IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2019] SGCA 82

Civil Appeal No 181 of 2018

Between

PEX International Pte Ltd

… *Appellant*

And

(1) Lim Seng Chye
(2) Formcraft Pte Ltd

… *Respondents*

Civil Appeal No 183 of 2018

Between

Lim Seng Chye

… *Appellant*

And

PEX International Pte Ltd

… *Respondent*

GROUNDS OF DECISION

[Tort] — [Nuisance]
[Tort] — [Rule in Rylands v Fletcher]

TABLE OF CONTENTS

PEX International Pte Ltd
v
Lim Seng Chye and another and another appeal

[2019] SGCA 82

Court of Appeal — Civil Appeals Nos 181 and 183 of 2018
Sundaresh Menon CJ, Andrew Phang Boon Leong JA and Steven Chong JA
17 October 2019

19 December 2019

Steven Chong JA (delivering the grounds of decision of the court):

Introduction

1 Foreseeability is a legal term of art that arises in different contexts. It is relevant for the purposes of examining the existence of a *duty of care* for the tort of negligence. It is also relevant in the context of *remoteness of damage* to determine the types of losses that are recoverable for the tort of private nuisance. The former inquiry bears on whether *liability is established* while the latter governs whether liability will be limited to certain *types of damage*.

2 In cases where damage to a neighbour's land is caused by an activity "which gives rise to the risk of escape of physically dangerous or hazardous material", it is quite common for such claims to be brought in negligence as well as in nuisance. Although these two torts are quite distinct and different in their nature, the element of foreseeability would typically feature in the analysis of

both claims albeit for different purposes. Foreseeability of the *type of harm* (which is relevant for the purposes of remoteness of damage in respect of claims in nuisance) is quite different from foreseeability of the *risk of harm* (which is relevant to establishing liability for claims in negligence). To avoid confusion, it is crucial to be conscious of this distinction.

3 The appeals before this court involved a dispute in relation to a fire that caused extensive damage to a building owned by Lim Seng Chye ("Lim"), located at 15 Link Road ("No 15"). The fire occurred while construction involving hot works was being carried out in an adjoining property located at 17 Link Road ("No 17"). The owner and occupier of No 17 is PEX International Pte Ltd ("PEX"). PEX had engaged Formcraft Pte Ltd ("Formcraft") as the contractor to carry out the construction works. Lim brought a claim in negligence, private nuisance and the rule in *John Rylands and Jehu Horrocks v Thomas Fletcher* (1868) LR 3 HL 330 ("*Rylands v Fletcher*") against PEX.

4 In the court below, the High Court Judge ("the Judge") dismissed the claim in negligence but allowed the claim in nuisance and the rule in *Rylands v Fletcher*. In allowing the claim in nuisance, the Judge found that the hot works on PEX's land "made such works *foreseeably* unsafe" [emphasis added] (*Lim Seng Chye v Pex International Pte Ltd and another* [2019] SGHC 28 ("the Judgment") at [121]). In so doing, she relied on a passage in *OTF Aquarium Farm (formerly known as Ong's Tropical Fish Aquarium & Fresh Flowers) (a firm) v Lian Shing Construction Co Pte Ltd (Liberty Insurance Pte Ltd, Third Party)* [2007] SGHC 122 ("*OTF Aquarium*") at [23] where the court observed that "[i]t is clearly not a reasonable use of land to create or to continue a hazard which the owner or occupier knows or should know carries a *foreseeable risk of damage* to one's neighbour" [emphasis added]. These references might have given the erroneous impression that foreseeability of the *risk of harm* arising

from the user of land is relevant for the purposes of establishing liability in nuisance.

5 Indeed, in these appeals, the central theme of PEX's case was that the Judge erred in purportedly finding that PEX knew or should have known that the renovation works on its land which included hot works gave rise to a "foreseeable risk of damage" to Lim's land. In the course of the oral hearing on 17 October 2019, we explained to PEX's counsel that their submission stemmed from a misunderstanding of the Judge's decision as well as the law. We nonetheless recognised that the references to foreseeability of the risk of damage in some decisions involving claims in nuisance might have contributed to their misunderstanding of the correct legal position. At the end of the hearing, we dismissed both appeals with brief oral grounds and stated that we would issue detailed grounds in due course especially since the appeals showed that it is indeed *not unforeseeable* that the distinction might be blurred or unwittingly confused.

The facts

The parties to the dispute

6 At the material time, Lim was operating a sole proprietorship registered as LTL Electrical Trading. Lim was in the business of repairing domestic electrical appliances and exporting consumer goods. Lim used No 15 as an office and a warehouse for the storage of second-hand household items, including polyurethane mattresses.[1]

[1] Joint Record of Appeal ("JROA") vol 3(1), pp 6–8.

7 PEX is in the business of general wholesale trading, including but not limited to the manufacturing of electrical machinery, apparatus, appliances and supplies. It is the owner and occupier of No 17. As mentioned, No 17 is adjacent to No 15. At the material time, No 17 was used by PEX as a warehouse for the storage of metal conduits and metal fittings.[2]

8 Molly Chan Ai Teow ("Chan") is the general manager of PEX. Ross Tan Joo Kim ("Tan") is the Chief Executive Officer of PEX and Chan's boss.[3] Both Chan and Tan gave evidence on behalf of PEX.

9 Formcraft is a company in the construction industry. PEX engaged Formcraft to undertake three construction projects in relation to No 17 between 2012 and 2013. It was not disputed that Formcraft possessed the necessary building licence to undertake these three projects. The fire occurred in the course of the third project. Although Formcraft did not enter an appearance in these proceedings, Chong Nyuk Kwong ("Chong"), Formcraft's director, testified at the trial.

