IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2017] SGCA 58

Civil Appeal No 99 of 2016

Between

(1) NG HUAT SENG
(2) KHO SUNG CHIN

… *Appellants*

And

(1) MUNIB MOHAMMAD MADNI
(2) ZAHRAH AYUB

… *Respondents*

In the matter of District Court Appeal No 19 of 2015

Between

(1) NG HUAT SENG
(2) KHO SUNG CHIN

… *Appellants*

And

(1) MUNIB MOHAMMAD MADNI
(2) ZAHRAH AYUB

… *Respondents*

GROUNDS OF DECISION

[Tort] — [Vicarious liability] — [Independent contractors]

[Tort] — [Negligence] — [Breach of duty]

[Tort] — [Non-delegable duties]

Ng Huat Seng and another
v
Munib Mohammad Madni and another

[2017] SGCA 58

Court of Appeal — Civil Appeal No 99 of 2016
Sundaresh Menon CJ, Chao Hick Tin JA, Andrew Phang Boon Leong JA, Judith Prakash JA and Tay Yong Kwang JA
2 March 2017

26 September 2017

Sundaresh Menon CJ (delivering the grounds of decision of the court):

Introduction

1 This was an appeal against the decision of the learned judicial commissioner ("the Judge") who dismissed the appellants' claim against the respondents for damage to their property. The damage was the result of demolition works carried out by a contractor on the respondents' premises. It was not disputed that the contractor had been negligent. The question was whether the respondents too were liable. The Judge's decision is reported as *Ng Huat Seng and another v Munib Mohammad Madni and another* [2016] 4 SLR 373 ("the High Court GD"). Three principal issues, corresponding to the three heads of liability relied on by the appellants, arose for our determination in this appeal:

(a) whether the respondents were vicariously liable for the negligence of their contractor (the "vicarious liability issue");

(b) whether the respondents had exercised reasonable care in selecting and appointing the contractor to undertake the demolition works (as well as other construction works) on their property (the "negligent selection issue"); and

(c) whether the respondents owed the appellants a non-delegable duty of care to ensure that the contractor took reasonable care in performing the demolition works (the "non-delegable duty of care issue"). In this context, the question also arose as to whether the doctrine of ultra-hazardous acts, under which a non-delegable duty of care is imposed in respect of the performance of such acts, should be recognised as part of Singapore law.

2 After hearing the parties, we ruled against the appellants on all three issues and dismissed the appeal. In the course of the arguments, it was suggested that the doctrine of ultra-hazardous acts (assuming it is recognised as part of our law) should be subsumed under the general law of negligence in Singapore instead of being analysed as a separate and independent basis for imposing liability. We deal with this issue and also set out the detailed reasons for our decision in this judgment.

Background facts

3 The parties own neighbouring properties located along a slope. The appellants' house is the lower property: the ground level of their house is 2m lower than the ground level of the respondents' house, which lies further up the slope. The building lines of the two houses are about 6m apart, with the two

properties separated by a wall located on the boundary between the two plots ("the boundary wall").

4 The respondents purchased their property in 2010 intending to demolish the existing house there and build another in its place. The respondents hired Esthetix Design Pte Ltd ("Esthetix"), a locally incorporated company holding a Class 2 General Builder's Licence from the Building and Construction Authority ("the BCA"), to carry out the required demolition and reconstruction works. Esthetix was appointed on a "turnkey" basis, meaning that as the main contractor, it assumed carriage of the entire project and was contractually responsible to the respondents for both demolishing the existing house on the property as well as designing and building the new house. To that end, it was to engage such subcontractors and professional consultants and apply for such approvals as might be required. It was put to us by the appellants that this differed from the "traditional approach", under which the owner would engage a team of professional consultants to design the house and obtain the necessary approvals before calling for tenders and appointing a main contractor to undertake the construction of the house. In keeping with the arrangement in this case, Esthetix appointed professional consultants to provide it with the requisite architectural and engineering services for the project. It sought and obtained approval from the BCA in June 2011 for the works on the respondents' property to be carried out.

5 On 5 September 2011, while demolition works were taking place on the respondents' property, some debris from the respondents' property fell on the boundary wall and damaged it. Some of the debris also ricocheted off the boundary wall and landed in the appellants' property. Among other things, the falling debris broke a number of windowpanes, damaged several air-

conditioning condensing units located at the exterior of the appellants' house and undermined the integrity of the boundary wall.

6 On 22 May 2012, the appellants commenced proceedings in the District Court against the respondents and Esthetix as joint defendants. In their statement of claim, the appellants pleaded that the demolition works on the respondents' property were "particularly hazardous and/or extra-hazardous", and that the respondents were personally liable for failing to "exercise reasonable care to avoid or prevent the damage and loss". They further pleaded that the respondents had failed to exercise reasonable care in appointing Esthetix as their contractor. In their defence, the respondents denied that the demolition works had been carried out under their "control, supervision and/or management". Instead, they pleaded that Esthetix was an independent contractor to whom they had entrusted the performance of the demolition works, having exercised reasonable care in selecting Esthetix for this purpose.

The decisions below

The decision of the District Court

7 The proceedings were first heard by a district judge ("the DJ"), whose decision is reported as *Ng Huat Seng and Kho Sung Chin v Munib Mohammad Madni, Zahrah Ayub and Esthetix Design Pte Ltd* [2015] SGDC 315 ("the District Court GD").

8 The DJ allowed the appellants' claim against Esthetix. He found that Esthetix had been negligent in carrying out the demolition works and was therefore liable to the appellants for the damage caused to their property. The DJ quantified the cost of repairing the damage at $136,796. The liability of Esthetix to pay this sum to the appellants has not been appealed against.

9 The DJ, however, dismissed the appellants' claim against the respondents. He found that:

(a) Esthetix was an independent contractor of the respondents and the respondents were therefore not vicariously liable for its negligence;

(b) the respondents had not been negligent in appointing Esthetix to carry out the demolition works on their property; and

(c) the respondents did not owe the appellants a non-delegable duty of care in respect of the performance of the demolition works because those works were not "ultra-hazardous".

In the circumstances, there was no basis in law for imposing liability on the respondents.

10 On finding (a), the DJ held that where the vicarious liability issue was concerned, there were two factors which were determinative. First, the respondents had little control over the manner in which Esthetix was to carry out the demolition works on their property. As Esthetix had been appointed on a "turnkey" basis, it enjoyed "significant autonomy when selecting and appointing the sub-contractors" with whom it contracted directly for the execution of certain parts of those works (see the District Court GD at [27]–[29]). Second, it was clear that Esthetix had taken on the project as part of its business and for its own account. Esthetix had entered into contracts with subcontractors in its own name, and had charged the respondents goods and services tax (at [33]–[34]). For these reasons (among others), the DJ held that Esthetix was an independent contractor and not an employee of the respondents (at [35]).

