IN THE GENERAL DIVISION OF
THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2022] SGHC 10

Suit No 378 of 2020

Between

Pilgrim Private Debt Fund

… *Plaintiff*

And

Asian Appraisal Company Private Limited

… *Defendant*

JUDGMENT

[Tort] — [Negligence] — [Duty of care]
[Tort] — [Negligence] — [Breach of duty]
[Tort] — [Negligence] — [Causation]
[Tort] — [Negligence] — [Contributory negligence]
[Tort] — [Negligence] — [Damages]
[Contract] — [Contractual terms] — [Unfair Contract Terms Act] — [Sections 2(2) and 11(3)]

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Pilgrim Private Debt Fund
v
Asian Appraisal Company Pte Ltd

[2022] SGHC 10

General Division of the High Court — Suit No 378 of 2020
Tan Siong Thye J
20–24 September, 5–8, 11 October, 23 November 2021

17 January 2022 Judgment reserved.

Tan Siong Thye J:

Introduction

1 The plaintiff, Pilgrim Private Debt Fund, claims against the defendant, Asian Appraisal Company Private Limited, for alleged professional negligence arising from the defendant's valuation of the plant and machinery ("the Assets") of NK Ingredients Pte Ltd ("NKI"). The defendant was engaged by NKI to prepare two valuation reports of its Assets dated 29 September 2017 (the "1st Report") and 17 May 2019 (the "2nd Report") (collectively "the Two Reports").

2 In the 1st Report, the defendant valued the fair market price of the Assets at approximately US$26m on an ongoing basis and US$12.13m on a forced sale basis as of 13 March 2017.[1] The plaintiff claims that, in reliance on the

[1] Statement of Claim ("SOC") at para 6.

1st Report dated 29 September 2017, the plaintiff granted a loan of S$1.6m to NKI (the "Loan"), which was secured against the Assets.[2] The Loan was disbursed in two tranches on 18 April 2018 and 25 April 2018.[3]

3 In 2019, NKI faced financial difficulties and one of its creditors applied to place it under judicial management. In light of the 1st Report in which the value of the defendant's Assets pledged to the plaintiff ostensibly far exceeded the Loan, the plaintiff agreed to support NKI in its application for a moratorium as it intended to pursue debt restructuring with the creditors. The moratorium was ultimately granted.[4] The moratorium lapsed on 1 July 2019.[5]

4 In January 2019, NKI indicated to the defendant that it wanted an updated appraisal of the Assets.[6] In March 2019 NKI engaged the defendant to prepare the 2nd Report. Subsequently, the plaintiff was given the 2nd Report dated 17 May 2019, in which the defendant valued the Assets at a fair value of approximately US$27m as an ongoing concern and US$9m on a forced sale basis as of 2 May 2019.[7] The plaintiff claims that, in reliance on the 2nd Report, the plaintiff decided not to appoint a receiver and manager.[8]

5 NKI was placed under judicial management on 20 August 2019 and FTI Consulting Pte Ltd ("FTI Consulting") was appointed as NKI's judicial

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2 SOC at paras 8 and 11; Plaintiff's Opening Statement ("POS") at para 3.

3 SOC at para 13.

4 SOC at para 17.

5 SOC at para 18.

6 Affidavit of Evidence-in-Chief of Chan Hiap Kong ("CHK") at para 25.

7 SOC at paras 20 and 21.

8 SOC at para 25.

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manager.[9] On 2 September 2019, FTI Consulting commissioned another valuation report of the Assets.[10] This report dated 6 September 2019 was prepared by Robert Khan International Business Consultants (the "RK Report")[11] and the salvage value of the Assets was valued at between S$1m and S$1.5m.[12]

6 The landlord of NKI, Soilbuild Business Space REIT ("Soilbuild"), wanted possession of the premises from NKI and that all chattels be cleared by 31 January 2019.[13] Accordingly, on 20 January 2020, FTI Consulting requested the plaintiff to remove the Assets from NKI's premises.[14] The plaintiff only received one offer of S$770,000 for the purchase of the Assets. After setting off the costs of demobilising and decommissioning the Assets, the plaintiff only received an approximate sum of S$250,000.[15] The plaintiff claims that the defendant had negligently overstated the value of the Assets in the Two Reports[16] and therefore claims for its loss arising therefrom.[17] NKI was subsequently wound up on 28 February 2020.[18]

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9 SOC at para 25.

10 SOC at para 26.

11 SOC at para 26.

12 SOC at para 27.

13 Agreed Bundle of Documents ("AB") at p 758.

14 SOC at para 28.

15 SOC at paras 30 and 31; POS at para 8.

16 POS at para 9.

17 SOC at paras 35 and 36.

18 SOC at para 32; Affidavit of Evidence-in-Chief of David Leow Tiak Cheow ("DLTC") at para 10.

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7 The defendant contends that it does not owe a duty of care to the plaintiff as the plaintiff was not the defendant's client. The defendant claims that the Two Reports were prepared only for NKI's use. The defendant also relies on a set of limiting conditions that is expressly stated in the Two Reports ("the Limiting Conditions").[19] In response, the plaintiff argues that the Limiting Conditions are invalid pursuant to s 2(2) of the Unfair Contract Terms Act (Cap 396, 1994 Rev Ed) ("UCTA").[20]

8 The defendant further contends that the plaintiff has not proven that the defendant has breached its duty of care or caused the plaintiff's loss. Even if the plaintiff had suffered loss, the defendant claims that the plaintiff failed to adequately mitigate its loss and/or was contributorily negligent.[21]

9 After commencing the present action, on 22 February 2021, the plaintiff applied for the trial to be bifurcated on liability and damages pursuant to O 33 r 2 of the Rules of Court (Cap 322, R 5, 2014 Rev Ed).[22] As the defendant agreed, I allowed this application on 5 March 2021.[23] The present judgment therefore concerns only the determination of the defendant's liability.

Background to the dispute

10 The plaintiff is a company incorporated in the Cayman Islands in 2017 and is in the business of corporate financing. It provides, *inter alia*, capital loans

19 Defence at paras 6, 22(c) and 29.

20 Reply (Amendment No 1) ("Reply") at paras 5.

21 Defence at paras 27 and 29.

22 HC/SUM 849/2021.

23 HC/ORC 5145/2021.

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for small and medium-sized enterprises in Singapore.[24] The plaintiff and Pilgrim Partners Asia, a fund management company incorporated in Singapore in 2009, have an investment management agreement.[25] Pilgrim Partners Asia set up the plaintiff as a separate corporate entity through which investments are made.[26] Pilgrim Partners Asia then provides fund management services to the plaintiff under the investment management agreement, which is a contract for services.[27] The plaintiff has directors but no employees.[28] One of the plaintiff's directors is Mr Tan Yong Hui Brian ("Mr Tan").[29]

11 The defendant is a company incorporated in Singapore sometime around 1971 and is in the business of providing valuation services.[30] Mr Chan Hiap Kong ("Mr Chan") is its director.[31]

12 NKI was a private limited company incorporated in Singapore whose primary business was in the manufacture of lanolin. Lanolin is a chemical substance extracted from wool grease and its derivatives have applications in the pharmaceutical, cosmetics and aquaculture industries.[32] Mr Leow Tiak Cheow ("Mr Leow") is its former director.[33] Mr Kurt Metzger ("Mr Metzger")

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24 SOC at para 1.

25 Transcript (20 September 2021) at p 34 line 6 to p 35 line 4; p 37 lines 20 to 22; p 41 line 11 to p 44 line 14.

26 Transcript (20 September 2021) at p 37 line 23 to p 38 line 5.

27 Transcript (20 September 2021) at p 42 lines 21 to 25.

28 Transcript (20 September 2021) at p 41 lines 16 to 23.

29 Affidavit of Evidence-in-Chief of Tan Yong Hui, Brian ("TYHB") at para 1.

30 Defence at para 3.

31 CHK at para 1.

32 DLTC at para 4.

33 DLTC at para 1.

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was NKI's Chief Restructuring Officer and Chief Executive Officer ("CEO") from August 2017 to 16 January 2019.[34] NKI had previously owned the property where the Assets are located (the "Property") but had sold it to Soilbuild in 2013. NKI then became Soilbuild's tenant from 15 February 2013 to the date of its winding up on 28 February 2020.[35]

13 Sometime in or around 2006, NKI was looking to obtain financing for, *inter alia*, expansion of its plant and machinery.[36] NKI eventually engaged the defendant, who produced a valuation report in 2006.[37] Subsequently, NKI decided to expand its business to Malaysia, which resulted in heavy financial losses.[38] NKI then had to be funded by way of various high-interest, short-term bridging loans. According to NKI, because this arrangement was unsustainable, NKI wanted to find long-term financing. Hence, in early March 2017, NKI requested the defendant to produce another valuation report, *viz*, the 1st Report.[39]

The 1st Report

14 On 13 March 2017, 14 March 2017 and 27 March 2017, the defendant's appraisers, Mr Mario Roberto P Mendoza ("Mr Mendoza") and Mr Cesar Ambulo ("Mr Ambulo"), visited NKI's premises to conduct an onsite

34 DLTC at para 20.

35 DLTC at para 10.

36 DLTC at para 11.

37 DLTC at para 14.

38 DLTC at para 16.

39 DLTC at paras 17 and 18.

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inspection of NKI's plant and machinery.[40] At that time, Mr Ambulo, who was the defendant's Valuation Manager (Plant & Machinery), was supervised by Mr Mendoza, who was the defendant's Valuation Consultant (Plant & Machinery). Mr Ambulo left the defendant's employ sometime after this assignment and has since passed away in 2020.[41]

15 Mr Mendoza and Mr Ambulo completed the valuation process sometime at the end of March 2017 and they sent NKI a draft initial valuation.[42]

16 In or around 16 May 2017, NKI requested for the "residual value" of its Assets at the "end of useful life",[43] which the defendant understood to be the scrap value of NKI's Assets.[44] Mr Mendoza replied in an email on 29 May 2017 as follows:[45]

> Good afternoon to you Mr. Koh. Sorry to have just read your reply. At any rate, please see our response to your queries as follows:
>
> …
>
> 3. As we don't have … any info on the weight of the P & M assets comprising the plant, we have estimated the Scrap Value as a percentage (2-7%) of the Cost of Replacement, New, also on a judgmental level, depending on the assets' material content. Nonetheless, the prevailing scrap value in Singapore would range from S$200-300/ton, if on a weight basis.
>
> Please note that all along, for the percentages mentioned we have been guided by the Depreciation Reference Table (excerpt

40 Affidavit of Evidence-in-Chief of Mario Mendoza ("MM") at para 21.

41 CHK at para 16.

42 CHK at para 18.

43 AB at pp 1458 to 1459.

44 CHK at para 19.

45 AB at p 1455.

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> from the textbook 'Appraising Machinery & Equipment' by the American Society of Appraisers) as attached, and which we believe we have already previously sent.
>
> …

Subsequently, in a letter dated 28 July 2017 to NKI, the defendant stated that the Assets had a scrap value of US$4,882,000 as of 31 December 2016 (the "Scrap Value Letter"). In this letter, "scrap value" was defined as "the estimated amount expressed in terms of money that could be realized for the assets if sold for its material content, not for a productive use, as of a specific date".[46]

17 On 25 September 2017, Mr Metzger sent an e-mail to, *inter alios*, Mr Mendoza and copying Mr Leow to inquire about the status of the valuation of the Assets. This e-mail states as follows:[47]

> Dear all,
>
> I understand you started an [*sic*] valuation of NKI's plant and equipment back in May 2017. As NKI is in the process of discussion with lenders to pledge the plant and equipment in Tuas, I need an *updated report I can use with the lenders*.
>
> Can you let me know the status of your report and how quickly you could complete the valuation which is of the *quality needed to use with financial institutions*. NKI has done some refurbishment on the FA plant so another site visit would be warranted.
>
> Look forward to hearing from you, soonest.
>
> Best
>
> Kurt
>
> [emphasis added]

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46 AB at pp 1295 to 1296.

47 AB at p 1467.

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Mr Mendoza responded by e-mail on 26 September 2017 to inform Mr Metzger that the defendant would send the soft copy of the report within that week.[48] Mr Metzger then replied to specifically instruct the defendant that the lenders/investors that NKI was in discussion with would focus on the "forced sale" scenario when considering whether to extend financing facilities to NKI.[49] This e-mail states as follows:[50]

> Mario,
>
> Thanks very much for the quick follow up. … As the valuation will be used for *financing purposes*, the lenders/investors will be focusing on the *'forced sale' scenario* so will need to be included in the report.
>
> Would be greatly appreciated if I could [*sic*] draft report by end of business on Thursday.
>
> Best
>
> Kurt
>
> [emphasis added]

Mr Mendoza then replied on 27 September 2017, and his e-mail states:[51]

> Good day to you Mr. Metzger. Just read you [*sic*] email. thank you too for your follow up reply. Just give us some time to work out the *Forced Sale valuation* which was only requested now for it to be included as well.
>
> …
>
> [emphasis added]

---

48 AB at p 1466.

49 DLTC at para 23.

50 AB at pp 1465 to 1466.

51 AB at p 1465.

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The subsequent correspondence between Mr Mendoza and Mr Metzger included the following email by Mr Metzger on 2 October 2017:[52]

> Mario,
>
> If possible, greatly appreciated if we can receive report by end of business Wednesday so I can send off to financial institutions.
>
> Best
>
> Kurt

18 Eventually, on 4 October 2017, NKI received the 1st Report dated 29 September 2017. This report provided two valuations of NKI's Assets:[53]

(a) Fair market value (in continued use): US$26,899,000 (the "fair market value"); and

(b) Forced sale value (the "forced sale value"): US$12,130,000.

I reproduce the material portions of the 1st Report below:[54]

> …
>
> **APPRAISAL OF FIXED ASSETS**
>
> …
>
> It is our understanding that this appraisal report shall be utilized for *financing purpose*.
>
> The term 'Fair Market Value In Continued Use' as used herein, is defined as being the amount, in terms of money, at which the assets would exchange in the market, allowing a reasonable time to find a purchaser, as between a willing buyer and a willing seller, both having reasonable knowledge of all relevant facts, and with equity to both, and contemplating the retention

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52 AB at p 1462.

53 DLTC at para 24.

54 AB at pp 1 to 6.

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> of the assets in their present existing use for the purpose they were designed and built as part of an ongoing business, but without specific reference to earnings, and is expressed as subject to adequate potential profitability of the undertaking.
>
> The term 'Forced Sale Value[']' as used herein, is defined as the estimated amount that might be realized from an assembled or piecemeal disposition of the subject assets in the second hand market, assuming a short period of time in which to complete the transaction. The value estimates consider that the assets will be offered for sale in its present location and condition on an 'as is, where is' basis.
>
> …
>
> APPRAISAL
>
> Having due regard to all the above remarks, and as supported by the accompanying summary and technical inventory, we are of the opinion that as of 13 March 2017, the total value of the assets appraised, located at [xxx], but without specific relation to earnings, was in the order of:
>
> **FAIR MARKET VALUE, (IN CONTINUED USE)**
>
> **US$ 26,899,000-/-**
>
> **(US DOLLAR: TWENTY SIX MILLION EIGHT HUNDRED AND NINETY NINE THOUSAND ONLY)**
>
> **FORCED SALE VALUE**
>
> **US$12,130,000-/-**
>
> **(US DOLLAR: TWELVE MILLION ONE HUNDRED AND THIRTY THOUSAND ONLY)**
>
> This report is issued to the accompanying limiting conditions
>
> …
>
> [emphasis in original in bold; emphasis added in italics]

19 While looking for financing from 2017 to 2018, NKI's financial difficulties persisted and NKI could not pay Soilbuild rent for the Property. On 13 November 2017, Soilbuild commenced Suit No 1045 of 2017 (the "Suit") against NKI for, *inter alia*, possession of the Property. In response to this Suit, NKI filed an application on 12 December 2017 for a moratorium under the

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repealed s 211B of the Companies Act (Cap 50, 2006 Rev Ed) (now s 64 of the Insolvency, Restructuring and Dissolution Act (Act 40 of 2018) (the "IRDA")) in Originating Summons No 1384 of 2017 ("OS 1384")[55] and the court granted this application.[56] To save time and costs, NKI implemented a debt restructuring plan through bilateral agreements with its creditors instead of employing a formal scheme of arrangement.[57] The court granted this moratorium on 11 January 2018, which was to end on 26 March 2018.[58]

20 Sometime in January 2018, Mr Tan was introduced to NKI by Qi Capital Pte Ltd ("Qi Capital").[59] Qi Capital would occasionally introduce businesses in need of short-term financing to the plaintiff.[60] NKI informed the plaintiff that it was looking to obtain credit facilities up to S$4m and NKI would pledge its Assets as security.[61] Mr Leow also informed the plaintiff that he was willing to provide a personal guarantee for any loan taken out by NKI.[62] Mr Leow owned a property, D'Grove Villas at 8A Orange Grove Road while his daughter owned another, The Ladyhill at 1 Ladyhill Road.[63] As part of this introduction, Qi Capital provided the plaintiff with a copy of the 1st Report via e-mail on 15 January 2018.[64] The 1st Report was previously sent to Qi Capital by the

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55 *Ex Parte* Originating Summons in HC/OS 1384/2017.

56 DLTC at para 29.

57 DLTC at paras 27 to 29.

58 HC/ORC 326/2018.

59 SOC at para 3; TYHB at para 20; DLTC at para 30.

60 TYHB at para 9.

61 SOC at para 3; TYHB at para 20; DLTC at para 30.

62 DLTC at para 34.

63 Transcript (23 September 2021) at p 73 line 22 to p 74 line 3.

64 TYHB at para 10 and pp 15 to 24.

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defendant on 4 October 2017.[65] Qi Capital then facilitated a formal introduction by way of a site visit of NKI's premises on 23 January 2018 for the plaintiff to view NKI's Assets.[66] After the site visit, Mr Leow informed the plaintiff that NKI was under a court-ordered moratorium in OS 1384 (see [19] above) and that NKI had negotiated a satisfactory settlement plan through bilateral agreements with its creditors.[67]

21 The plaintiff's regulations only permitted it to extend a loan of up to 20% of the plaintiff's total assets under management ("AUM") to a single borrower even if the loan was adequately secured. At that time, the plaintiff's AUM was S$6m, so the plaintiff could only grant a maximum loan of S$1.2m to NKI. The plaintiff then brought another lender on board, Goldbell Financial Services Pte Ltd, to increase the potential loan sum.[68]

22 Subsequently, Mr Tan provided a summary of NKI's loan request to the plaintiff's credit committee (the "Credit Committee") in an e-mail dated 1 February 2018.[69] The Credit Committee would review and approve any funding exercise conducted by the plaintiff. At the material time, the chairman of the Credit Committee was Mr Choo Boon Tiong ("Mr Choo").[70] In this email, Mr Tan stated that the loan extended by the plaintiff to NKI would be secured

65 TYHB at para 10 and pp 25 to 31.

66 TYHB at para 17 and p 24; DLTC at paras 32 and 33.

67 TYHB at para 18.

68 TYHB at paras 21 to 23.

69 TYHB at para 25 and pp 36 to 37.

70 TYHB at para 24.

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against NKI's Assets valued at around US$27 million with a forced sale value of US$12 million, which was supported by the defendant's 1st Report:[71]

> Dear Credit Committee,
>
> We have 2 items that require your approval please.
>
> 1) NKI
>
> …
>
> The plan is to syndicate a loan to NKI for US$4m with the fund taking SGD$1.2m. This syndicated loan will receive super-priority in accordance with s211E of the Companies Act (Rescue financing). The fund will receive finder's fees for any other financing on top of the SGD$1.2m that it extends.
>
> The loan will be secured against the plant and equipment which has been valued at US$27m with a force[d] sale value of US$12m, although it is reasonable to expect that an industrial buyer would pay more than that to take over the plant and run it (original cost of the plant US$100m).
>
> The directors and owners of NKI own large apartments in prime areas of Singapore and the estimated equity is approximately SGD$6m. The family also has other business interests where there is value.
>
> Lend SGD$1.2m for 12 months (extendable) with interest servicing. Interest rate to be determined during syndication.
>
> …

23 The plaintiff's initial AUM of S$6m was subsequently increased to S$8m. The plaintiff thus agreed to extend a loan of $1.6m to NKI. On 11 April 2018, NKI and the plaintiff signed a facility agreement for the Loan (the "Facility Agreement").[72] The Loan was then disbursed in two tranches. The first tranche of the Loan, which amounted to S$1,169,312.69, was disbursed on 17 April 2018.[73] After disbursing the first tranche of the Loan, the plaintiff and

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71 TYHB at para 25 and p 36.

72 TYHB at para 30 and pp 41 to 47; AB at pp 310 to 316.

73 TYHB at para 31.

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NKI executed a deed of debenture dated 19 April 2018 for the plaintiff to have a floating charge over, *inter alia*, NKI's plant and machinery (the "Deed of Debenture").[74] The second tranche of the Loan, which was the remainder of the Loan sum less other agreed deductions, amounted to $263,549.74. This was disbursed on 25 April 2018.[75]

The 2nd Report

24 Notwithstanding the Loan, NKI's financial troubles persisted.[76] On 16 January 2019, one of NKI's creditors, LLS Capital Pte Ltd ("LLS Capital"), applied to place NKI under judicial management in Originating Summons No 72 of 2019. Mr Metzger left NKI's employ on the same date.[77] NKI engaged BlackOak LLC ("BlackOak") to defend against this judicial management application, and BlackOak assisted NKI to engage KordaMentha Restructuring ("KordaMentha"), which was a corporate restructuring specialist.[78]

25 As of 16 January 2019, a sum of S$1,620,940 was due and owing from NKI to the plaintiff under the Facility Agreement. NKI had made eight instalment payments of $20,800 as interest payments. However, due to the judicial management proceedings, NKI was unable to make the ninth instalment payment and further payments owed under the Facility Agreement.[79]

---

74 TYHB at para 32 and pp 50 to 97.

75 TYHB at para 33.

76 DLTC at para 38.

77 DLTC at para 39.

78 DLTC at paras 40 to 41.

79 TYHB at paras 34 to 35.

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26 On 21 February 2019, NKI made an application for a moratorium in Originating Summons No 222 of 2019 pursuant to the now repealed s 211B of the Companies Act (now s 64 of the IRDA) for the purpose of entering into a scheme of arrangement with its creditors.[80] This is distinct from the moratorium obtained in OS 1384 (see [19] above). In the course of doing so, NKI sought the support of the plaintiff.[81] According to the plaintiff, because it was of the opinion that the Loan was secured, the plaintiff issued a letter of support dated 21 February 2019 to support NKI's moratorium application.[82]

27 NKI was granted the moratorium on 20 March 2019,[83] which was subsequently extended to 22 July 2019.[84] However, it lapsed earlier on 1 July 2019 when NKI could not make payment of the sums due to Soilbuild, which was one of the conditions for the moratorium to subsist.[85] Meanwhile, on 26 March 2019, LLS Capital's judicial management application was stayed until this moratorium lapsed. LLS Capital resumed pursuing this application once that occurred.