The background to the dispute

10 PEX came to engage Formcraft through the recommendation of one Poh Hui Choo ("Poh"), the owner of a company called Golden Champ Pte Ltd. Sometime around the first quarter of 2012, Poh invited Chan and Tan to view her newly renovated premises at 25 Link Road ("No 25"). Chan and Tan were impressed with the quality of the renovation work, and decided they wanted to do similar work at No 17. They asked Poh about the identity of the contractor who had done the renovations at No 25 and queried her on her experience with

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2 JROA vol 3(2), p 131.

3 JROA vol 3(2), p 130.

him. Poh expressed satisfaction with the contractor, Chong, and said she had no hesitation in recommending him. In April 2012, Poh introduced Chong to Chan and Tan. PEX eventually decided to engage Formcraft on the strength of Poh's recommendation and what they had observed when they visited No 25.[4]

11 In or around early May 2012, PEX engaged Formcraft to install a skylight canopy, skylight windows and ventilation globes around No 17 and to carry out minor repair works on the roof ("the First Job"). PEX made final payment on the First Job on 22 June 2012. Chan stated that PEX was very impressed by Formcraft's work.[5]

12 In or around August 2012, PEX decided to engage Formcraft to replace one of its office windows, install signage at the front of No 17 and tear down the existing structures at the rear of No 17 ("the Second Job"). PEX made final payment on the Second Job on 18 October 2012.[6]

13 Around August 2012, PEX also contacted Formcraft to seek a quotation for the construction of an extension to the rear of No 17, in place of the existing structures which Formcraft was to tear down as part of the Second Job ("the A&A works"). Chong told PEX that government approvals would need to be sought for the A&A works and that he would calculate how much it would cost to obtain the necessary approvals before providing the quotation.[7]

14 On 26 September 2012, PEX engaged ETS Design & Associates ("ETS"), a sole proprietorship, to assist in making all the necessary submissions

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4 JROA vol 3(2), pp 132–133.

5 JROA vol 3(2), pp 132–134.

6 JROA vol 3(2), p 134.

7 JROA vol 3(2), pp 135–136.

to the authorities and to apply for all the necessary permits and approvals for the A&A works.[8]

15 ETS quoted a total fee of $16,000 to assist in producing the submissions and procuring the requisite approvals. According to the quotation, PEX would be paid according to the following payment schedule:[9]

(a) 30% down payment upon confirmation of the appointment of ETS;

(b) 15% upon the submission of the plan to Jurong Town Council ("JTC") for endorsement;

(c) 15% upon the submission of JTC's endorsed plan to Urban Redevelopment Authority ("URA") for the grant of planning permission;

(d) 15% upon the submission of plans to the Building and Construction Authority ("BCA") for structural plan approval;

(e) 15% upon the submission of plans to BCA for building plan approval;

(f) 5% upon the submission of plans to the Fire Safety and Shelter Department of the Singapore Civil Defence Force ("SCDF") for fire safety approval; and

(g) 5% upon completion of the construction works.

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8 JROA vol 3(2), pp 136, 161.

9 JROA vol 3(2), p 160.

16 PEX made the following progress payments to ETS:[10]

(a) PEX paid ETS $4,800 on 26 September 2012 as a 30% down payment upon confirmation of the appointment of ETS.

(b) PEX paid ETS $2,400 on 7 January 2013 as a progress payment upon the submission of a plan to JTC for endorsement.[11] JTC had issued its letter of consent on 31 December 2012.

(c) PEX paid ETS $4,800 on 20 February 2013 as a progress payment for two milestones: (i) the submission of the JTC-endorsed plan to URA for the grant of planning permission; and (ii) the submission of the structural plans to BCA for structural plan approval.[12] URA had issued its grant of planning permission on 6 February 2013. However, notwithstanding payment on 20 February 2013, ETS had not submitted the structural plans to BCA for approval by that date.

17 On 25 February 2013, PEX signed and accepted a quotation from Formcraft for the A&A works.[13] PEX contracted to pay Formcraft a total sum of $88,150.50. The works listed in the quotation included the construction of a brick wall separating No 17 and No 15. The backyards of No 17 and No 15 had hitherto been separated by a chain link fence covered with corrugated iron sheets.[14] The quotation also included $16,000 for "Preliminaries & Insurance,

10 JROA vol 3(2), p 137.

11 JROA vol 3(2), pp 162–163.

12 JROA vol 3(2), pp 164–166.

13 JROA vol 3(2), pp 167–168.

14 JROA vol 3(1), p 10.

including hoarding & protection".[15] However, Formcraft did not procure insurance for the A&A works.

18 The fire broke out on 30 April 2013. SCDF's investigation report on the fire dated 9 October 2013 made the following relevant findings, which were not challenged by PEX and Lim:[16]

(a) Tan stated that the A&A works started six weeks before the fire.

(b) A construction worker employed by Formcraft stated that he was performing hot works on the top of scaffolding at the backyard of No 17 on the day of the fire. At 9.30am, he was welding a rebar to a steel column to support the brick wall that was being constructed between No 15 and No 17 (see [17] above). The construction worker recalled that there were strong winds at the time. The construction worker left for a break at 10.00am and returned at 10.15am to continue his work. At 10.30am, he spotted fire on the blue canvas at the backyard of No 15 directly below the position where he was performing his welding work.

(c) The fire was caused by sparks from the hot works being carried out at the backyard of No 17. These sparks were the ignition source. These sparks fell onto the mattresses and other miscellaneous items at the backyard of No 15, and those items served as the ignition fuel. The strong winds fanned the fire and caused the fire to spread.

