgment at [108].

33 Judgment at [109].

34 Judgment at [108].

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(c) Finally, the cause of the fire was unknown. Both the SCDF and Burgoyne did not, on the balance of probabilities, point to any one cause as being probable (or more probable than not).[35]

15 All of these factors gave rise to the *prima facie* inference that the appellant's negligence more probably than not caused the fire.[36] The Judge was of the view that the evidential presumption arising from the inference was not rebutted by the appellant. The Judge was not convinced that the presumption was rebutted by reason of the appellant's explanation, *inter alia*, that it "had a valid Electrical Installation Licence".[37]

16 Having reached the conclusion that the appellant's negligence caused the fire, the Judge found that the appellant's alternative defence under s 63 of the Insurance Act (Cap 142, 2002 Rev Ed) did not arise for determination. This argument is not pursued in the appeal. The Judge accordingly awarded the respondent $1,584,091.52, which was the entirety of the amount it sought.

Cases on appeal

The appellant's case

17 Notwithstanding the appellant's acceptance of the Judge's finding that the fire had indeed started on its premises, it denies any liability to the respondent for three reasons. First, the Judge should not have applied the rule of *res ipsa loquitur*. Second, the appellant had not breached its duty of care to

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35 Judgment at [113].

36 Judgment at [115].

37 Judgment at [115].

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the respondent. Third, even if the appellant had breached its duty of care, the fire was not caused by that breach.[38]

18 For the appeal, the appellant's position is that *res ipsa loquitur* does not apply because two of the three requirements, as laid down in *Scott v The London and St Katherine Docks Company* (1865) 3 H & C 596 ("*Scott*") (followed in *BNJ (suing by her lawful father and litigation representative, B) v SMRT Trains Ltd and another* [2014] 2 SLR 7 ("*BNJ*") at [137]–[138]), have not been satisfied.[39]

19 First, the appellant submits that it cannot be said that "the occurrence [was] such that it would not have happened without negligence", *ie*, the fire could have occurred even without negligence.[40] That is because there were other possible and credible explanations for the fire that occurred (as seen from the various expert reports), including non-negligent causes, none of which was shown to be more probable than the other.[41] None of the possible electrical causes stated in these reports has been established to be related to the appellant's negligence.[42] The causes identified by the various reports were electrical in nature and were therefore unrelated to the appellant's unlicensed use of its premises as a workers' quarters.[43] The electrical installations on the premises were also checked regularly and there was a valid Electrical Installation Licence ("the Licence") in respect of the appellant's premises at all material times.[44]

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38 Appellant's case at pp 6–10.

39 Appellant's case at paras 40, 50, 59.

40 Appellant's case at paras 41, 53.

41 Appellant's case at paras 42–43, 50.

42 Appellant's case at para 45.

43 Appellant's case at para 45.

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20 Next, the appellant submits that the requirement that the cause of the accident be unknown is also not satisfied. It cannot be said that "there [was] no evidence as to why or how the occurrence took place"[45] since there is "ample evidence on the possible causes of the [f]ire"[46] as seen from the various expert reports, all of which suggest that electrical appliances were the possible causes of the fire.[47] It was then incumbent on the Judge to determine the most likely cause of the fire, rather than rely on the rule of *res ipsa loquitur*.[48] The appellant argues that the present case can be distinguished from that of *Shimizu Corp v Lim Tiang Chuan and another (The Tai Ping Insurance Co Ltd, third party)* [1993] 2 SLR(R) 45 ("*Shimizu*"), because in *Shimizu*, there was no evidence whatsoever on the possible cause of the fire. There was no expert evidence and all other evidence before the trial judge was either inadmissible, had no probative value, or was not corroborated by other evidence.[49]

21 In addition, the appellant contends that it did not breach its duty of care to the respondent.[50] The appellant argues that the Judge erred in relying on its breaches of the FSA to find that it had breached its duty of care, as a breach of statutory regulations does not automatically equate to a breach of a common law duty of care (relying on *Animal Concerns Research & Education Society v Tan Boon Kwee* [2011] 2 SLR 146 ("*Animal Concerns*") at [21]–[23]).[51] Further, the

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44 Appellant's case at para 46.

45 Appellant's case at para 59.

46 Appellant's case at para 59.

47 Appellant's case at paras 64–65.

48 Appellant's case at para 66.

49 Appellant's case at paras 62–63.

50 Appellant's case at paras 68–69.

51 Appellant's case at paras 72–75.

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appellant's breaches of the FSA were not causally relevant to the occurrence of the fire as they did not increase the risk of fire occurring on its premises.[52] The charges that the appellant faced under s 30(1) of the FSA pertained to the lack of "fire safety measures". According to the appellant, the inadequacy of these measures did not materially increase the risk of outbreak of fire[53] because the additional fire safety measure that the SCDF's Fire Code 2007 required the appellant to install for "workers' dormitories", specifically an additional means of escape for the occupants, would not have made any difference to the likelihood of fire occurring on its premises.[54] Although the appellant also faced charges under s 24(1) of the FSA, these pertained to the erection of structures that were not located near the rear of its premises, which was the location that the various expert reports posited that the fire took place.[55] Hence, the appellant submits that its breaches of the FSA were irrelevant to any alleged breach of its duty of care to the respondent.

22 The appellant also argues that it did not act in breach of its duty of care as there were no fire hazards on the premises.[56] The appellant did not receive any notice to abate fire hazards. It was also not charged by the SCDF for failure to comply with such notices.[57]

23 Next, the appellant argues that it had taken adequate care to prevent the *spread* of the fire.[58] This relates to the respondent's *alternative* case. First, the

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52 Appellant's case at paras 80–82.

53 Appellant's case at para 85.

54 Appellant's case at para 87.

55 Appellant's case at paras 89–96.

56 Appellant's case para 99.

57 Appellant's case at paras 102–104.

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various expert reports concluded that the fire was probably due to electrical causes.[59] The appellant had taken due care to ensure that the general electrical wirings, fittings, circuitry, and appliances in its premises were safe. Second, although the workers used cooking and other electrical appliances on the appellant's premises, it is inconceivable that the use of these appliances, without more, would amount to a fire hazard or raise the likelihood of fire.[60] Third, there were fire suppression measures on the ground floor of the premises, including a fire alarm system, a fire extinguisher near the switch room, and a hose reel.[61] Fourth, the evidence shows that the appellant's workers attempted to fight the fire.[62] Finally, when the fire became uncontrollable, the workers were justified in not attempting to further suppress it because such efforts would have been futile.[63]

24 Finally, the appellant submits that even if it had breached its duty of care to the respondent by using its premises as a workers' dormitory where cooking was permitted, this breach was not causally linked to the loss suffered by the respondent.[64] The appellant's workers' cooking activities did not cause the fire.[65] In any case, the appellant submits that there were other possible causes of the fire that were not related to the appellant's negligence (as seen from the various expert reports) and that it is the respondent's burden to prove that the breach

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58 Appellant's case para 99.

59 Appellant's case para 109.

60 Appellant's case para 115.

61 Appellant's case at para 121.

62 Appellant's case at paras 122–123.

63 Appellant's case at paras 124–126.

64 Appellant's case at para 128.

65 Appellant's case at paras 130–134.

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had indeed caused the loss.[66] There is also no satisfactory evidence that the allegedly negligent cause of the fire (*ie*, cooking and/or breaches of the FSA) was more likely than other non-negligent causes. Therefore, the appellant's alleged breaches of its duty of care, if any, have not been shown to be causative of the respondent's loss.[67]

25 The appellant acknowledges that the points raised in relation to the breach of its duty of care and causation (summarised above from [21]–[24]) are "new points" and seeks leave to introduce them pursuant to O 57 r 9A(4)(*b*) of the Rules of Court (Cap 332, R 5, 2014 Rev Ed) ("ROC"). Key to the present appeal is the new argument that the various expert reports reveal other possible and credible causes of the fire. This forms the foundation of the two new arguments advanced by the appellant on appeal. The appellant applied to raise these two new arguments which will be considered below at [33]–[38].