28 Meanwhile, the plaintiff obtained an updated valuation report of NKI's Assets in June 2019, *ie*, the 2nd Report dated 17 May 2019. In this report, the defendant valued NKI's Assets as follows:[86]

---

80 *Ex Parte* Originating Summons in HC/OS 222/2019; DLTC at para 42; TYHB at para 36.

81 TYHB at para 36.

82 TYHB at para 37 and pp 100 to 101.

83 HC/ORC 2069/2019.

84 HC/ORC 3735/2019; TYHB at para 38.

85 TYHB at para 38 and pp 102 to 104.

86 TYHB at para 39.

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(a) Replacement cost, new: US$84,605,000;

(b) Fair market value: US$27,747,000;

(c) Forced sale value: US$9,774,000; and

(d) Scrap value: US$4,003,000.

I reproduce the material portions of the 2nd Report below:[87]

…

APPRAISAL OF FIXED ASSETS

…

It is our understanding that this appraisal report shall be utilized for *corporate management purpose*.

The term 'Replacement Cost, New' as used herein, is defined as being the amount, in terms of money pertaining to a new asset or assets of the same or of equivalent utility, considering price levels as of a specified date.

The term 'Fair Market Value In Continued Use' as used herein, is defined as being the amount, in terms of money, at which the assets would exchange in the market, allowing a reasonable time to find a purchaser, as between a willing buyer and a willing seller, both having reasonable knowledge of all relevant facts, and with equity to both, and contemplating the retention of the assets in their present existing use for the purpose they were designed and built as part of an ongoing business, but without specific reference to earnings, and is expressed as subject to adequate potential profitability of the undertaking.

The term 'Forced Sale Value[']' as used herein, is defined as the estimated amount that might be realized from an assembled or piecemeal disposition of the subject assets in the second hand market, assuming a short period of time in which to complete the transaction. The value estimates consider that the assets will be offered for sale in its present location and condition on an 'as is, where is' basis.

The term 'Scrap Value' as used herein, is an opinion of the amount, expressed in terms of money that could be realised for

87 AB at pp 55 to 226.

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the assets if they were sold for their material content, not for productive use, as of a specified date.

…

APPRAISAL

Having due regard to all the above remarks, and as supported by the accompanying summary and technical inventory, we are of the opinion that as at 2 May 2019, the total value of the assets appraised, located at [xxx], but without specific relation to earnings, was in the order of:

REPLACEMENT COST, NEW

US$ 84,605,000-/-

(US DOLLAR: EIGHTY FOUR MILLION SIX HUNDRED AND FIVE THOUSAND ONLY)

FAIR MARKET VALUE, (IN CONTINUED USE)

US$ 27,747,000-/-

(US DOLLAR: TWENTY SEVEN MILLION SEVEN HUNDRED AND FORTY SEVEN THOUSAND ONLY)

FORCED SALE VALUE

US$ 9,774,000-/-

(US DOLLAR: NINE MILLION SEVEN HUNDRED AND SEVENTY FOUR THOUSAND ONLY)

SCRAP VALUE

US$ 4,003,000-/-

(US DOLLAR: FOUR MILLION AND THREE THOUSAND ONLY)

This report is issued subject to the accompanying limiting conditions.

…

[emphasis in original in bold; emphasis added in italics]

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29 Subsequently, on 20 August 2019, NKI was placed under judicial management.[88] FTI Consulting was appointed as NKI's judicial manager on the same date.[89]

30 FTI Consulting, as the judicial manager, commissioned Robert Khan International Business Consultants to prepare another valuation report of the Assets, *viz*, the RK Report dated 6 September 2019.[90] This report stated that the salvage value of the Assets was valued at only between S$1m and S$1.5m.[91] I reproduce the material portions of the RK Report below:[92]

> …
>
> In accordance with your instruction, on 2 September 2019, we have conducted a valuation of the lanolins, lanolin derivatives and cholesterol manufacturing plant & machinery, ancillary equipment and utilities, which we understand to be the property of NK Ingredients Pte Ltd or held by them under finance agreements.
>
> Our instruction is to assess the Salvage Value of the plant and machinery assets for possible liquidation sale as at current date.
>
> …
>
> Based on the information provided to us, we are of the opinion that the value of the assets were as follows as at **2 September 2019**.

88 TYHB at para 43.

89 SOC at para 25; TYHB at para 44.

90 SOC at para 26.

91 SOC at para 27; TYHB at para 47.

92 AB at pp 227 to 236.

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	Estimated Salvage Value Range (S$)
Lanolin, lanolin derivatives and cholesterol manufacturing plant & machinery, ancillary equipment and utilities *(Production Cap. 10,000 tonnes of woolgrease into lanolin, lanolin derivatives and cholesterol per annum)*	1,000,000 to 1,500,000

…

Kindly note the following points in connection with our valuation:

…

4. Basis of Valuation

'Salvage Value', as defined by International Valuation Standards (IVS) in IVS 2 – Valuation Bases Other Than Market Value.

Para 6.8 – '*Salvage Value'* is ordinarily used to express the current price expected for property, other than land, that has reached the end of its useful life expectancy in terms of its original purpose and function. At that point, the asset is valued for disposal as salvage rather than for its originally intended purpose. In this context, *salvage value* is also known in accountancy terminology as the net realisable amount for an asset with no further use to any entity.

Para 6.8.1 – *Salvage Value* does not imply that a property has no further useful life or utility. Property sold for salvage could be rebuilt, converted to a similar or different use, or may provide spare parts for other properties that are still serviceable. At the other extreme, *Salvage* Value may represent scrap value or the value for recycling.

…

[emphasis in original in italics and bold]

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31 In late January 2020, FTI Consulting requested the plaintiff to remove NKI's Assets from NKI's premises in a letter dated 20 January 2020.[93] The plaintiff then sourced for quotes for the sale of the Assets with Soilbuild's assistance. Ultimately, the Assets were sold to Sin Hock Huat Construction Pte Ltd for the net sum of S$250,000, after deducting the costs of decommissioning the plant which amounted to S$520,000.[94]

32 NKI's judicial management did not succeed and NKI was eventually ordered to be wound up on 28 February 2020.[95]

The parties' cases

The plaintiff's case

33 The plaintiff claims that the defendant was negligent in preparing the Two Reports that the plaintiff relied upon when it made its decisions regarding NKI.

34 As regards the 1st Report, the plaintiff claims that the defendant knew that it would rely on this report to grant the Loan to NKI, which was secured against the Assets. The 1st Report expressly stated that it was prepared for "financing purpose".[96] In the circumstances, the defendant owed the plaintiff a duty of care to ensure that the contents of the 1st Report were correct and that it used "reasonable skill and care … expected of an established and competent

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93 TYHB at para 49 and p 287.

94 TYHB at para 52 and p 288; Affidavit of Evidence-in-Chief of Leow Lay Sing ("LLS") at paras 18 to 28.

95 TYHB at para 45.

96 SOC at paras 9 to 11.

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valuation service provider".[97] The plaintiff alleges that the defendant had overstated the forced sale value of the Assets in the 1st Report. Thus, the defendant is in breach of this duty of care owed to the plaintiff.[98] If the defendant had prepared a true and fair report of the forced sale value of NKI's Assets in the 1st Report, the plaintiff would not have extended the Loan to NKI.[99] Hence, the plaintiff has suffered loss and damage as a result of the defendant's actions.[100]

35 As regards the 2nd Report, the plaintiff claims that the defendant knew or ought to have known upon making reasonable enquiries that a judicial management application had been filed against NKI and that creditors and lenders would rely on the 2nd Report in assessing whether to support this application.[101] The plaintiff relied on the 2nd Report in deciding not to appoint a receiver and manager.[102] Had the defendant prepared a true and fair report of the forced sale value and scrap value of the Assets in the 2nd Report, the plaintiff would have appointed its own receiver and manager prior to FTI Consulting's appointment as the judicial manager on 20 August 2019.[103] In the premises, the plaintiff claims that its loss could have been "avoided or at least minimised".[104]

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97 SOC at para 10.

98 SOC at para 33.

99 SOC at para 35.

100 SOC at para 34.

101 SOC at para 24.

102 SOC at para 25.

103 SOC at para 36.

104 SOC at para 36.

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36 The plaintiff seeks the following reliefs against the defendant: (a) the outstanding Loan amount as at the date of the Writ of Summons, *ie*, S$1,650,310; alternatively, (b) the sum of S$1,561,240 due from NKI to the plaintiff as at the date of the winding up order, *ie*, 28 February 2020; or (c) damages to be assessed by the court.[105]

The defendant's case

37 In respect of the Two Reports, the defendant contends that it does not owe a duty of care to the plaintiff.

38 As regards the 1st Report, the defendant claims the following:[106]

(a) At all material times prior to and after the defendant's preparation of the 1st Report, NKI did not inform the defendant that it was facing financial difficulties, but merely that it wanted to conduct a valuation of its plant and machinery for financing purposes.

(b) The defendant was not aware that NKI had approached the plaintiff nor that NKI had provided the 1st Report to the plaintiff. The defendant only came to know of the plaintiff when the latter contacted the defendant in or around February 2020 to enquire about the total estimated tonnage of NKI's plant and machinery.

(c) Further and/or in the alterative, the 1st Report was prepared by the defendant for NKI on a confidential basis, and circulation of the 1st Report was expressly limited to NKI and/or the professional advisers

105 SOC at p 9.

106 Defence at para 6.

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assisting NKI on the specified purpose. The defendant claims that the plaintiff is at all material times a party whom the defendant contemplated would not have access to or have sight of the 1st Report. The defendant also relies on the Limiting Conditions expressly set out in the 1st Report.

(d) Further and/or in the alternative, the valuations in the 1st Report were prepared approximately one year before the plaintiff and NKI negotiated the loan. The defendant claims that it is not reasonable nor proper market practice for the plaintiff to rely on such valuations.

39 As regards the 2nd Report, the defendant claims the following:[107]

(a) The defendant was not informed by NKI that a judicial management application had been filed against NKI. When the defendant was approached by NKI to provide an updated valuation, the defendant had informed NKI that it would not be prepared to do so if the valuation would be used to obtain financing as the defendant was not prepared to provide a valuation which would be relied upon by third parties other than NKI. NKI informed the defendant that it was undergoing some corporate restructuring exercise and the defendant was given the impression that the 2nd Report would only be used by NKI's board to restructure its business. The defendant thus agreed to provide an updated valuation in the form of the 2nd Report.

(b) The defendant did not owe a duty to make reasonable enquiries to ascertain that a judicial management application was filed against

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107 Defence at para 22.

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NKI, and/or that it should accordingly infer from the same that creditors and lenders would have access to the 2nd Report.

(c) Further and/or in the alternative, it is expressly stated in the 2nd Report that it is confidential to NKI for the specific purpose to which it refers. The circulation of the 2nd Report was expressly limited to NKI and its professional advisers. The defendant claims that the plaintiff is at all material times a party whom the defendant contemplated would not have access to or have sight of the 2nd Report. The defendant also relies on the full force and effect of the Limiting Conditions expressly set out in the 2nd Report.

40 The plaintiff contends in response that cll 3, 8 and 10 of the Limiting Conditions seek to unreasonably exclude and/or limit the defendant's liability for negligence in contravention of s 2(2) of the UCTA.[108] These clauses are as follows:[109]

> This appraisal report is subject to the following limiting conditions:-
>
> …
>
> 3. Information, estimates, and opinions furnished to the appraiser and contained in this report were obtained from sources considered reliable to be true and correct; however, no responsibility for the accuracy of such items furnished to the appraiser can be accounted to him or her. No liability or responsibility is expressed for results from actions taken by anyone as a result of this report. Further, there is no accountability, obligation, or liability to any third party.
>
> …

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108 Reply at paras 5(a) and 10(a).

109 CHK at pp 348 and 557.

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> 8. This report is confidential to the client for the specific purpose to which it refers. It may be disclosed to other professional advisers assisting the client in respect of the purpose, but the client shall not disclose the report to any other person. The valuer's responsibility in connection with this report is limited only to the client to whom the report is addressed.
>
> …
>
> 10. In the event that Asian Appraisal Company Pte Ltd is subject to any liability in connection with this engagement, regardless of legal theory advanced, such liability against the company including directors, officers, employees, subcontractors, affiliates or agents shall be limited to the amount of fees we received for this engagement.
>
> …

41 The defendant also argues that the plaintiff's decision not to appoint a receiver and manager was a commercial decision made based on the prevailing and relevant circumstances.[110]

42 The defendant further contends that: (a) even if it had owed a duty of care to the plaintiff, it had exercised reasonable skill and care required of a reasonably competent valuation service provider in the circumstances; (b) even if it had breached its duty of care, it did not cause the plaintiff's alleged loss; (c) even if the plaintiff had suffered loss as a result of such a breach, the defendant claims that the plaintiff failed to adequately mitigate its loss and/or was contributorily negligent.[111]

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110 Defence at para 23.

111 Defence at paras 27 and 29.

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43 As regards contributory negligence on the plaintiff's part, the defendant claims that the plaintiff:[112]

(a) knowingly, wilfully and/or negligently relied on the contents of the 1st Report and/or the 2nd Report notwithstanding the Limiting Conditions expressly stated in the said reports;

(b) failed to conduct any adequate due diligence on the state of NKI's financial position, business prospects and/or ability to service the loan when agreeing to provide the Loan to NKI;

(c) knowingly, wilfully and/or negligently relied on the valuation in the 1st Report notwithstanding that the valuation was conducted approximately one year prior to the plaintiff's Loan to NKI;

(d) failed to exercise any reasonable care when it relied on the contents of the 1st Report and/or properly understand the basis on which the valuation stated in the 1st Report was made before relying on the same;

(e) failed to conduct any or any adequate due diligence on the state of NKI's financial position, and/or the prospects of the company when determining whether to appoint a receiver to protect its interests; and

(f) failed to exercise reasonable care when it relied on the contents of the 2nd Report and/or properly understand the basis on which the valuations stated in the 2nd Report were made before relying on the same.

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112 Defence at para 30.

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Issues to be determined

44 The following issues arise for my determination in respect of the Two Reports:

(a) Did the defendant owe the plaintiff a duty to take reasonable care in the preparation of the Two Reports for NKI?

(i) Could the defendant invoke the Limiting Conditions in the Two Reports to vitiate its duty of care to the plaintiff?

(A) If so, would s 2(2) of the UCTA apply to invalidate cll 3, 8 and 10 of the Limiting Conditions?

(ii) What is the scope of the defendant's duty of care?

(b) Did the defendant breach its duty of care owed to the plaintiff?

(c) Did the defendant's breach of duty cause the plaintiff's loss?

(d) Did the plaintiff adequately mitigate its loss?

My decision

The law on the tort of negligence

45 As stated in *Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency* [2007] 4 SLR(R) 100 ("*Spandeck*") at [21], the plaintiff has to prove the following elements in order to succeed under the tort of negligence:

(a) the defendant owes the plaintiff a duty of care;

(b) the defendant has breached that duty of care by acting (or omitting to act) below the standard of care required of it;

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(c) the defendant's breach has caused the plaintiff damage;

(d) the plaintiff's losses arising from the defendant's breach are not too remote; and

(e) such losses can be adequately proved and quantified.

The 1st Report

46 The plaintiff claims that as a result of the defendant's negligence, the defendant had overstated the forced sale value of the Assets in the 1st Report. The plaintiff, relying on the 1st Report, granted the Loan to NKI and suffered losses arising from NKI's subsequent default.[113]

Duty of care

(1) The applicable law

47 In Singapore, it is settled law that the test in the landmark decision of *Spandeck* applies to determine the existence of a duty of care in the tort of negligence, irrespective of the type of damages claimed: *Spandeck* at [71]–[72].

48 The court in *Ramesh s/o Krishnan v AXA Life Insurance Singapore Pte Ltd* [2015] 4 SLR 1 has provided the following succinct summary of the *Spandeck* test (at [231]–[234]):

> 231 … regardless of the nature of damage caused (be it physical, pure economic loss *etc*), the test laid down in the landmark decision of *Spandeck* sets out the applicable framework for determining if a duty of care in the tort of negligence arises (see *Ngiam Kong Seng v Lim Chiew Hock* [2008] 3 SLR(R) 674; *Animal Concerns Research & Education*

113 SOC at paras 33 and 35.

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Society v Tan Boon Kwee [2011] 2 SLR 146 ('*Animal Concerns*'); *AEL v Cheo Yeoh & Associates LLC* [2014] 3 SLR 1231).

232 The *Spandeck* test consists of two stages, namely, proximity and policy considerations. The two-stage test is preceded by the threshold question of factual foreseeability, which is not strictly considered as being part of the *Spandeck* test due to the likelihood of it being fulfilled in most cases. Whether or not it is better regarded as a three-stage or two-stage test is, in my view, largely a matter of semantics. What is clear is that in the vast majority of cases, plaintiffs are unlikely to face difficulty in meeting the threshold test of factual foreseeability. That said, factual foreseeability is not a mere formality and plaintiffs must still satisfy the court that the threshold requirement is met (see *The Law of Torts in Singapore* ([196] *supra*) at para 03.046, citing *Man Mohan Singh s/o Jothirambal Singh v Zurich Insurance (Singapore) Pte Ltd* [2008] 3 SLR(R) 735 as an example where the Plaintiff failed to meet the threshold test).

233 The Court of Appeal in *Spandeck* (at [73]) has also given helpful guidance on the relevance of judicial precedents:

> … We would add that this test is to be applied *incrementally*, in the sense that *when applying the test in each stage, it would be desirable to refer to decided cases in analogous situations to see how the courts have reached their conclusions in terms of proximity and/or policy*. As is obvious, the existence of analogous precedents, which determines the current limits of liability, would make it easier for the later court to determine whether or not to extend its limits. However, the absence of a factual precedent, which implies the presence of a novel situation, should not preclude the court from extending liability where it is just and fair to do so, taking into account the relevant policy consideration against indeterminate liability against a tortfeasor. We would admit at this juncture that this is basically a restatement of the two-stage test in *Anns*, tempered by the preliminary requirement of factual foreseeability. Indeed, we should point out that this is the test applied in substance by many jurisdictions in the Commonwealth: see, for example, the Canadian case of *Cooper v Hobart* (2001) 206 DLR (4th) 193; the New Zealand case of *Rolls-Royce New Zealand Ltd v Carter Holt Harvey Ltd* [2005] 1 NZLR 324 … [emphasis added]

234 Since *Spandeck* ([229] *supra*) was decided, local courts have consistently applied the test therein to determine whether

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> a duty of care exists in claims of negligence. To this end, as observed by the Court of Appeal in *Go Dante Yap v Bank Austria Creditanstalt AG* [2011] 4 SLR 559 ('*Go Dante Yap*') at [28], the English approach of a general exclusionary rule against recovery of pure economic loss has been rejected in Singapore. Rather than taking established principles and rules from foreign jurisdictions, therefore, what *Spandeck* requires is an incremental application of the test that was formulated therein *in the local context*.
>
> [emphasis in original]

(2) Did the defendant owe the plaintiff a duty of care?

(A) FACTUAL FORESEEABILITY

49 I shall now deal with the issue of factual foreseeability.

50 In *Sunny Metal & Engineering Pte Ltd v Ng Khim Meng Eric (practising under the name and style of W P Architects)* [2007] 1 SLR(R) 853 (cited with approval in *Spandeck* at [75]), Andrew Phang Boon Leong J (as he then was) described the threshold inquiry of factual foreseeability as one that "will *almost always be satisfied*, simply because of its very nature and the very wide nature of the 'net' it necessarily casts" [emphasis in original]: at [55].

51 In the present case, it is readily apparent that a failure on the defendant's part to prepare a true and fair report of the forced sale value of NKI's Assets in the 1st Report could result in the plaintiff's loss. The CEO of NKI, Mr Metzger, had informed Mr Mendoza of the defendant that the 1st Report "will be used for financing purposes, the lenders/investors will be focusing on the 'forced sale' scenario so [this valuation] will need to be included in the report."[114] Hence, the defendant ought to have foreseen that the plaintiff would suffer damage if the

[114] AB at p 1466, email dated 26 September 2017 from Mr Metzger to Mr Mendoza.

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defendant had been careless in its preparation of the forced sale value in the 1st Report or if it had failed to correctly ascertain the appropriate values for NKI's Assets.

(B) PROXIMITY

52 I shall now deal with the more contentious issue of whether legal proximity has been proven in this case.

(I) THE APPLICABLE LAW

53 As regards legal proximity under the first stage of the *Spandeck* test, "[t]he focus here is necessarily on the closeness of the relationship between the parties themselves": *Spandeck* at [77]. The court elaborated that legal proximity can be proven by the concepts of "physical, circumstantial as well as causal proximity" and "the twin criteria of voluntary assumption of responsibility and reliance": *Spandeck* at [81]. The court also added that in determining proximity using these factors, "the court should apply these concepts first by analogising the facts of the case for decision with those of decided cases, if such exist, but should not be constrained from limiting liability in a deserving case only because it involves a novel fact situation": *Spandeck* at [82].