19 On appeal, it was also not disputed that:

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15 JROA vol 3(2), p 167.

16 JROA vol 5(1), pp 116–118.

(a) Formcraft was authorised by PEX to conduct the A&A works and these works required hot works.

(b) There was no evidence that PEX knew that hot works were being conducted on the day of the fire.

(c) Formcraft was negligent in the performance of the A&A works at No 17. It failed to ensure adequate supervision of the works and it commenced the works without the requisite permit and in defiance of the express instructions of ETS.

(d) If a supervisor had been present during the welding works on 30 April 2013, he would have noted the presence of strong winds and the close proximity to flammable material and would have put a stop to the welding.

The proceedings below

20 Lim commenced a suit against PEX and Formcraft on 19 April 2016. Lim's claim was for insured losses in respect of the damage to No 15 and the goods within (pursuant to his insurers' rights of subrogation) as well as for uninsured losses, specifically, a claim for damages in respect of personal injuries allegedly suffered in the form of post-traumatic stress disorder ("PTSD") and panic disorder.

21 Interlocutory judgment was entered against Formcraft on 3 May 2016, following Formcraft's failure to enter an appearance. The trial below proceeded on the issues of liability alone. Lim's claim against PEX was founded on the tort of negligence, the tort of private nuisance and the rule in *Rylands v Fletcher*.

22 The Judge found that PEX was liable in the nuisance (see the Judgment at [122]) and the rule in *Rylands v Fletcher* (see the Judgment at [131]) but was not liable in negligence (see the Judgment at [106]).

23 In relation to the tort of negligence, the Judge found that:

(a) The decision to engage Formcraft for the A&A works was based primarily on the recommendation of Poh, the visual inspections by Chan and Tan of the similar work done at No 25 and their satisfaction with Formcraft's performance in the two jobs carried out at No 17 prior to the A&A works, *ie*, the First Job and the Second Job (see the Judgment at [23]).

(b) PEX's decision to engage ETS was in response to Chong's request for a consultant to assist in making the submissions for government approvals (see the Judgment at [32]).

(c) There was reasonable basis for PEX to believe that Formcraft and ETS would be liaising and communicating with each other in relation to the commencement and execution of the A&A works at No 17 (see the Judgment at [33]) and Formcraft and ETS did in fact communicate with each other for that purpose (see the Judgment at [34]).

(d) Formcraft was negligent in the performance of the A&A works at No 17, in that it had commenced these works without the requisite permit and in defiance of ETS's express instruction not to do so, and it failed to ensure adequate supervision of these works (see the Judgment at [44]–[45]).

(e) PEX delegated the performance of the A&A works to Formcraft as an independent contractor and thus PEX could not be held vicariously liable for Formcraft's negligence in carrying out these works (see the Judgment at [54]).

(f) PEX was not negligent in the selection of Formcraft as its independent contractor (see the Judgment at [66]–[69]).

(g) There was no basis to find that PEX owed a non-delegable duty to Lim to ensure that Formcraft took reasonable care in the execution of the A&A works at No 17 (see the Judgment at [83] and [94]).

24 In relation to the tort of private nuisance, the Judge found that:

(a) The elements of unreasonable use of land and foreseeability of harm reflected important limiting principles in any consideration of nuisance liability (see the Judgment at [111]–[112]).

(b) These two elements were fulfilled in the present case. PEX could have reasonably foreseen that the work it had instructed Formcraft to do was likely to result in a nuisance to Lim. The element of unreasonable use was also established, in part because the hot works were executed in a manner that was foreseeably unsafe. PEX was therefore liable under the tort of nuisance (see the Judgment at [116]–[121]).

25 In relation to the rule in *Rylands v Fletcher*, the Judge found that:

(a) Foreseeability of damage of the relevant type was a prerequisite of liability in damages under the rule in *Rylands v Fletcher* (see the Judgment at [129]). PEX ought to have known that the A&A works it

had commissioned at the rear of its property included hot works (see the Judgment at [131]).

(b) The hot works which produced sparks or molten globules amounted to a non-natural use of the land. These sparks constituted a dangerous "thing" which posed an exceptionally high risk to neighbouring property should the sparks escape. The sparks escaped and caused extensive damage. On this basis, PEX was liable under the rule in *Rylands v Fletcher* (see the Judgment at [131]).

26 In Civil Appeal No 181 of 2018, PEX appealed the Judge's findings on nuisance and the rule in *Rylands v Fletcher*. In Civil Appeal No 183 of 2018, Lim appealed the Judge's findings on negligence.

Our decision

27 After considering the parties' written and oral submissions, we dismissed both appeals on 17 October 2019. In respect of the Judge's findings on the tort of negligence, we agreed with the Judge that Lim's claim in negligence was not made out for the reasons set out by the Judge. As for the claim in private nuisance and the rule in *Rylands v Fletcher*, while we were of the view that the correct outcome was reached, there were aspects of the decision that merited further clarification. It is for this reason that our grounds of decision will focus on private nuisance, with a particular emphasis on the role of foreseeability in this tort. The impact of these grounds on the rule in *Rylands v Fletcher* will also be briefly analysed.