11 On finding (b), which addressed the negligent selection issue, the DJ held that the respondents had not fallen short of the standard of care expected of them in selecting a contractor. Given that the respondents were laypersons, the following facts showed that they had not been negligent in engaging Esthetix to undertake the demolition works on their property:

(a) Esthetix held a Class 2 General Builder's Licence from the BCA, which meant that it satisfied the statutory conditions to undertake the type of work that was done in this case. Esthetix was also subject to statutory requirements which mandated (among other things) that the execution of any building works be supervised by a person with the requisite technical expertise (at [37]);

(b) there was no evidence that Esthetix had breached any regulations, nor was there any reason to think that it was unsuitable to undertake the demolition works in question (at [38]); and

(c) the respondents had solicited the opinions of their friends and sought the advice of the architect for the project before confirming the appointment of Esthetix as their contractor (at [41]).

12 On finding (c), which concerned the non-delegable duty of care issue, the DJ adopted the approach of the English Court of Appeal in *Biffa Waste Services Ltd and another v Maschinenfabrik Ernst Hese GmbH and others* [2009] 3 WLR 324 ("*Biffa Waste*"), in which it was held that the doctrine of ultra-hazardous acts should be "kept as narrow as possible" and "applied only to activities that are exceptionally dangerous whatever precautions are taken" [emphasis in original omitted] (see the District Court GD at [51], citing *Biffa Waste* at [78]). Applying that approach, the DJ held that the demolition works

in this case did not cross this threshold so as to be deemed "ultra-hazardous". This was because:

(a) there was no evidence that any inherently dangerous procedures were to be employed as part of those works (at [53]);

(b) demolition works were commonly carried out in Singapore and were not statutorily regarded as being "particularly hazardous and/or extra-hazardous" such that a separate permit had to be obtained for them to be carried out (at [54]–[55]); and

(c) the demolition works in the present case were unlikely to have presented any hazard to anyone if they had been done with due caution by a skilled contractor (at [57]).

The DJ thus found that the respondents did not owe the appellants a non-delegable duty of care in relation to the demolition works undertaken by Esthetix.

13 In all the circumstances, the DJ ruled that the respondents could not be held liable for the damage to the appellants' property.

14 Dissatisfied with the DJ's decision on their claim against the respondents, the appellants appealed. Although judgment was entered against Esthetix, it appears that the appellants pursued the matter against the respondents on appeal because Esthetix was experiencing financial troubles and there was some concern over its ability to satisfy the judgment debt.

The decision of the High Court

15 The High Court dismissed the appellants' appeal against the DJ's decision. The Judge agreed with and affirmed the DJ's conclusions on all three issues arising under the appellants' claim (as outlined at [1] above).

The vicarious liability issue

16 In respect of the vicarious liability issue, the Judge, drawing on the judgments of the UK Supreme Court in *Various Claimants v Catholic Child Welfare Society and others* [2012] 3 WLR 1319 ("the *Christian Brothers* case") and *Cox v Ministry of Justice* [2016] 2 WLR 806 ("*Cox*"), adopted the following two-stage inquiry in deciding whether vicarious liability should be imposed (see the High Court GD at [25]):

> (a) First, was the *relationship* between the tortfeasor and the defendant of a type which was capable of giving rise to vicarious liability?
>
> (b) Second, did the tortfeasor's conduct possess a sufficient *connection* with the relationship between the tortfeasor and the defendant such that vicarious liability might arise?

17 The Judge ruled that there could be no basis for holding a defendant vicariously liable where the tortfeasor was an independent contractor because the requisite relationship under the first stage of the inquiry would be absent (at [33]). Since the appellants had not challenged either the legal test applied by the DJ for determining whether a person was an employee or an independent contractor, or the factual finding that Esthetix was an independent contractor upon the application of that test, on the facts, the Judge upheld the DJ's decision

that the respondents could not be made vicariously liable for the negligence of Esthetix because the latter was an independent contractor (at [41]–[42]).

18 In explaining the reasons for his decision on the vicarious liability issue, the Judge recognised that the courts, in determining whether vicarious liability should be imposed, had been moving from a rigid adherence to labels such as "employer-employee" and "course of employment" towards a "more open-textured analysis" of the relevant circumstances which was "grounded in a consideration of the policy objectives underpinning the doctrine of vicarious liability" (at [39]). However, this did not mean that the distinction between employees and independent contractors should be "jettisoned entirely" (see likewise [39] of the High Court GD). The Judge thus expressly rejected the appellants' contention that the "close connection" test, under which the court would examine all the relevant circumstances of the case at hand, including policy considerations, to determine whether it would be fair and just to impose vicarious liability on a defendant, could be used to justify the imposition of vicarious liability on the respondents in the present case. In order for vicarious liability to arise, the Judge held, the relationship between the tortfeasor and the defendant had to be of a type which could give rise to vicarious liability in the first place, and this condition was not met on the facts of the case (at [40]).

The negligent selection issue

19 On the negligent selection issue, the Judge based his decision primarily on the point of causation, which was not considered in the District Court. He found on the evidence that even if the respondents had conducted the checks and inquiries which the appellants said they ought to have carried out, they would not have uncovered anything irregular or received any answers that would have been unfavourable to Esthetix and that would have led them to

appoint some other contractor to undertake the demolition works on their property. Indeed, there was no evidence that the respondents were considering other contractors besides Esthetix (at [49]). In other words, based on the evidence before the court, even if the respondents had conducted the selection process in the "non-negligent" manner proposed by the appellants, the respondents would still have selected the same contractor (namely, Esthetix), with the result that the damage to the appellants' property would still have occurred. In the circumstances, the appellants had failed to show that the respondents' alleged negligence in the selection process had *caused* the damage to the appellants' property.

20 The Judge also held that in any event, the respondents had not been negligent in selecting Esthetix as their contractor. The applicable standard of care in this regard was "that of a reasonable person in the circumstances of the defendant" (at [52], citing *Blyth v The Company of Proprietors of the Birmingham Waterworks* (1856) 11 Ex 781 *per* Alderson B). The respondents were laypersons and the steps which they had taken prior to appointing Esthetix were entirely reasonable (at [52]–[53]). Further, it was not disputed that the "turnkey" basis on which the respondents had appointed Esthetix was "an accepted industry practice at the time and a 'common choice for homeowners in Singapore'" (at [52]). In the circumstances, the respondents had not breached their duty to exercise reasonable care in selecting Esthetix to undertake the demolition works on their property.

The non-delegable duty of care issue

21 On the non-delegable duty of care issue, the Judge began by examining the nature of non-delegable duties. He observed that while there was no unified theory to explain the existence of these duties, the UK Supreme Court in

Woodland v Swimming Teachers Association and others [2014] AC 537 ("*Woodland*") had identified two broad categories in which they might arise. The first was where an independent contractor had been hired to perform "a function which was 'inherently dangerous or [liable] to become so in the course of his work'" (at [61] of the High Court GD, citing *Woodland* at [6]) such that the doctrine of ultra-hazardous acts would apply. The second was where "there existed an assumption of responsibility by virtue of the special character of the relationship between the defendant and the claimant" (see likewise [61] of the High Court GD, citing *Woodland* at [11]–[12]). The present case, the Judge held, concerned the first of these two categories.