54 The present case involves the plaintiff's claim for its loss resulting from the outstanding unpaid moneys due under the Loan. I note that case law has shown that for disputes concerning *pure economic loss*, the courts have placed emphasis on the twin criteria of voluntary assumption of responsibility and reliance in determining the existence of legal proximity. This trend has been noted by the court in *Straits Advisors Pte Ltd v Michael Deeb (alias Magdi Salah El-Deeb) and others* [2014] SGHC 94 (at [89]–[91]):

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89 At this juncture, I pause to make a brief observation regarding the *application* of these indicia, which is that there is certainly no strict requirement that a claimant has to canvass and prove *all* of these indicia to establish proximity and, depending on the precise factual matrix at hand, *some* of these indicia may assume greater prominence. As Deane J remarked in *Sutherland* (at 499), 'Both the identity and the relative importance of the factors which are determinative of an issue of proximity are likely to vary in different categories of cases.'

90 For the particular purposes of this claim, I note that our courts seem to take the view that, where *pure economic loss* is concerned, it may be more practicable to adjudge whether the requisite proximity existed based on the *twin criteria* of voluntary assumption of responsibility and reliance. The following observation of Quentin Loh J in *Resource Piling Pte Ltd v Geospecs Pte Ltd* [2014] 1 SLR 485 ('*Geospecs*') is apposite (at [26]):

> I note that although the Court of Appeal in *Spandeck* set out a single test for a duty of care and enunciated a number of broad proximity considerations … *the factors to be considered in ascertaining whether the requisite proximity exists depends on the precise factual circumstances, including the type of harm*: see for example, *Spandeck*, which emphasised the traditional test of assumption of responsibility and reliance in *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465 … in the context of economic loss; *cf Ngiam Kong Seng*, which applied the three factors in *McLoughlin v O'Brian* [1983] 1 AC 410 within the context of the first proximity stage in the *Spandeck* Test for a claim involving a duty of care not to cause psychiatric harm. *The case before me is one involving economic loss, and I analyse the factual circumstances primarily through the prism of the twin criteria of assumption of responsibility and reasonable reliance*, but with reference to other considerations where relevant. [emphasis added]

91 In a similar vein, it has also been commented in Gary Chan Kok Yew & Lee Pey Woan, *The Law of Torts in Singapore* (Academy Publishing, 2011) at para 03.059 that:

> *[T]he twin concepts of assumption of responsibility and reliance are useful for particular types of cases involving negligent advice or the provision of professional services, but less important in other scenarios such as negligent acts by defendants causing personal injury or psychiatric harm to plaintiffs who were strangers at the relevant time* … In the context of psychiatric harm, for instance, it is

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> often difficult to find, as in *Ngiam Kong Seng*, that the defendant had voluntarily assumed responsibility for the psychiatric harm suffered by the plaintiff. [emphasis added and footnotes omitted]

55 In this regard, the Court of Appeal in *Go Dante Yap v Bank Austria Creditanstalt AG* [2011] 4 SLR 559 has explained the relationship between the concept of "assumption of responsibility" under legal proximity and the UCTA (at [38]):

> … It was clear from the actual decision in *Hedley Byrne* ([32] *supra*) itself that an ***express disclaimer of responsibility could prevent a tortious duty of care from arising, by negating the proximity sought to be established by the concept of an "assumption of responsibility"***. ***Where such a disclaimer takes the form of a contractual exclusion clause, such a term would now be subject to the Unfair Contract Terms Act (Cap 396, 1994 Rev Ed) ('UCTA')*** (see the House of Lords decision of *Smith v Eric S Bush* [1990] 1 AC 831), but the general principle is still the same. In *Goldman Sachs* ([15] *supra*), *Springwell* and *Titan Steel* ([15] *supra*), the material terms of the contracts governing the banking relationship were highly detailed and, as was accepted by the respective judges deciding those cases, *the relevant terms made it abundantly clear that the banks were not accepting or assuming any responsibility to take care, and/or that the client was not relying on such care being taken*. In such circumstances, it was inevitable that *no duty of care in tort was found to be owed by the banks in those cases*. …
>
> [emphasis added in italics and bold italics]

56 The Court of Appeal reiterated this relationship in *Deutsche Bank AG v Chang Tse Wen and another appeal* [2013] 4 SLR 886 (at [67]–[68]):

> 67 … *Phillips* and *Smith* therefore stand for the proposition that ***any attempt to exclude or restrict an obligation or duty by reference to a*** *contractual term or* ***non-contractual notice will not be effective, unless the term or notice satisfies the requirement of reasonableness under the UCTA***.
>
> 68 This seems to us at present to be correct because the mere fact that a clause is labelled a basis clause should not be

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> determinative as to its true effect. The term 'basis clause' appears to have developed in contradistinction to the term 'exclusion clause' and to this extent it might be an unfortunate misnomer. The UCTA does not in fact contain any reference to "exclusion clauses". Rather, the UCTA simply addresses itself to clauses which "exclude or restrict" a liability, obligation or duty. The legislative eye is firmly set on the substantive *effect* of a term or notice, rather than on its *form* or identification. Seen in this light, ***the only question which arises for a court is whether a term or notice has the effect of excluding or restricting the imposition of a duty of care in law. If so, it will have to satisfy the requirement of reasonableness.*** It has not been necessary for us to address either of these questions in this case because, on the view that we have formed from all the other surrounding circumstances, there was no duty to begin with.
>
> [emphasis in original in italics; emphasis added in bold italics;]

57 The above relationship stems from the applicability of ss 2(2) and 11(3)–11(5) of the UCTA. Section 2(2) of the UCTA provides as follows:

> **Negligence liability**
>
> **2.**— …
>
> …
>
> (2) In the case of other loss or damage, a person cannot so exclude or restrict his liability for negligence except in so far as the term or notice satisfies the requirement of reasonableness.

Sections 11(3) to 11(5) provide as follows:

> **The 'reasonableness' test**
>
> **11.**—…
>
> (3) In relation to a notice (not being a notice having contractual effect), the requirement of reasonableness under this Act is that it should be fair and reasonable to allow reliance on it, having regard to all the circumstances obtaining when the liability arose or (but for the notice) would have arisen.
>
> (4) Where by reference to a contract term or notice a person seeks to restrict liability to a specified sum of money, and the question arises (under this or any other Act) whether the term or notice satisfies the requirement of reasonableness, regard

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> shall be had in particular (but without prejudice to subsection (2) in the case of contract terms) to —
>
> (*a*) the resources which he could expect to be available to him for the purpose of meeting the liability should it arise; and
>
> (*b*) how far it was open to him to cover himself by insurance.
>
> (5) It is for those claiming that a contract term or notice satisfies the requirement of reasonableness to show that it does.

In this regard, I note that pursuant to s 14 of the UCTA, "notice" includes "an announcement, whether or not in writing, and any other communication or pretended communication".

(II) MY FINDINGS

58 I shall now examine whether the plaintiff and the defendant were legally proximate such that the defendant owed the plaintiff a duty of care.

59 I first consider whether the defendant's Limiting Conditions in the Two Reports exonerate the defendant from its duty of care to the plaintiff. It is apposite to examine this issue at the outset as I have alluded to above (at [55]), an express disclaimer of responsibility could negate a finding of an assumption of responsibility by the defendant, thereby abrogating a finding that there was proximity on the facts.

(a) Do the Limiting Conditions relieve the defendant from any responsibility to the plaintiff?

60 As a preliminary issue, the plaintiff submits that cl 10 does not apply to it because the plaintiff did not contract with the defendant.[115] From the

115 Plaintiff's Closing Submissions ("PCS") at para 185.

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perspective of contract law, the plaintiff is right as there is privity of contract. However, cll 3, 8 and 10 are found in the Two Reports, which are valuation reports prepared on the instructions of NKI for use by lenders like the plaintiff, who are third parties. Thus, while these clauses would not apply as "term[s]" under s 2(2) of the UCTA, they may apply as non-contractual "notice[s]" in that provision, subject to whether such notices satisfy the requirement of reasonableness.

61 I turn next to the issue of reasonableness.

62 The plaintiff submits that it is not fair and reasonable to allow the defendant to rely on the Limiting Conditions, especially cll 3, 8 and 10, in the light of the circumstances of the present case.[116] The plaintiff refers primarily to the e-mail correspondence between Mr Metzger and Mr Mendoza on 25 September 2017 and 2 October 2017 (see [17] above). These e-mails show that NKI had informed the defendant that NKI was in discussions with the lenders to pledge NKI's Assets for financing and required the 1st Report to be prepared for the purpose of the lenders' use.[117] Moreover, the defendant's 1st Report itself had stated that it was to be utilised for "financing purpose" (see [18] above).[118] The plaintiff, therefore, submits that the defendant was fully aware that the 1st Report was to be relied upon by the lenders for the purposes of financing NKI. Accordingly, it is highly unreasonable for the defendant to rely on the Limiting Conditions to exclude and/or limit its liability for negligence.[119]

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116 Reply at para 5(b).

117 Reply at para 5(b)(ii).

118 Reply at para 5(b)(iii).

119 Reply at para 5(c).

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63 Pursuant to s 11(5) of the UCTA, the burden of proof falls on the defendant to show that the Limiting Conditions satisfy the requirement of reasonableness under s 11(3) of the UCTA (see [57] above). The defendant submits that the Limiting Conditions are common contractual terms adopted by the valuation profession in Singapore.[120] Indeed, similar conditions can be found in the RK Report. The defendant claims that para 11 of the RK Report is similar to cll 3 and 8 while para 16 of the RK Report is similar to cl 10. I reproduce the material provisions in the Table below:

Limiting Conditions	**RK Report**[121]
Clause 3 Information, estimates, and opinions furnished to the appraiser and contained in this report were obtained from sources considered reliable to be true and correct; however, no responsibility for the accuracy of such items furnished to the appraiser can be accounted to him or her. No liability or responsibility is expressed for results from actions taken by anyone as a result of this report. Further, there is no accountability, obligation, or liability to any third party. Clause 8 This report is confidential to the client for the specific purpose to which it refers. It may be disclosed to other professional advisers assisting the client in respect of the purpose, but the client shall not disclose the report to any other person. The valuer's responsibility in connection with this report is limited only to the client to whom the report is addressed.	Paragraph 11 In accordance with our usual practice, this Report is for the use only of the party to whom it is addressed and no responsibility is accepted to any third party for the whole or part of its contents.

120 Supplementary AEIC of Chan Hiap Kong ("CHK2") at para 8.

121 AB at pp 231 and 232.

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Clause 10 In the event that Asian Appraisal Company Pte Ltd is subject to any liability in connection with this engagement, regardless of legal theory advanced, such liability against the company including directors, officers, employers, subcontractors, affiliates or agents shall be limited to the amount of fees we received for this engagement.	Paragraph 16 Our maximum liability to the client relating to our services rendered (regardless of action whether in contract, negligence or otherwise) shall be limited to the fees paid for engaging our services. Under no circumstances will we be liable for consequential, incidental, punitive or special losses, damage or expenses (including opportunity costs and loss of profits) despite being advised of their possible existence.

64 In my view, the Limiting Conditions do not satisfy the requirement of reasonableness on the facts of the present case. The defendant was clearly informed that a specific class of persons, *ie*, lenders and investors of NKI, which includes the plaintiff, would rely on the 1st Report (see [60] above). It is immaterial as to whether the Limiting Conditions are common terms used by professional valuers.

65 Moreover, pursuant to s 11(4)(*b*) of the UCTA, the defendant admitted that its professional conduct was covered by public liability insurance.[122] Its loss arising from negligent acts to third parties, if any, would therefore be insured. While the defendant submits that its insurance policy is subject to a limit, it did not claim that the plaintiff's present loss, if proven, would not be adequately covered.[123]

66 Hence, the defendant cannot rely on the Limiting Conditions to exclude or limit its liability from negligence, if successfully proven.

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122 PCS at para 192; Defendant's Closing Submissions ("DCS") at para 128; Transcript (6 October 2021) at p 22 line 23 to p 24 line 19; Exhibit P4.

123 DCS at para 128.

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(b) Has the plaintiff proven legal proximity?

67 To recapitulate, NKI had instructed the defendant to provide the fair market value of the Assets as well as the forced sale value in the 1st Report (see [17] above). Pursuant to these instructions, the defendant provided the fair market value and the forced sale scenario of the Assets in the 1st Report.

68 The plaintiff's argument in support of its case proceeds broadly as follows. The defendant knew of the existence of the class of people, *ie*, the lenders and investors of NKI, who would use the 1st Report besides NKI, the defendant also had an obligation to ensure that the 1st Report was prepared according to the needs of the lenders.[124] Such lenders included the plaintiff. Hence, the defendant had voluntarily assumed responsibility to produce a true and fair forced sale value of the Assets in the 1st Report that would be relied on by the plaintiff.

69 In support of this main argument, the plaintiff submits that NKI informed the defendant that the lenders, including the plaintiff, really wanted to know the value of the Assets in a *worst-case scenario* in the 1st Report. Hence, although NKI had requested the defendant to prepare a valuation for a "forced sale" scenario (see [17] above), NKI was using the term "forced sale" colloquially and not as a term of art.[125] The plaintiff therefore submits that: (a) the defendant owed a duty to the plaintiff to clarify with NKI as to what basis of valuation was required in the 1st Report;[126] and (b) the defendant owed a duty to the plaintiff to prepare the 1st Report in accordance with its requirements,

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124 POS at para 31.

125 POS at paras 33 to 35.

126 PCS at para 78.

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which was to value the Assets in a worst-case scenario.[127] With regard to (b), since the scrap value of the Assets would represent the value of the same in a worst-case scenario, this basis of valuation should have been used in the 1st Report.[128]

70 I shall first address the plaintiff's submission that the defendant owed a duty to clarify with NKI as to what basis of valuation was required in the 1st Report.

71 In the plaintiff's Closing Submissions, it relies on the four emails between Mr Metzger and Mr Mendoza stated above (at [17]), in which NKI, through Mr Metzger, instructed the defendant, through Mr Mendoza, to prepare a valuation report for the Assets in a "forced sale" scenario for use with "financial institutions" and/or "lenders/investors".[129] The plaintiff submits that the defendant failed to clarify with NKI as to what these instructions entailed, especially with regard to what was the requisite basis of valuation to be used for the 1st Report.[130]

72 The plaintiff's submission is strange: why would the defendant be obligated to clarify its client's instructions if it did not see the need to? The defendant had been previously instructed by NKI to value the Assets on a scrap value basis in or around 16 May 2017 (see [16] above). NKI communicated this request by phrasing its request as one that was for the "residual value" of its Assets at the "end of useful life". In the subsequent four emails in late

127 PCS at paras 124 to 126.

128 PCS at para 129.

129 PCS at para 41.

130 PCS at paras 78, 87 and 88.

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September 2017 and early October 2017 (at [17]), the defendant received a *different* set of instructions from NKI, which was to value the Assets in a "forced sale" scenario. This difference is as clear as day, and I see no need for the defendant to clarify with NKI as to whether NKI could have been requesting for the scrap value of the Assets in its instructions for the 1st Report.

73 Conversely, the evidence indicates instead that the *plaintiff* ought to have conducted its own due diligence prior to granting the Loan to NKI. In the Facility Agreement, the plaintiff charged NKI a fee amounting to 2% of the Loan (*ie*, S$32,000) so that it could conduct such due diligence. I reproduce the material clause below:[131]

> **7. Facility Fee**
>
> A fee representing **2.0%** of the Loan Amount which shall be deducted from the Loan to be disbursed upon satisfactory completion of all administrative and legal documentation and/or other requirements as stipulated. *This fee covers all administrative and due diligence works and other checks which are required to be conducted including all Lender's costs in assessing and processing the Facility*.
>
> [emphasis in original in bold; emphasis added in italics]

Yet, the plaintiff did not conduct its own valuation of the Assets despite having received the above sum from NKI.

74 Next, I shall turn to the plaintiff's submission that the defendant ought to have used a valuation basis that would represent the value of the Assets in the *worst-case* scenario. In this regard, it is not immediately clear what the plaintiff's position is.

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131 AB at p 311.

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75 I begin with the plaintiff's pleadings. The plaintiff states as follows in its Statement of Claim:

> 33. The [plaintiff] aver[s] that the [defendant] had *negligently over-stated* the value of [NKI]'s plant and machinery both on a *forced sale value* and scrap value in its 1st Report and 2nd Report and the [defendant is] in breach of [its] duty of care owed to the [plaintiff].
>
> …
>
> 35. The [plaintiff] aver[s] that had the [defendant] prepared a *true and fair report* of the *forced sale value* of [NKI]'s plant and machinery in its 1st Report, the [plaintiff] would not have extended the Loan Amount to [NKI].
>
> [emphasis added]

Evidently, the plaintiff's pleaded case is that the defendant had *overstated* the forced sale value of the Assets in the 1st Report.

76 In its Opening Statement (at [43]), the plaintiff claims that the defendant had carelessly omitted to include the scrap value in the 1st Report where it should have:[132]

> If the Scrap Value of the Assets represented the value of the Assets in a worst-case scenario, then that is what the [defendant] ought to have included in the 1st Report.

The plaintiff also questions the use of a forced sale value in the 1st Report, and makes the following points:[133]

> On the issue of the [forced sale value], the [plaintiff's] position is three-fold: -
>
> a. Firstly, as highlighted above, the [plaintiff] question[s] whether this terminology was accurate given that the

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132 POS at para 43.

133 POS at para 42.

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> sources relied on by the [defendant] state that [forced sale value] is not a basis of valuation;
>
> b. Secondly, in any event, what the [defendant] did in the [Two Reports] was to simply apply a discount on their assessment of the Fair Market Value to arrive at the [forced sale value]. However, what was conspicuously absent in their Reports is an explanation as to whether this methodology was sound, given that none of the reference materials cited by the [defendant] support this method in arriving at the [forced sale value]; and
>
> c. Thirdly, this [forced sale value] – assuming it is an acceptable value, does not represent the worst-case scenario valuation of the Assets as would be required by the lenders.

Here, the plaintiff argues that the forced sale value: (a) was not a basis of valuation; (b) used an unsound methodology; and (c) did not represent the worst-case scenario valuation of the Assets.

77 Then, at the trial, counsel for the plaintiff, Mr Vijai Dharamdas Parwani ("Mr Parwani"), said that the plaintiff's case was that the defendant's forced sale valuation in the 1st Report was actually a scrap valuation. I reproduce Mr Parwani's lengthy explanation of the plaintiff's case here:[134]

> Court: Mr Parwani, I am trying to understand what is the plaintiff's case. Now, you are basically saying that you are relying -- that Pilgrim rely on the first report that was prepared by the defendant and granted the loan to NKI.
>
> Mr Parwani: That's right, your Honour.
>
> Court: And you are saying that the defendant's first report is not accurate.
>
> Mr Parwani: That's right, specifically the valuation of the forced sale value.
>
> Court: So what is the plaintiff's case? In other words, what is the reliance, on which part of the report

134 Transcript (6 October 2021) at p 72 line 16 to p 82 line 2.

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that you are saying that you are -- that it had caused losses to the plaintiff?

Mr Parwani: The forced [*sic*] value, your Honour.

Court: The forced sale value? The first report has got two values there: fair market value and forced sale value.

Mr Parwani: That's right.

Court: The forced sale value, if I remember correctly, is US$12 million.

Mr Parwani: That's right.

Court: So you are saying -- the plaintiff is saying that they rely on the forced sale value of 12 million, and that was the reason why they granted a loan to NKI for 1.6 million.

Mr Parwani: That's right.

Court: What is then the correct forced sale value?

Mr Parwani: Our clients' position is that the forced sale value, or whatever term you use, forced sale or liquidation, basically represents a worst-case scenario. In this case, it would be scrap value.

Court: But the report didn't mention anything about the scrap value.

Mr Parwani: So we are saying *the forced sale value is basically the scrap value*.

Court: *So what you are saying now is that forced sale value equals scrap value?*

Mr Parwani: *Yes.*

…

Court: … my point here is what is your basis for saying that forced sale value equals scrap value?

Mr Parwani: We are saying that the forced sale scenario, that was what Kurt wanted, would be the worst-case scenario, and the worst-case scenario would be the scrap value.

…

Court: The point here is that your loan is 1.6 [million].

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> Mr Parwani: That's right.
>
> Court: So if you say that the value they came up with was less than 1.6 [million], then I can understand the plaintiff's case. But presently, that's why I'm asking you, where is the evidence to show that the valuation in the first report was not what it represents?
>
> Mr Parwani: Your Honour, if the valuation was less than 1.6, my client would not have granted the loan. Or if they had granted the loan, then there is clearly -- there is no case for my client to proceed because they know what it was. Our case is that their reflection of 12.7 million as the forced sale value was wrong. It was overly stated. It should have been close to 1 to 1.5 million at best.
>
> Court: That's because *you equate forced sale value to scrap value*.
>
> Mr Parwani: *That's right*, your Honour.
>
> [emphasis added]

Mr Parwani's explanation above was unclear as to how the forced sale value was to be equated with the scrap value. Was the plaintiff claiming that the defendant: (a) *should have* provided the scrap value of the Assets through the forced sale value; or (b) *did in fact* provide the scrap value of the Assets through the forced sale value, albeit calculated carelessly?

78 In the plaintiff's Closing Submissions, the plaintiff sought to clarify the above confusion. The plaintiff submits that the defendant *should have* provided a scrap value in the 1st Report because the "forced sale" scenario referred to the worst-case scenario for the value of the Assets.[135] However, the defendant had carelessly provided a forced sale value that did not reflect the value of the Assets in the worst-case scenario, *ie*, the forced sale value was not calculated on scrap

135 PCS at paras 124 to 126 and 129.

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value basis. Hence, the forced sale value of the Assets in the 1st Report *should have* referred to the scrap value of the same.[136] In other words, the plaintiff is *not* claiming that the defendant should have included the scrap value of the Assets *on top of* the forced sale value of the same, but that *the calculation of the forced sale value should have been on a scrap value basis*. The plaintiff is also *not* claiming that *the defendant had intended* for the forced sale value of the Assets to be, in reality, the scrap value of the Assets.