The role of foreseeability in nuisance

28 In coming to her decision on the claim in nuisance, the Judge stated the following propositions of law:

> (a) An actionable nuisance may be characterised as causing or permitting a state of affairs in one man's property from which damage to his neighbour's property is likely to arise (see the Judgment at [109]). This is, however, limited by two principles.
>
> (b) First, the use of that man's (the defendant's) land must be unreasonable (see the Judgment at [111]).
>
> (c) Second, the damage must be reasonably foreseeable (see the Judgment at [112]–[113]). In setting out this principle, the Judge cited the High Court decisions of *Tesa Tape Asia Pacific Pte Ltd v Wing Seng Logistics Pte Ltd* [2006] 3 SLR(R) 116 ("*Tesa Tape*") and *OTF Aquarium*. A corollary of this principle is that an owner or occupier of land is not liable for the acts of his independent contractor under the tort of nuisance unless he can reasonably foresee that the work he had instructed was likely to result in a nuisance (see the Judgment at [114]). This proposition was extracted from a passage in *Clerk & Lindsell on Torts* (Michael A Jones gen ed) (Sweet & Maxwell, 22nd Ed, 2018) ("*Clerk & Lindsell*") as well as *Spicer and another v Smee* [1946] 1 All ER 489 (*"Spicer v Smee*") (see the Judgment at [115]).

29 On appeal, PEX seized on the latter principle to develop the argument that as it could not reasonably foresee the fire, it should thus not be liable for the claim in nuisance. A critical issue for determination in this case was

therefore whether and to what extent the concept of foreseeability features in determining liability for nuisance.

30 Foreseeability as a test for liability is traditionally associated with the tort of negligence. In the seminal UK House of Lords decision of *M'Alister (or Donoghue) (Pauper) v Stevenson* [1932] AC 562 at 580, Lord Atkin expressed the test in the following terms:

> … You must take reasonable care to avoid acts or omissions which you can *reasonably foresee* would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be – persons who are so closely and directly affected by my act that I ought *reasonably to have them in contemplation* as being so affected when I am directing my mind to the acts or omissions which are called in question. … [emphasis added]

31 The modern test for the existence of a duty of care in the tort of negligence continues to be strongly anchored to the concept of reasonable foreseeability and this concept expresses itself in our local jurisprudence through the tests of factual foreseeability and proximity (see *Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency* [2007] 4 SLR(R) 100 at [75]–[82]).

32 The relevance of foreseeability in the tort of private nuisance has been the subject of conflicting interpretations and applications. This can be illustrated from an examination of the relevant cases on this point.

33 We start with the decision in *Spicer v Smee*. That decision involved two adjoining bungalows each owned by the defendant and one of the plaintiffs respectively. A fire originating from the defendant's bungalow almost completely destroyed the plaintiff's bungalow and its contents. Atkinson J found that the cause of the fire was the negligent workmanship of an independent contractor hired by the defendant some nine years before the fire.

The contractor had installed electric wiring in the defendant's bungalow without adequately protecting part of the live wire. Eventually, this portion of the wire was exposed, came into contact with wet wood and resulted in the fire (see *Spicer v Smee* at 492–493). Atkinson J found that the defendant was answerable in nuisance. He emphasised that nuisance and negligence were torts that could exist independently of each other (see *Spicer v Smee* at 493):

> … Liability for a nuisance may exist quite independently of negligence. In negligence a plaintiff must prove a duty to take care, but not so in nuisance. … Nuisance and negligence are different in their nature, and a private nuisance arises out of a state of things on one man's property whereby his neighbour's property is exposed to danger. …

34 Critically, Atkinson J considered that the fact that it was an independent contractor's negligence that created the nuisance was irrelevant (see *Spicer v Smee* at 493 and 495):

> … In general, the responsibility for nuisance is based on possession, but it is clear law that, if an owner lets his premises with a nuisance thereon created by himself or by his servants or agents, he assumes liability for the continuance of that nuisance. In *Job Edwards, Ltd.* v. *Birmingham Navigations* … Scrutton, L.J., was dealing with the question of nuisance, and damage done by fire. His judgment was a minority judgment, but there was no difference between the members of the court as to what was the law which they were applying. He said ([1924] 1 K.B. 341, at p. 355):
>
> > In my view it is clear that a landowner or occupier is liable to an action by a private person damaged by a nuisance existing on or coming from his land: (i) if he or his servants or agents created the nuisance; (ii) ***or if an independent contractor acting for his benefit created the nuisance, though contrary to the terms of his employment*** …
>
> Accepting that, as I am bound to do, as a correct statement of the law, [the defendant] was clearly liable for the negligent way in which this installation had been carried out.
>
> …

> It was urged that [the defendant] could not be liable for the acts of the contractor. *As to that, usually a man is not liable for the default of an independent contractor, but in the law of nuisance an exception exists.* I have already referred to what was said by Scrutton, L.J., in *Job Edwards, Ltd.* v. *Birmingham Navigations* … Winfield on Torts also deals with this contention and states that it does not apply in the case of nuisance. …
>
> [emphasis added in italics and bold italics]

35 *Spicer v Smee* thus suggests that the concepts of reasonable care and foreseeability as understood in the tort of negligence is irrelevant in the context of nuisance. It should be noted that during the oral hearing before us, counsel for PEX, Mr Chia Boon Teck, sought to rely on *Spicer v Smee* for the proposition that reasonable foreseeability of the risk of harm was relevant in the context of claims in nuisance involving independent contractors, but as we highlighted to Mr Chia at the hearing, the case appears to stand for the converse proposition.