22 Based on the manner in which the appellants had framed their submissions, the Judge considered whether a non-delegable duty of care existed from two perspectives: (a) by considering whether the demolition works on the respondents' property fell within the ambit of the doctrine of ultra-hazardous acts; and (b) by applying the general principles of the law of negligence as articulated in *Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency* [2007] 4 SLR(R) 100 ("*Spandeck*").

23 For the analysis based on the first approach, the Judge examined in detail the decisions of the English Court of Appeal in *Honeywill and Stein, Limited v Larkin Brothers (London's Commercial Photographers), Limited* [1934] 1 KB 191 ("*Honeywill*") and *Biffa Waste*, which presented contrasting approaches to the ambit of the doctrine of ultra-hazardous acts. In common with the DJ, the Judge preferred the approach in *Biffa Waste*, under which an act had to be "exceptionally dangerous whatever precautions are taken" in order to be considered "ultra-hazardous". The Judge was of the view that this "[n]ot only … minimise[s] the difficulties associated with trying to define what surrounding circumstances should be taken into account, it also allows the courts to narrow

the application of the doctrine only to that small sliver of cases where it may properly be said to belong" (see the High Court GD at [77]). Applying this approach to the facts before him, the Judge held that the appellants had not shown that the performance of demolition works was "a dangerous operation in its intrinsic nature" [emphasis in original omitted]. Therefore, the execution of the demolition works in this case did not warrant the imposition of a non-delegable duty of care on the respondents (at [78]).

24 The Judge then considered the second angle from which the parties argued their respective cases, which was whether, under the general law of negligence, the respondents owed the appellants a personal duty to "ensure that reasonable care was taken [by Esthetix] to avoid harm to the [a]ppellants and to their property" (at [79]). In this regard, the Judge applied the two-stage framework set out in *Spandeck* ("the *Spandeck* test"). First, on the requirement of legal proximity, the Judge found that the relationship between the parties did not have the requisite quality of proximity that was needed in order to establish such a duty (at [83]). This was because the relationship between the parties as described by the appellants was one that would ordinarily exist between any neighbours who happened to own adjoining plots of land, and there was nothing beyond this to show that it gave rise to a positive duty on the respondents' part to *ensure* the careful performance of demolition works undertaken by any suitably qualified independent contractor whom they might engage. Second, and in any event, the following policy considerations militated against the finding of a duty of care: (a) finding a duty of care in this case would undermine the general principle that a person was not liable for the acts of independent contractors whom he engaged (at [85]); and (b) it would also expose the respondents and other homeowners in like situations to a potentially indeterminate extent of liability (at [86]). For these reasons, the Judge held that

the respondents did not owe the non-delegable duty of care that the appellants sought to argue they did.

25 In the circumstances, the Judge dismissed the appellants' appeal against the DJ's decision.

The issues before this court

26 Dissatisfied with the Judge's decision, the appellants brought the present appeal, raising the same three issues which were decided in the lower courts (see [1] above).

27 Unsurprisingly, the conclusions which the appellants urged us to draw on all three issues were the opposite of those reached by the Judge.

The appellants' case

The vicarious liability issue

28 On the vicarious liability issue, the appellants contended that the respondents were vicariously liable for the negligence of Esthetix. Relying on *Skandinaviska Enskilda Banken AB (Publ), Singapore Branch v Asia Pacific Breweries (Singapore) Pte Ltd and another and another appeal* [2011] 3 SLR 540 ("*Skandinaviska*"), the *Christian Brothers* case and *Cox*, they submitted that a "multi-factorial" approach should be applied to determine whether vicarious liability should be imposed in relationships such as the present which fell outside the setting of an employment relationship. According to the appellants, vicarious liability could be imposed on a defendant even for an independent contractor's negligence in appropriate cases, and, applying the multi-factorial approach to vicarious liability that they proposed, they

contended that liability would be made out in this case against the respondents.

The negligent selection issue

29 With regard to the negligent selection issue, the appellants argued that the respondents had been negligent in selecting Esthetix as their contractor. According to the appellants, the Judge erred in taking into account the fact that the "turnkey" approach was "an accepted industry practice … and a 'common choice for homeowners in Singapore'" (at [52] of the High Court GD) in calibrating the relevant standard of care to be met. It was also submitted that the respondents had not satisfied the requisite standard of care on the facts because: (a) they had appointed Esthetix based on the opinions of the very architects and consultants who were to be engaged by Esthetix; and (b) they had not carried out any independent assessment of Esthetix's experience and intended methods, but had merely relied on their friends' recommendations and the fact that one of Esthetix's directors had accompanied them when they were looking for a house to buy. The appellants further argued that the Judge erred in finding that there was no causal link between the respondents' alleged breach of duty and the appellants' loss. In particular, the Judge failed to consider that the onus was on the respondents to show that the damage caused could not have been avoided even if they had taken reasonable care in appointing Esthetix as their contractor. The appellants submitted that if the respondents had made further inquiries, they would have taken extra precautions which would have avoided the damage to the appellants' property.

The non-delegable duty of care issue

30 In respect of the non-delegable duty of care issue, the appellants argued that a non-delegable duty should be imposed on the respondents in respect of

the demolition works carried out by Esthetix on their property regardless of whether the issue was considered under the doctrine of ultra-hazardous acts or under the general law of negligence by applying the *Spandeck* test.

31 In submitting that the demolition works in this case fell within the ambit of the doctrine of ultra-hazardous acts, the appellants contended that the *Honeywill* approach to this doctrine should be preferred over the *Biffa Waste* approach. The appellants submitted that the former was "more holistic" and "more principled", in that it took better account of the surrounding circumstances of the activity in question and also cohered better with existing cases such as *Spandeck*. Applying *Honeywill*, they contended that the demolition works on the respondents' property were "ultra-hazardous" having regard to the surrounding circumstances, in particular, the proximity and the relative elevations of the two houses. In any event, the appellants argued, even if the approach in *Biffa Waste* were adopted, the demolition works in this case were intrinsically hazardous. In support of their argument, they referred to the fact that various workplace safety regulations and publications had indicated that demolition works were "hazardous" or "high-risk" activities.

32 In submitting that a non-delegable duty of care arose even on an application of the *Spandeck* test, the appellants submitted that there was legal proximity arising from the following factors: (a) the respondents had "assumed responsibility towards their neighbours" in electing to undertake the demolition works on their property; (b) the appellants were vulnerable as their property was 2m lower than the respondents' property and they had no control over the demolition works carried out there; and (c) the respondents, in contrast, had control over the performance of the demolition works, as evinced by the fact that they had control of the work site and the method of work, and could also make decisions on workplace safety and health. The appellants argued further

that the following policy considerations reinforced the conclusion that a duty of care ought to be found:

(a) the close proximity of landed properties in Singapore made it imperative for a property owner who elected to demolish a building on his land to ensure that it was done in a manner that was safe to his neighbours;

(b) the absence of such a duty would lead to a lack of care being exercised by landowners when appointing contractors;

(c) the absence of such a duty would also prejudice innocent neighbours who suffered harm and damage through no fault of their own; and

(d) the prospect of physical harm to persons in the course of demolition works added to the imperative of finding such a duty.