79 From the above, the plaintiff has taken the following positions at different points in time as regards the 1st Report:

(a) First, in its pleadings, the plaintiff claims that the quantum of the forced sale value of the Assets was inaccurately overstated.

(b) Second, in its Opening Statement, the plaintiff claims that the defendant should have provided the scrap value of the Assets but failed to do so. In addition, the plaintiff claims that the forced sale value: (a) was not a basis of valuation; (b) used an unsound methodology; and (c) did not represent the worst-case scenario valuation of the Assets.

(c) Third, at the trial and in its Closing Submissions, the plaintiff sought to equate the forced sale value of the Assets with the scrap value of the same. In its view, the forced sale value of the Assets ought to have been calculated using its scrap value. However, the defendant did not do so.

136 PCS at para 138.

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80 The defendant submits that the plaintiff's later position, *ie*, that the defendant should have provided a valuation which reflects the Assets' value in the worst-case scenario is inconsistent with the plaintiff's earlier position in its pleaded case, *ie*, that the defendant had inaccurately overstated the forced sale value of the Assets.[137] The former concerns *the appropriate choice of valuation basis* while the latter concerns *the quantum of the forced sale valuation*. The unsatisfactory state of the plaintiff's pleadings has caused difficulty to the defendant in meeting the plaintiff's case.

81 I shall address the merits of the plaintiff's submissions in support of its ultimate position that the defendant ought to have provided the scrap value of the Assets through the forced sale value of the same.

82 The plaintiff submits that a forced sale valuation is not a recognised basis of valuation.[138] Indeed, according to para 170.1 of the International Valuation Standards 2017 ("IVS"), "forced sale" refers to a *situation* and not a basis of valuation. Paragraph 170.1 of the IVS states as follows:[139]

> **170. Premise of Value – Forced Sale**
>
> 170.1 The term 'forced sale' is often used in circumstances where a seller is under compulsion to sell and that, as a consequence, a proper marketing period is not possible and buyers *may* not be able to undertake adequate due diligence. The price that could be obtained in these circumstances will depend upon the nature of the pressure on the seller and the reasons why proper marketing cannot be undertaken. It *may* also reflect the consequences for the seller of failing to sell within the period available. Unless the nature of, and the reason for, the constraints on the seller are known, the price

137 DCS at para 55.

138 PCS at paras 89 to 107.

139 AB at p 1329.

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> obtainable in a forced sale cannot be realistically estimated. The price that a seller will accept in a forced sale will reflect its particular circumstances, rather than those of the hypothetical willing seller in the Market Value definition. ***A 'forced sale' is a description of the situation under which the exchange takes place, not a distinct basis of value***.
>
> [emphasis in original in italics; emphasis added in bold italics]

The plaintiff also submits that it was incumbent on the defendant to inform NKI that a forced sale value was not an accepted basis of valuation, as the defendant was purportedly an expert on valuing plant and machinery.[140]

83 More substantively, the plaintiff contends that the forced sale value was not suitable to lenders like the plaintiff who were interested in the sum they could recover from NKI in the worst-case scenario. Since the scrap value would indicate the base sum in the worst-case scenario, the defendant should have indicated the scrap value in the 1st Report.

84 In my view, the above submissions by the plaintiff are unsupported by the evidence. I begin with the issue of compliance with the IVS.

85 As can be seen from the e-mail correspondence between Mr Mendoza and Mr Metzger (see [17] above), NKI had specifically requested for a valuation of the Assets in a forced sale scenario. Clearly, the defendant's foremost duty is to act in the interests of its client, *viz*, NKI, and thus to prepare the valuation in accordance with NKI's instructions. In this regard, I note that the IVS states the following at para 20.2:[141]

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140 POS at para 37.

141 AB at p 1322.

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> Valuers must choose the relevant basis (or bases) of value according to the terms and purpose of the valuation assignment. *The valuer's choice of a basis (or bases) of value should consider instructions and input received from the client and/or its representatives*. However, regardless of instructions and input provided to the valuer, the valuer should not use a basis (or bases) of value that is inappropriate for the intended purpose of the valuation (for example, if instructed to use an IVS-defined basis of value for financial reporting purposes under IFRS, *compliance with IVS may require the valuer to use a basis of value that is not defined or mentioned in the IVS*).
>
> [emphasis in original omitted; emphasis added in italics]

The IVS thus permits the defendant to use bases of value that are not defined or mentioned in the IVS in appropriate circumstances. Here, NKI specifically told the defendant that "the lenders/investors will be focusing on the 'forced sale' scenario" (see [17] above), not that these lenders were interested to know how much they could recover from the Assets in a worst-case scenario. In providing the forced sale value as instructed by NKI, the defendant is therefore in compliance with both NKI's instructions and the IVS. As to whether the scrap value of the Assets is needed for a valuation of the Assets in a worst-case scenario, I note that although NKI did request the defendant to provide a scrap value in May 2017 and the defendant provided a scrap valuation of US$4,882,000 on 28 July 2017, it did not instruct the defendant to include the scrap value in the 1st Report.

86 The defendant's expert, Mr Chay Yiowmin ("Mr Chay") and Mr Mendoza agreed that a forced sale value is similar to a forced liquidation value, which is a defined basis of valuation under para 80.1(b) of the IVS.[142] As stated above, the definition of "forced sale value" in the 1st Report is as follows (see [18] above):

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142 Transcript (11 October 2021) at p 126 line 23 to p 131 line 8.

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> The term 'Forced Sale Value[']' as used herein, is defined as the estimated amount that might be realized from an *assembled or piecemeal* disposition of the subject assets in the second hand market, assuming a short period of time in which to complete the transaction. The value estimates consider that the assets will be offered for sale in its present location and condition on an 'as is, where is' basis.
>
> [emphasis added]

Paragraph 80.1(b) of the IVS states as follows:[143]

> Liquidation Value is the amount that would be realised when an asset or group of assets are sold on a *piecemeal* basis. Liquidation Value should take into account the costs of getting the assets into saleable condition as well as those of the disposal activity. Liquidation Value can be determined under two different premises of value:
>
> …
>
> (b) a forced transaction with a shortened marketing period (see section 170).
>
> [emphasis in original omitted; emphasis added in italics]

Indeed, para 80.1(b) of the IVS refers to para 170, which is the forced sale scenario (see [82] above). Mr Mendoza, who assisted in the preparation of the 1st Report, testified that while forced sale value was technically not a basis of valuation as specified in the IVS, it is an acceptable colloquial term of valuation in Singapore. Mr Chay and Mr Chan concurred with Mr Mendoza.[144]

87 In cross-examination, the plaintiff's expert witness, Mr Robert Khan ("Mr Khan") from Robert Khan International Business Consultants, claimed that the definition of the forced sale value in the 1st Report is problematic. Mr Khan emphasised that the difference between the forced sale value and the

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143 AB at p 1326.

144 Transcript (6 October 2021) at p 40 line 15 to p 41 line 14; p 48 line 2 to p 49 line 16; Transcript (11 October 2021) at p 23 lines 9 to 23; DCS at para 143.

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forced liquidation value was that the former concerned the disposition of the Assets on an "assembled or piecemeal" basis while the latter concerned only a "piecemeal" basis (see definitions at [86] above).[145] To him, "assembled" meant that NKI's whole plant was to be sold altogether as an operational plant; "piecemeal" meant that the individual items of the Assets would be sold. To him, there are two problems flowing from this difference.

88 First, given the above difference, the defendant's forced sale value was internally contradictory. This is because the value derived from the disposition of the Assets on an assembled basis would clearly be higher than that from a piecemeal disposition, so the valuer should choose one basis or the other. I disagree. In the RK Report, Mr Khan referred to the salvage value of the assets (see [30] above). As I shall elaborate in a later section (see [186] below), the salvage value actually refers to a range of values pertaining to the appraised assets and the scrap value refers to the lower end of this range.[146] Just as the salvage value of the Assets can encompass a range of values, with the scrap value being on the lowest end, the defendant's forced sale value can likewise encompass a range of values, with the value on an assembled basis being on the highest end. What is sauce for the goose is sauce for the gander. There is therefore no internal contradiction in the defendant's definition of "forced sale value".

89 Furthermore, it does not necessarily follow that the value derived from the disposition of the Assets on an assembled basis would always be higher than that from a piecemeal disposition. Whether the price of the assembled Assets

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145 DCS at para 144; Transcript (22 September 2021) at p 63 line 7 to p 77 line 23.

146 Transcript (22 September 2021) at p 15 line 17 to p 16 line 1; p 17 lines 6 to 16.

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will be higher than the price of the Assets on a piecemeal basis depends on several factors such as the needs or requirements of the buyers. In other words, it is contingent on the demand for the assembled Assets as opposed to the demand of the various components of the Assets. In fact, the price of the assembled Assets may even be cheaper. The purchaser of the assembled Assets in this scenario will be akin to a purchaser buying in bulk. Such a purchaser will have more bargaining power than one who buys a small quantity on a piecemeal basis and would therefore be able to negotiate for a lower price of the assembled Assets.

90 Second, Mr Khan claimed that where the Assets are sold on a piecemeal basis *in the context of a chemical plant*, the forced liquidation value of the plant's assets will be the same as the scrap value of the same. I reproduce Mr Khan's explanation here:[147]

> A: … This definition [*ie*, that of the forced sale value] states that it is 'assembled or piecemeal disposition'. And in the context of a chemical plant, when it's a piecemeal disposition, there is no way that it will be other than a scrap situation when you do this valuation. So that's why it is important here to distinguish when the defendant uses the phrase "assembled or piecemeal disposition", in a chemical plant, there is no way you are going to -- unless you're selling intact and someone comes in to operate the plant as is, where is, I agree, then the value would be higher, much higher; whereas, in this case, where it's going to be piecemeal disposition of a chemical plant, is going to be *scrap value*, your Honour.
>
> Court: I don't understand you.
>
> A: Because they have to remove piece by piece the tanks, the pipelines and all these thing. The only sensible way to do it is cut it up and put it on a trailer using a crane to lift it up and move it on to a weighbridge where they

[147] Transcript (22 September 2021) at p 73 line11 to p 74 line 7.

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> will weigh it before they send it to the scrap entities like NatSteel or other scrap dealers who have means to recycle this scrap metal.
>
> [emphasis added]

If Mr Khan's explanation is accepted, it would suggest that, since the forced sale value is similar to forced liquidation value, the defendant was supposed to provide the scrap value through the forced sale value. However, in my view, his explanation is unconvincing. If Mr Khan himself was convinced that the forced liquidation value was equal to the scrap value for the present purposes, then why did he not state so in the RK Report or in his expert report? Moreover, I do not understand how it follows from the assumption that individual items of the Assets, *eg*, tanks, pumps and pipes, have to be removed piece by piece, that they must then be scrapped. The defendant rightly submits that it is plausible such items can be sold and re-used or recycled.[148] I agree with the defendant that since Mr Khan is not an engineer by training, he is not in a position to opine that the components of a plant or machinery cannot be sold as a functional component to be reused in another plant or for another purpose.[149]

91 Having carefully analysed the evidence from both parties above, I accept that the defendant's use of a forced sale value in the 1st Report is similar to a forced liquidation value and was not problematic. Paragraph 20.2 of the IVS permits the defendant to use bases of value that are not defined or mentioned in the IVS in appropriate circumstances. The forced sale value is an accepted colloquial term of valuation. Thus, I find the use of the forced sale value in the 1st Report was in compliance with the IVS.

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148 DCS at para 154.

149 DCS at para 164; Transcript (22 September 2021) at p 81 lines 9 to 11.

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92 Next, I turn to the defendant's state of mind at the material time.

93 To recapitulate, in the course of the 1st Report NKI had requested the defendant to ascertain the "residual value" of its Assets at the "end of useful life" (see [16] above). In response, the defendant provided the scrap value of NKI's Assets as US$4,882,000.

94 Subsequently, NKI instructed the defendant to value the Assets in a "forced sale" scenario (see [17] above). The defendant clearly understood these instructions to mean that NKI was requesting for a *different* basis of valuation (see [72] above) for the 1st Report. As stated above, the defendant mentioned in the 1st Report that the forced sale value of NKI's Assets was US$12,130,000.

95 Based on NKI's instructions the defendant adopted different *definitions* and *methods of calculation* for the scrap value and the forced sale value.

96 The difference in definitions is stark. In the Scrap Value Letter dated 28 July 2017, the defendant stated that "scrap value" is defined as "the estimated amount expressed in terms of money that could be realized for the assets if *sold for its material content, not for a productive use, as of a specific date*" [emphasis added] (see [16] above). In contrast, in the 1st Report , the defendant stated that "forced sale value" is defined as "the estimated amount that might be realized from an *assembled or piecemeal disposition of the subject assets in the second hand market*, assuming a short period of time in which to complete the transaction. The value estimates consider [*sic*] that the assets will be offered *for sale in its present location and condition on an 'as is, where is' basis*" [emphasis added] (see [18] above).

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97 Likewise, the difference in the methods of calculation for the two bases of valuation is clear. The defendant calculated scrap value by taking a percentage (4% to 7%) of the Cost of Replacement, New ("CRN") pertaining to the Assets. For the calculation of the forced sale value, Mr Mendoza explained that it was necessary to first ascertain the fair market value, which was a depreciation of 61% of the CRN. Thereafter, there would be "further reduction" of the fair market value to get the forced sale value.[150] Mr Mendoza said that the defendant's usual practice was to apply a discount of 20% to 75% of the fair market value to get the forced sale value, *ie*, by taking those percentages of the fair value to derive the forced sale value.[151] Mr Chay agreed with Mr Mendoza's approach to the calculation of the fair market value and the forced sale value. Mr Chay further added that this is reasonable, acceptable and in-line with industry standards.[152]

98 Hence, it was clear to the defendant that there was a distinct and substantial difference between the forced sale value and scrap value. The difference is not only in the definition but also in the quantum, since the method of calculation is very different. Moreover, the defendant provided the scrap value in the Scrap Value Letter to NKI on 28 July 2017. Two months later, the defendant furnished the 1st Report on 29 September 2017 which contained the forced sale value. Thus, the defendant would have found it strange for NKI to request for the scrap value of its Assets by using a different set of instructions, since the defendant had already provided the scrap value of NKI's Assets two

150 MM at para 30; Transcript (8 October 2021) at p 96 lines 21 to 24.

151 Transcript (7 October 2021) at p 39 lines 18 to 21.

152 Affidavit of Evidence-in-Chief of Chay Yiowmin ("CY") at p 21 para 5.11.

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months ago. NKI could have simply asked for the scrap value that was previously provided.

99 Indeed, the scrap value of an asset cannot be the same as its forced sale value. An asset's scrap value concerns the situation where that asset is sold for its material content. In contrast, an asset's forced sale value concerns a situation where the asset has some utility but is sold under forced circumstances, *ie*, within limited time. Therefore, the forced sale value of an asset will generally have a higher quantum than the scrap value of the same item. It is, therefore, illogical for the plaintiff to suggest that the defendant should have referred to the scrap value of the Assets in its provision of the forced sale value. If the plaintiff did not fully understand the meaning of forced sale value in the 1st Report, it should have sought clarification from NKI or the defendant. This is not the case here. However, if the plaintiff misunderstood the forced sale value to mean scrap value, it only has itself to blame.

100 I turn lastly to the plaintiff's state of mind before the Loan was given to NKI.

101 The evidence shows that the plaintiff itself did not appear to consider the worst-case scenario at time when considering whether to grant the Loan to NKI.[153]

102 On 1 February 2018, Mr Tan sent the following e-mail to Mr Choo for the Credit Committee to approve the Loan:

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153 DCS at para 168.

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> Dear Credit Committee,
>
> We have 2 items that require your approval please.
>
> 1) NKI
>
> …
>
> The loan will be secured against the plant and equipment which has been valued at US$27m with a *force[d] value* of US$12m, although it is *reasonable to expect that an industrial buyer would pay more than that to take over the plant and run it* (original cost of the plant US$100m).
>
> [emphasis added]

As can be seen from the above, it was not the case that the plaintiff was concerned that NKI was on the verge of liquidating its Assets. Rather, the plaintiff was optimistic about NKI's business prospects.

103 Moreover, in the plaintiff's credit note for the Loan to NKI (the "Credit Note"), the plaintiff had identified NKI's exit from the Loan to be "[c]ash flow from existing operations" and "[e]xisting AR [*ie*, accounts receivable] debtors".[154] This suggests that the plaintiff did not consider having to sell the Assets as scrap in order to recover the Loan sum.

104 Hence, the plaintiff is now doing a *volte-face* at these proceedings when it submits that it considered the scrap value of NKI's Assets at the time of granting the Loan to NKI. This is a retroactively conceived attempt by the plaintiff at recovering the Loan sum from the defendant, in light of its inability to do so from NKI.

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154 AB at p 676.

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105 Thus, the defendant did not owe a duty of care to the plaintiff to provide the scrap value of the Assets through the provision of the forced sale value of the same.

106 From the evidence, the defendant had voluntarily assumed responsibility to provide a reasonable estimate of the *fair market value* and *forced sale value* in the 1st Report, in compliance with NKI's instructions and the IVS. This forced sale value was *not* calculated on the same basis as that applicable to the scrap value of the Assets. Instead, it was calculated on a basis similar to a forced liquidation value of the Assets.

107 It is clear that the plaintiff can reasonably rely on the 1st Report as a lender. The defendant submits, however, that any alleged reliance was only on the part of the Credit Committee, which is part of Pilgrim Partners Asia, a separate entity from the plaintiff (see [10] above).[155] In my view, this is an artificial distinction. The plaintiff relied on the 1st Report in seeking approval from the Credit Committee. Once such approval was granted, the plaintiff was then able to grant the Loan to NKI. It is, therefore, clear that the plaintiff relied on the 1st Report in granting the Loan. Hence, I find that the plaintiff has proven legal proximity.

108 However, the scope of the defendant's duty of care must clearly be circumscribed by NKI's instructions. Given that it was NKI's instructions that lenders would rely on a value based on the forced sale scenario provided by the defendant, the plaintiff could only reasonably rely on the *definition and quantum of the forced sale value* (and the fair market value) provided in the 1st

155 DCS at para 102.

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Report. As stated above (at [18]), the definition of the forced sale value was clearly provided as "the estimated amount that might be realized from an assembled or piecemeal disposition of the subject assets in the second hand market, assuming a short period of time in which to complete the transaction. The value estimates consider that the assets will be offered for sale in its present location and condition on an '*as is, where is' basis*" [emphasis added]. This clearly differs from a scrap valuation of the Assets, which is "the estimated amount expressed in terms of money that could be realized for the assets if sold for its *material content, not for a productive use*, as of a specific date" [emphasis added] (see [16] above). If the plaintiff had wanted the scrap value of the Assets, they could have asked NKI to include it in the 1st Report. However, the plaintiff did not do so. Indeed, this could have been readily done since the defendant had furnished a scrap valuation to NKI on 28 July 2017 at the latter's request.

109 Thus, subject to the analysis under the second stage of the *Spandeck* test, I find that the defendant would owe a duty to take care in providing a true and fair report of the Assets using a reasonable estimate of the fair market and forced sale valuation in the 1st Report. However, this duty did not extend to providing a scrap value of the Assets as neither did NKI instruct the defendant to include the scrap value in the 1st Report nor did the plaintiff request for the same.

110 For completeness, I shall address the plaintiff's submissions regarding the scrap value provided by the defendant to NKI on 28 July 2017 in the Scrap Value Letter (see [16] above). In Mr Mendoza's email on 29 May 2017 (see [16] above), the defendant estimated the scrap value of the Assets at 2% to 7% of the CRN pertaining to the Assets. However, in the Scrap Value Letter, the

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defendant used 4% to 7% of the CRN. In the 1st Report, the CRN is defined as:[156]

> … the cost of the assets under appraisement in new condition, with the same or of equivalent utility, considering current prices for materials, labour, manufactured machinery & equipment, freight, installation (if any), and other attendant costs and related charges.

Mr Mendoza also explained in that email that he relied on the Depreciation Reference Table ("DRT") found in a reference book, *Appraising Machinery and Equipment* (John Alico ed) (McGraw-Hill, 1988) at p 63, in employing this methodology.[157]

111 The plaintiff submits that the defendant had improperly applied the DRT, which states that the relevant percentage range should be 0% to 2.5%. This corresponds to the "Not Saleable or Scrap" categories of the DRT. The defendant applied different ranges for the calculation of the scrap value. I reproduce the DRT here:

156 AB at p 4.

157 MM at para 32; Exhibit P3.

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Table 7.1. Depreciation Reference Table

Depreciation, %	Condition	Remaining useful life, %
	New	
0	New, installed, and unused	100
5	property in excellent condition	95
	Very Good	
10	Like new, only slightly used,	90
15	and not requiring any replace-	85
	ment of parts or repairs	
	Good	
20	Used property, but repaired or	80
25	renovated and in excellent con-	75
30	dition	70
35		65
	Fair	
40	Used property which requires	60
45	some repairs or replacement of	55
50	parts such as bearings	50
55		45
60		40
	Usable	
65	Used property in operable con-	35
70	dition, but considerable repairs	30
75	or replacements such as motors	25
80	or elements required	20
	Poor	
85	Used property requiring major	15
90	repairs such as replacement of moving parts or main structural members	10
	Not Salable or Scrap	
97.5	No reasonable prospect of being	2.5
100	sold except for the recovery value of its basic material content	0

112 The plaintiff also submits that the defendant should have employed a more accurate and simple method in calculating the scrap value. This involves multiplying the weight of the Assets with its price per unit.[158]

158 POS at paras 45 to 51; PCS at paras 130 to 134.

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113 The above submission is irrelevant. I wish to reiterate that the 1st Report did not contain the scrap value of the Assets because NKI did not request the defendant to furnish it in the report. Mr Metzger instructed Mr Mendoza to include the forced sale value in the "forced sale" scenario for the lenders in the 1st Report. Even if the defendant had inaccurately calculated the scrap value stated in the Scrap Value Letter to NKI dated 28 July 2017, that is irrelevant to the present dispute. Since the scrap value was not in the 1st Report, the plaintiff could not have relied on the scrap value in its decision to grant the S$1.6m Loan to NKI. Indeed, the plaintiff oddly submits on the appropriate quantum of the Asset's scrap value that the defendant should have responded to NKI via e-mail, prior to the submission of the 1st Report:[159]

> Be that as it may, since the [defendant] could calculate the tonnage from the drawings in [its] possession, [its] response in the *29/5/2017 email to NKI* should have been that the *scrap value would have been within the range of S$800,000 to S$1.2million (before taking into account the decommissioning costs)*. It bears highlighting that this is based on the [defendant's] own evidence of the tonnage and the prevailing price of scrap metal. The lower end of S$800,000 is remarkably close to the sum of S$770,000 that the [plaintiff was] eventually quoted and accepted.
>
> [emphasis in original omitted; emphasis added in italics]

This submission cannot be applicable to the 1st Report as no scrap value was mentioned therein. In the absence of instructions by NKI to include the scrap value in the 1st Report, the defendant does not owe a duty to provide a reasonable estimate of the scrap value in that report.