The respondent's case

26 The respondent's position is that the Judge was correct in applying *res ipsa loquitur* to the present case. It submits that the incident would not have happened in the ordinary course of things if proper care had been taken.[68] Contrary to what the appellant suggests, the existence of possible non-negligent explanations for the loss does not exclude the application of *res ipsa loquitur*. Such an argument, according to the respondent's counsel, Ms Marina Chin, would lead to the absurd result that a defendant can evade the application of the rule simply by alleging possible causes of an incident, even though these are

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66 Appellant's case at paras 138–143.

67 Appellant's case at para 144.

68 Respondent's case at para 18.

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merely lesser causes, *ie*, causes that cannot be proven on a balance of probabilities. By way of an example, the respondent relies on *Teng Ah Kow and another v Ho Sek Chiu and others* [1993] 3 SLR(R) 43 ("*Teng Ah Kow*") at [31] and [35].[69]

27 Further, the respondent argues that the appellant cannot rely on the existence of competing and credible non-negligent potential causes for the fire to demonstrate that *res ipsa loquitur* does not apply, because these alleged potential causes are inconsistent with the appellant's pleaded case.[70] Relying on *Feoso (Singapore) Pte Ltd v Faith Maritime Co Ltd* [2003] 3 SLR(R) 556 ("*Feoso*") at [34], it submits that the court should not grant leave to the appellant to introduce this new point.[71] In addition, it argues that the evidence does not prove that the causes relied on by the appellant were indeed competing and credible non-negligent causes.[72] According to the respondent, the reports by the SCDF and Burgoyne were both inconclusive as regards the cause of the fire.[73] The report by Approved has no probative value since the maker of the report was not called to testify.[74]

28 The respondent also submits that *res ipsa loquitur* applies to the present case as the cause of the fire is unknown. It contends that the appellant's argument that there must be "no evidence" whatsoever as to how the incident occurred before the rule is applicable is legally flawed.[75] The fact that possible

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69 Respondent's case at para 18.

70 Respondent's case at paras 23–24.

71 Respondent's case at para 5.

72 Respondent's case at para 22(b).

73 Respondent's case at paras 26–27.

74 Respondent's case at para 28(c).

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hypothetical inferences on the cause of the incident may be drawn is no bar to a reliance on *res ipsa loquitur* if such inferences cannot properly be drawn on a balance of probabilities.[76]

29 It is also the respondent's case that the appellant has failed to discharge its evidential burden of showing that it was not negligent in causing the fire to start on its premises.[77] It is undeniable that the appellant had permitted its premises to be used as accommodation for workers in contravention of the FSA. These breaches were not irrelevant to the issue of the appellant's negligence. After all, the appellant was charged under s 30(1) of the FSA for causing its existing fire safety measures to become inadequate. These fire safety measures, as defined under s 2 of the FSA, include measures for "preventing or limiting a fire". The inadequacies of the appellant's fire safety measures would therefore have contributed to the spread of the fire to the respondent's premises.[78] Further, it is not disputed that cooking activities did take place on the appellant's premises on the night of the fire as late as past 11.15pm, less than three hours before the fire. Various workers slept after midnight. The backyard was also cluttered with many electrical *cooking* appliances, including six refrigerators, rice cookers, heaters, and kettles.[79] Although the appellant claims that it had taken due care to ensure that the general electrical wirings, fittings, circuitry and/or appliances in its premises were safe, for instance by checking the

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75 Respondent's case at para 30.

76 Respondent's case at para 31.

77 Respondent's case at para 38.

78 Respondent's case at para 47.

79 Respondent's case at para 52; Respondent's SCB Vol 2 at p 202; ROA Vol 3F at p 68.

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electrical installations regularly, it failed to produce any evidence to show that such checks were carried out.[80]

30 In all the circumstances, the respondent submits that the appellant failed to provide a credible account as to what happened on the night in question. The Judge was therefore correct in applying *res ipsa loquitur* and in holding that the appellant had failed to demonstrate that it had not been negligent.[81]

31 Further and alternatively, the respondent submits that the appellant should, in any event, be found liable in negligence for failing to take sufficient steps to prevent the fire from *spreading* to the respondent's premises.[82]

The key issue

32 The central issue in this appeal is whether the Judge was correct to have applied *res ipsa loquitur* to the present case and, if so, whether the appellant has rebutted the evidential presumption of negligence.

Our decision

The appellant's new arguments

33 The two arguments raised by the appellant on appeal to challenge the Judge's finding on the applicability of *res ipsa loquitur* are admittedly new. These new arguments are based entirely on the expert reports which were categorically disavowed by the appellant at the trial. The question which arises

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80 Respondent's case at paras 55–56.

81 Respondent's case at para 78.

82 Respondent's case at para 74.

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is whether the appellant can now rely on these expert reports in the appeal. If the answer is in the negative, then these new arguments are non-starters.

34 We note that the new arguments run contrary to the appellant's pleaded case. In its Defence and Counterclaim (Amendment No 1), the appellant pleaded that "[n]one of the 3 investigations" that were conducted by the SCDF, Burgoyne, and Approved, "could identify the actual cause of the fire and all of them differed materially in their findings on the probable area of origin of fire and the probable cause of fire".[83] This pleading contradicts the two new arguments and understandably so, given that the appellant's primary defence at trial was that the fire had originated from the respondent's premises instead.[84]

35 Acknowledging that these arguments are "new points not taken in the [c]ourt below", the appellant seeks leave of court pursuant to O 57 r 9A(4)(*b*) of the ROC to introduce them in this appeal.[85] The respondent argues that leave should not be granted because the new points contradict the appellant's pleaded case.[86]

36 There is, strictly speaking, no legal impediment for the appellant to raise these points on appeal even if it did not plead any of the competing causes of the fire. The mere fact that a party raises a new point that contradicts its pleaded case does not invariably lead to the denial of leave to raise the new point on appeal. In *Feoso*, leave was denied not merely because the new point raised contradicted its pleaded case but, more importantly, because further findings

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83 ROA Vol 2 at p 25 (paras 5A and 5B).

84 ROA Vol 2 at p 28.

85 Appellant's case at para 38.

86 Respondent's case at para 5.

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and evidence might well have been made, given, or raised had the arguments been raised below. In the result, the court was "deprived of any findings and reasoning of the [court below] on the [new] point". The court relied on the observations of Lord Birkenhead LC in *North Staffordshire Railway Company v Edge* [1920] AC 254 at 263 to 264:

> The efficiency and the authority of a Court of Appeal … are increased and strengthened by the opinions of learned judges who have considered these matters below. To acquiesce in such an attempt as the appellants have made in this case is in effect to undertake decisions which may be of the highest importance without having received any assistance at all from the judges in the Courts below.