The respondents' case

33 The respondents, in contrast, submitted that the appeal should be dismissed in respect of all three heads of liability invoked by the appellants for essentially the same reasons as those given by the DJ and the Judge.

The vicarious liability issue

34 In relation to the vicarious liability issue, the respondents contended that there was nothing in the authorities to suggest that the doctrine of vicarious liability could be extended to impose liability on a defendant for an independent contractor's negligence, and indeed, there was no reason either in policy or principle which could justify such an extension. It was submitted that since the

appellants were not disputing the finding that Esthetix was an independent contractor, there was no basis for holding the respondents vicariously liable for the negligence of Esthetix and the appellants' position was therefore unsustainable.

The negligent selection issue

35 On the negligent selection issue, the respondents did not dispute that they owed the appellants a duty to exercise reasonable care in selecting a contractor to carry out the demolition works on their property, and that the relevant standard of care was that which would be expected of a reasonable person in the respondents' position. However, they contended that they had discharged this duty on the facts. Further, the respondents submitted that the appellants had not adduced any evidence that would warrant a finding that Esthetix should not have been chosen for the project, or that the respondents would have appointed another contractor in lieu of Esthetix had they taken the additional measures that the appellants suggested should have been adopted during the selection process. Thus, the appellants' arguments on the negligent selection issue should be dismissed as they had not been able to prove either any breach of duty on the respondents' part or causation of loss flowing from any such breach.

The non-delegable duty of care issue

36 With regard to the non-delegable duty of care issue, the respondents submitted that they did not owe the appellants a non-delegable duty to ensure that Esthetix took reasonable care in carrying out the demolition works which it had been engaged to undertake. The respondents advanced three arguments in this regard.

37 First, the respondents submitted that the doctrine of ultra-hazardous acts should not be recognised as part of Singapore law. This was because imposing a non-delegable duty of care in respect of the performance of ultra-hazardous acts posed practical difficulties and was "out of line with the developments in the modern law of negligence". The better approach was instead to impose a higher standard of care commensurate with the degree of risk involved in cases involving such acts. The respondents considered the relevant standard of care in this case to be that in respect of *selecting a contractor to carry out the demolition works on their property*, and, as stated above, they contended that they had met the requisite standard in this regard.

38 Second, and in the alternative, the respondents argued that should the doctrine of ultra-hazardous acts be recognised as part of Singapore law such that a non-delegable duty would be imposed in respect of the performance of such acts, the inquiry into whether such a duty should be imposed in a particular situation would be more appropriately addressed under the *Spandeck* test. According to the respondents, this was a move that had in fact been foreshadowed by this court in *Management Corporation Strata Title Plan No 3322 v Tiong Aik Construction Pte Ltd and another* [2016] 4 SLR 521 ("*Tiong Aik*"), where the test set out for determining whether to impose non-delegable duties "largely mirror[ed]" the *Spandeck* test. On this premise, the respondents relied on the same reasons as those given by the Judge (as set out at [24] above) to argue that a non-delegable duty should not be imposed on them on the facts of this case.

39 Third, the respondents contended that in any event, the demolition works in this case were "not ultra-hazardous in their intrinsic nature" and therefore did not warrant the imposition of a non-delegable duty in respect of their performance. In common with the DJ and the Judge, the respondents preferred

the description of "ultra-hazardous" acts adopted in *Biffa Waste* over that articulated in *Honeywill*. On this basis, they submitted that the demolition works on their property were not intrinsically hazardous, and, as long as proper precautions were taken, were not even comparable, in terms of their potential danger, to activities such as the use of explosives, which had previously been found to be "ultra-hazardous".

Our decision

Preliminary observations

40 As we mentioned at [2] above, we dismissed this appeal after we heard the parties' oral arguments. We did so because, as will shortly become evident (and with respect to counsel for the appellants), the arguments advanced on behalf of the appellants rested on certain misconceptions of the law governing the imposition of tortious liability on persons other than a primary tortfeasor. Esthetix was the primary tortfeasor in this case. Yet, the appellants sought to impose liability on the respondents on the three separate bases outlined at [1] above. It would be helpful for us to provide an overview of each of these bases before we analyse them in detail.

41 The first basis on which the appellants mounted their case was the doctrine of vicarious liability, which is a form of *secondary* liability. In brief, under this doctrine, the law holds a defendant liable for the negligence of another even if the defendant has not been negligent at all. This, plainly, is an uncommon situation, and it is important to understand the proper limits of the doctrine and the circumstances in which the law will impose such liability. Under the orthodox analysis, it has always been recognised that a prerequisite for the imposition of such liability is the existence of a special relationship between the defendant and the tortfeasor such as would make it fair, just and

reasonable to impose liability on the defendant for the wrongful acts of the tortfeasor.

42 Equally, under the orthodox analysis, whatever might be the nature of that special relationship, its very antithesis is a relationship under which the tortfeasor is engaged by the defendant as an independent contractor. The reason for this will become evident when the underlying rationale of the doctrine of vicarious liability is properly understood. In the present case, the appellants, despite accepting that the tortfeasor, Esthetix, was an independent contractor, nevertheless contended that the respondents could be made vicariously liable for the negligence of Esthetix. They said that this was because the courts had eschewed the law's traditional focus on the employment relationship as the primary basis for imposing vicarious liability in favour of a multi-factorial approach that examined whether it was just to impose such liability in all the circumstances of the case concerned. This is a mistaken view of the law. As we will elaborate below, there are two separate inquiries to be undertaken when determining whether vicarious liability should be imposed. The first examines the nature of the relationship between the defendant and the tortfeasor. While the law does not confine this to a relationship of employment, it remains necessary to establish a relationship of sufficient closeness such as would make it fair, just and reasonable to impose liability on the defendant for the tortious acts of another. Indeed, a proper understanding of the cases cited by the appellants will reveal that where the courts have been prepared to find vicarious liability outside the context of an employment relationship, the relationships within which this has been done have all been closely analogous to the employment relationship and bear many of the same features so as to make it fair, just and reasonable to impose such liability.

43 Further, as we indicated earlier, the fact that the tortfeasor is an independent contractor will generally be sufficient, in and of itself, to exclude the application of the doctrine of vicarious liability. The appellants did not challenge the finding by both the District Court and the High Court that Esthetix was engaged by the respondents as an independent contractor, and this was sufficient to dispose of the appellants' case on the vicarious liability issue.

44 The second inquiry to be made when deciding whether vicarious liability should be imposed is whether there is a sufficient connection between the relationship between the defendant and the tortfeasor on the one hand, and the commission of the tort on the other. Has that relationship created or significantly enhanced the risk of the tort being committed? This is a second and distinct part of the analysis which is only reached if the claimant can first establish the existence of a special relationship between the defendant and the tortfeasor. As the appellants failed at the first hurdle in this appeal, the second inquiry did not arise at all.