114 I now turn to consider the second stage of the *Spandeck* test.

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159 PCS at para 134.

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(C) POLICY CONSIDERATIONS

115 Under the second stage of the *Spandeck* test, the court has to examine whether there were any policy considerations that would persuade it to deny any remedy to the plaintiff: *Spandeck* at [111].

116 In so far as the defendant has voluntarily assumed responsibility to provide an accurate forced sale value in the 1st Report, I find that there are no policy considerations to negate the existence of such a duty of care. Conversely, there are policy considerations in favour of finding such a duty of care: valuers ought to be responsible for providing their valuation based on professionally acceptable methodology and merits within the scope of their clients' instructions. They should bear such a responsibility especially where they know that their professional opinion would be relied on. Here, the defendant was aware that the 1st Report was for "financing purpose", *ie*, lenders and investors would be reading and relying on the 1st Report. Thus, valuers like the defendant cannot rely on the boilerplate Limiting Conditions of the 1st Report, particularly those like cl 8 which limits the usage of the 1st Report to NKI and its professional advisers.[160] This is *a fortiori* the case where valuers like the defendant are insured (see [64] above).

(D) CONCLUSION ON DUTY OF CARE

117 For the reasons above, I find that the defendant owes the plaintiff a duty to take care in the provision of a reasonable estimate of the fair market value and forced sale value of the Assets in the 1st Report. I stress that this duty of care involves providing a *reasonable estimate* because valuation is not an exact

[160] AB at p 2, see para 2 of the 1st Report.

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science but an art.[161] The scope of this duty pursuant to NKI's instructions does not extend to the provision of the scrap value of the Assets in the same report since NKI did not request for the same.

Breach of duty of care

(1) The applicable law

118 As stated by the Court of Appeal in *Jurong Primewide Pte Ltd v Moh Seng Cranes Pte Ltd and others* [2014] 2 SLR 360 at [43], the standard of care expected to discharge a duty of care is usually the general objective standard of a reasonable person using ordinary care and skill (see *Blyth v The Company of Proprietors of the Birmingham Waterworks* (1856) 11 Exch 781). However, the court can consider factors such as industry standards and normal practice.

119 Where valuers are concerned, it is settled law that a valuer has to "attain the requisite standard of care of an ordinary competent valuer": see *Kuah Kok Kim and others v Ernst & Young* [1996] 3 SLR(R) 485 at [41] and *Kua Kok Kim and others v Ernst & Young* [1999] 3 SLR(R) 1184 ("*Kua Kok Kim SGHC*") at [18]. If the valuer fails to do so, he can be sued in tort. This follows the general rule that "a professional is required to meet the standard of the ordinary skilled man exercising and professing to have the special skill in question": *Kua Kok Kim SGHC* at [18], citing *Halsbury's Laws of England*, vol 33 (4th Ed) para 623 with approval.

[161] CHK2 at para 11(a).

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(2) My findings

120 The issue here is whether the forced sale value, which was calculated on a basis similar to a forced liquidation value (see [86]–[91] above), was carelessly and inaccurately calculated by the defendant.

121 As Mr Mendoza explained and Mr Chay concurred, there are generally two accepted approaches that are used in the valuation of plant and machinery.[162] Mr Mendoza explained that a third approach, the income approach, is seldom used for valuing plant and machinery because it is difficult and impractical to establish income streams for each machinery.[163]

122 The first is the cost approach. Paragraphs 70.2 and 70.3 of the IVS state as follows:[164]

> 70.2. Generally, replacement cost is the cost that is relevant to determining the price that a *participant* would pay as it is based on replicating the utility of the asset, not the exact physical properties of the asset.
>
> 70.3. Usually replacement cost is adjusted for physical deterioration and all relevant forms of obsolescence. After such adjustments, this can be referred to as depreciated replacement cost.
>
> [emphasis in original]

Under the cost approach, the valuer will consider the cost of replacing or reproducing the asset in a new condition and then apply a deduction to account

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162 CY at p 18 paras 5.1 to 5.4; MM at paras 12 to 14.

163 MM at para 12.

164 MM at p 66.

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for depreciation based on the age, physical condition of the asset appraised and other relevant factors.[165]

123 The second approach is the market data approach. The IVS at paras 20.1 and 20.2 state as follows:[166]

> 20.1 The market approach provides an indication of value by comparing the *asset* with identical or comparable (that is similar) *assets* for which price information is available.
>
> 20.2 The market approach *should* be applied and afforded *significant weight* under the following circumstances:
>
> (a) the subject *asset* has recently been sold in a transaction appropriate for consideration under the basis of value;
>
> (b) the subject *asset* or substantially similar *assets* are actively publicly traded, and/or
>
> (c) there are frequent and/or recent observable transactions in substantially similar *assets*.
>
> [emphasis in original]

Under the market data approach, the valuer will consider the prices offered by willing buyers or recently paid for the same or similar assets in the second-hand market, with adjustments (if any) to reflect the condition and utility of the appraised assets.[167]

124 Mr Mendoza explained that the cost approach was the more appropriate approach to evaluate the fair market value of NKI's machinery and equipment because many components of the Assets are specialised equipment.[168] He

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165 MM at para 14.

166 MM at p 52.

167 MM at para 13.

168 MM at para 27.

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claimed that NKI was unable to provide the invoices indicating the costs of the Assets as NKI did not retain them. Instead, NKI gave spreadsheets showing the costs of the Assets to the defendant. Mr Mendoza and Mr Ambulo also obtained estimated costs of comparable equipment from websites such as www.matche.com[169] and "grainger".[170] Using this information, they derived the CRN. Thereafter, as explained above (at [97]), the defendant derived the fair market value of US$26,899,000 and forced sale value of US$12,130,000 for NKI's Assets (see [18] above) using the appropriate discount.

(A) DID THE DEFENDANT BREACH ITS DUTY OF CARE BY USING PURPORTEDLY UNRELIABLE SOURCES OF DATA AND BY CARELESS COMPUTATION?

125 The plaintiff makes the following submissions:

(a) www.matche.com is not a reliable source of data for the defendant to have calculated the CRN;[171]

(b) Mr Mendoza had input wrong values to www.matche.com, resulting in wrong prices provided by that website;[172] and

(c) the defendant had made calculation errors of the forced sale value in the 1st Report.[173]

126 I shall address these submissions in turn.

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169 MM at para 30.

170 Transcript (8 October 2021) p 71 line 24 to p 72 line 5.

171 PCS at paras 114 to 115.

172 PCS at paras 116 to 117.

173 PCS at paras 119 to 121.

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127 First, the plaintiff submits that www.matche.com collects prices from anonymous sources and Mr Mendoza agreed during cross-examination that there was no way to verify the accuracy of the information from the website.[174] In my view, as matter of logic, it does not immediately follow from the fact that information was compiled from anonymous sources, that such information is therefore inaccurate. Crucially, the plaintiff has not adduced expert evidence to show that the information from www.matche.com is unreliable. In the circumstances, the plaintiff's submission in this regard is nothing more than a bare assertion from the bar.

128 Second, the plaintiff submits that Mr Mendoza had converted the prices of the assets given by www.matche.com, which were in USD, to SGD, and back to USD again. This resulted in a different initial price to that stated by www.matche.com.[175] At the trial, Mr Mendoza explained why he did so:[176]

> Q: Mario, matche already gave you the price in US dollars, why are you converting to Sing dollars and then converting it back to US dollars?
>
> A: Because initial [*sic*] we thought that the engagement was for the report to be reported in local currency, local currency which is Sing dollars.
>
> Q: Yes, but eventually you reported it in US dollars.
>
> A: Yes.
>
> Q: Since you got this equipment price from the website in US dollars, you just reflect the price what you got from there; right?
>
> A: Yes.
>
> Q: So it doesn't make sense for you to convert to Sing dollars and convert back again to US dollars. It's not

174 PCS at para 115.

175 PCS at para 117.

176 Transcript (8 October 2021) p 71 lines 4 to 20.

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> giving the reader a true reflection of what was reflected on your matche.com. Do you agree with me? I'm moving on whether you agree or not.

Here, Mr Mendoza was advertent to his obligation to use US dollars. Indeed, it would have been better if he had used the original USD prices of the assets stated on www.matche.com, instead of converting these prices to SGD and back to USD. However, the plaintiff has not submitted on what the difference in price is. Even before examining the issue of causation, there would be no breach of duty by the defendant here if the difference in price was *de minimis*. This must be the case since the requisite standard of care is that of an ordinary competent valuer, and a valuer, being a natural person, cannot be faulted for making inconsequential human mistakes. Since the plaintiff did not discharge its burden of proof here, I am unable to make a finding in its favour.

129 Third, the plaintiff submits that Mr Mendoza: (a) had "made fundamental mistakes in computing the costs of individual items of NKI's Assets"; and (b) had admitted to wrongly calculated the total sum of the forced sale value, which should have been US$11,770,000 instead of US$12,130,000.[177]

130 With regard to (a), while Mr Mendoza did admit that there were some errors in his computation, the plaintiff only examined a few instances. The plaintiff did not submit how these few instances amounted to "fundamental mistakes" such that the defendant had failed to attain the requisite standard of care of an ordinary competent valuer. Again, the plaintiff did not discharge its burden of proof here.

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177 PCS at paras 120 and 121.

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131 With regard to (b), the plaintiff cites the following extract of Mr Mendoza's testimony as his purported admission on the witness stand:[178]

> Q: Now, when we did a calculation, when I add 1.7 million all the way down, I get a total sum of 11,730,000 and not 12,130,000.
>
> Did you also know that this was a mistake but you have not told this court, or are you hearing this for the first time?
>
> A: *This is the first time that I hear about this.*
>
> [emphasis added]

I do not see how Mr Mendoza's response above amounts to an admission. Ironically, it indicates instead that he had disagreed with Mr Parwani's question. Hence, the plaintiff's submission on this point is unsupported.

132 Lastly, I note that when NKI reviewed the defendant's breakdown of the Assets' initial valuation in April 2017, NKI actually found that it was "much lower than [its] expectation".[179] In the circumstances, it was likely that the sources that the defendant relied on for the prices of the Assets were more conservative than what was reasonably expected.

133 I therefore find that the defendant did not breach its duty of care to the plaintiff by using the prices of the Assets from www.matche.com and by the alleged careless computation of the costs of individual items of the Assets and the forced sale value of the same.

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178 PCS at para 121; Transcript (8 October 2021) at p 90 lines 3 to 9.

179 Defendant's Reply Submissions at para 44; AB at p 1442 to 1443.

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(B) DID THE DEFENDANT BREACH ITS DUTY OF CARE BY FAILING TO CONSIDER NKI'S PURCHASE PRICE OF THE PLANT AND MACHINERY?

134 According to Mr Leow, NKI's plant and machinery were built by Yoshikawa Chemicals Singapore (Pte) Ltd ("YChem") at a cost of about US$80m.[180] YChem encountered financial difficulties in the early 1990s and was put under judicial management on 10 January 1992. NKI then purchased the Assets and the Property from YChem at S$20m to $21m (the "Purchase Price") in or around September 1994.

135 In cross-examination, Mr Mendoza conceded that he should have taken into account the Purchase Price in the valuation of the 1st Report. He acknowledged that if he had done so, the fair market value in the 1st Report would be lower:[181]

> Q: So you can read paragraphs 9 and 10 [of Mr Leow's affidavit of evidence-in-chief]. My question doesn't change. The fact that he bought the machinery at 20 million, does that have any bearing on the fair market value when you do your report?
>
> …
>
> Q: Now that you know what were the original costs for NKI, would your fair market value change?
>
> A: That this report -- I were [*sic*] asked to revalue it at the current level, at the current date, is that the question?
>
> Q: No. When you prepared your report, you said you did not know and you did not ask what was the original cost to NKI when they bought the plant and machinery. So I'm telling you they bought the plant and machinery in 1994 for 20 million to 21 million; right? The facts are there at paragraphs 7, 8 and 9 [of Mr Leow's affidavit of evidence-in-chief].

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180 DLTC at paras 7 to 9.

181 Transcript (8 October 2021) at p 103 line 20 to p 106 line 3.

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> So my question is if you had known the information then, would your fair market value be different?
>
> A: Yes, it would have been different.
>
> …
>
> Q: Would you be able to give an estimate whether this fair market value would be much lower than 26 million?
>
> Court: Mr Mario?
>
> A: Yes.
>
> Court: What is troubling you?
>
> A: After the purchase -- after the purchase period in 1992, there have -- of course there may have been some improvements or upgrading done. I would have put it on not really on the lower side, but it would be about -- lower than 26. Probably about 20 million.
>
> Court: 20 million Sing dollars or US dollars?
>
> A: US dollars.

From the above, it appears that Mr Mendoza acknowledged at the trial that if he had accounted for the Purchase Price of S$20m, he would have derived a fair market value of NKI's US$20m in the 1st Report instead of US$26,899,000. Since the forced sale value is a percentage of the fair market value (see [96] above), a lower fair market value would entail a lower forced sale value.

136 I place little weight on what appears to be a concession on Mr Mendoza's part above. Mr Mendoza's calculation of the fair market value in the 1st Report was in full compliance with the cost approach, which applies a percentage to the CRN of the Assets, following the DRT. The plaintiff suggests that the fair market value, not the CRN, should account for the Purchase Price of the plant and machinery. However, since the cost approach is premised on the CRN, the purchase price does *not* feature in this methodology.

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Hence, I find that Mr Mendoza was mistaken and confused when he made the alleged concession.

137 Mr Chay opined that the defendant's use of the cost approach was acceptable and in-line with industry standards and that the defendant's computations were reasonable and acceptable.[182] I see no reason to deviate from Mr Chay's expert opinion.

138 Hence, the defendant has not breached its duty to take care in the provision of a reasonable estimate of the forced sale value in the 1st Report when it did not consider NKI's Purchase Price of the Assets.

(C) DID THE DEFENDANT BREACH ITS DUTY OF CARE BY FAILING TO EXCLUDE THE LEASED ASSETS FROM THIRD PARTIES IN ITS VALUATION OF THE ASSETS IN THE 1ST REPORT?

139 Mr Khan, the plaintiff's expert, stated at para 32 of his report that, "during our inspection, we were informed by the General Manager of Operations, Mr Tan Tee Hai, that some assets (namely the cooling towers, chillers and compressed air system) were leased assets and/or belonging to third parties".[183] He went on to state that the defendant, however, failed to exclude these leased assets belonging to third parties in its valuation.[184] This would be in breach of para 90.3 of the IVS, which states as follows:[185]

> Items of plant and equipment that are subject to operating leases are the property of third parties and are therefore not

182 CY at pp 18 to 21 paras 5.2 to 5.11.

183 Affidavit of Evidence-in-Chief of Robert Khan ("RK") at p 13 of Expert Report para 32.

184 RK at p 13 of Expert Report paras 32 to 34.

185 RK at p 13 of Expert Report para 33.

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> included in a *valuation* of the *assets* of the lessee, subject to the lease meeting certain conditions. However, such *assets may* need to be recorded as their presence *may* impact on the *value* of owned *assets* used in association. In any event, prior to undertaking a *valuation*, the *valuer should* establish (in conjunction with *Client* and/or advisors) whether *assets* are subject to operating lease, finance lease or loan, or other secured lending. The conclusion on this regard and wider *purpose of the valuation* will then dictate the appropriate basis and valuation methodology.
>
> [emphasis in original]

I note parenthetically that this is likely a reference to an older version of the IVS since Mr Khan admitted at the trial that he had relied on the version from the year 2000 instead of the year 2017 (see [186] below).[186]

140 The defendant explained why it did not exclude leased assets from third parties when it did the valuation of the Assets of NKI. Mr Chan said the defendant was asked by NKI to value the plant and machinery and it was "not told which is leased and which one is not".[187]

141 Mr Chan came to know of the leased assets from Mr Khan's expert report and he was asked what the impact on the defendant's valuation would have been if the defendant had known of the leased assets. Mr Chan said he would have adjusted the fair market value and the forced sale value in the 1st Report downward by about 10–15%.[188] The fair market value and the forced sale value in the 1st Report are US$26,899,000 and US$12,130,000 respectively (see [18] above). If these figures are less by 10–15%, the fair market value would have been US$24,209,100 (less 10% of US$26,899,000) to US$22,864,150

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186 Transcript (22 September 2021) at p 117 line 18 to p 120 line 8; RK at p 34 para 38.

187 Transcript (6 October 2021) at p 62 lines 23 to 24.

188 Transcript (6 October 2021) at p 63 line 16 to p 64 line 4.

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(less 15% of US$26,899,000) and the forced sale price would have been US$10,917,000 (less 10% of US$12,130,000) to US$10,310,500 (less 15% of US$12,130,000).

142 The above calculations show that the leased assets would make a difference in the valuations in the 1st Report.

143 However, the evidence shows that the defendant was informed that all the Assets were not leased. Mr Mendoza testified during cross-examination that he was informed during the site inspection of NKI's premises that all of the Assets were in NKI's ownership. I reproduce the material portion as follows:[189]

Mr Parwani:	Mario, you are saying that when you did the inspection, you didn't check whether the land and the building belonged to NKI or it was rented or anything.
A:	Because we were actually just focusing on plant and machinery, so we didn't bother to ask about the property aspect.
Q:	Did you even ask whether any of the plant and machinery was leased out?
A:	*Yeah*, we -- we -- I remember, *we enquired about that but everything that they pointed to us, they said is it's their ownership. That's why we put in the -- in the covering letter for our report tendered that these are properties exhibited to us as that or for NKI.*

[emphasis added]

As stated above, Mr Mendoza explained that because NKI had indicated that all its Assets were in its ownership, the defendant put in the cover letter of the 1st Report that the assets inspected were exhibited to the defendant as that of NKI's.

189 Transcript (7 October 2021) at p 58 lines 10 to 22.

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This is supported by the documentary evidence, as shown by the material extract of the 1st Report here:[190]

> Pursuant to your instructions, we [*ie*, the defendant] have inspected certain assets *exhibited to us as that of NK Ingredients Pte Ltd*, in order to advise you of our opinion of the Fair Market Value (In Continued Use) and Forced Sale Value as at 13 March 2017.
>
> [emphasis added]

144 I find Mr Mendoza's explanation satisfactory. His account of NKI's conduct is consistent with NKI's representation to *the plaintiff* that the Assets were "unencumbered". In an email dated 1 February 2018, Mr Metzger stated to a representative of the plaintiff and Mr Choo as follows:[191]

> All,
>
> I wanted to make sure we have a common understanding of NKI's funding needs. NKI already has a commitment for a factoring facility in the amount of USD1.8 million.
>
> NKI needs a tranche of capital to provide liquidity for raw material purchases and provide a cushion while revenues are increased and cash flow turns positive.
>
> The capital/loan can likely be provided under 211e financing although the collateral for the loan, Tuas plant and equipment, is *unencumbered*.
>
> …
>
> [emphasis added]

145 In light of the strong corroborating evidence in favour of the defendant, I find that the defendant was misled by NKI into believing that all the Assets belonged to NKI. Hence, the defendant's omission to account for the leased

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190 AB at p 773; DCS at para 136.

191 AB at p 258.

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assets did not breach para 90.3 of the IVS. The defendant therefore did not breach its duty of care to the plaintiff in this regard.

146 Hence, I find that the defendant did not breach its duty to take care in providing a reasonable estimate of the fair market value and forced sale value in the 1st Report.

147 For completeness, I shall address the significance of the rest of the Mr Khan's expert report.

148 Mr Khan was asked to comment on the defendant's 1st Report and the 2nd Report as to whether these Two Reports were prepared in accordance with practices which are regarded as professionally competent and acceptable by industry standards.[192] Mr Khan critiqued the Two Reports. For the 1st Report, Mr Khan stated that there were mathematical errors in the calculation of the defendant's fair market value of US$26,899,000 and the forced sale value of US$12,130,000; however, he did not propose a different fair market value and forced sale value or forced liquidation value.[193] Instead, the emphasis of Mr Khan's opinion was that the forced sale value was not strictly a basis of value and that the defendant should have worked on the worst-case scenario for the plaintiff, the lender, which would have been the scrap value.[194] In this regard, Mr Khan's opinion is flawed as it was NKI, the defendant's client, who requested for the forced sale value and not the scrap value of the Assets. Since the plaintiff was not the defendant's client, the defendant would not have valued the Assets on the basis of the scrap value or the worst-case scenario, when the

192 RK at p 1 of Expert Report para 2.

193 RK at pp 17 to 18 of Expert Report.

194 RK at p 7 of Expert Report para 18.

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instruction from NKI, the paying client, was to value the Assets on the basis of a forced sale scenario.