36 Another relevant case is the UK House of Lords decision in *Sedleigh-Denfield v O'Callaghan and Others* [1940] AC 880 ("*Sedleigh-Denfield*"). In that case, a pipe was placed on the respondents' land by a trespasser without the consent and authorisation of the respondents. The respondents subsequently became aware of the pipe and used it to drain their fields. The pipe later caused flooding to the appellant's adjacent premises (see *Sedleigh-Denfield* at 884–886). The question before the court was whether the respondents were liable in the tort of private nuisance. Lord Wright noted at 902 that:

> … The structure of the orifice of the pipe was on the respondents' land. If the work had been done by or on behalf of the respondents, the conditions requisite to constitute a cause of action for damages for a private nuisance, would be beyond question complete. …

37 However, Lord Wright highlighted that the situation was different in the case before the court (see *Sedleigh-Denfield* at 904):

> … [The] difficulty is that the respondents did not create the offending structure and in that sense create the nuisance. It was created by the Middlesex County Council, which was or has been treated as being a trespasser. …
>
> … [A]n occupier is not prima facie responsible for a nuisance created without his knowledge and consent. If he is to be liable a further condition is necessary, namely, that he had knowledge or means of knowledge, that he knew or should have known of the nuisance in time to correct it and obviate its mischievous effects. …

38 Applying this principle, the House of Lords found that the respondents were liable because they had such knowledge of the nuisance and continued the nuisance (see *Sedleigh-Denfield* at 895, 901, 911, 913 and 919). *Sedleigh-Denfield* thus draws a distinction between situations where the acts of a third party are authorised by the owner of the land (where knowledge or foreseeability is irrelevant) and where the acts of a third party are not authorised (where knowledge or foreseeability is relevant).

39 In *Overseas Tankship (UK) Ltd v The Miller Steamship Co Pty and another* [1967] AC 617 ("*Wagon Mound (No 2)*"), the Privy Council was confronted with the question of the role of foreseeability in nuisance. Lord Reid analysed the issue in the following terms (at 639–640):

> Comparing nuisance with negligence the main argument for the respondent was that in negligence foreseeability is an essential element in determining liability and therefore it is logical that foreseeability should also be an essential element in determining the amount of damages: but negligence is not an essential element in determining liability for nuisance and therefore it is illogical to bring in foreseeability when determining the amount of damages. It is quite true that negligence is not an essential element in nuisance. Nuisance is a term used to cover a wide variety of tortious acts or omissions and in many negligence in the narrow sense is not essential. … And although negligence may not be necessary, fault of some kind is almost always necessary and fault generally involves foreseeability, e.g., in cases like [*Sedleigh-Denfield*] the fault is in failing to abate the nuisance of the existence of which the

> defender is or ought to be aware as likely to cause damage to his neighbour. …
>
> …
>
> … In their Lordships' judgment the similarities between nuisance and other forms of tort to which *The Wagon Mound (No. 1)* [[1961] AC 388] applies far outweigh any differences, and they must therefore hold that the judgment appealed from is wrong on this branch of the case. *It is not sufficient that the injury suffered by the respondents' vessels was the direct result of the nuisance if that injury was in the relevant sense unforeseeable.*
>
> [emphasis added]

40 On its face, Lord Reid's statements appear to suggest that foreseeability is relevant for establishing liability in nuisance and *Sedleigh-Denfield* is an illustration of this general principle. However, the true scope of the decision in *Wagon Mound (No 2)* was subsequently clarified in the UK House of Lords decision of *Cambridge Water Co v Eastern Counties Leather Plc* [1994] 2 AC 264 ("*Cambridge Water*").

41 In *Cambridge Water* at 299, Lord Goff of Chieveley emphasised that the concepts of reasonable care and foreseeability were generally irrelevant to establishing liability for nuisance:

> … [L]iability for nuisance has generally been regarded as strict, at least in the case of a defendant who has been responsible for the creation of a nuisance, even so that liability has been kept under control by the principle of reasonable user … The effect is that, if the user is reasonable, the defendant will not be liable for consequent harm to his neighbour's enjoyment of his land; but if the user is not reasonable, the defendant will be liable, even though he may have exercised reasonable care and skill to avoid it. …

42 According to Lord Goff, *Sedleigh-Denfield* was an exception to this general principle (see *Cambridge Water* at 300):

> … In the present case, we are not concerned with liability in damages in respect of a nuisance which has arisen through natural causes, or by the act of a person for whose actions the defendant is not responsible, in which cases the applicable principles in nuisance have become closely associated with those applicable in negligence: see [*Sedleigh-Denfield*] and *Goldman v. Hargrave* [1967] 1 A.C. 645. …

43 Lord Goff highlighted at 300–301, however, that although foreseeability of the risk of harm was irrelevant in establishing nuisance, foreseeability of the *type of harm* was relevant in considering the issue of remoteness:

> … We are concerned with the liability of a person where a nuisance has been created by one for whose actions he is responsible. Here … the fact that the defendant has taken all reasonable care will not of itself exonerate him from liability, the relevant control mechanism being found within the principle of reasonable user. But it by no means follows that the defendant should be held liable for *damage of a type* which he could not reasonably foresee … this appears to have been the conclusion of the Privy Council in [*Wagon Mound (No. 2)*]. …
>
> It is widely accepted that this conclusion, although not essential to the decision of the particular case, has nevertheless settled the law to the effect that foreseeability of harm is indeed a prerequisite of the recovery of damages in private nuisance, as in the case of public nuisance. … It is unnecessary in the present case to consider the precise nature of this principle; but it appears from Lord Reid's statement of the law that he regarded it *essentially as one relating to remoteness of damage*.
>
> [emphasis added]

44 *Cambridge Water* thus clarified that the statements in *Wagon Mound (No 2)* relating to foreseeability were made in the context of remoteness of damage and pertained only to foreseeability of the *type of harm*. Foreseeability of the risk of harm was irrelevant to nuisance, except in circumstances, like in *Sedleigh-Denfield*, where the nuisance originated from a source that was not authorised by the owner or occupier.