45 The second basis of the appellants' claim, which concerned the negligent selection issue, was an assertion of *primary* liability against the respondents on the grounds that they had been negligent in selecting Esthetix to carry out the demolition works on their property. The appellants mounted this argument even though: (a) the works in question were a regulated activity that required the appointed contractor, Esthetix, to be duly qualified; (b) Esthetix was duly qualified; and (c) the appellants were unable to point to even a single factor that would have alerted the respondents to the fact that in appointing Esthetix to undertake work that it was statutorily qualified to perform, the respondents were acting in breach of their duty of care. It will be evident why we were not impressed with this. The appellants appeared to think that Esthetix was evidently unsuitable to undertake the demolition works on the respondents'

property because it did in fact carry out those works negligently. However, this misses the point – Esthetix would be liable for executing those works negligently. But this affords no grounds for also imposing liability on the respondents for appointing Esthetix to do that which it was duly qualified to do.

46 The third basis of liability invoked by the appellants, which related to the non-delegable duty of care issue, was again an attempt to impose *primary* liability on the respondents. The appellants argued that because of the nature of the demolition works on the respondents' property, the duty of care on the respondents' part was not only to take reasonable care in appointing a suitable contractor to carry out those works, but also to *ensure* that "whatever [was] done on their land [was] done with reasonable care". The duty of care advocated by the appellants would provide an exceptional remedy, and to the extent that it is recognised as part of our law, it should apply only in limited settings, such as where a defendant engages a contractor to perform ultra-hazardous activities. The focus of the inquiry in such a situation would be on whether the activity in question is ultra-hazardous such that it is fair, just and reasonable to impose liability on the defendant if it fails to ensure that the activity is carried out with reasonable care. We were amply satisfied that demolition works of the type carried out in this case did not qualify as an ultra-hazardous activity.

47 In that light, we turn to elaborate on our decision on the three specific heads of liability raised in this case.

Whether the respondents were vicariously liable for the negligence of Esthetix

48 We begin with the vicarious liability issue.

49 The appellants cited a number of authorities, both foreign and local, which ostensibly supported their contention that vicarious liability could be imposed outside the context of an employment relationship whenever the circumstances made it appropriate to do so. According to the appellants, the *Christian Brothers* case and *Cox* heralded a new approach to determining whether vicarious liability should be imposed in any given situation. This new approach was said to feature a "more nuanced, multi-factorial" inquiry, under which the appointment of an independent contractor would no longer afford a defence or an "automatic escape hatch" that exonerated a defendant from liability. Instead of examining only the legal relationship or agreement between the tortfeasor and the defendant, the court should look to the criteria set out in the *Christian Brothers* case (at [35]) in determining whether vicarious liability should be imposed. In the context of the appellants' case, the questions to be addressed were essentially the following:

(a) Was the defendant more likely than the tortfeasor to have the means to compensate the victim, and could the defendant be expected to have insured itself against that liability?

(b) Was the tort committed as a result of activity undertaken by the tortfeasor on behalf of the defendant?

(c) Was the tortfeasor's activity part of the defendant's business activity?

(d) Did the defendant, by engaging the tortfeasor to carry out the activity, create the risk of the tort being committed by the tortfeasor?

(e) Was the tortfeasor, to a greater or lesser degree, under the defendant's control at the time the tort was committed?

50 The appellants submitted that this approach resonated with our observations in both *Skandinaviska* and *BNM (administratrix of the estate of B, deceased) on her own behalf and on behalf of others v National University of Singapore and others and another appeal* [2014] 4 SLR 931 ("*BNM*"), which, it was said, "foreshadowed a movement away from a categorical approach premised on the finding of an employment or agency relationship" towards the more policy-centric approach embodied in the *Christian Brothers* case and *Cox* as described above.

51 Applying the *Christian Brothers* case and *Cox* to the facts of this appeal, the appellants argued that vicarious liability should be imposed on the respondents. This was because Esthetix was carrying out the demolition works on the respondents' property for the respondents' purposes, and in truth, the respondents had control over the premises as well as the demolition works even though they had abdicated such control to Esthetix. Furthermore, there were several policy considerations which justified the imposition of vicarious liability on the respondents, including providing effective compensation to the appellants, who did not have the control that the respondents had over the situation, and deterring future harm by encouraging persons in the respondents' position to take steps to reduce the risk of similar harm in future cases.

52 In analysing the aforesaid arguments by the appellants, it is helpful, first, to set out the facts and the reasoning in the *Christian Brothers* case and *Cox*.

53 In the *Christian Brothers* case, the sole issue was whether a Catholic teaching order ("the Institute"), which assigned its members to teach at various schools, could be held vicariously liable for acts of physical and sexual abuse committed by its members during their assignment at a boys' residential school in England. Lord Phillips of Worth Matravers, with whom the other members

of the court agreed, began his analysis by setting out the two-stage inquiry for determining whether vicarious liability would arise in the context of a relationship which was alleged to be one of employment (at [19]): First, was there a true employer-employee relationship between the defendant and the tortfeasor? And second, was the tortfeasor acting in the course of his employment when he committed the tortious act?

54 In relation to the first stage of the inquiry, Lord Phillips explained that the policy objective underlying the doctrine of vicarious liability was to ensure, in so far as it was fair, just and reasonable to do so, that liability for a tortious wrong was borne by a defendant with the means to compensate the victim. The relationship that gave rise to vicarious liability in the vast majority of cases was that between an employer and an employee under a contract of employment. In such a situation, the following would generally be true, and there would usually be no difficulty in finding it fair, just and reasonable to impose vicarious liability on the employer (at [35]):

> (a) the employer would be more likely than the employee to have the means to compensate the victim and could be expected to have insured itself against that liability;
>
> (b) the tort would have been committed as a result of activity undertaken by the employee on behalf of the employer;
>
> (c) the employee's activity would likely be part of the business activity of the employer;
>
> (d) the employer, by employing the employee to carry out the activity, would have created the risk of the tort being committed by the latter; and

(e) the employee would, to a greater or lesser degree, have been under the control of the employer at the time the tort was committed.

As we noted above at [49], these were the basic criteria which the appellants sought to draw on in support of their case on the vicarious liability issue. Lord Phillips then went on to say that where the defendant and the tortfeasor were not bound by an employment contract but their relationship had the same incidents, that relationship could properly give rise to vicarious liability on the grounds that it was "akin to [the relationship] between an employer and an employee" (at [47]).

55 On the facts of the *Christian Brothers* case, the relationship between the Institute and its members differed from that between an employer and an employee. The members were bound to the Institute not by contract, but by their religious vows. In addition, the members were not paid for teaching at the schools to which they were posted. Instead, the members would enter into deeds under which they were obliged to transfer all their earnings to the Institute. The Institute catered for its members' needs from these funds. Lord Phillips held that these differences in fact rendered the relationship between the members and the Institute *even closer* than that between an employer and an employee (at [58]). The criteria under the first stage of inquiry (as set out at [53] above) was therefore found to be satisfied on the basis that the relationship at hand was sufficiently akin to an employment relationship.