149 Mr Khan did not express his expert opinion as to what the fair market value and the forced sale value in the 1st Report should have been. This may suggest that he found the fair market value of US$26,899,000 and the forced sale value of US$12,130,000 to be reasonable. Moreover, in using the market data approach to ascertain the scrap value, Mr Khan tapped on his personal contacts to invite three contractors to provide price quotations.[195] Only two contractors quoted S$1m to S$1.5m for the scrap value of the Assets, excluding the decommissioning cost.[196] Since the data was gathered from Mr Khan's own contacts and not from offers in the open market, the two quotations from Mr Khan's own contacts lack objectivity and are insufficient to constitute market data.

(3) Conclusion on breach of duty of care

150 For the above reasons, the defendant did not breach its duty to the plaintiff to take care in providing a reasonable estimate of the fair market value and the forced sale value of the Assets.

195 Transcript (22 September 2021) at p 38 lines 15 to 19.

196 RK at pp 21 to 23 of Expert Report.

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Causation

(1) The applicable law

151 As regards the law on causation in the tort of negligence, the Court of Appeal in *Sunny Metal & Engineering Pte Ltd v Ng Khim Ming Eric* [2007] 3 SLR(R) 782 ("*Sunny Metal*") has provided a succinct summary (at [52]–[55]):

> 52 … causation … is in turn made up of causation in fact and causation in law. Causation in fact is concerned with the question of whether the relation between the defendant's breach of duty and the claimant's damage is one of cause and effect in accordance with scientific or objective notions of physical sequence. It is concerned with establishing the *physical connection* between the defendant's wrong and the claimant's damage. The universally accepted test in this regard is the "but for" test, which we will elaborate on later.
>
> 53 However, satisfying the 'but for' test is by no means a sufficient condition because the all important "causation in law" test must be satisfied as well. The reason for this is that to adopt the 'but for' test without limit would lead to absurd results. To illustrate the potential absurdity, we refer to the example provided in *McGregor on Damages* ([51] *supra*) at para 6-008. Consider that a mother gives birth to a son who, when he grows up, commits murder. Adopting the question of factual causation, it is clear that if the mother had not decided to have a child in the first place, the murder would never have happened; the 'but for' test is amply satisfied. She is thus a cause in fact of the murder by virtue of a physical sequence that is unbroken by scientific and objective notions of logic. Yet, it is equally true that the law regards the mother as bearing no responsibility for the murder on account of lack of negligence or other tortious activity on her part; it is the *law* which removes her from being a cause of the murder. This is causation *in law*. The rationale is to prevent indeterminate liability resulting from causation in fact alone. This concern is most aptly summarised in *Prosser and Keeton on the Law of Torts* (West Group, 5th Ed, 1984) at p 266, which we gratefully adopt:
>
> > It should be quite obvious that, once events are set in motion, there is, in terms of causation alone, no place to stop. The event without millions of causes is simply inconceivable; and the mere fact of causation, as distinguished from the nature and degree of the causal

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> connection, can provide no clue of any kind to singling out those which are to be held legally responsible.
>
> 54 As illustrated by the example just discussed, sometimes, the defendant's conduct sets off a sequence of events, each one of which is a necessary link in the causal chain between the initial wrong and the claimant's damage. In such cases, the court has to determine whether any of the intervening events can be said to be so significant causally as to break the causal link to be regarded as a *novus actus interveniens*. There is usually no dispute as to what in fact happened to cause the claimant's damage; rather the question is which event will be treated as *the cause* for the purpose of attributing legal responsibility. The court therefore has to decide whether the defendant's wrongful conduct constituted the 'legal cause' of the damage. This recognises that causes assume significance to the extent that they assist the court in deciding how best to *attribute responsibility* for the claimant's damage: see *M'Lean v Bell* (1932) 48 TLR 467 at 469. In effect, as Andrews J quite candidly put it in *Palsgraf v The Long Island Railroad Company* 248 NY 339 (1928) at 352:
>
> > [B]ecause of convenience, of public policy, of a rough sense of justice, the law arbitrarily declines to trace a series of events beyond a certain point. This is not logic. It is practical politics.
>
> 55 These principles were recognised recently by this court in *Jet Holding Ltd v Cooper Cameron (Singapore) Pte Ltd* [2006] 3 SLR(R) 769, where it said (at [108]): 'Indeed, where it can be established that a *novus actus interveniens* has broken the chain of causation, the defendant will be freed from liability.' See also *Salcon Ltd v United Cement Pte Ltd* [2004] 4 SLR(R) 353; *TV Media Pte Ltd v De Cruz Andrea Heidi* [2004] 3 SLR(R) 543; *Low Hua Kin v Kumagai-Zenecon Construction Pte Ltd* [2000] 2 SLR(R) 689; and *Saatchi & Saatchi Pte Ltd v Tan Hun Ling* [2006] 1 SLR(R) 670 (at [25] and [26]), in which the High Court found that there was no break in the chain of causation when the event relied on was an inanimate act or the omission of a third party which formed one of the links between the negligent conduct and the damage complained of.
>
> [emphasis in original]

152 Regarding the "but for" test, the court in *Sunny Metal* explained as follows (at [71]–[73]):

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71 In the traditional 'but for' test, the claimant bears the burden of proving cause in fact and is only entitled to succeed if he or she proves on the balance of probabilities that, but for the defendant's wrongful conduct, he or she would not have been injured. If, on the balance of probabilities, the loss would have been suffered even if the defendant had not acted negligently, the claimant is not entitled to recover. This is well established in local case law: see *Chong Yeo and Partners v Guan Ming Hardware and Engineering Pte Ltd* [1997] 2 SLR(R) 30 at [12]; *Tan Hun Hoe v Harte Denis Mathew* [2001] 3 SLR(R) 414 ("*Tan Hun Hoe*") at [47]; *Yeo Peng Hock Henry* ([68] *supra*) at [19]; *The Cherry* ([63] *supra*) at [67]; and *Chew Swee Hiang v AG* [1990] 2 SLR(R) 215. Indeed, Christopher Lau JC stated in *Guan Ming Hardware & Engineering Pte Ltd v Chong Yeo & Partners* [1996] 2 SLR(R) 382 at [99] that:

> … [The lack of causation] is a direct attack on the plaintiff's case, for it indicates that the plaintiff's case is defective in one of its elements. From this it must follow that it must be part of the plaintiff's assertions that there is sufficient causation, and therefore the burden must lie on him.

However, as alluded to above, this is problematic in certain circumstances, where it might be impossible for the claimant to prove cause in fact.

72 In *Cook v Lewis* [1951] SCR 830, the Canadian Supreme Court shifted the burden of disproving cause in fact to the defendant. In that case, two hunters simultaneously discharged their rifles and the claimant was injured. The jury determined that the claimant was shot by one of the defendants, but did not determine which one. On the basis of the reasoning in a similar American case (*Summers v Tice* 199 P 2d 1 (1948)), Cartwright J, for the majority, held that if the jury was of the opinion that both defendants were negligent in shooting towards the claimant but was unable to decide which one, both should be held liable. The burden lay on them to prove otherwise.

73 In other cases, Canadian, English and Australian courts have held that the 'but for' test should be applied flexibly and with common sense. Thus, although the burden of proving cause in fact is not reversed and no actual presumption of causation is created, an inference of causation may be drawn even in the absence of affirmative scientific evidence of causation, or where the claimant's evidence of causation is minimal: see, for example, *Wilsher v Essex Area Health Authority* [1988] AC 1074 and *March v E & M H Stramare Pty Limited* (1991) 171 CLR 506. In fact, this court in *United Project*

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> *Consultants Pte Ltd v Leong Kwok Onn* [2005] 4 SLR(R) 214 appeared to apply a commonsensical approach to causation in place of the 'but for' test.

(2) My findings

(A) THE PLAINTIFF HAS TO PROVE CAUSATION IN A BIFURCATED TRIAL

153 I first pause to address a preliminary but important issue.

154 As I have stated above, the trial for the present matter was bifurcated by the parties (see [9] above). The plaintiff submits that "[a]s the trial of this matter has been bifurcated, the Court is not required to make a finding of the actual losses that the [plaintiff] suffered in either of the two scenarios [*ie*, in respect of the 1st Report or the 2nd Report]".[197] In other words, the plaintiff claims that the bifurcation of the trial obviated its need to prove causation.

155 In *Tan Woo Thian v PricewaterhouseCoopers Advisory Services Pte Ltd* [2021] 1 SLR 1116, the Court of Appeal dealt with precisely the same situation as the one at hand. The Court of Appeal held as follows (at [6]–[8]):

> 6 This appeal may be dealt with swiftly even though we think a number of difficult issues arise in connection with the question of whether a duty of care arises. That is because even assuming, for the sake of argument, that a duty of care exists, and that the respondent had breached that duty, the appeal inevitably fails at the hurdle of causation. *A cause of action in negligence is inchoate absent evidence of actual loss*. This is *distinct from the question of what the precise quantum of such loss is. The appellant's sole argument on causation*, as set out in his Appellant's Case at [94], *was that the trial was bifurcated between liability and quantum, and that the case should go for assessment of damages if breach of a duty of care was made out*.
>
> 7 The appellant's contention in this regard is, with respect, *incorrect*. It *wrongly conflates the separate questions of*

197 PCS at para 9.

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> *whether the appellant is able to establish that the respondent's breach has caused loss, with the quantum of that loss*. In order to even make out the tort of negligence, it must first be shown that the defendant's breach has in fact *caused* loss. As observed in *Winfield & Jolowicz on Tort* (Sweet & Maxwell, 19th Ed, 2014) at para 7-002:
>
> > Even if the claimant proves every other element in tortious liability he will lose the action or, in the case of torts actionable per se, normally fail to recover more than nominal damages, if what the defendant did is not treated as a legal cause of his loss. ***This issue is logically distinct from and anterior to the question of measure of damages which will be dealt with at a later stage***. Thus, in one of the leading cases, the issue was whether the defendants were liable for fire damage to a wharf which arose from a rather unusual chain of events after the defendants spilled oil into a harbour. If they had been liable (in fact they were not) the prima facie measure of damages would have been the cost of repairing the wharf plus consequential losses like loss of business … …
>
> 8 It follows from this that if, and to the extent, the trial had been bifurcated between liability and quantum, then the plaintiff would *not* have been obliged to adduce evidence at the liability stage of the trial as to the *quantification of the losses and injuries* he claims he suffered. But, he would *nonetheless have been obliged* to show that he did, in fact, *suffer one or more types of loss that was causally connected to the alleged breach*.
>
> [emphasis in original omitted; emphasis added in italics and bold italics]

Hence, in a bifurcated trial, the plaintiff nevertheless has to prove the element of causation for his claim in negligence although it does not have to ascertain the extent of the losses.

156 The plaintiff's submission on this point is therefore misconceived.

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(B) THE APPLICATION OF THE "BUT FOR" TEST

157 Applying the traditional "but for" test, the issue here is whether the plaintiff would have granted the Loan had the defendant provided NKI with a reasonable estimate of the forced sale value in the 1st Report.

158 In the 1st Report, the defendant applied a percentage of approximately 45.1% to the fair market value to derive the forced sale value. This can be seen by working backwards (US$12,130,000 ÷ US$26,899,000 = 0.451). Mr Mendoza also testified that the defendant's usual practice is to apply a percentage of 20% to 75% to the fair market value to derive the forced sale value (see [96] above).[198]

159 As explained above (at [135]), the plaintiff relies on the defendant's alleged concession that the fair market value in the 1st Report ought to have been US$20m if it had accounted for the Purchase Price of S$20m. Yet, using this figure of US$20m and the lowest percentage that the defendant would have employed under the DRT (see [97] and [135] above), *ie*, 20%, this would yield a forced sale value of US$4m. Next, taking the highest discount of 15% to account for the value of the leased assets (see [141] above), this would yield a forced sale value of US$3.4m. A forced sale value of US$3.4m is still much higher than the Loan amount, which is S$1.6m. Hence, even if the correct quantum of the forced sale should have been US$4m or US$3.4m, I find that the plaintiff would have still granted the Loan to NKI.

160 Furthermore, the evidence clearly shows that the value of the Assets was not the plaintiff's sole consideration in granting the Loan.

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198 Transcript (7 October 2021) at p 39 lines 18 to 21.

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161 In the plaintiff's Credit Note, the rationale for the Loan was stated as follows:[199]

> 1) Syndicated loan will receive super-priority in accordance with s211E of the Companies Act (Rescue financing);
>
> 2) Potential & further growth for the lanolin business as the borrower is only operating at 20% to 30% of their factory resources (original cost of the factory at USD 100 mill);
>
> 3) Good business profile & personal estimated [net worth] of PG (SGD 6 mill);
>
> 4) Fully secured by company's machinery & equipment valued at USD 27 mill, FSV USD 12 mill & Mr David Leow & family personal residential properties;

162 From the above, it is immediately clear that the plaintiff's Credit Committee had assessed NKI to have good business prospects and felt that the Loan would be safely secured.[200] I surmise that the plaintiff's representatives were impressed with the Assets after the site visit of NKI's premises on 23 January 2018. The plaintiff saw the Assets spread over NKI's premises, which was a huge property that was about the size of four to five football fields.[201] At the trial, Mr Choo testified as follows:[202]

> Court: Mr Choo, would you like to explain to me -- I'm still look[ing] at the credit note. I'm looking at this rationale number 2 which states:
>
> 'Potential & further growth for the lanolin business as the borrower is only operating at 20% to 30% of their factory resources …'

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199 AB at p 676.

200 DCS at paras 166 and 167.

201 Transcript (23 September 2021) at p 86 lines 10 to 11; Transcript (8 October 2021) at p 34 lines 23 to 25.

202 Transcript (21 September 2021) at p 124 line 25 to p 125 line 24.

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> What do you understand from this second point?
>
> A: Well, it's an opinion from the executive team that there is potential for this business. However, it's operating at a very low capacity because of cashflow constraints. So the plant could actually go up very substantially in terms of production but it just didn't have the money. That was my understanding.
>
> …
>
> A: … My understanding from this sentence is that the executive team believes the plant, the business has a great deal of potential because it is currently operating at only 20, 30 per cent capacity. If it had the money, the funding to buy more wool grease and increase production, it could do a lot better than what it was doing at the time.

Thus, the evidence shows that the plaintiff cast its caution to the wind when it felt that their loan of S$1.6m was relatively small compared to the size of the Assets and thus felt that the Loan amount was safely secured.

163 The Credit Note also showed that the plaintiff had considered Mr Leow's property at D'Grove Villas at 8A Orange Grove Road and his daughter's property at The Ladyhill at 1 Ladyhill Road (see [20] above) as additional security in granting the Loan. Indeed, this is supported by Mr Choo's e-mail dated 1 February 2018 wherein the Credit Committee granted approval of the Loan:[203]

> Loan of up to $1.2 million to NKI against debenture on all assets – including receivables, etc and not just plant and equipment – as well as the *personal guarantee of David Leow* is *approved*. …

[203] AB at p 264.

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In other words, the Assets were not the only security that the plaintiff considered.

164 Moreover, Mr Leow testified that he knew Mr Choo, who was the chairman of the plaintiff's Credit Committee, before the Loan was approved and that Mr Choo was instrumental in approving the loan of S$1.6m to NKI:[204]

Mr Parwani:	Let's start with ground zero. How was Choo instrumental in this connection in this loan?
Court:	First, was Mr Choo instrumental in this loan? 'This loan' refers to the loan with [the plaintiff], the loan which you eventually got 1.6 million; right?
A:	Yes.
Court:	So was Mr Choo instrumental in this loan of 1.6 million?
A:	Yes, he was instrumental.
Mr Parwani:	Okay. Then can you tell this court, why do you say he was instrumental?
A:	Well, because I base it on my past relationship with him. And Mr Choo was instrumental in the sense that he helped push the deal through by also engaging another loan with me -- for me, with Goldbell.
Q:	So your understanding of 'instrumental' is because not only he got [the plaintiff] to give you this loan, he also arranged for Goldbell to give you the loan?
A:	Yes. Yes, precisely.

In the circumstances, Mr Choo's and Mr Leow's prior business relationship would have contributed to the plaintiff's granting of the Loan.

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204 Transcript (23 September 2021) at p 146 lines 3 to 22.

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165 Hence, the evidence shows that the forced sale value of the Assets in the 1st Report was not the plaintiff's sole consideration in granting the Loan. As a corollary, if the forced sale value had been lower than the Loan amount (especially by an insubstantial amount), it is plausible that the plaintiff would have still granted the Loan to NKI.

166 I, therefore, find that the plaintiff has not proven that but for the defendant's 1st Report, it would not have granted the Loan to NKI. Thus, the plaintiff has not established the element of causation on the balance of probabilities.

Conclusion for the 1st Report

167 I find that the defendant did owe a duty of care to the plaintiff when the 1st Report was prepared. The scope of this duty only extends to taking care in providing a reasonable estimate of the fair market value and forced sale value. The defendant was not obliged to provide the scrap value in the 1st Report as NKI did not request to include it. The defendant also did not equate the scrap value of the Assets with the forced sale value.

168 I also find that the defendant did not breach the duty of care in its computation of the fair market value and forced sale value. The plaintiff has not proven the defendant's computation errors meant that the defendant had not attained the requisite standard of care of an ordinary competent valuer. Also, since the defendant complied with the industry approved cost approach of the valuation, the defendant was not obliged to consider NKI's purchase price of the plant and machinery. Its omission to do so therefore did not amount to a breach of its duty of care. The defendant also did not breach its duty of care by

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not accounting for the leased assets in its valuation of the Assets, since it was informed by NKI that NKI had owned all of the Assets.

169 Nevertheless, even if the defendant had committed such a breach, this breach would not have caused the plaintiff's loss as the plaintiff would have granted the Loan to NKI in any case. I also pause to make an important observation regarding the 1st Report. The plaintiff's expert, Mr Khan, did not indicate what should have been the correct fair market value and forced sale value or forced liquidation value. The implication, therefore, is that the defendant's fair market value and the forced sale value were satisfactory.

170 Hence, I find that the plaintiff has failed to prove on a balance of probabilities that the defendant was negligent in its preparation of the 1st Report.

171 I shall now deal with the 2nd Report.

The 2nd Report

172 The plaintiff claims that as a result of the defendant's negligent overstatement of the forced sale value and the scrap value of the Assets in the 2nd Report, the plaintiff did not appoint its own receiver and manager prior to the appointment of NKI's judicial manager on 20 August 2019. The plaintiff contends that its "current loss would have been avoided or at least minimised" if the defendant was not negligent.[205]

[205] SOC at para 36.

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173 I highlight at the outset that the plaintiff's pleadings and the evidence adduced did not disclose the loss suffered by the plaintiff arising from the 2nd Report other than a missed opportunity to appoint a receiver and manager. However, whether the plaintiff could succeed in the appointment of its own receiver and manager is a discretion of the court that dealt with the financial crisis of NKI as there were other creditors going after NKI.

Duty of care

174 I have stated above (at [47]–[48]) that the applicable law as regards finding a duty of care is the *Spandeck* test. This involves the threshold issue of factual foreseeability and the two-stage test of legal proximity and policy considerations.

175 In relation to the 1st Report, I have found that the defendant owed a duty of care to the plaintiff to provide a reasonable estimate of the fair market value and forced sale value in the 1st Report. The scope of this duty is circumscribed by NKI's instructions to the defendant.

176 To recapitulate, in the 2nd Report, the defendant valued NKI's Assets as follows (see [28] above):[206]

(a) Replacement cost, new: US$84,605,000;

(b) Fair market value: US$27,747,000;

(c) Forced sale value: US$9,774,000; and

(d) Scrap value: US$4,003,000.

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206 TYHB at para 39.

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177 The same analysis under the *Spandeck* test for the 1st Report would apply here as well.

178 It is factually foreseeable that a failure on the defendant's part to prepare a true and fair report of the forced sale value and scrap value of NKI's Assets in the 2nd Report could result in the plaintiff's loss. Hence, I find that the defendant ought to have foreseen that the plaintiff would suffer damage if the defendant had been careless in its preparation of the 2nd Report.

179 Just like the case of the 1st Report (see [116] above), the defendant knew that creditors such as the plaintiff would rely on the 2nd Report. Notwithstanding the indication in the 2nd Report that it was for "corporate management purpose" (see [28] above), the defendant knew that NKI's creditors would be relying on the 2nd Report. There were various e-mails in May 2019 regarding the 2nd Report between the defendant and NKI, in which a representative of KordaMentha was copied.[207] KordaMentha was engaged by NKI to assist in the corporate restructuring arising from its financial distress.[208] Indeed, as Mr Leow testified, Kordamentha needed the 2nd Report in order to comply with a court order in the judicial management proceedings, so that NKI's creditors could be assured of the Assets' value.[209] In one e-mail dated 13 May 2019, Mr Mendoza referred to one Mr Oh Jia Rong ("Mr Oh") from KordaMentha as NKI's "adviser". I set out this email below:[210]

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207 AB pp 970 to 974.

208 POS at para 54.

209 DLTC at para 47.

210 AB at p 974.

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> **From:** Mario Roberto Mendoza <xxx@hotmail.com>
>
> **Sent:** Monday, May 13, 2019 3:31pm
>
> **To:** Cindy <accounts@nkigrendients.com>
>
> **Cc:** Jia Rong Oh <JOh@kordamentha.com>
>
> **Subject:** Fw: Proposal 2019-0127 (ME)
>
> Good afternoon Ms. Cindy. Sorry to have missed out your adviser in the loop. I'm resending again.
>
> Best regards,
>
> Roberto

Prior to this email, the correspondence showed that NKI wanted the 2nd Report before 17 May 2019. On 16 May 2019, Mr Mendoza, in his email to NKI (a) attached the initial 2nd Report to NKI for its review and approval and (b) copied Mr Oh on this email.[211] The totality of the above evidence therefore shows that Mr Mendoza knew of KordaMentha's role as NKI's adviser for the latter's corporate restructuring. In the circumstances, the defendant must have known *beforehand* about NKI's financial distress and the moratorium that was then in force (see [24]–[27] above). The moratorium was in force because NKI intended to organize a scheme of arrangement with the creditors (see [26]–[27] above). Therefore, it follows that the defendant must also have known that third parties such as NKI's creditors would rely on the 2nd Report. Furthermore, as the defendant's involvement in the 1st Report was relatively recent, the defendant would have known that since NKI was looking for lenders and investors, such parties would now be concerned creditors during this period of corporate restructuring.