45 Unfortunately, in *Transco plc v Stockport Metropolitan Borough Council* [2004] 2 AC 1 ("*Transco*"), the UK House of Lords did not draw the same distinction between foreseeability of the risk of harm and foreseeability of the type of harm. One issue before the court was whether the rule in *Rylands v Fletcher* should be abrogated. In order to answer this question, Lord Hoffmann investigated the relationship between nuisance and the rule in *Rylands v Fletcher*. At [26]–[27] he stated:

> 26 … a conclusion that an occupier of land has no *right* to discharge water or filth … or chemicals … upon his neighbour's land is not inconsistent with a rule that ***he will be liable in damages only for damage caused by a discharge which was intended or foreseeable. Indeed, that is the general rule of liability for nuisance today***: [*Wagon Mound (No 2)*]. Liability in nuisance is strict in the sense that one has no *right* to carry on an activity which unreasonably interferes with a neighbour's use of land merely because one is doing it with all reasonable care. If it cannot be done without causing an unreasonable interference, it cannot be done at all. But liability to pay damages is limited to damage which was reasonably foreseeable.
>
> 27 *Rylands v Fletcher* was therefore an ***innovation*** in being the ***first clear imposition of liability for damage caused by an escape which was not alleged to be either intended or reasonably foreseeable***. …
>
> [emphasis in original in italics; emphasis added in bold italics]

46 Lord Hoffmann thus appears not to have confined the concept of foreseeability to the question of remoteness. Foreseeability of the risk of harm was regarded as a principle of general application in establishing liability for nuisance. The rule in *Rylands v Fletcher* retained its relevance because it was an exception to the general principle: only under the rule in *Rylands v Fletcher* would foreseeability of the risk of harm have no role to play in establishing liability. At [64], Lord Hobhouse of Woodborough was explicit in rejecting Lord Goff's view that foreseeability was a concept confined to remoteness of damage in nuisance:

> Finally there is the principle recognised in [*Cambridge Water*] … Lord Goff of Chieveley who delivered the leading judgment drew upon the language of nuisance used by Blackburn J and the limitations of the scope of that tort recognised by the Privy Council in [*Wagon Mound (No 2)*] and held that "foreseeability of harm of the relevant type by the defendants was a prerequisite for the recovery of damages in nuisance and under the rule in *Rylands v Fletcher*". ***Lord Goff saw this as a principle of the remoteness of damage (pp 301 and 304) but his reasoning is also consistent with it being part of the risk element in the tort.*** … [emphasis added]

47 This shift in the English position was captured in the English Court of Appeal decision of *Northumbrian Water Limited v Sir Robert McAlpine Limited* [2014] EWCA Civ 685:

> Three important principles can be derived from the speeches of Lord Goff in *Cambridge Water* and Lord Hoffmann in [*Transco*]. The first is that although liability in nuisance has traditionally been regarded as strict, in the sense that it does not depend on proof of negligence, if the defendant's user of his land is reasonable, he will not be liable for interference with his neighbour's enjoyment of his land. ***The second is that, unless the case can be brought within the scope of the rule in* Rylands v Fletcher*, the defendant is not liable for damage caused by an isolated escape, i.e., one that is not intended or reasonably foreseeable.*** The third is that foreseeability of harm of the type suffered by the plaintiff is necessary for the defendant to be liable in damages for nuisance. [emphasis added]

48 The portion highlighted above confirms that foreseeability of the risk of harm is generally relevant to establishing liability in nuisance, and this appears to be the law in England today. As Lord Hobhouse noted in *Transco* (see [46] above), this is a departure from Lord Goff's position in *Cambridge Water*.

49 Several Singapore High Court decisions have also issued pronouncements that could be interpreted as suggesting that foreseeability of the risk of harm is relevant in establishing liability for nuisance. In *OTF Aquarium*, it was stated at [22]–[23] that:

> 22 I now return to my discussion on foreseeability of damage which is a factor relevant to liability in nuisance and negligence. The *type of damage suffered must be foreseeable* to the defendant at the time the nuisance or negligence was committed. … Of relevance factually is the defendant's state of knowledge at the time of the acts and omissions complained of. That knowledge in turn will have a bearing on the reasonable means taken to avert the dangers that were to be anticipated.
>
> 23 For the purpose of this case, actionable nuisance may be characterised as the causing or permitting of a state of affairs in one man's property from which damage to his neighbour's property is likely to arise … It is clearly not a reasonable use of land to create or to continue a hazard which *the owner or occupier knows or should know carries a foreseeable risk of damage to one's neighbour. … Of importance to the issue of liability in private nuisance and negligence is the question whether the damage done was reasonably foreseeable. …*
>
> [emphasis added]

50 As seen from the above extract, the High Court in *OTF Aquarium* suggested that if the risk of harm was foreseeable, it would follow that the use of the land is not reasonable. In so doing, the court conflated the concepts of foreseeability of the type of harm and foreseeability of the risk of harm. Likewise, in *Tesa Tape*, the High Court appeared to have analysed foreseeability of the risk of harm in the context of both negligence and nuisance (see *Tesa Tape* at [6] and [16]–[20]). As mentioned (see [28(c)] above), the Judge also cited both these decisions in coming to her conclusion that foreseeability of the risk of harm was a principle that limited nuisance liability.

51 In the light of the above, it will be desirable for this court to explain the *proper* role of foreseeability in the tort of private nuisance. There are two competing approaches to examine.

52 The first approach is that foreseeability of the risk of harm is generally relevant in determining whether liability in nuisance is established. This is

consonant with the position adopted in *Transco* and followed in subsequent English decisions.

53 The second approach is that foreseeability of the risk of harm is not generally relevant in establishing liability. Instead, the relevant control mechanism is the principle that the use of land must be reasonable. Foreseeability of the type of harm, however, is relevant in determining whether a type of loss is too remote to be claimed. This tracks the position adopted in *Cambridge Water*.