56 As to the second stage of the inquiry, Lord Phillips stated that where the relationship between the defendant and the tortfeasor was akin to an employment relationship, the issue was whether there was a "close connection" between the tortious act and the tortfeasor's relationship with the defendant. In cases involving sexual abuse, this requirement would likely be satisfied "where

a defendant, whose relationship with the abuser put it in a position to use the abuser to carry on its business or to further its own interests, ha[d] done so in a manner which ha[d] *created or significantly enhanced the risk* that the victim or victims would suffer the relevant abuse" [emphasis added] (at [86]).

57 On the facts of the *Christian Brothers* case, the criteria under the second stage of the inquiry was found to be satisfied as well. Lord Phillips explained that the relationship between the Institute and its members had enabled the Institute to place its members in teaching positions at the residential school concerned, and it was also by virtue of the abusers' standing as members of the Institute that they had come to teach at that school, with the victims placed in their charge. Even though abusing the boys in their charge was diametrically opposed to the objectives for which the members had been assigned to the school (these being to care for the boys' educational and religious needs), the acts of abuse bore a close connection with the members' relationship with the Institute and were therefore acts in respect of which the Institute could be held vicariously liable. Lord Phillips therefore concluded that by reason of the satisfaction of the relevant criteria, the *Christian Brothers* case was a clear instance where it was fair, just and reasonable for the Institute to be held vicariously liable for its members' tortious acts.

58 The other authority on which the appellants sought to rely, *Cox*, was a 2016 decision of the UK Supreme Court which affirmed the earlier decision in the *Christian Brothers* case. In *Cox*, the claimant was a catering manager in a prison. While moving supplies with the help of prisoners who worked in the prison's kitchen, she was injured by a prisoner who had negligently dropped a bag of rice on her back. She brought proceedings against the prison service, claiming that it was vicariously liable for the prisoner's act in the course of his work in the kitchen.

59 In his judgment, Lord Reed JSC, with whom the other members of the court agreed, was of the view that the approach adopted in the *Christian Brothers* case to decide whether a relationship other than one of employment could give rise to vicarious liability had developed the doctrine of vicarious liability so as to make it responsive to modern circumstances. He noted as follows (see *Cox* at [29]):

> … [The approach in the *Christian Brothers* case] is intended to provide a basis for identifying the circumstances in which vicarious liability may in principle be imposed outside relationships of employment. By focusing upon the business activities carried on by the defendant and their attendant risks, it directs attention to the issues which are likely to be relevant in the context of modern workplaces, where workers may in reality be part of the workforce of an organisation without having a contract of employment with it, and also reflects prevailing ideas about the responsibility of businesses for the risks which are created by their activities. It results in an extension of the scope of vicarious liability beyond the responsibility of an employer for the acts and omissions of its employees in the course of their employment, but not to the extent of imposing such liability where a tortfeasor's activities are entirely attributable to the conduct of a recognisably independent business of his own or of a third party. An important consequence of that extension is to enable the law to maintain previous levels of protection for the victims of torts, notwithstanding changes in the legal relationships between enterprises and members of their workforces which may be motivated by factors which have nothing to do with the nature of the enterprises' activities or the attendant risks.

60 In affirming the two-stage approach adopted in the *Christian Brothers* case, Lord Reed JSC held that the requirements laid down in that case had similarly been satisfied in *Cox*. As the prisoners working in the prison's kitchen were integrated into the operations of the prison, the activities assigned to them by the prison service formed an integral part of the activities which the latter carried out in furtherance of its aims. The prisoners had been placed by the prison service in a position where there was a risk that they might commit a variety of negligent acts within the field of activities assigned to them.

Furthermore, they worked under the direction of the prison staff. In the premises, it was fair, just and reasonable to hold the prison service vicariously liable to the claimant given that she had been injured as a result of the negligence of the aforesaid prisoner, who had at that time been performing the activities assigned to him by the prison service.

61 In our judgment, upon a closer consideration of the *Christian Brothers* case and *Cox*, it was evident that there was no merit in the appellants' arguments on the vicarious liability issue. In the first place, the appellants' submissions rested on a mischaracterisation of the law. What the appellants did, in essence, was to take certain pronouncements from the respective speeches of Lord Phillips and Lord Reed JSC in the *Christian Brothers* case and *Cox* out of context and then contrive a legal argument out of them.

62 We earlier stated (at [41]–[42] above) that it remains necessary to establish the existence of a special relationship between the defendant and the tortfeasor in order to mount a claim under the doctrine of vicarious liability. In this regard, the factors mentioned by Lord Phillips in the *Christian Brothers* case (see [54(a)]–[54(e)] above), which were relied on by the appellants (see [49(a)]–[49(e)] above), do not present a new analytical framework for determining whether vicarious liability should be imposed. Rather, as is clear from the summary of Lord Phillips' analysis at [54] above, his Lordship was merely explaining some of the reasons why the law is prepared to impose liability on a defendant for the tortious acts of another in certain circumstances. To put it simply, the criteria listed at [54(a)]–[54(e)] above help to guide the court in determining the types of relationships within which it would be fair, just and reasonable to impose such liability. In that context, Lord Phillips recognised that it would be wrong to take a rigid approach and confine the application of the doctrine of vicarious liability to situations where there was an

employment relationship. On the facts of the *Christian Brothers* case, Lord Phillips held that the relationship between the Institute and its members, although not one of employment, was closely analogous to it; and since that relationship admitted of the same or similar considerations as would make it fair, just and reasonable to impose liability on an employer for the tortious acts of its employee, there was no reason in principle not to do so in relation to the Institute. Much the same approach was taken in *Cox*, where the court, in affirming the approach adopted in the *Christian Brothers* case, demonstrated a keen appreciation of its significance in extending the scope of vicarious liability beyond employment relationships to those that bore certain characteristics similar to those found in an employment scenario, subject to there being a sufficient connection between that relationship and the commission of the tort in question.

63 Hence, while we accept that the *Christian Brothers* case and *Cox* recognise that the doctrine of vicarious liability can be applied outside the strict confines of an employment relationship, it becomes evident, when one examines these judgments more closely, that their essential contribution was to fine-tune the existing framework underlying the doctrine so as to accommodate the more diverse range of relationships which might be encountered in today's context. These relationships, when whittled down to their essence, possess the same fundamental qualities as those which inhere in employer-employee relationships, and thus make it appropriate for vicarious liability to be imposed. This was also the view which the Judge arrived at when he observed that the inquiry set out in the *Christian Brothers* case and affirmed in *Cox* "was never intended to inaugurate a radical change in the law of vicarious liability, but to systematise and update it in the light of modern business realities" (at [32] of the High Court GD).