37 The present case is quite different. First, the new arguments do not require any amendments to the pleadings. Second, the appellant is relying on the expert reports already before the court to make good the new arguments. Hence, there is no question of adducing fresh evidence. Finally, it is notable that the Judge carefully considered the other possible causes of fire that were raised by the expert reports in relation to the application of *res ipsa loquitur* (see the Judgment at [105]–[115]). In any case, it is the respondent and not the appellant who bears the burden of establishing the requirements of *res ipsa loquitur* such that the appellant can *prima facie* be found negligent. The respondent will only succeed in doing so if it is able, "[o]n the assumption that a submission of no case is then made", show that on the evidence, in the ordinary course of things, the accident was "more likely than not" caused by the appellant's negligence (see *Lloyde v West Midlands Gas Board* [1971] 1 WLR 749 ("*Lloyde*") at 755–756). In this appeal, the appellant is relying on the same expert reports to rebut the inference of negligence. The fact that the appellant had renounced the expert reports in the court below does not alter whatever probative value these reports might otherwise have on the issue of the appellant's alleged negligence. The

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appellant should be entitled to rely on all the evidence already before the court to seek to displace the application of the rule, if possible. It is then for the court to make findings on that evidence and determine the weight that should be assigned to it.

38 That having been said, the appellant has to contend with the fact the expert reports' conclusions on the *cause* of the fire were not subject to cross-examination as its focus below was on challenging the conclusions in the reports that the fire started on the *appellant's* (as opposed to the respondent's) premises. Equally, in making its case on appeal in reliance on the expert reports, the appellant cannot ignore its own submissions below when it described the reports as "speculative"[87] or "not sustainable".[88] Both these observations obviously reflect the appellant's own assessment of the weight that ought to be attributed to the expert reports. However, whether the appellant can ultimately rely on the expert reports to successfully rebut the presumption or to displace the application of *res ipsa loquitur* is separate and distinct from the question whether it can raise the new arguments on appeal. In our view, the fact that the appellant had renounced the expert reports below does not disentitle it from raising the new arguments in reliance on the expert reports. We emphasise, however, that whether a party is granted leave under O 57 r 9A(4)(*b*) of the ROC to introduce on appeal new points not taken in the court below – in particular, points that represent a substantial departure from the position taken below by that party – will be the subject of careful consideration in each case, having due regard to factors including (a) the nature of the parties' arguments below; (b) whether the court had considered and provided any findings and

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87 ROA Vol 4A at p 184 (para 34).

88 ROA Vol 4A at p 184 (para 38).

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reasoning in relation to the new point; (c) whether further submissions, evidence, or findings would have been necessitated had the new points been raised below; and (d) any prejudice that might result to the counterparty in the appeal if leave were to be granted. On the facts of the present case, we are satisfied for the foregoing reasons that leave should be granted to the appellant to raise the new arguments before us.

Res ipsa loquitur

39 It is perhaps apposite to begin by examining the principles governing the application of *res ipsa loquitur*. It is undisputed that at law, the legal burden is on the plaintiff to prove on the balance of probabilities that the defendant was negligent in order for the plaintiff to succeed in the action. *Res ipsa loquitur* is a rule of evidence that enables a plaintiff to establish a *prima facie* case of negligence in the event that there is insufficient direct evidence to establish the cause of the accident in a situation where the accident would not have occurred in the ordinary course of things had proper care been exercised, *ie*, absent any negligence. The three requirements for the application of *res ipsa loquitur* are identified in the seminal case of *Scott* (see also *Tesa Tape Asia Pacific Pte Ltd v Wing Seng Logistics Pte Ltd* [2006] 3 SLR(R) 116 ("*Tesa Tape*") at [21]; *Teng Ah Kow* at [23]):

(a) the defendant must have been in control of the situation or thing which resulted in the accident ("the first requirement");

(b) the accident would not have happened, in the ordinary course of things, if proper care had been taken ("the second requirement"); and

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(c) the cause of the accident must be unknown ("the third requirement").

40 Once the three requirements are satisfied, the evidential burden shifts to the defendant to rebut the *prima facie* case of negligence (see *Teng Ah Kow* at [22]). For this appeal, only the second and third requirements are in dispute.

41 *Res ipsa loquitur* has been applied in different settings. As the present case concerns losses arising from a fire, it is fitting to examine its application in the specific context of fire outbreaks where the *precise* cause of the fire is *unknown*. In this context, it must be borne in mind that the mere occurrence of a fire does not in itself give rise to the inference of negligence (see *Wayfoong Credit Limited and others v Tsui Siu Man t/a Wilson Plastics Manufactory* [1984] HKCA 205 ("*Wayfoong*") at [59]; *Sochacki v Sas and another* [1947] 1 All ER 344 at 345, which is cited with approval in *Paquette v Labelle* (1981) 33 O.R. (2d) 425 ("*Paquette*")). This is not controversial because fires may occur without negligence on anybody's part. This does not cease to be a fact merely because the particular premises and operations carried on therein are under the exclusive control of the defendant or a person for whom he is responsible (see *Flannigan v British Dyewood Company Limited* [1970] SLT 285 at 289). In every case, the court must necessarily examine the circumstances under which the fire started in order to determine whether the *res ipsa loquitur* rule is applicable.

Examining cases involving fire outbreaks

42 We believe it will be useful to analyse prior cases involving fire outbreaks so as to discern the reasons why, and the circumstances under which, the *res ipsa loquitur* rule may or may not be found to be applicable. A

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consideration of the cases will assist us to identify a set of principles that can then be applied to the present case to determine if the rule is applicable on the facts of the present case.

43 We begin with the cases where the rule was found to be *inapplicable*. One of the key cases that the appellant relied upon was *Wayfoong*. In that case, the cause of a fire that broke out on the 8th floor of an industrial building was unknown. The Hong Kong Court of Appeal held that the evidence was insufficient to support a finding of *res ipsa loquitur*. The court found that in all likelihood the 8th floor had been left untouched for some three hours before the fire. No heaters had been left on and there was nothing liable to spontaneous combustion in the premises. When the fire actually started, how it actually started, how long it smouldered before it really took hold, and how easily it might have been detected during that period, were all matters of pure speculation. There was no evidence as to who might have been in the premises, as to whether there was an electrical storm, electrical fault, or a defective switch, or as to whether there was a third party in the premises. The court also identified several ways by which an electrical fault could have occurred. In the light of all the circumstances, the court did not apply the rule as it found that the evidence could not be regarded as anything other than "equivocal" (*Wayfoong* at [16]). *Wayfoong* is an example of a case where there is an absence of evidence to indicate *any* breach or negligence on the part of the defendant. In such a situation, *res ipsa loquitur* does not apply at all. The evidential burden does not shift to the defendant to rebut the inference of negligence.

44 In *Wayfoong*, the plaintiff pleaded that the defendant was negligent in that it kept stocks of plastic materials and dolls on its premises and did not employ a night watchman. This allegation was directed only at the *spread* of the

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fire. As such, there was no pleaded allegation against the plaintiff as regards the *cause* of the fire. The trial judge rejected the suggested breach of statutory duty in failing to employ a night watchman but found that the defendant was negligent in keeping four tons of plastic dolls in the premises because once ignited, "[the fire] was not easy to extinguish". Hence, the finding of negligence by the trial judge was not in relation to the cause of the fire, only its spread. For completeness, we should add that this finding of negligence in connection with the spread of fire was, in any event, overturned by the Hong Kong Court of Appeal.

45 Similarly, in *Paquette*, a fire of unknown origin broke out in the defendant's automobile body repair and painting shop and spread to the plaintiff's premises. The Ontario Court of Appeal held that the rule did not apply because there was no evidence to show *any* negligence on the part of the defendant or his servants.[89] There was also no evidence to identify the object that formed the source of the fire.[90] The evidence also indicated that no repair or painting operation had been carried out for more than 24 hours prior to the outbreak of the fire. The court rejected the trial judge's finding that the fire occurred as a result of spontaneous combustion as there was no evidence of any material of any kind on the floor of the premises; the floor was clean. There was also no evidence that any person was in the premises at the relevant time.[91]

46 Finally, in *Blue and White Barra Pty Ltd v Solley* [2001] SASC 194 ("*Blue and White Barra*"), the Supreme Court of South Australia declined to

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89 Respondent's BOA at p 206.