54 What is common to both these approaches is that foreseeability of the risk of harm is relevant where the nuisance was created by a third party that was not authorised by the owner or occupier of the land. In the first approach, this is merely an application of the general principle that foreseeability of the risk of harm is relevant in establishing nuisance. In the second approach, this exception is justified on the basis that nuisance will only be established if there is an unreasonable *use* of land, and if the owner or occupier had no knowledge of a nuisance created by an unauthorised third party, it would follow that such a situation cannot be characterised as "use". This rationale was made explicit in *Sedleigh-Denfield* at 896–897 where Lord Atkin stated:

> … [N]uisance is sufficiently defined as a wrongful interference with another's enjoyment of his land or premises by the use of land or premises either occupied or in some cases owned by oneself. The occupier or owner is not an insurer; there must be something more than the mere harm done to the neighbour's property to make the party responsible. Deliberate act or negligence is not an essential ingredient but *some degree of personal responsibility is required, which is connoted in my definition by the word "use."* This conception is implicit in all the decisions which impose liability only where the defendant has "caused or continued" the nuisance. … [emphasis added]

55 In our judgment, the second approach, encapsulated in *Cambridge Water*, is preferred over the first approach for three reasons.

56 First, this position preserves the historical distinction between the tort of negligence and the tort of private nuisance. Nuisance focuses on the vindication of the plaintiff's interests and rights over his land. In contrast, negligence is focused on the conduct of the defendant: the emphasis is on whether a defendant should be made responsible for a fall in his standards of behaviour below that which is expected in a particular society (see also Gary Chan Kok Yew & Lee Pey Woan, *The Law of Torts in Singapore* (Academy Publishing, 2nd Ed, 2016) ("*The Law of Torts*") at paras 10.094–10.097; Kenneth Cheong & Kenneth Yap, "An Overhaul of Nuisance" (1998) 19 Sing LR 309 at pp 317–318). This distinction accounts for the differing emphasis on foreseeability. Where the conduct of the defendant is in focus, fault and reasonable foreseeability has a critical part to play in determining liability. Where the focus is instead on vindicating the plaintiff's interest in land, the fault of the defendant has limited relevance and the inquiry instead shifts to determining the proper balance of interests between neighbouring landowners. This inquiry is exemplified by the reasonable user test. This analysis accounts for why it cannot be correct to imply, as the court did in *OTF Aquarium* (see [50] above), that reasonable foreseeability of the harm has a bearing on the reasonable user test. The retention of this distinction between the two torts also provides a justification for the continued co-existence of nuisance and negligence as separate torts: although in practice they may often overlap, these torts nonetheless protect different interests.

57 Second and in a related vein, adopting the second approach would be more consistent with the original scope of nuisance as set out in the older cases. In *Spicer v Smee*, there was no suggestion that the defendant was aware of the

negligent performance of the independent contractor and the extent of her involvement was in authorising the independent contractor to do the wiring work. If foreseeability of the risk of harm were a requirement in establishing liability, it would appear that the defendant could not have been held liable for nuisance. The departure from this original position appears to have been contributed by the manner in which foreseeability has been discussed in the cases. The distinction between foreseeability of the type of harm and foreseeability of the risk of harm has not always been explicitly drawn. Both concepts have instead been used and applied interchangeably using the broader label of "foreseeability" (see, for example, the extracts at [39] and [45] above). This has led to a blurring of the lines between the test for remoteness of damage and that of establishing liability in private nuisance.

58 Third, in *Xpress Print Pte Ltd v Monocrafts Pte Ltd and another* [2000] 2 SLR(R) 614 ("*Xpress Print*"), this court imposed a stricter version of the duty to support adjacent property as compared to other Commonwealth jurisdictions. This was done on the basis that the principle that one should use his own property in such a manner as not to injure that of another is particularly important in land-scarce Singapore (see *Xpress Print* at [48]–[51]). In that case, the landowner also argued that it was its independent contractor which caused the wrongful act, but this court nevertheless imposed a strict duty to support the adjacent property on the landowner (see *Xpress Print* at [53]). Similar considerations apply in the present case and these considerations militate in favour of imposing a stricter version of the test for nuisance in Singapore. Indeed, the action for withdrawal of a right of support was described by this court in *Xpress Print* at [52] as "equivalent or akin to an action under the tort of nuisance".

59 In the light of the above, we summarise the position as follows:

(a) Foreseeability of the risk of harm is not generally necessary to mount a successful action in nuisance, even where the source of the nuisance is the independent contractor of the defendant. The relevant control mechanism is the principle that any use of land that interferes with the plaintiff's use and enjoyment of his neighbouring land must be reasonable.

(b) Foreseeability of the risk of harm is relevant only where the acts which created the nuisance were not authorised by the defendant, such as where the relevant acts originated from a trespasser. This exception is founded on the basis that the defendant needs to have "used" the land in an unreasonable manner in order to be liable in nuisance (see [54] above). Acts of a trespasser unknown to the owner of the land cannot possibly constitute "use" by the owner of the land.

(c) Nevertheless, foreseeability of the type of harm is relevant in determining whether the claim satisfies the requirement of remoteness of damage. Causation and remoteness of damage are essential elements in supporting a claim in nuisance because the tort is only actionable on proof of damage (see *The Law of Torts* at paras 10.066–10.068).