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211 AB at p 970.

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180 I, therefore, find that the defendant had voluntarily assumed responsibility to take care in providing reasonable valuations in the 2nd Report. The defendant also knew of the plaintiff's likely reliance on this report, and the latter could reasonably do so since it was a creditor. Hence, I find that there is legal proximity between the plaintiff and the defendant. This duty of care extends to four values in the 2nd Report: CRN, fair market value, forced sale value and scrap value. The scrap value would have been the most important consideration to the plaintiff.

181 I pause to state that, for the same reasons set out above (at [179]) and similar to the case of the 1st Report, the same Limiting Conditions (*viz*, cll 3, 8 and 10) should not apply to negate a finding that the defendant owed a duty of care in respect of the 2nd Report. Since the defendant was clearly aware that a specific class of persons, *ie*, lenders and investors of NKI, which includes the plaintiff, would rely on the 2nd Report, it is not reasonable for the defendant to rely on the Limiting Conditions to exclude or limit its liability from negligence, if successfully proven. I reiterate that even if the Limiting Conditions are common and standard terms used by professional valuers, that is immaterial.

182 Finally, there are similarly no policy considerations to negate the existence of such a duty of care. Conversely, because valuers ought to be responsible for providing their professional opinion, there is a policy consideration in favour of finding such a duty of care (see [116] above).

183 Hence, I find that the defendant owes the plaintiff a duty to take care in providing reasonable valuations of the CRN, the fair market value, the forced sale value and the scrap value in the 2nd Report.

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Breach of duty of care

184 I have set out the applicable law as regards breach of duty of care above (at [118]–[119]). To recapitulate, a valuer has to "attain the requisite standard of care of an ordinary competent valuer".

(1) Scrap value

185 The plaintiff relies on the RK Report to show that the defendant had overstated the *scrap* value of the Assets amounting to US$4,003,000 in the 2nd Report (see [28] above). The RK Report states that the *salvage* value of the Assets was only S$1m to S$1.5m (see [30] above). The RK Report purports to highlight several deficiencies in the 2nd Report.

186 According to Mr Khan, the salvage value actually referred to a range of values pertaining to the appraised assets, and the scrap value refers to the lower end of this range.[212] Indeed, the IVS states the following at para 6.8.1 (see [30] above): "[a]t the other extreme, *Salvage* Value may represent ***scrap value*** or the value for recycling" [emphasis in original in italics; emphasis added in bold italics]. Hence, the scrap value refers to the *lowest* salvage value. In this regard, Mr Khan claimed that "scrap value" is not a basis of valuation under the IVS.[213] However, Mr Khan admitted at the trial that he had relied on an older version of the IVS, *ie*, the version from the year 2000 instead of the year 2017.[214] Nevertheless, in my view, since NKI requested for the scrap value of the Assets, the defendant did not breach its duty to provide such a value to NKI. As I have

212 Transcript (22 September 2021) at p 15 line 17 to p 16 line 1; p 17 lines 6 to 16.

213 Transcript (22 September 2021) at p 15 line 17 to p 16 line 1; RK at p 8 of Expert Report para 22.

214 Transcript (22 September 2021) at p 117 line 18 to p 120 line 8; RK at p 34 para 38.

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noted above (at [85]), para 20.2 of the IVS states that "compliance with IVS may require the valuer to use a basis of value that is not defined or mentioned in the IVS".

187 Next, the plaintiff relies on Mr Khan's expert report to submit that the defendant's calculation of the scrap value was inaccurate. There are two points to note from this report.

188 First, in contrast to the cost approach adopted by the defendant in the 2nd Report, Mr Khan's expert report adopted the market approach.[215] I have set out these two approaches above (at [122]–[123]).

189 As I have explained above in the context of the 1st Report, according to Mr Chay and Mr Mendoza, both are acceptable approaches to the valuation of the Assets (see [121]–[123] above).[216]. Hence, in my view, Mr Khan's market data approach is simply another approach to ascertain the scrap value. This does not mean that the defendant's cost approach is wrong. This choice between accepted approaches was up to the valuer's judgment and discretion. Hence, the defendant did not breach its duty of care when it chose to adopt the cost approach in ascertaining the scrap value.

190 Second, Mr Khan's expert report claimed that the defendant should not have determined the scrap value of the Assets by using a percentage of the CRN and certain other costs factors should have been deducted. Mr Khan's expert report states as follows:[217]

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215 RK at p 20 of Expert Report para 43.

216 CY at p 18 paras 5.1 to 5.3; MM at p 3 paras 12 to 14.

217 RK at p 10 of Expert Report paras 25 and 40 to 41.

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> 25. It is erroneous for the Defendant in determining the Scrap Value for its material content using a percentage from the Replacement Cost, New. Even when the "foundry gate prices" (prevailing scrap metal prices) and the "standing tonnage" (actual weight) of the plant were established, in the case of this plant, the following cost factors would have to be deducted to arrive at the 'net worth' of the material content:
>
> (a) cost of labour, equipment hire & miscellaneous costs to dismantle and remove the material content from its current premises;
>
> (b) costs for flushing, removal & disposal of the leftover waste chemical / oil in relation to health and safety standards; and
>
> (c) costs of building structure / civil works reinstatement to make good or restore the premises to its rightful state of condition.
>
> …
>
> 40. In order to ascertain the Scrap Value of the Subject Plant, the valuer has to calculate and compute the actual weight / tonnage of each individual asset. To do that, one needs to find out the actual material content of various assets by relying on actual engineering drawings with construction specifications or taking actual measurements (i.e., length, width, height and thickness), determine the type of metal material and even weighing them where feasible.
>
> 41. The next step is to multiply the weight with the prevailing scrap metal price. To ascertain the actual weight and for an accurate measurement, ideally, the assets have to be weighed on a weighbridge or weighing scale. However, the bulk of the assets in the Subject Plant are not standalone, individual machines. The plant involved an assemblage of various types of machinery & equipment connected with a network of pipelines.

As can be seen from the above, Mr Khan claimed that: (a) decommissioning costs should have been accounted for in the scrap value; and (b) the defendant should have calculated the scrap value of the Assets by multiplying the actual weight of each individual asset by its price (the "tonnage approach"). With

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regard to (a), I shall deal with the issue of decommissioning costs below (see [196]). With regard to (b), it is not clear whether the tonnage approach is a third approach, or a subset of either the cost or market approaches. I note that the defendant understood the plaintiff's case to be that the tonnage approach would comply with the market approach.[218] If that is the case, the analysis above with regard to the market approach would apply to the tonnage approach. Nevertheless, for the avoidance of doubt, I shall consider the merits of the plaintiff's case regarding the tonnage approach separately as well.

191 As regards the tonnage approach, the plaintiff notes that the defendant was able to calculate the weight of the Assets. In response to a query by the plaintiff in February 2020, the defendant stated that the *estimated* weight of the Assets was 4,000 tonnes.[219] The plaintiff submits that the defendant ought to have used the tonnage method to calculate the scrap value. The plaintiff further submits that, if the defendant had used the weight of 4,000 tonnes, the scrap value of the Assets would have been S$800,000 to S$1.2m, which would have been less than the Loan amount.[220]

192 The defendant explained why it did not use the tonnage method. According to Mr Chan, for an exact calculation of the Assets' weight, all the Assets have to be individually weighed. If this is not possible, the weight is estimated based on the dimensions of the Assets.[221] Mr Mendoza explained that because most of the Assets' dimensions furnished to the defendant were

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218 DCS at para 242.

219 PCS at para 132; MM at pp 444.

220 PCS at paras 134 and 155.

221 Transcript (5 October 2021) at p 48 lines 13 to 20.

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themselves estimates, he was not confident of getting an accurate estimate of the Assets' weight.[222] Moreover, Mr Khan's expert report states as follows:[223]

> 41. … To ascertain the actual weight and for an accurate measurement, ideally, the assets have to be weighed on a weighbridge or weighing scale. However, *the bulk of the assets in the Subject Plant are not standalone, individual machines*. The plant involved an *assemblage of various types of machinery & equipment connected with a network of pipelines*.
>
> 42. In this situation, it is *very challenging*, as a valuer, to estimate the Subject Plant's weight based on visual observation, *without the benefit of dismantling and weighing the items*. Whilst for an experienced dealer, a visual inspection of the Subject Plant will provide a rough estimate of the weightage.
>
> [emphasis added]

Evidently, on the plaintiff's own evidence, it would be difficult to dismantle and weigh each individual asset in order to compute an accurate total weight of the Assets.[224] Hence, the defendant had chosen a method which was, in its view, more accurate. In the circumstances, the defendant cannot be faulted for exercising its discretion in calculating the scrap value of the Assets by using a percentage of the CRN.

193 Moreover, in respect of both points above, the 2nd Report stated clearly that the defendant "[has] primarily used the *Cost Approach* to valuation" and *specifically* used the "Depreciated Replacement Cost" method. In the 2nd Report, the defendant stated as follows:[225]

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222 DCS at para 239; Transcript (8 October 2021) at p 21 line 7 to p 22 line 6.

223 RK at p 20 of Expert Report para 42.

224 DCS at para 241.

225 AB at pp 56 to 58.

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…

The term 'Scrap Value' as used herein, is an opinion of the amount, expressed in terms of money that could be realised for the assets if they were sold for their material content, not for productive use, as of a specified date.

…

We have personally inspected the assets on 2 May 2019, and have given consideration to:-

> Cost of replacement, new of the replaceable assets in accordance with current market prices for materials, labour, manufactured equipment, freight and other related charges, installation, contractor's overhead & profit and fees, but without provision for overtime or bonuses for labour and premiums for materials;
>
> Accrued depreciation as evidenced by the observed condition and present and prospective serviceability in comparison with new units of like kind;
>
> Extent, character and utility of the assets; and
>
> Cost of similar assets in the market.

VALUATION APPROACH/VALUE CONCLUSION

Wherever deemed appropriate, we have used two (2) of the generally accepted approaches which are mostly used in the valuation of plant and machinery, in valuing the assets.

The *Cost Approach* or what is referred to as the *Depreciated Replacement Cost (DRC)* method considers first to establish the *Replacement Cost, New*, or the cost to reproduce or replace in new condition the asset/s appraised, with the same or of equivalent utility, considering current prices for materials, labour, manufactured machinery & equipment, freight, installation and commissioning and start up (if any), and other attendant costs and related charges, as of the specified cut-off date of the valuation.

The net value arrived at after deducting from the *Replacement Cost, New* the considerations for the depreciation due to physical deterioration arising from utility, age, wear and tear, and where further adjustments are made either upward or downward as to the appraiser's judgement of his or her observed condition of the asset/s, obsolescence (if any) and other relevant contributory factors which would either adversely or positively affect the value of the assets at the time

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> of inspection, would be the accumulated depreciated value, or the *Market Value*.
>
> The *Market Data Approach* is used in valuing assets where there is an established market comparable. This considers prices for offers and/or transacted sales for similar assets, and where further adjustments (if deemed needed) are then imputed relative to these comparables, to reflect the condition and utility of the subject assets in order to arrive at the *Market Value*.
>
> Further discounts were then applied to the market value which in our opinion would fetch a *Forced Sale*.
>
> ***The Scrap Value was estimated as a percentage of the Cost of Replacement, New on a case to case basis***, as to the material content of the subject assets.
>
> ***For this exercise, we have primarily used the Cost Approach to valuation***, and the values were reported in US Dollars. For any conversion done, we have used the exchange rates prevailing as at 2 May 2019, the inspection date as well as the valuation cut-off date.
>
> [emphasis in original in italics and underline; emphasis added in bold italics]

From the above, the defendant had thoroughly explained the specific methodology that it used in deriving the scrap value for the 2nd Report and NKI had accepted it. I emphasise that the defendant expressly stated that it calculated the scrap value of the Assets using a percentage of the CRN. The plaintiff, having read the 2nd Report and acquiesced in the defendant's choice of valuation methodology, cannot now critique this choice. If the plaintiff did not agree with this choice, it should have commissioned its own valuation report.

194 In addition, there was nothing wrong in the defendant's execution of the cost approach by its deviation from the depreciation values in the DRT. According to the DRT, the guidelines suggest that for scrap value, the range of

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depreciation is 0 to 2.5% of the CRN. Mr Mendoza explained his reasons for using a higher range of 2% to 7% instead of the guidelines in the DRT:[226]

> Q: So would you agree that your reference of using 2 to 7 per cent is wrong?
>
> A: To me, the depreciation reference table is just a guideline. So it was in my judgment call to go beyond the percentage range for scrap, because of the wide variation in the material components that the most -- there are precious metals that are composing the components, like copper, stainless steel, aluminium, so it was on my judgment call that I would use a wider range which is below the rating for the poor condition. So I opted to use a wider range, that's why 0 to 7 per cent.

195 The defendant also did not have to apply a discount for the leased assets of NKI as it was not told about the leased assets. In any case if these leased assets had been excluded, Mr Chan estimated that the scrap value determined by the defendant should have been reduced by 10% to 15%. In the 2nd Report, the scrap value was US$4,003,000. Thus, the new scrap value should have been US$3,602,700 (less 10% of US$4,003,000) to US$3,402,550 (less 15% of US$4,003,000) if 10% to 15% is discounted from the original estimate of the scrap value. After taking into account these estimated discounts the scrap value is still far more than the Loan sum of S$1.6m. However, as I have explained above (at [139]–[146]), the defendant was informed that all the Assets belonged to NKI. Hence, the defendant did not breach its duty of care by not accounting for the value of the leased assets.

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226 Transcript (8 October 2021) at p 42 lines 12 to 23.

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196 However, the defendant did not account for the decommissioning costs for the scrap value. I note that the IVS states at paras 50.27 and 50.28 as follows:[227]

> ***Salvage Value/Disposal Cost***
>
> 50.27. The terminal value of some assets may have little or no relationship to the preceding cash flow. Examples of such assets include wasting assets such as a mine or an oil well.
>
> 50.28. In such cases, the terminal value is typically calculated as the salvage value of the asset, *less costs to dispose of the asset*. In circumstances where the costs exceed the salvage value, the terminal value is negative and referred to as a disposal cost or an asset retirement obligation.
>
> [emphasis in original omitted; emphasis added in italics]

As I have noted above (at [186]), the scrap value refers to the lowest end of the salvage value. Indeed, Mr Khan mentioned that, for the purpose of calculating the scrap value, the decommissioning costs must be taken into account. This is especially important for NKI's Assets as these Assets were used for processing chemicals and there would be toxic waste involved.[228] Mr Mendoza acknowledged that he ought to discount the decommissioning costs from the scrap value of the materials of the plant and machinery. He was asked to estimate the decommissioning costs for NKI's huge plant and machinery and he gave a "guestimate" of about S$200,000.[229]

197 Since the defendant failed to account for the decommissioning costs in calculating the scrap value where it ought to have done so, the defendant has

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227 AB at pp 1345 and 1346.

228 Transcript (22 September 2021) at p 30 line 25 to p 31 line 14.

229 Transcript (8 October 2021) at p 36 line 9.

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breached its duty to take care in providing a reasonable scrap value in the 2nd Report.

(2) Forced sale value and fair market value

198 In the 2nd Report, the forced sale value and the fair market value are US$9,774,000 and US$27,747,000 respectively. These figures also did not account for the value of the leased assets (see [139]–[141] above). If the value of the leased assets is factored in, there should have been a discount of 10% to 15%. The forced sale value without the leased assets would have been US$8,796,600 (less 10% from US$9,774,000) to US$8,307,900 (less 15% from US$9,774,000). The fair market value without the leased assets would have been US$24,972,300 (less 10% of from US$27,747,000) to US$23,584,950 (less 15% from US$27,747,000). After taking into account these estimated discounts the fair market value and the forced sale value are still far more than the Loan sum of S$1.6m.

199 Again, as I have explained above (at [139]–[146]), the defendant was informed that all the Assets belonged to NKI. Hence, the defendant did not breach its duty of care by not accounting for the value of the leased assets here as well.

(3) Conclusion on breach of duty of care

200 For the above reasons, I find that the defendant did not breach its duty to take care in providing a reasonable estimate of the scrap value, the forced sale value and the fair market value of the Assets in the 2nd Report.

201 I turn next to the issue of causation.

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Causation

202 The principles governing the issue of causation as enunciated above (at [151]–[152]) will also apply equally to the 2nd Report. I reiterate that although the trial had been bifurcated, the plaintiff nevertheless needs to prove the element of causation (see [153]–[156] above).

203 The plaintiff alleges that the forced sale value and the scrap value in the 2nd Report assured it that the value of the Loan was firmly secured.[230] Hence, the plaintiff claims that "but for" the overstated value of the scrap value in the 2nd Report, it would have applied to appoint its own receiver and manager prior to the appointment of the judicial manager on 20 August 2019.[231] Indeed, the plaintiff is entitled to do so under cl 15.1 of the Deed of Debenture, which states as follows:[232]

> **15. APPOINTMENT AND RIGHTS OF RECEIVERS**
>
> **15.1 Appointment of Receivers**
>
> (a) If the Borrower [*ie*, NKI] fails to pay, satisfy or discharge any part of the Secured Amounts or any other Default has occurred (whether or not the Lender [*ie*, the plaintiff] has taken possession of the Charged Property [*ie*, the Assets]), without any notice or further notice, the Lender may, by deed or otherwise in writing signed by any officer or manager of the Lender or any person authorised for this purpose by the Lender, appoint one or more persons to be a Receiver
>
> …

230 POS at para 56.

231 SOC at paras 33 and 36.

232 AB at p 24.

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The plaintiff further submits that had it done so, the Assets "would not be subject to the authority of the JM" as its appointed receiver and manager "would have taken over the cash in bank and receivables that were due to NKI".[233]

204 I pause to note that the plaintiff's reference to a "receiver and manager" in its Statement of Claim[234] is a reference to a singular entity. To begin with, a "receiver and manager" refers to a receiver vested with management powers. The *Report of the Insolvency Law Review Committee* (2013) states as follows at p 50:

> 2. In the corporate insolvency context, a receiver is normally appointed by a security holder for the predominant purpose of realising the security and applying the proceeds of sale towards the discharge of the debts owed to the debenture holder. Where the security is a floating charge that covers the undertaking of the company (or more commonly termed in commercial parlance as a 'debenture'), the receiver is also conferred powers of management over the undertaking of the company, and is known as a *receiver and manager*.
>
> [emphasis added]

In the Deed of Debenture, it is stated that "'[r]eceiver' means a receiver and/or manager appointed in respect of the Charged Property", *ie*, a singular entity.[235] Moreover, cl 15 and Schedule 1 of the Deed of Debenture provides that the plaintiff's appointed receiver would have powers of management on top of its powers of realising the security. I reproduce an excerpt below:[236]

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233 PRS at p 28.

234 SOC at paras 33 and 36.

235 AB at p 9.

236 AB at pp 35 to 36.

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SCHEDULE 1

RIGHTS OF RECEIVERS

Any Receiver appointed pursuant to Clause 15 (*Appointment and Rights of Receivers*) shall have the right, either in its own name or in the name of the Borrower or otherwise and in such manner and upon such terms and conditions as that Receiver thinks fit, and either alone or jointly with any other person:

1. Enter into Possession

To take possession of, get in and collect the Charged Property and to require payment to it or to the Lender of any Book Debts or credit balance on any Bank Account.

2. Carry on business

To manage and carry on any business of the Borrower.

3. Contracts

To enter into any contract or arrangement and to perform, repudiate, rescind or vary any contract or arrangement to which the Borrower is a party.

…

Hence, in the present case, the plaintiff submits that it would have appointed a single receiver and manager, *ie*, not a receiver *and* a manager in addition if it had not been for the 2nd Report.

205 To begin with, it is not even clear that the plaintiff would have definitely been able to appoint its own receiver and manager. I note that the private appointment of a receiver and manager, as opposed to the court's appointment of one, "flows from the exercise of a creditor's contractual powers (usually under the terms of a debenture) granted by a company": see *Kao Chai-Chau Linda v Fong Wai Lyn Carolyn and others* [2016] 1 SLR 21 at [20]. Here, the moratorium granted in favour of NKI lapsed on 1 July 2019 and NKI entered into judicial management on 20 August 2019 (see [27] and [29] above). Arguably, the plaintiff could have attempted to appoint its own receiver and

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manager during this interim period. However, given that LLS Capital resumed pursuing its judicial management application immediately (see [27] above), LLS Capital would have applied to the court to object to the plaintiff's appointment of its own receiver and manager. Indeed, pursuant to the now repealed ss 221(1) and 222(1) of the Companies Act (now ss 81(1) and 82(1) of the IRDA), both the court and LLS Capital would have notice of this appointment. In oral submissions, the plaintiff agreed that it is not completely certain that it would have been able to appoint a receiver and manager as this would depend on whether LLS Capital would object.[237] Hence, the loss alleged here is that of the plaintiff's *chance* to appoint its own receiver and manager which is vague and uncertain. Even if the plaintiff had applied, it does not necessarily follow that the court would grant its application.