90 Respondent's BOA at p 206.

91 Respondent's BOA at pp 199–200, 208.

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apply *res ipsa loquitur* to determine the cause of a fire that began in an electrical switchboard at the appellant's fish farm. The respondent was an electrician who performed all the electrical work associated with the fish farm. The plaintiff's expert identified 10 possible causes of the fire, including damage by rodents, ageing of insulation, and electrical failure due to a loose connection (a negligent cause). Although the expert ruled out some of the 10 possible causes of the fire, the court concluded that this was a case where it was "simply not possible to identify any one as being more likely than another" (see *Blue and White Barra* at [67]). The evidence "fell short of identifying a cause attributable to fault on the part of the [defendant] which was more likely than other possible causes, at least one of which would not have involved fault on his part" (see *Blue and White Barra* at [78]).

47 From the above cases, we observe that the courts have generally declined to apply *res ipsa loquitur* in situations where there is simply *no* evidence of *any* act or omission (including any breach of statutory duty) by the defendant that *could* have caused the fire. In addressing the second requirement (see [39(b)] above), the court must necessarily examine whether there was *any* act or omission on the part of the defendant that could have caused the fire. Absent that, the rule simply does not apply.

48 We now turn to examine the cases where the rule was applied. We begin with *Teng Ah Kow*. In that case, the plaintiffs were cooks employed by the defendants who owned the restaurant where the plaintiffs worked. The plaintiffs suffered burns when they turned on a gas powered stove to cook and an explosion and fire occurred. This court held that the circumstances were sufficient for *res ipsa loquitur* to apply. It was admitted that the cap on one of the three gas cylinders was faulty. The court held that it was not for the plaintiffs

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to explain why the explosion and the fire occurred and to specifically identify which cylinder was turned on by one of the cooks; they were entitled to expect the defendant employers to provide them with safe equipment to do their work and/or a safe system of work. Two other possibilities were canvassed, including the tampering of the gas cylinder (which was suggested by the expert) and the intrusion by a third party into the premises. However, the court found that there was insufficient evidence to find that either of these possibilities was the cause of the fire. They were "no more than a possibility".[92]

49 In *Sisters of Charity of the Immaculate Conception v Robert J Fudge Ltd* [1988] NBJ No 322 ("*Sisters of Charity*"), a fire broke out on the roof of the plaintiff's premises where the defendant was carrying out repair works. The New Brunswick Court of Appeal held that the requirements for the application of *res ipsa loquitur* were satisfied. On the evidence, the defendant had "created a risk of fire" when he left hot tarred mops on the roof contrary to the Fire Protection Handbook.[93] The court acknowledged that whilst fires could occur without negligence, the respondent's negligence in improperly storing the hot tarred mops near combustible materials (such as roofing paper and untreated paper) led to the conclusion that "in the ordinary course of events no fire would have occurred if the [defendant] had used proper care".[94] The possibility of lightning being the cause of the fire was discussed. However, the court held that "the negligent handling of the mops, by operation of law, brought that cause of the fire into the realm of probabilities".[95] The defendant was therefore "taken to

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92 *Teng Ah Kow* at [31], [35] and [36].

93 Respondent's BOA at p 212.

94 Respondent's BOA at p 225.

95 Respondent's BOA at p 213.

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have caused the injury by (its) breach of duty".[96] In so finding, the court was persuaded by the principles laid down in *Wilsher v Essex Area Health Authority* [1987] 1 QB 730 at 771–772:

> … If it is an established fact that conduct of a particular kind *creates a risk that injury will be caused to another or increases an existing risk that injury will ensue*; and if the two parties stand in such a relationship that the one party owes a duty not to conduct himself in that way; and if the party does conduct himself in that way; and if the other party does suffer injury of the kind to which the injury related; then the first party is taken to have caused the injury by his breach of duty, *even though the existence and extent of the contribution made by the breach cannot be ascertained.* … [emphasis added]

50 Thus, it can be seen that where the defendant has committed *a* negligent act or omission, the court is more likely to apply the rule where such negligent act or omission has created or *increased the risk* of the occurrence of fire. This would cause his negligence (as a cause of the fire) to shift into the "realm of probabilities" (see *Sisters of Charity*; referred to above at [49]). In order to raise a *prima facie* inference of negligence, the plaintiff must "at the close of [its] case" and "[o]n the assumption that a submission of no case is then made", show that on the evidence, in the ordinary course of things, the accident was "more likely than not" caused by the defendant's negligence (see *Lloyde* referred to above at [37]). With these principles in mind, we now consider whether *res ipsa loquitur* was correctly applied by the Judge in the present case, bearing in mind the appellant's various convictions for its contraventions of the FSA.

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[96] Respondent's BOA at p 212.

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Whether res ipsa loquitur *applies in the present case*

The significance of the appellant's breaches of the FSA

51 As previously mentioned, the appellant had committed various breaches of the FSA. After the fire, the SCDF charged the appellant for breaches of ss 24(1) and 30(1) of the FSA. There were a total of eight charges;[97] the appellant pleaded guilty to five of the charges and the remaining three charges were taken into consideration for the purpose of sentencing.[98] The charges against the appellant centred on the conversion of its premises into a place of accommodation without the SCDF's approval. The appellant also received notifications of its breaches of ss 24(1) and 30(1) on two prior occasions (*ie,* on 6 October 2009 and 25 May 2012).[99]

52 In our view, the appellant's breaches and its subsequent convictions under the FSA are particularly relevant to the court's assessment of whether the second requirement of *res ipsa loquitur* is satisfied. The convictions present the clearest objective evidence that the appellant had, by its conduct, *increased the risk* of fire on its premises. In examining whether the FSA convictions had any nexus to the increase in the risk of fire, it is relevant to consider whether the convictions concerned acts or omissions that occurred in the *location* where the fire started. This approach is illustrated in *Sisters of Charity* where the tarred mops were carelessly left behind on the roof, which was the place where the fire occurred. Although it could not be established that the fire was caused by the tarred mops, the court held that "the negligent handling of the mops, by

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97 CB Vol 2 at pp 88-95.

98 Respondent's SCB Vol 2 at 176.

99 Respondent's SCB Vol 2 at pp 165–172.

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operation of law, brought that cause of the fire into the realm of probabilities". This is to be contrasted with *Wayfoong* where there was no evidence as to the location where the fire started.

53 Here, it is significant that the location where the fire started was in the backyard of the appellant's premises which included the unauthorised accommodation area.[100] It is undisputed that the use of the premises for accommodation resulted in the presence of "[n]umerous electrical appliances and electrical wirings",[101] including six refrigerators,[102] two televisions,[103] electrical cooking appliances,[104] and fans.[105] In this appeal, the appellant relies on the expert reports and submits that the cause of the fire was possibly *electrical* in nature.[106] However, the presence of these electrical appliances on the premises was entirely due to the *appellant's* use of its premises for unauthorised accommodation of its workers. This submission therefore does not serve in any way to exculpate the appellant. It is also common ground that the appellant allowed the workers to cook on the premises. The pantry area where the cooking took place was in close proximity to the area where the fire started – it was *immediately* behind the accommodation area.[107] At the time of the fire, there were 10 workers living in the premises.[108] They were cooking past

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100 CB Vol 2 at pp 62, 74, 79.