60 Before leaving this point, we should add that although our decision is at variance with some aspects of the reasoning adopted in *Tesa Tape* and *OTF Aquarium*, we are satisfied that they were nevertheless decided correctly:

(a) *Tesa Tape* was a case that involved damage caused by the collapse of containers that were stacked by the defendant next to the plaintiff's property. The court found at [14] and [20] that there were various reasonable precautions that could have been taken in stacking the containers that would have significantly reduced the risk posed by

the containers. Although these paragraphs were couched in the language of reasonable foreseeability and the issue was analysed in terms of the creation of a duty of care in negligence, the same facts equally apply to establish that there was an unreasonable use of land.

(b) In *OTF Aquarium*, which was a case involving damage caused by flooding that arose out of drainage works on the defendant's land, the court at [31] discussed whether reasonable steps were taken to adequately guard against the risk of flooding and concluded that no such steps were taken. This factor likewise suggests that there was an unreasonable use of land.

The application to this case

61 In coming to her decision, the Judge took into account the fact that PEX could have foreseen the *risk of harm* occurring (see the Judgement at [121]). However, unlike in *Sedleigh-Denfield*, and much like in *Spicer v Smee*, the works that created the nuisance were authorised by the defendant, PEX. Thus, foreseeability of the risk of harm was strictly irrelevant, and in that limited respect, the Judge appeared to have erred in taking that factor into account.

62 Nevertheless, we agreed with the Judge there was an unreasonable use of land. The hot works were done at the perimeter between No 15 and No 17 in the presence of strong winds, in close proximity to the flammable mattresses stored at the backyard of No 15 and significantly, without any proper supervision of the workers (see the Judgment at [121]).

63 Lim's claim was also not too remote because the *type of harm* (damage due to fire) was reasonably foreseeable by PEX since PEX authorised Formcraft to conduct the A&A works which ordinarily would involve hot works. In

making this finding, we emphasise that we are not making a determination on the viability of a claim in nuisance for personal injury, *ie*, Lim's claim for PTSD and panic disorder, caused by the fire, which, as noted by the Judge, was a matter left for determination at the hearing for the assessment of damages (see the Judgment at [135]).

64 For the reasons given above, we found that the Judge was right to hold PEX liable in nuisance, and thus we dismissed PEX's appeal on this point.

The rule in Rylands v Fletcher

65 The Judge found that foreseeability of the risk of harm was relevant in the context of the rule in *Rylands v Fletcher* (see the Judgment at [131]). This was premised on the position that the rule is a sub-species of the tort of nuisance.

66 The English authorities are united in the view that the rule in *Rylands v Fletcher* is a sub-species of the tort of nuisance. In contrast to the Judge however, these same authorities are also in agreement that foreseeability of the risk of harm is *not relevant* in establishing liability under the rule.

67 In *Cambridge Water*, Lord Goff viewed the role of foreseeability in the rule in *Rylands v Fletcher* as indicative of the general position under the tort of nuisance (*ie*, that only the type of harm was relevant for the purposes of remoteness of damage). According to Lord Goff, when Blackburn J originally conceived of the rule in *Rylands v Fletcher* in the lower court decision of *Fletcher v Rylands and another* (1866) LR 1 Ex 265, Blackburn J was merely extending the law of nuisance to cases of isolated escape, and was not attempting to develop a new basis to hold persons strictly liable for certain ultra-hazardous operations (see *Cambridge Water* at 304–305). In *Transco*, Lord Hoffmann justified the continued existence of the rule in *Rylands v*

Fletcher on the basis that it was an exception to the general rule that foreseeability of the risk of harm is relevant in establishing liability for nuisance (see [45]–[46] above).

68 The effect of our decision would appear to undermine this distinction drawn by Lord Hoffmann. As such, it is an open question whether it remains necessary to preserve the distinction between nuisance and the rule in *Rylands v Fletcher*. Nevertheless, we note on a preliminary basis that there were other reasons given in *Transco* to justify the continued existence of the rule. For instance, Lord Hoffmann also noted that abolishing the rule was too radical a step to take given that it had been part of English law for nearly 150 years (see *Transco* at [43]). The matter of the continued relevance of the rule has also been the subject of much academic scrutiny, and several commentators have advocated for its retention on various other grounds (see, for example, John Murphy, "The Merits of Rylands v Fletcher" (2004) 24(4) OJLS 643 at pp 649–659; Donal Nolan, "The distinctiveness of Rylands v Fletcher" (2005) 121 LQR 421 at pp 426–440).

69 This specific point, however, was not argued before us. Thus, for present purposes, it suffices to state that we do not see any good reason to depart from the English authorities that describe the rule in *Rylands v Fletcher* as a sub-species of nuisance and leave the question of whether it should be subsumed entirely within the tort of nuisance to a more appropriate case. Regardless of which view to adopt on the relationship between nuisance and the rule in *Rylands v Fletcher*, the authorities uniformly establish that foreseeability of the risk of harm is not relevant to determining liability under the rule. The Judge thus erred in holding otherwise.

70 Nevertheless, we dismissed PEX's appeal on the rule in *Rylands v Fletcher* because we agreed with the Judge that there was non-natural use of the land and there was an escape of a dangerous object onto Lim's property (see the Judgment at [131]) and we also found that the loss was not too remote as the type of harm was foreseeable (see [63] above).

Sundaresh Menon Chief Justice	Andrew Phang Boon Leong Judge of Appeal	Steven Chong Judge of Appeal

Chia Boon Teck, Darryl Chew Zijie and Chan Xian Yi, Jonathan (Chia Wong Chambers LLC) for the appellant in CA 181/2018 and the respondent in CA 183/2018;
Appoo Ramesh and Vinodhan Gunasekaran (Just Law LLC) for the first respondent in CA 181/2018 and the appellant in CA 183/2018;
The second respondent in CA 181/2018 absent and unrepresented.