64 Seen in this context, it will be apparent that while the *Christian Brothers* case and *Cox* present a renewed and more fine-grained method for discerning the types of relationships which may give rise to vicarious liability, they ultimately do not detract from the normative roots of the doctrine governing such liability. In keeping with this, it has to be said that the cases cited by the appellants do not, by any stretch, suggest that vicarious liability can be imposed on a defendant for the lapses committed by a person who was engaged as an *independent contractor*. Indeed, to do so would be antithetical to the doctrine's very foundations, and it is therefore entirely unsurprising that in *Cox*, Lord Reed JSC explicitly cautioned in no uncertain terms that although the approach espoused in the *Christian Brothers* case extended the scope of vicarious liability beyond the employment context, this was "not to the extent of imposing such liability where a tortfeasor's activities are entirely attributable to the conduct of a recognisably independent business of his own or of a third party" (see *Cox* at [29], which we reproduced earlier at [59] above). Indeed, we do not see how vicarious liability, the normative foundation of which rests on the theory that it is fair, just and reasonable to hold a defendant liable for the acts of the tortfeasor on the ground that the tortfeasor is in fact engaged in the defendant's enterprise, could possibly be extended to tortious acts committed by an independent contractor, who, by definition, is engaged in his own enterprise. There is simply nothing fair, just and reasonable about imposing secondary liability on a defendant in such a situation.

65 The appellants' reliance on *Skandinaviska* and *BNM* (see [50] above) was equally misplaced. Although the appellants were of the view that decisions such as *Skandinaviska* and *BNM* had recognised a more open-textured inquiry in determining whether vicarious liability should be imposed in a particular situation, there is nothing in these decisions to support an extension of the

doctrine of vicarious liability in the way that the appellants suggested. We return here to the preliminary observation that we made at [44] above, which is consistent with the findings in the *Christian Brothers* case and *Cox* as outlined earlier – namely, that aside from the existence of the requisite relationship between the defendant and the tortfeasor, it is necessary to also inquire into the *connection* between that relationship and the commission of the tort. When vicarious liability was a doctrine that applied essentially in the context of an *employer* being held liable for the tortious acts of an *employee*, this latter part of the inquiry focused on whether the tortious act was carried out within the scope of the employment in terms of whether that act: (a) had been specifically authorised by the employer; or (b) had been committed by the employee while he was doing something which he was authorised to do, albeit in a *manner* that was not authorised. This approach has not always been easy to apply in practice, and still less is it satisfactory when the doctrine is extended beyond the strict confines of an employment relationship.

66 In the *Christian Brothers* case, Lord Phillips examined whether the requisite connection was established from the perspective of whether the relationship between the defendant and the tortfeasor was such that the way in which the defendant had used or engaged the tortfeasor had "created or significantly enhanced the risk" of the harm that ensued. As his Lordship put it at [86]–[87]:

> 86 … Vicarious liability is imposed where a defendant, whose relationship with the abuser put it in a position to use the abuser to carry on its business or to further its own interests, *has done so in a manner which has created or significantly enhanced the risk that the victim or victims would suffer the relevant abuse*. The essential closeness of connection between the relationship between the defendant and the tortfeasor and the acts of abuse thus involves a strong causative link.

> 87 These are the criteria that establish the necessary "close connection" between relationship and abuse. I do not think that it is right to say that creation of risk is simply a policy consideration and not one of the criteria. Creation of risk is not enough, of itself, to give rise to vicarious liability for abuse but it is always likely to be an important element in the facts that give rise to such liability.
>
> [emphasis added]

In our judgment, this is entirely correct. Not only must there be a special relationship between the tortfeasor and the defendant, but in addition, the defendant must in some way have created or significantly enhanced, by virtue of that relationship, the very risk that in fact materialised in order to be held vicariously liable for the tortfeasor's wrongful acts.

67 This is consistent with the approach taken in *Skandinaviska*, which concerned an elaborate fraud perpetrated by a finance manager of a prominent company on a number of banks for more than four years. The issue was whether vicarious liability should be imposed on the company for the torts committed by its finance manager while he was engaged in an unauthorised course of conduct. In that context, the "close connection" test was articulated, under which the court was to "examine all the relevant circumstances – including policy considerations – and determine whether it would be fair and just to impose vicarious liability on the employer" [emphasis in original omitted] (at [75]; see also [86] of *Skandinaviska*). It is plain that the "close connection" test set out in *Skandinaviska* presupposed the existence of an employment relationship between the defendant and the tortfeasor, and was conceived to help evaluate whether vicarious liability should be imposed in a situation where the tortfeasor had acted outside the scope of his authority but nonetheless *within the context of his employment*. In essence, this test simply shifted the attention to the second and essential inquiry outlined at [44] above, in the context of a relationship of sufficient closeness between the defendant and the tortfeasor

having already been established, to determine whether it would be fair, just and reasonable to impose vicarious liability on the defendant.

68 As for *BNM*, that decision simply recognised that in addition to the defendant's control over the tortfeasor, a range of other considerations, such as whether the tortfeasor undertook the financial risks of running its business, whether the tortfeasor retained the profits from its business and whether the tortfeasor took out its own public liability insurance, were relevant and important in determining whether the tortfeasor was an independent contractor and, thus, whether vicarious liability should be imposed on the defendant (at [31]–[32]). In other words, the observations in that case were not concerned with the question of whether the scope of the doctrine of vicarious liability should be extended; they were only concerned with the range of factors that should be considered in determining whether vicarious liability would arise within the *existing* scope of the doctrine. In our judgment, the appellants' attempt to rely on *BNM* therefore did not assist them in any way.

69 On an application of the two-stage inquiry set out in the *Christian Brothers* case, the appellants' contention that the respondents should be held vicariously liable for the negligence of Esthetix must be rejected on both grounds. First, the respondents had engaged Esthetix as an independent contractor to carry out demolition works (among other works) on their property. For the reasons given by the Judge at [41] of the High Court GD, the facts clearly disclosed a project which Esthetix had pursued for its own gain: (a) Esthetix concluded contracts with consultants and subcontractors in its own name; (b) it hired its own employees and was solely responsible for their management and supervision; (c) it took out insurance in its own name; and (d) it maintained a separate account from the respondents and regularly received lump sum payments from the respondents which it retained as its own profits.

In fact, that Esthetix was an independent contractor on an application of the law as it currently stands was not seriously disputed by the appellants in the proceedings before us. In the circumstances, we failed to see how the present case could possibly be brought within the ambit of the doctrine of vicarious liability.

70 Second, to the extent that it was suggested that because the works carried out on the respondents' property were an enterprise which properly belonged to the respondents, the risks of that enterprise should rightly be borne by them, this was flawed for a fundamental reason. This argument rested on the notion that as long as factual or "but for" causation was established between the defendant's relationship with the tortfeasor and the commission of the ensuing tort, vicarious liability could be imposed. This, however, is simply not the law. It is not any relationship between the defendant and the tortfeasor that will suffice, and an independent contractor relationship will generally exclude the application of the doctrine altogether. Nor will "but for" causation suffice. As we have already pointed out, the essential requirement is that the defendant must, pursuant to or by virtue of its relationship with the tortfeasor, either have created or significantly increased the risk of the harm that ensued. There was nothing at all to suggest that this requirement was satisfied in the present case.