101 Respondent's SCB Vol 1 at p 99.

102 Respondent's SCB Vol 2 at p 202; ROA Vol 3F at p 68.

103 Respondent's SCB Vol 2 at p 14; ROA Vol 3F at p 6 (para 14).

104 Respondent's SCB Vol 2 at pp 216 (lines 9–10), 218 (line 23).

105 Respondent's SCB Vol 1 at p 105.

106 Appellant's case at para 65; Respondent's SCB Vol 1 at pp 99 (para 8(d)), 160.

107 ROA Vol 3K at p 69; ROA Vol 4B at p 5; CB Vol 2 at p 79.

108 Respondent's SCB Vol 2 at p 200.

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11.15pm,[109] less than three hours before the fire started. These workers would not have been present at, much less cooking on, the appellant's premises at the material time but for the appellant's contraventions of the FSA. Finally, it cannot be seriously denied that the appellant's breaches of the FSA had "compromised the fire safety of [its] premises".[110] In the circumstances, the appellant had, by reason of the very conduct that led to repeated convictions under the FSA (for acts and/or omissions occurring at the location where the fire started), thereby *increased the risk* of fire occurring on its premises.[111] In fact, the SCDF reported that "[o]ne of the electrical entities may be a *possible* cause of the fire". Such increase in risk made it more probable that the fire would not have occurred if proper care had been taken by the appellant. Put simply, this brought the appellant's breaches of the FSA as a cause of the fire into the "realm of probabilities".

54 The appellant argues that its breaches of the FSA do not equate to a breach of its duty of care to the respondent. It relies on the Singapore High Court's decision in *Virco Metal Industries Pte Ltd and another v Carltech Trading and Industries Pte Ltd and others* [1999] 2 SLR(R) 503 ("*Virco*").[112] In that case, a fire broke out in the premises of the second defendant, who was a tenant in an industrial building owned by the first defendant. The fire spread to the premises of the first plaintiff, which was likewise a tenant within the same building. The first plaintiff commenced an action for damages for the losses it suffered. The defendants contended that the first plaintiff's losses could not be

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109 CB Vol 2 at p 23.

110 Judgment at [104] and [108].

111 Judgment at [115].

112 Appellant's case at para 77.

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recovered because the first plaintiff had used its premises in breach of the Factories Act (Cap 104, 1998 Rev Ed) ("Factories Act"). It was not disputed that the first plaintiff had indeed breached the Factories Act as it was operating a factory on the premises without a factory licence. However, the High Court held that nothing in that breach could give the first defendant a cause of action or a defence (see *Virco* at [20]). The appellant relies on this case to illustrate that its breaches of the FSA are analytically distinct from the question of whether it had breached its duty of care to the respondent.

55 We find that *Virco* does not remotely assist the appellant. In *Virco*, the High Court found that the first defendant could not rely on the first plaintiff's breach of the Factories Act as a defence because the property loss suffered by the first plaintiff from the fire, had nothing to do with the object of the Factories Act, which was the protection of workmen (see *Virco* at [21]–[22]). Unlike the present case, there was no suggestion in *Virco* that the first plaintiff's unlicensed use was in breach of the FSA (as opposed to the Factories Act) or had in any way compromised its safety standards. Furthermore, there was no link whatsoever between the breach of the Factories Act with the fire. There was also no suggestion that the breach had increased the risk of fire on the premises. Liability would only arise if it could be established that Parliament intended breach of the relevant statutory duty to be actionable by the individual harmed by that breach (see *Virco* at [20]). However, it was not Parliament's intention to allow the first defendant to rely on a technical breach of the Factories Act to bar recovery of the losses suffered by the first plaintiff arising from a fire for which the first defendant was responsible. In the present case, quite unlike *Virco*, the appellant's contraventions of the FSA *had in fact increased the risk of fire* occurring on its premises. The legislative object of the FSA is to "prescribe minimum fire safety standards", to "ensure that these are implemented,

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complied with and effectively enforced" for the "protect[ion] [of] lives *and property*" [emphasis added] (*Singapore Parliamentary Debates, Official Report* (10 November 1993) vol 61 at cols 940 to 941). The respondent's premises would constitute "property" which the FSA was designed to protect. In *Virco* at [22], the High Court held that "[t]he loss which is the subject of the present action has nothing to do with the object of the Factories Act". The present case calls for exactly the opposite conclusion. Loss such as that which resulted from the fire that occurred on the appellant's premises on that fateful night in September 2012 was *precisely* that which was sought to be prevented by the FSA.

56 In any case, *Virco* only goes so far as to establish that breach of a statutory duty does not *ipso facto* give rise to a concomitant breach of a common law duty of care. This principle is well-settled (see *Animal Concerns* at [21]; *Jurong Primewide Pte Ltd v Moh Seng Cranes Pte Ltd and others* [2014] 2 SLR 360 ("*Jurong Primewide*") at [37]). However, it is equally well-established that the existence and scope of a statutory duty may "form the backdrop to and inform the existence (or lack thereof) of a common law duty of care" (see *Animal Concerns* at [22]). Further, in *Jurong Primewide*, this court held at [36] and [43] that the prevailing regulatory framework in that case (*ie*, the Workplace Health and Safety Act (Cap 354A, 2009 Rev Ed) ("Workplace Health and Safety Act") and its relevant regulations) had "a significant bearing on [the court's] analysis of the parties' conduct, their legal responsibilities and the imputation of negligence" and that the "stipulations under the [Workplace Health and Safety Act] would … be relevant in pitching the standard of care". Likewise, in the present case, the FSA would be relevant in informing the court of the standard of care expected of the appellant. Breaches of the FSA would then provide the backdrop for our assessment (see [51]–[53] above) as to

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whether the circumstances under which the fire occurred justified an inference of negligence on the appellant's part.

57 The appellant asserts that none of the offences under the FSA that it had committed has any bearing on the question of whether *res ipsa loquitur* should be applied, because its commission of those offences did not increase the risk of a fire outbreak on its premises.[113] Implicit in the appellant's submission is that if its conduct amounting to offences under the FSA *had indeed* increased the risk of fire, then its convictions for those offences would be relevant to the court's decision on whether to draw an inference of negligence. The appellant argues that its breaches of s 30(1) of the FSA are irrelevant to the outbreak of the fire because even if it had complied with s 30(1) to request for the Commissioner's approval to use the premises as a workers' dormitory, "the only relevant change which the [a]ppellant would have had to make on [its premises] would be the installation of additional means of escape for the occupants".[114] In our view, such an argument is entirely speculative because s 30(3) of the FSA gives the Commissioner the discretion to "grant permission for the change of use, subject to such conditions as he may impose". The court is simply not in a position to speak on the nature of the terms the Commissioner might or would have imposed on the appellant after reviewing the physical condition of the appellant's premises if the appellant had applied for the requisite permission. This would amount to nothing more than speculation on the court's part and we decline to do so. More crucially, the fact that the Commissioner's approval was not sought also meant that there was no occasion for the Commissioner to even *consider* the conditions that he might have imposed. It follows that the

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113 Appellant's case at para 79.

114 Appellant's case at para 87.

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Commissioner would have no reason to inspect the appellant's premises to ensure that the fire safety measures were adequate for the use of its premises for resting and cooking. The possibility that the Commissioner might simply have rejected the appellant's application for conversion of the premises for use as workers' accommodation altogether cannot be ruled out either. This was in fact conceded by the appellant's Project Director, Mr Teo Boon Len, under cross-examination when he testified that the Ministry of Manpower and the appellant's landlord, Jurong Town Corporation, would not have approved the use of the premises for accommodation.[115] In the circumstances, the appellant's assertion that its breaches of the FSA did not increase the risk of fire is simply untenable.