206 With regard to the loss of a chance, the Court of Appeal has stated in *JSI Shipping (S) Pte Ltd v Teofoongwonglcloong (a firm)* [2007] 4 SLR(R) 460 (at [147]–[148]) and in *Asia Hotel Investments Ltd v Starwood Asia Pacific Management Pte Ltd and another* [2005] 1 SLR(R) 661 (at [133] and [135]) that:

> (a) First, the plaintiff must first prove on a balance of probabilities that but for the defendant's acts, the plaintiff would have taken the necessary steps to "put it on track to secure the benefit of that chance".
>
> (b) Second, once causation is established for the loss of a chance, all that is needed to be shown is that the chance which was lost was "real or substantial". The plaintiff is not required to show, on a balance of probabilities, that the chance would have come to fruition.

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237 Transcript (23 November 2021) at p 59 line 5 to p 63 line 17.

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207 From the above legal principles, the plaintiff must first show that but for the defendant's over valuation in the 2nd Report the plaintiff would have taken steps to appoint a receiver and manager. It is this issue which I shall turn to examine below.

208 I first examine the scrap value. Taking the lowest scrap value above after applying a discount for the leased assets, *ie*, US$3,402,550 (at [195]), and subtracting $200,000 for decommissioning costs (at [196]), this yields a final scrap value of US$3,202,550. Evidently, even if the scrap value had taken into account the value of the leased assets and the decommissioning costs, it would still be much higher than the Loan sum of S$1.6m.

209 I next examine the forced sale value. As I have explained above, after accounting for the value of the leased assets, the forced sale value would have at least been US$8,307,900 (see [198] above). Again, this value is exceedingly higher than the Loan sum of S$1.6m.

210 Hence, both the scrap value and the forced sale value are also substantially above the Loan sum. The 2nd Report would have indicated that the Loan was firmly secured notwithstanding that the eventual scrap value of the Assets was only S$250,000 (net).

211 Thus, the plaintiff has failed to prove on a balance of probabilities that "but for" the 2nd Report, it would have applied to appoint its own receiver and manager. Accordingly, there is no need to further examine if the loss of this chance was "real or substantial". The plaintiff has therefore failed to prove the element of causation in its claim for negligence premised on the 2nd Report.

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Conclusion for the 2nd Report

212 I find that the defendant did owe a duty to take care in providing a reasonable estimate of the fair market value, the forced sale value and the scrap value in the 2nd Report. The defendant did not breach its duty of care by: (a) using the scrap value as a basis of valuation instead of the salvage value; (b) using the cost approach of calculating the scrap value instead of the market approach or the tonnage method; and (c) not accounting for the value of the leased assets in respect of all three values. However, the defendant breached its duty of care by failing to account for the decommissioning costs in respect of the scrap value. Nevertheless, the plaintiff has failed to prove, on a balance of probabilities, that the defendant's breach has caused it loss since it would not have taken steps to appoint its own receiver and manager in any event. By failing to establish causation, the plaintiff has not proven all the elements of the tort of negligence. Hence the plaintiff has failed to prove that the defendant was negligent in its preparation of the 2nd Report.

Observations on the plaintiff's conduct in relation to its loss

213 Having found that the defendant was not negligent in preparing the Two Reports, it is unnecessary to deal with the issue of whether the plaintiff had mitigated its loss or whether the plaintiff was contributorily negligent.

214 Nevertheless, for completeness, I state my observations on these two issues below.

Mitigation of loss

215 It is trite law that the plaintiff owes a duty to mitigate in respect of a claim in tort. This was succinctly explained by the court in *Cristian Priwisata*

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Yacob and another v Wibowo Boediono and another and another suit [2017] SGHC 8 (at [310]):

> … it is clear that the duty to mitigate arises in respect of both claims in tort and contract. Andrew Burrows in *Remedies for Torts and Breach of Contract* (Oxford University Press, 3rd Ed, 2004) at p 122 explains that the duty to mitigate 'is a restriction placed on compensatory damages. A claimant should not sit back and do nothing to minimize loss flowing from a wrong but should rather use its resources to do what is reasonable to put itself into as good a position as if the contract had been performed or the tort not committed.' In a similar vein, *The Law of Torts in Singapore* at para 20.098 summarises the principle as follows:
>
> > It is the defendant's burden to show that the plaintiff ought to have taken reasonable steps to prevent or reduce the plaintiff's loss arising from the defendant's tort. If the defendant is able to discharge his or her burden, the loss claimable by the plaintiff would be reduced accordingly. The question of mitigation is one of fact, not law. The standard of conduct expected of the plaintiff in mitigation is generally not a high one considering that the defendant is the wrongdoer.

216 The plaintiff made little attempt at mitigating its loss.

217 When the plaintiff was asked to liquidate the Assets, it only had one reference from Soilbuild, *ie*, Sin Hock Huat Construction Pte Ltd.[238] I understand the plaintiff was not given much time to clear the premises. Nevertheless, the plaintiff should have requested for more time from Soilbuild in order to get the best price for the Assets. There is no evidence that the plaintiff did so.

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238 SOC at para 30; POS at para 62.

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218 There is also no evidence that the plaintiff attempted to auction the Assets, which would have been the most effective way of securing the best price.

219 Furthermore, there is no evidence that the plaintiff advertised the sale of the Assets. Lastly, Ms Leow Lay Sing, a former employee of the plaintiff who was instrumental in the sale of the Assets, had the RK Report which contained two other contacts for scrap materials. Yet, she did not contact these two contractors.[239]

220 Hence, the plaintiff clearly made insufficient efforts to ameliorate its loss and to ensure the best price for the Assets.

Contributory negligence

221 The evidence also reveals that the plaintiff was contributorily negligent.

222 The law on contributory negligence has been set out by the Court of Appeal in *Asnah bte Ab Rahman v Li Jianlin* [2016] 2 SLR 944 at [18]–[22]:

> 18 In the introduction to our judgment, we noted that a victim's right to recover damages from a tortfeasor has to be modulated by the extent to which he could himself have prevented the accident from happening. The doctrine of contributory negligence gives effect to this position. Even though the defendant is found to have been negligent, contributory negligence provides him a partial defence by reducing the quantum of damages payable to a claimant where the claimant failed to take due care for his own safety and thus caused loss to himself. In determining contributory negligence, one looks solely at the conduct of the claimant in the prevailing circumstances of each case (*Charlesworth & Percy on Negligence* (Sweet & Maxwell, 13th Ed, 2014) at para 4-03). Contributory negligence connotes a failure by the claimant to

239 Transcript (24 September 2021) p 73 line 7 to p 75 line 16.

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take reasonable care for his own personal safety in all the circumstances prevailing at the time of the accident, such that he is blameworthy to the extent that he contributed to his own injury. A person is guilty of contributory negligence if he ought to have objectively foreseen that his failure to act prudently could result in hurting himself and failed to take reasonable measures to guard against that foreseeable harm (*Cheong Ghim Fah v Murugian s/o Rangasamy* [2004] 1 SLR(R) 628 ('*Cheong Ghim Fah*') at [83]). The above discussion is neatly borne out by Denning LJ's (as he then was) dictum in *Jones v Livox Quarries Ld* [1952] 2 QB 608 ('*Jones v Livox*') at 615:

> Although contributory negligence does not depend on a duty of care, it does depend on foreseeability. Just as actionable negligence requires the foreseeability of harm to others, so contributory negligence requires the foreseeability of harm to oneself. A person is guilty of contributory negligence if he ought reasonably to have foreseen that, if he did not act as a reasonable, prudent man, he might hurt himself; and *in his reckonings he must take into account the possibility of others being careless*. [emphasis added]

19 While the literal meaning of 'contributory negligence' may suggest that the claimant owes some form of duty to the defendant, there is no such requirement in law. A finding of contributory negligence is not premised on a breach of some duty owed to the defendant. What is, however, required of the defendant is that he shows that the claimant owes *himself* a duty to take care of his own safety in the prevailing circumstances of the case. In this regard, we refer to the following clarifications Lord Simons made in *Nance v British Columbia Electric Railway Co Ltd* [1951] AC 601 at 611:

> … But when contributory negligence is set up as a defence, its existence does not depend on any duty owed by the injured party to the party sued, and all that is necessary to establish such a defence is to prove … that the injured party did not in his own interest take reasonable care of himself and contributed, by this want of care, to his own injury. For when contributory negligence is set up as a shield against the obligation to satisfy the whole of the plaintiff's claim, the principle involved is that, where a man is part author of his own injury, he cannot call on the other party to compensate him in full. …

20 As a general rule, the standard of care expected of the claimant is measured against a person of ordinary prudence, corresponding in most cases to the standard of care in

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> negligence (*Sungravure Pty Ltd v Meani* (1964) 110 CLR 24 at 36–37; see also *A C Billings & Sons Ltd v Riden* [1958] AC 240 at 252; see also generally Glanville Williams, *Joint Torts and Contributory Negligence* (Stevens & Sons Ltd, 1951) at p 353).
>
> 21 In Singapore, the defence is statutorily enacted in the Contributory Negligence and Personal Injuries Act (Cap 54, 2002 Rev Ed) ("Contributory Negligence Act"). The relevant provision in the Contributory Negligence Act is s 3(1) which reads:
>
> > **3.**—(1) Where any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage.
>
> 22 Section 3(1) of the Contributory Negligence Act was adopted from s 1(1) of the English Law Reform (Contributory Negligence) Act 1945. Both these provisions were enacted to correct the perceived injustice inherent in the common law doctrine of contributory negligence. Prior to legislative intervention, courts were not allowed to apportion damages between the claimant and the defendant. *Butterfield v Forrester* (1809) 11 East 60 was often cited as a case manifesting such injustice, as it represented the common law rule that where a claimant's injury was caused in part by his own fault, he was wholly disentitled from claiming damages from the negligent defendant. The passing of the apportionment legislation assisted claimants to recover part of their losses even where they were contributorily negligent. With contributory negligence now being a partial defence, courts are now empowered to apportion the damages recoverable if the injury was partly due to the claimant's own fault. As would be apparent from the provision, fault can arise not only from a positive act but also from an omission on the part of the claimant. …
>
> [emphasis in original]

223 In my view, the plaintiff was partly to be blamed for its loss by failing to conduct its own independent due diligence by seeking a valuation of its own.

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224 To begin with, such independent due diligence was essential as NKI was in financial distress in 2018 (see [19] above). At that time, the plaintiff was informed that NKI was under a court-ordered moratorium in OS 1384 and that NKI had negotiated a debt restructuring plan with its creditors. Further, when the 1st Report was delivered to the plaintiff, it was already more than a year old. In the circumstances, it would have been prudent and wise for the plaintiff to have a separate valuation report on its own terms before the Loan was granted, notwithstanding that the defendant was an experienced and professional valuer. Bearing in mind that valuation is an art and not an exact science, since the 1st Report was provided to NKI, *ie*, the borrower, the valuations in the 1st Report would likely have been tailored favourably for NKI's purposes.[240]

225 Moreover, the Limiting Conditions in the 1st Report would have alerted the plaintiff to the danger of relying on the 1st Report, especially when they purport to limit the usage of the 1st Report to NKI and its professional advisers only. When the plaintiff read the Limiting Conditions before the Loan was approved, it should have been concerned about the defendant's attempt at, *inter alia*, limiting its liability to the quantum of its professional fee. This should have been a crucial consideration since the Loan sum of S$1.6m far exceeds the defendant's professional fees. It is immaterial that the court now finds, in the present proceedings, that the defendant cannot rely on the Limiting Conditions as it would be unfair for the defendant to use them as a bulwark against liability. The point here is that the plaintiff should have exercised more caution at the time of considering whether to grant the Loan to NKI.

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[240] CHK2 at para 11(a); DCS at paras 80 and 96.

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226 Furthermore, as I have noted above, the plaintiff had received a sum from NKI for the express purpose of conducting such due diligence (see [73] above). Yet, the plaintiff simply proffered no convincing reason for its omission to do so.

227 The plaintiff explained that it did not carry out its own independent valuation as it trusted the defendant, an experienced and professional valuer. This explanation is ironic. If the plaintiff did indeed trust the defendant, then why is it now claiming that the defendant was negligent? Moreover, the plaintiff did not even know the defendant when the Loan was disbursed. Evidently, the plaintiff's purported trust in the defendant is nothing more than an excuse for its own carelessness in granting the Loan to NKI as it failed to conduct its own independent valuation of NKI's Assets before the Loan was approved.

228 The plaintiff gave another reason for not conducting an independent valuation: it would take a long time to do so. This explanation is unsatisfactory. There is no evidence that a valuation would take an inordinate amount of time. The only reason why the defendant took so long to furnish the 1st Report was because NKI made several changes to its original instructions.[241] More importantly, the plaintiff's unwillingness to expend time for an independent valuation is not a valid excuse. The plaintiff should have done more to safeguard its interests but simply carelessly failed to do so at the material time. Hence, if the plaintiff had commissioned an independent valuation to begin with, the present dispute would likely not arise.

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241 DCS at para 99(a).

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229 Hence, the plaintiff had suffered loss partly of its own fault and its claim in respect of its loss would have been reduced accordingly.

The credibility of the defendant's witnesses

Mr Chan's and Mr Mendoza's credibility

230 Mr Mendoza admitted to lying in court. He first distanced himself from the calculation of the 4,000 tonnes of the Assets (see [191] above) and suggested that the weight was worked out by his colleague, Mr Alexis Dominguez, as he was out of town during that period.[242] Later, he admitted that he had returned to the office and he was involved in the calculation of the 4,000 tonnes.[243]

231 Moreover, when he first took the stand, Mr Mendoza wanted to make an amendment to his affidavit of evidence-in-chief ("AEIC").[244] At para 11 of his AEIC, Mr Mendoza initially stated that "[f]or plant and machinery valuation, it is [the defendant's] practice to *adhere* to the standards set by the International Valuation Standards Council …" [emphasis added]. He wanted "adhere" to be amended to "comply". In cross-examination, Mr Mendoza eventually admitted that before he was due to give evidence in court, Mr Chan had told him to tell the court that he did not "100 per cent comply with the guidelines". I set out the material portions of Mr Mendoza's evidence below:[245]

> Q: So I'm quite curious why you decided to amend this paragraph to change from 'adhere' to 'comply' this morning. Did Mr Chan have a word

242 Transcript (8 October 2021) at p 10 lines 3 to 19.

243 Transcript (8 October 2021) at p 14 lines 4 to p 16 line 12.

244 Transcript (6 October 2021) at p 89 lines 1 to 22.

245 Transcript (6 October 2021) at p 101 line 12 to p 106 line 5.

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with you about the questions that I had asked him?

A: No, I don't think so.

…

Q: So did you have a short discussion with him before you took the stand today? Be honest, Mario.

A: Yes, but it was just a casual discussion.

Q: Did he suggest to you to change 'adhere' to 'comply'?

…

Court: Mr Mario, did you have a brief discussion with Mr Chan today?

A: About the -- about this matter but just a casual discussion.

Court: What is this casual discussion?

A; Just -- I mean, just few pointers that -- to -- during the proceedings that I be attentive to the questions and be careful with my reply.

Mr Parwani: Mario, why suddenly change 'adhere' to 'comply'? Did Chan tell you to -- did Chan suggest this to you?

A: No, no. He did not make any suggestions.

Q: So did he discuss with you about the IVS and that I will ask questions -- or I had asked him questions about the IVS? Mr Mario, before you answer, please note that you have taken an oath to tell the truth and it is important that your testimony be honest. It doesn't matter if your testimony doesn't reflect on the defendant, but you have to be honest to this court.

So if he did discuss with you, please just tell us he discussed with you and we can move on to the next question.

A: Yeah, he discussed with me but he didn't make any suggestion.

Q: But did he talk to you about the IVS?

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A: Just to -- not really in detail, but just to -- I mean, be -- be familiar or be attentive with the questions pertaining to the IVS, that's all he said.

…

A: … It is not a detail[ed] discussion. But just -- just advised that -- just advised for me to be attentive to the questions particularly to the IVS.

…

Court: Did Mr Chan discuss with you about IVS?

A: Yes, but beforehand. Not today, but I think during our previous meeting -- our previous meeting.

…

Q: So last week Friday or Saturday you met Chan in your office?

A: Yes. I mean --

Q: You casually had a discussion with him about this case?

A: Yes.

Q: Did he share with you the questions that I had asked him, some questions at least? He must have shared with you something; right?

Mr Mario, you put your hand on the Bible and raised your hand to tell the truth.

A: Yes, he said something but I cannot remember what he said.

Q: … Mario, please tell the truth. What was your discussion with Chan about on Friday or Saturday?

A: It was about this case, but I cannot remember all the details.

Q: So what are some of the details that you remember?

A: One of them is about the IVS.

Q: Okay. So what about the IVS?

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A: Just to -- I mean just to be attentive to the questions that will be asked.

Q: Mr Mario, if he just told you to be attentive, you wouldn't want to come and tell the court you want to change from "adhere" to 'comply'; right? There must have been something more than to just tell you to be attentive.

So what did he tell you, Mr Mario?

A: I'm trying to recall. Although we complied -- we complied with IVS -- we complied with the IVS, that -- because there are some departures from the IVS that it's not 100 per cent -- it's not 100 per cent -- how to call it? Guide -- it's not 100 per cent -- what I mean by 'comply', is that we need -- we don't need to go by the book. We don't need to go by the book means -- because my interpretation of 'adhere' is you strictly go by the rules.

Q: Correct.

A: So it does not necessarily mean that we have to comply totally with the guidelines.

Q: So Chan told you to tell the court that you did not 100 per cent comply with the guidelines, is that it?

A: Yes.

232 From the above, it is apparent that Mr Chan had told Mr Mendoza to be careful in giving evidence to the court. It is unclear from the above if Mr Chan had told Mr Mendoza specifically to make the amendment, or that Mr Mendoza wanted to make the amendment because of Mr Chan's advice to him. In either case, the amendment was motivated by a desire to be truthful to the court. To Mr Mendoza's understanding, "comply" did not mean strict observance with the IVS but "adhere" did. Because the defendant did not observe the provisions of the IVS to the letter, Mr Mendoza and/or Mr Chan wanted to communicate this state of affairs through Mr Mendoza's amendment. In the circumstances, there is insufficient evidence for the plaintiff's grave allegations that there was

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"witness tampering" and that Mr Chan wanted to "pervert the course of justice to achieve his own ends".[246]

233 Nevertheless, as a matter of prudence, I have treated Mr Mendoza's and Mr Chan's evidence with caution and sought corroborative evidence wherever possible. Having evaluated their evidence, I find that it was safe to rely on those parts of their testimony in my analysis above.

Mr Chay's credibility

234 In cross-examination, Mr Chay stated that he is not a plant and machinery valuer, but a business valuer. In this regard, he explained that he had experience in assessing valuation reports relating to plant and machinery, but he had not done valuations of plant and machinery personally.[247] The plaintiff therefore submits that Mr Chay lacked the relevant expertise to give evidence for the present matter.[248]

235 However, Mr Chay is familiar with how plant and machinery valuers conduct their valuations according to various industry standards as he would have to work with them.[249] Accordingly, he has some expertise on the valuation bases and methodologies employed by the defendant and knowledge of industry standards. However, I was advertent to the limitations of Mr Chay's opinion.

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246 PRS at para 3.

247 Transcript (11 October 2021) at p 92 line 10 to p 94 line 18.

248 PRS at paras 5 and 6.

249 Transcript (11 October 2021) at p 93 line 16 to p 94 line 4.

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Conclusion

236 For the above reasons, I dismiss the plaintiff's claims. I make the following findings:

(a) For the 1st Report, the defendant owed the plaintiff a duty to take care in providing a reasonable estimate of the fair market value and forced sale value of the Assets. This duty did not extend to providing a reasonable estimate of the Assets' scrap value as NKI did not instruct the defendant to do so. The defendant explained that the forced sale value is different from the scrap value. The defendant did not breach its duty of care to the plaintiff when it used the cost approach to value the Assets and did not account for the Purchase Price of the Assets. The defendant also did not breach its duty of care when it did not account for the leased assets in its valuation of the Assets. In any case, even if there was such a breach, it would not have resulted in the plaintiff's loss since the forced sale value would have still been higher than the Loan sum in any event (see [46]–[170] above). Thus, the plaintiff fails to establish that the defendant is liable for negligence.

(b) For the 2nd Report, the defendant owed the plaintiff a duty to take care in providing a reasonable estimate of the fair market value, forced sale value and scrap value of the Assets. The defendant did not breach its duty of care by: (a) using the scrap value as a basis of valuation instead of the salvage value; (b) using the cost approach of calculating the scrap value instead of the market approach; and (c) not accounting for the value of the leased assets in respect of all three values. However, the defendant breached its duty of care by failing to account for the decommissioning costs of the Assets when calculating the scrap

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value. Nevertheless, this breach did not result in the plaintiff's loss as the forced sale value and the scrap value would have still been higher than the Loan sum in any event (see [172]–[212] above). Accordingly, the plaintiff has not proven that it would have taken steps to appoint its own receiver and manager at the material time. Since the plaintiff fails to prove the element of causation, it therefore fails to establish that the defendant is liable for negligence.

(c) Even if I had held the defendant liable to the plaintiff, the plaintiff did not adequately mitigate its damages since it did not take any sufficient steps to ensure that it could obtain the highest price for the Assets. The plaintiff would also have been contributorily negligent. In view of NKI's financial distress at the material time, the plaintiff should have procured an independent valuation to safeguard its interests. The plaintiff could have easily done so, especially when the cost of engaging an independent valuer would be borne by NKI. The plaintiff could not provide an adequate and satisfactory explanation other than that it would take time to do so. Hence, the plaintiff had contributed to its loss by its conduct and its claim for its loss would have been reduced accordingly (see [213]–[229] above).

(d) In the course of my analysis, I have been careful in assessing the credibility of the defendant's witnesses, *viz*, Mr Chan, Mr Mendoza and Mr Chay (see [230]–[235] above).

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237 The plaintiff is to pay costs to the defendant, to be agreed or taxed.

Tan Siong Thye
Judge of the High Court

Vijai Dharamdas Parwani, Huang Po Han and Lim Shu Yi (Parwani Law LLC) for the plaintiff;
Anparasan S/O Kamachi and Wong Jing Ying Audrey (Whitefern LLC) for the defendant.

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