58 In relation to the appellant's breaches of s 24(1) of the FSA, the appellant argues that the structures that were erected (and which formed the subject matter of the s 24(1) charges) were nowhere near the rear of the premises, which was the location that the various expert reports posited was the origin of the fire.[116] The SCDF report stated that the fire could have originated from the location of the "severely damaged wooden shelves in the backyard of [the appellant's premises]".[117] The Burgoyne report stated that the fire started at the "rear northern store of [the appellant's premises]".[118] The s 24(1) charges the appellant faced pertained to the "erection of accommodation area using metal container at the drive way and open areas of [the premises]",[119] the "erection of

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115 Respondent's SCB Vol 2 at pp 199 (lines 12–14), 204 (lines 9–13).

116 Appellant's case at para 92.

117 CB Vol 2 at pp 74, 79.

118 CB Vol 2 at p 62.

119 CB Vol 2 at p 93.

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[a] roof structure at the rear of [the premises],[120] and the "erection of [a] pantry area at the staircase landing of [the premises]".[121] The appellant argues that even if the Commissioner's approval had been sought prior to the erection of these structures, it would not have made any difference to the likelihood of the fire occurring.[122]

59 With respect, this argument misses the point. While it may be unclear whether the specific breaches of s 24(1) of the FSA were *directly* causative of the fire, it cannot be disputed that the breaches led to the appellant's unauthorised use of its premises as an accommodation area where the electrical appliances were located and, for the reasons discussed above at [52]–[53], increased the risk of fire occurring on the premises. The appellant's breaches of the FSA form the backdrop to our finding that it had more likely than not breached its duty of care to the respondent because the breaches undeniably *increased the risk* of fire occurring on the appellant's premises.

When would the possibility of other causes preclude or displace the application of the rule?

60 At the close of the hearing of the appeal, we invited the parties to file further submissions to address the question as to whether, in order to exclude the application of *res ipsa loquitur*, it is incumbent on the defendant to prove that it had not been negligent in respect of at least one reasonable explanation of the cause of the damage suffered by the plaintiff. This pertains to the extent of the appellant's burden in adducing evidence as to the cause of the fire before

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120 CB Vol 2 at p 94.

121 CB Vol 2 at p 95.

122 Appellant's case at para 95.

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it can successfully displace the application of the rule. Our direction arose from the appellant's new argument that the expert reports had allegedly identified some possible non-negligent explanations for the fire, and on this basis that the second requirement was not satisfied. In such a situation, the appellant claims, the thing ceases to speak for itself.

61 From our review of cases such as *Teng Ah Kow* at [48] and *Sisters Charity* at [49], it is clear that the mere presence of some evidence indicating other *possible* causes of the fire has never been sufficient to preclude the application of *res ipsa loquitur*. The rule was applied in those cases notwithstanding the evidence of other possible causes. This in turn begs the question as to the circumstances in which other possible causes of the fire would preclude or displace the application of the rule.

62 The appellant's new argument also raises several sub-issues. Who bears the burden of proving the other possible competing causes of the fire? And what is the standard of proof required to discharge that burden? Before addressing these questions, it is important to understand what is meant by "other possible competing causes" in the context of *res ipsa loquitur*. From the cases, we think such causes fall into two categories. The first concerns "non-negligent causes" while the second concerns "neutral causes", in the sense that the cause is consistent with both negligence and non-negligence of the defendant.

63 The appellant reiterates in its further submissions that the burden of proving a claim in negligence rests on the respondent throughout the proceedings and that *res ipsa loquitur* does not change the position. We agree with Ms Chin that this submission obfuscates the distinction between the legal burden (which is always on the respondent) and the evidential burden which is

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shifted to the appellant once the respondent establishes a *prima facie* case of negligence.

64 In its further written submissions, the appellant also states that it does not bear any burden to prove that the fire was started by a non-negligent cause in order to exclude the application of *res ipsa loquitur*.[123] This is, strictly speaking, correct because the respondent (or a plaintiff seeking to rely on the rule) will only succeed in demonstrating that the rule applies if it can, "[o]n the assumption that a submission of no case is then made", show that on the evidence, in the ordinary course of things, the accident was "more likely than not" caused by the defendant's negligence (see *Lloyde* at 755–756; see above at [37]). In other words, the plaintiff may fail to even raise a *prima facie* inference of negligence. Nonetheless, the appellant is *at liberty* to prove a non-negligent cause (though he is not obliged to do so) if the evidence is available. The appellant asserts that it can displace the inference of negligence by referring to the evidence before the court to show that there was "at least one other plausible explanation consistent with reasonable care or which does not connote negligence".[124] In making this submission, the appellant accepts that in order to displace the inference, the appellant bears the burden of establishing two matters: (a) the existence of a plausible competing cause; and (b) that plausible competing cause is either (i) consistent with the existence of reasonable care on the part of the appellant or (ii) does not connote negligence on the part of the appellant. The appellant, however, adds that this submission is tantamount to showing "that the accident is as consistent with no negligence as with negligence".[125] In support, it cites *Trindade and Tan* at 201. It would appear that

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123 Applicant's further submissions at paras 3–5.

124 Applicant's further submissions at para 7.

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the authors of the article treated these two propositions as synonymous. In our judgment, the appellant's submission is erroneous for two related reasons. First, because *res ipsa loquitur* is merely a rule of evidence which enables the court in certain circumstances to arrive at an inference of negligence, the question before the court at all times remains whether on a balance of probabilities, it is satisfied that there is negligence. What this means is that it is *never* a matter of raising possibilities in order to exclude the application of the rule. The court must be satisfied at the close of the plaintiff's case that the explanation that rests on the negligence of the defendant is that which is *more probable than no*t; and if the court is satisfied of that, the defendant can only overcome it by adducing evidence to show that there are other causes that are *more probable*. And in relation to this evidential burden on the part of the defendant, the second point we wish to make is that in order to displace the inference, it will not suffice for the defendant to establish a *neutral* event. *Trindade and Tan* in fact goes on to explain the utility of the rule "in flushing out some evidence from the defendant which he would rather not bring forward" and in helping "a plaintiff to resist a submission of no case to answer". The significance of this second point is explained below at [69]–[71] when we deal with the evidence which was led (or, more accurately, not led) by the appellant in relation to the alleged electrical faults.

65 The subtle but vital distinction between the burden of establishing a competing cause which does not connote negligence and that of a neutral cause is borne out by the authorities. In *Barkway v South Wales Transport Co* [1948] 2 All ER 460 ("*Barkway*") at 471, the English Court of Appeal made the following observations, which we find instructive:

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125 Applicant's further submissions at para 7.

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> (i) If the defendants' omnibus leaves the road and falls down an embankment, and this without more is proved, then *res ipsa loquitur*, there is a presumption that the event is caused by negligence on the part of the defendants, and the plaintiff succeeds unless the defendants can rebut this presumption. (ii) *It is no rebuttal for the defendants to show, again without more, that the immediate cause of the omnibus leaving the road is a tyre-burst, since a tyre-burst per se is a* ***neutral event*** *consistent, and equally consistent, with negligence or due diligence on the part of the defendants.* When a balance has been tilted one way, you cannot redress it by adding an equal weight to each scale. The depressed scale will remain down…*To displace the presumption, the defendants must go further and prove (or it must emerge from the evidence as a whole) either (a) that the burst itself was due to a specific cause which* ***does not connote negligence on their part but points to its absence as more probable,*** *or (b), if they can point to no such specific cause, that they used all reasonable care in and about the management of their tyres*… [emphasis added in italics and bold italics]

66 What the passage above shows is that once a *prima facie* inference of negligence arises, it is insufficient for the defendant, in its attempt to rebut the inference, to merely show that the accident was due to a neutral event. The defendant must go on to show either that (a) this neutral event does not connote negligence on its part (*ie,* the event was a non-negligent cause of the accident); or (b) it had exercised all reasonable care in relation to that event. In seeking to show a cause which does not connote negligence, the appellant must positively point to "its absence as more probable". This position is also consistent with the case of *Colvilles Ltd v Devine* [1969] 1 WLR 475[126] where the House of Lords held that the defence must put forward a "plausible explanation" (citing Lord Simonds in *Woods v Duncan* [1946] AC 401 at 441) and must go further to show that this explanation is "consistent with no negligence on [the defendant's] part" (at 477–478).

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126 Respondent's further submissions at para 12.

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67 To appreciate this important distinction, it is crucial to bear in mind that the respondent's reliance on *res ipsa loquitur* is premised on the cause of the fire being *unknown*. Therefore, it stands to reason that in order for the appellant to rebut the inference of negligence in respect of a fire which occurred from an unknown cause in its premises, in circumstances where the appellant's conduct constituting breaches of the FSA had increased the risk of fire, it has to establish a cause which is *more probably* due to non-negligence. If that is achieved by the appellant, the inference of negligence would then be successfully displaced but not otherwise. In contrast, in a situation where the evidence is equally consistent with negligence as with no negligence (which is premised on evidence to establish the absence of negligence in relation to the other plausible cause), then the rule simply would not apply and the plaintiff would fail at the first hurdle as it would have failed to satisfy the court that, in the ordinary course of things, the accident was *more likely than not* to have been caused by the defendant's negligence.

68 The appellant cites the decision of the High Court of Australia in *Schellenberg v Tunnel Holdings Ptv Ltd* (2000) 170 ALR 594 ("*Schellenberg*") in aid of its proposition (see above at [64]). That case involved an allegation of negligence made after the plaintiff was struck in the face by a hose carrying compressed air, which became loose while he was using it in the course of his employment with the defendant. In our judgment, *Schellenberg* does not assist the appellant. First, the court found at [27] that *res ipsa loquitur* did not apply because the cause of the accident was *known*. Accordingly, there was no question of displacing the rule. Second, the court found at [140]–[141] and [146] that there was evidence that the air hose could have been separated from its coupling for reasons that did not suggest negligence on the part of the defendant, such as a defect of the air hose or a sudden surge in air pressure. For that reason,

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the court held at [146] that "[t]here was no basis for concluding that the reasons which did not suggest negligence were any more or less probable causes of what happened than other reasons which did suggest negligence by the respondent". Based on the evidence before the court, the accident was as consistent with no negligence as with negligence. The evidence in *Schellenberg* did not connote negligence on the part of the defendant, quite unlike the present case.

69 In the present case, the appellant has not been able to identify a cause of the fire which is "consistent with reasonable care *or* which does not connote negligence" on its part. This is the relevant inquiry which arises from the appellant's own further submission. In our view, the appellant fails on both scores. The appellant relies on the expert reports to argue that the "other possible competing cause" of the fire is "electrical".[127] Given the appellant's position below, whether the fire was due to an electrical fault became a non-issue. More importantly, because the appellant had expressly denied that this was the cause of the fire at the trial, it had effectively forfeited the opportunity to establish through cross-examination of the experts that the electrical cause was *more probably* a non-negligent cause.

70 It is also material that the expert reports merely identified the possibility of other *physical* causes of the fire without expressing any view as to whether or not there was any *negligence* with regard to those causes. This means that the identified possible causes in the reports do not in themselves preclude the possibility of negligence on the part of the appellant. In other words, the expert reports are incapable of providing true assistance to the appellant in showing that the electrical faults were, more probably than not, non–negligent events.

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127 Appellant's case at paras 65, 109.

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71 Further, the appellant also did not adduce sufficient evidence to show that it had exercised all reasonable care in relation to its electrical appliances and wirings. The appellant relies on the License in its attempt to show that it had exercised reasonable care (see [19] above). The appellant argues that in order to obtain the Licence, the appellant is required to employ a licensed electrical worker to take charge of and maintain its electrical systems.[128] In our view, the proper inquiry ought to go beyond establishing the mere existence of the License. First, no evidence was led at the trial as to what checks were carried out for the purposes of the License or how regularly this took place. Second, it is unclear precisely which electrical appliance or wirings caused the fire, and whether those appliances and/or wirings had been checked by the electrical worker. This woeful state of the evidence is the direct product of the manner in which the appellant had *deliberately* conducted its case in the court below. Therefore, insofar as the evidential burden is concerned, the appellant effectively did not lead any evidence to rebut the inference, *ie,* to all intents and purposes, the appellant's response to the evidence led by the respondent below is no different from a submission of no case to answer.

72 We are therefore satisfied that the second requirement of *res ipsa loquitur, ie,* that the fire was in the ordinary course of things more likely than not to have been caused by the appellant's negligence (see *Teng Ah Kow* at [22]) is satisfied.

What is meant by the cause is unknown in the context of the rule

73 The appellant submits that the third requirement is not satisfied since there is ample evidence as to why and how the fire started. According to the

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128 Appellant's case at para 46.

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appellant, in order to satisfy the third requirement, "there must be *no evidence* as to why or how the occurrence took place"[129] [emphasis added], *ie*, that there must be a *complete* "absence of explanation" on the cause of the fire.[130] And because the expert reports had put forward possible causes of the fire, it follows that there was ample evidence for the court to draw a conclusion on the cause of the fire on the balance of probabilities.[131]

74 This proposition appears to have been inspired by *Clerk & Lindsell on Torts* (Sweet & Maxwell, 20th Ed, 2010) ("*Clerk & Lindsell*") where the authors state at para 8–172 that in relation to this requirement, "there must be *no evidence* as to why or how the occurrence took place. If there is, then appeal to *res ipsa loquitur* is inappropriate for the question of the defendant's negligence must be determined on that evidence."[132] [emphasis added]

75 In our view, the appellant has misstated the third requirement for the rule. With respect, the appellant has taken the phrase "there must be no evidence" out of its context. The authors of *Clerk & Lindsell* explain the third requirement of *res ipsa loquitur* in the following manner (at para 8–175):

> **Cause of occurrence unknown to claimant**. Res ipsa loquitur has no application when the cause of the occurrence is known. This is because there is then no need to do more than to decide whether on these facts negligence on the part of the defendant has been proved or not. … *Where the defendant does give evidence relating to the possible cause of the damage and the level of precaution taken, the court may still conclude that the evidence provides an insufficient explanation to displace the inference of negligence.* … [emphasis added]

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129 Appellant's case at para 59.

130 Appellant's case at para 60.

131 Appellant's case at para 64.

132 Respondent's BOA at p 238.

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76 In stating that "there must be no evidence as to why or how the occurrence took place", the authors of *Clerk & Lindsell* meant to draw a distinction between cases where the cause of the accident is unknown and cases where the cause is known (for example, where the cause has been proved or otherwise established either by admission or common ground between the parties) and therefore the rule cannot apply. This makes sense because when a cause of the accident has been established, it ceases to speak for itself and the onus is then on the plaintiff to prove that the defendant was negligent in relation to *that* cause. In other words, the claim would have to be proved in the usual manner without invoking the *prima facie* inference of negligence through the application of *res ipsa loquitur*. Thus, contrary to Mr Tay's submission, the presence of other "possible" causes does not *per se* mean that the third requirement of *res ipsa loquitur* is not satisfied.

77 This position is amply supported by the authorities. As mentioned above at [48], this court held in *Teng Ah Kow* that *res ipsa loquitur* applied even though there was evidence from an expert that the gas cylinders could have been tampered with. Similarly, in *Shimizu* at [8], the Singapore High Court accepted that the conclusion reached by a field incident report, namely that the fire was caused by cooking or over-heating of food in the defendant's building, was "a possible inference to be drawn". The court nonetheless held that "*on the balance of probabilities* [it] [could not] properly draw this inference" [emphasis added]. The court applied *res ipsa loquitur* because "on the evidence before [it] the true cause of the fire ha[d] not been established"; it had "not been established to [the court's] satisfaction that a kerosene stove had been brought to the defendants' building and was used in cooking or heating food and that the fire was caused by over-heating of food left unattended on the kerosene stove in the defendants' building".

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78 The distinction (mentioned above at [76]) is also borne out in cases where the cause of the accident is known. In *BNJ*, the plaintiff fell on to the tracks of an MRT station operated by first defendant and owned by second defendant. She was struck by a train and severely injured. CCTV footage, eyewitness and expert evidence supported the finding that the plaintiff fell on to the tracks because she suffered a sudden and unpredictable loss of consciousness. The court held that *res ipsa loquitur* did not assist the plaintiff's case because the circumstances leading to her injuries were clear. There was no evidential gap to fill. Where there is no such evidential gap, the rule has no relevance, even if it can be shown that the defendant was in control of the thing which inflicted the damage (see *BNJ* at [139]–[140]).

79 Likewise, in *Tesa Tape*, the plaintiff and the defendant occupied adjoining premises. The defendant stacked several rows of containers side-by-side, creating a large mono-block of containers, which was the standard practice. During a heavy thunderstorm, some containers fell onto the plaintiff's land and damaged the plaintiff's property. The court found at [21]–[22] that negligence was established but *res ipsa loquitur* did not apply as there was ample evidence as to causation. The court found that "although strong gales were infrequent, they occurred often enough to be expected". It held at [16] that "in the absence of any other reasonable evidence, … *on a balance of probabilities*, the collapse of the stacks of containers was substantially, if not solely, caused by a sudden gust of strong wind during the thunderstorm that occurred at the material time" [emphasis added].

80 In the present case, the evidence available to the Judge below and on appeal shows that the *precise* cause of the fire had not been established *on the balance of probabilities*. This was in fact the appellant's pleaded position. It

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would be useful at this juncture to examine the purpose and the context behind the production of each of the expert reports in order to determine the probative value of their conclusions on the possible causes of the fire and the Judge's application of *res ipsa loquitur* notwithstanding the contents of the reports. It appears to us that the purpose and the focus of the SCDF report was to identify whether the fire was accidental as opposed to deliberate (and not to determine the *precise* cause of the fire). The first page of the SCDF report requires the investigating officer to select one of two possible options, namely "accidental" or "incendiary".[133] If the fire was "deliberately set", it would be classified as "incendiary".[134] Otherwise, it would be "accidental".[135] The Burgoyne report was prepared on the instructions of the respondent's insurer.[136] The preparation of the Burgoyne report, however, was severely impeded as its maker was denied physical access to the site until a month later and was not permitted to interview the witnesses.[137] He was compelled to obtain evidence through the SCDF and Approved.[138] We accept the respondent's submission (see [27] above) that the report by Approved, which was produced on the instructions of the appellant's insurer, has no probative value because its maker was not called as a witness.

81 In our judgment, none of the expert reports presented a cause that can be proven *on a balance of probabilities*. Although the SCDF report was prepared contemporaneously in that the investigations were carried out "immediately after the fire" and the investigating officers had access to the

133 CB Vol 2 at p 68.

134 ROA Vol 3J at p 57 (lines 7–9).

135 ROA Vol 3J at p 57 (lines 15–17).

136 Respondent's SCB Vol 1 at p 152.

137 Respondent's SCB Vol 1 at pp 26 (paras 9–10), 152, 154–156.

138 Respondent's SCB Vol 1 at pp 26 (paras 8, 11), 154–156.

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witnesses,[139] the limitations of the conclusions reached are expressed within the SCDF report itself. The SCDF report only goes so far as to say that amongst the "[n]umerous electrical appliances and electrical wirings" at the backyard of the appellant's premises, "[o]ne of the electrical entities may be a *possible* cause of the fire"[140] [emphasis added]. Further, at the trial, Major Rashid Bin Mohd Noor of the SCDF testified that because most of the electrical entities were badly burnt, the SCDF had difficulty determining the cause of the fault.[141] Likewise, the Burgoyne report was tentative in its conclusions. It concluded that the "plausible accidental causes" were "carelessly discarded smokers' materials or an electrical fault occurring at lighting on the premises".[142] Before coming to this conclusion, the Burgoyne report noted that "there was no clear evidence of the cause of the incident" and that it was only "consider[ing] the potential likely causes of [the] fire".[143]

82 The expert reports were introduced at the trial by the respondent, who called witnesses from the SCDF and Burgoyne.[144] On initial impression, it might seem counterintuitive for the respondent to do so given that it was (and still is) seeking to invoke the rule of *res ipsa loquitur*. However, the respondent did so because it wanted to establish that neither report arrived at a firm view on the cause of the fire[145] (thus satisfying the third requirement for the application of

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139 CB Vol 2 at pp 71, 72.

140 Respondent's SCB Vol 1 at p 99 (para 8(d)).

141 ROA Vol 3J at p 94 (lines 19–21).

142 Respondent's SCB Vol 1 at p 160.

143 CB Vol 2 at p 63.

144 Respondent's case at para 8.

145 ROA Vol 4A at p 107 (para 126).

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res ipsa loquitur) as well as to address the appellant's claim below that the fire started in the respondent's premises.[146]

83 Further, as mentioned above at [38], the appellant's reliance on the expert reports is not without difficulty. While the reports generally suggest that *some* electrical appliance might be the cause of the fire, they do not provide sufficient evidence for the court to conclude, *on the balance of probabilities*, what exactly caused the fire, be it an electrical appliance or, as the Burgoyne report suggests, the careless disposal of smokers' materials.[147] Owing to the appellant's conduct of its case during the trial, *ie*, the position taken below by the appellant that the fire had started in the respondent's premises, it renounced the SCDF and the Burgoyne reports. Therefore, the possible causes of the fire identified by these reports were not seriously tested through cross-examination. The conclusions the reports arrived at are, at their highest, *mere possibilities*. Hence, unlike in cases such as *BNJ* and *Tesa Tape*, we are not satisfied that any particular cause can be established *on the balance of probabilities*. Accordingly, we find that the third requirement is also satisfied.

84 For the avoidance of doubt, we should make it clear that the rule applies in cases where there is genuine difficulty with establishing the cause of the incident and not in cases where, merely by reason of the way the case was run, there was no evidence on the relevant issues before the court. Put another way, the rule is a practical outworking of the burden of proof in cases where there are real difficulties in establishing what in fact happened, and not a means by which

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146 ROA Vol 4A at p 67 (para 54).

147 Respondent's SCB Vol 1 at p 159.

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to overcome the shortcomings in the evidence arising only from the failure of the plaintiff to prove his case in the appropriate way.

Conclusion

85 We are therefore not persuaded by the appellant's new arguments. These new arguments simply cannot succeed given the state of the evidence which was led in the court below. In our view, the Judge had correctly invoked the rule of *res ipsa loquitur* on the facts of this case. Given our findings, it is unnecessary to decide the respondent's alternative case that the appellant was also negligent in failing to prevent the spread of the fire. The appeal is therefore dismissed with costs fixed at $55,000 inclusive of disbursements.

86 We thank both counsel for their respective submissions which assisted the court in arriving at our decision to clarify the maxim of *res ipsa loquitur* especially in the specific context of fire cases.

Sundaresh Menon Chief Justice	Tay Yong Kwang Judge of Appeal	Steven Chong Judge of Appeal

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