71 We therefore agreed with the Judge that vicarious liability could not be imposed on the respondents for the negligence of Esthetix in carrying out the demolition works in this case.

Whether the respondents had exercised reasonable care in selecting Esthetix as their contractor

72 On the negligent selection issue, we found no merit in the appellants' argument that the Judge erred in finding that the respondents were not negligent

in appointing Esthetix as their contractor for the demolition works on their property. There were two reasons for our decision in this regard.

73 First, we were unable to accept the appellants' contention that the Judge had applied the wrong standard of care. As we noted earlier at [20] above, in setting out the applicable standard of care, the Judge observed that the "turnkey" approach which the respondents adopted was "an accepted industry practice … and a 'common choice for homeowners in Singapore'" (see the High Court GD at [52]). According to the appellants, the Judge should not have defined the standard of care expected of the respondents by reference to industry practice, but should instead have applied the objective standard of the reasonable man. We saw no merit in this submission. In the first place, the Judge did state expressly that the applicable standard was "that of a reasonable person in the circumstances of the defendant" (at [52]). What the Judge then proceeded to do was to have regard to the particular circumstances of the present case, including the applicable industry practices, and then ascertain, on this basis, what a reasonable person in the respondents' position would have done.

74 In our judgment, the Judge was entirely correct to approach the negligent selection issue in this way. Industry standards and common practice have long been viewed as important, although not necessarily conclusive, factors in ascertaining the appropriate standard of care. As the learned authors of *Charlesworth & Percy on Negligence* (C T Walton gen ed) (Sweet & Maxwell, 13th Ed, 2014) have observed (at para 7-43), when receiving evidence of what is alleged to be a common and approved practice so as to assess the standard of care appropriate in a particular set of circumstances, the court should of course examine the practice against considerations of logic and common sense. This is only sensible since negligent conduct does not cease to be so simply on account of repetition and normalisation. In assessing the standard of care to be met,

therefore, it would be just as unwise to accept a common industry practice uncritically as it would be to simply ignore it.

75 On the facts of this case, there was nothing which would have led us to conclude that the "turnkey" approach was in any sense an inappropriate practice. The appellants had not shown how any other precautions which a reasonably prudent person in the respondents' situation would have taken would have avoided or reduced the danger from the demolition works carried out on their property. Certainly, no evidence was led to suggest that the "turnkey" approach was inappropriate either generally or in the present context, and we saw no reason to take a contrary view.

76 Second, and in any case, we also failed to see how it could possibly be said that the respondents had breached their duty of care in selecting Esthetix as the contractor to carry out the aforesaid works. The short point was that Esthetix was *licensed* to carry out the works that it had been engaged to perform. In a regulated area of activity, the fact that a tortfeasor was statutorily qualified to carry out the very works that the defendant engaged him to do would generally afford a cogent basis for excluding a finding of negligence on the part of the defendant in selecting that person to do those works. In this case, Esthetix met the requisite standards of professional competence and safety imposed under the Building Control Act (Cap 29, 1999 Rev Ed); and by ascertaining that Esthetix was properly licensed by the BCA prior to appointing it, the respondents had gone a considerable way in demonstrating that they had not breached their duty of care. The appellants did not present anything to suggest that there was any reason why the respondents should be found to have known that despite being duly licensed by the BCA, Esthetix was not in fact competent to undertake the demolition works which it had been engaged to undertake.

77 In the circumstances, we upheld the Judge's finding that the respondents were not negligent in appointing Esthetix as their contractor for the aforesaid works.

Whether the respondents owed the appellants a non-delegable duty of care in respect of the demolition works carried out on their property

78 We turn now to the final issue, the non-delegable duty of care issue, which concerned the question of whether the respondents bore a non-delegable duty to ensure that Esthetix took reasonable care in performing the demolition works which it had been engaged to carry out on their property. If such a non-delegable duty were found, the respondents would be liable for the negligence of Esthetix, an independent contractor, in carrying out those works even if the respondents had selected Esthetix as their contractor with the utmost care. As we have already noted at [46] above, such liability on the respondents' part would not be secondary liability based on the doctrine of vicarious liability, but would instead be primary liability based on the respondents' breach of their non-delegable duty to *ensure* that Esthetix performed the demolition works on their property without any negligence.

The law on non-delegable duties of care

79 The law on non-delegable duties of care was most recently discussed in our decision in *Tiong Aik*. The Judge did not have the opportunity to consider this decision because it was issued only after he had released the High Court GD. Nonetheless, the Judge's approach in analysing whether a non-delegable duty arose on the facts of this case was not inconsistent with the framework which we set out in *Tiong Aik* ("the *Tiong Aik* framework").

80 In *Tiong Aik*, we began with a conceptual analysis of the nature of non-delegable duties of care in tort. We observed that under the tort of negligence, a person would generally be held liable only for his *own* carelessness, and not for the carelessness of others (at [19]). Vicarious liability, we noted, was one derogation from this fault-based principle (at [20]); another "derogation" (in the loose sense) was the doctrine of non-delegable duties, which, in essence, imposed on a defendant a duty that "extend[ed] beyond being careful, to procuring the careful performance of work delegated to others" (see *Woodland* at [5] *per* Lord Sumption JSC, cited at [22] of *Tiong Aik*). A party subject to a non-delegable duty would be held liable in tort even if he had non-negligently delegated the performance of certain tasks to an independent contractor who had then been negligent in performing those tasks (at [24]). However, unlike vicarious liability, which was a form of secondary liability, tortious liability imposed pursuant to a breach of non-delegable duties was *primary* liability because those duties were personal to the duty-bearer (at [21] and [24]).

81 In *Tiong Aik*, we sought to rationalise the situations in which non-delegable duties of care could arise. Drawing on the principles laid down in *Woodland* as a starting point, we formulated the *Tiong Aik* framework, which was essentially a two-stage test for determining whether a non-delegable duty would arise on a given set of facts (at [58] and [62]).

82 We held that at the first stage of this two-stage test, the claimant would have to satisfy the threshold requirement that:

(a) *either* his case fell within one of the established or recognised categories of non-delegable duties; *or*

(b) his case possessed all of the five defining features outlined by Lord Sumption JSC in *Woodland* at [23], namely:

(i) The claimant was a patient or a child, or, for some other reason, was *especially vulnerable or dependent on the protection of the defendant to avoid the risk of injury*. Prisoners and residents in care homes were also mentioned in *Woodland* as likely examples in this regard.

(ii) There was an antecedent relationship between the claimant and the defendant, independent of the negligent act or omission itself, which placed the claimant in the defendant's actual custody, charge or care, *and* from which it was possible to *impute to the defendant the assumption of a positive duty to protect the claimant from harm, and not merely a duty to refrain from conduct which would foreseeably harm or injure the claimant*. In this regard, Lord Sumption JSC noted in *Woodland* that it was characteristic of such relationships that they involved an element of control by the defendant over the claimant, which would vary in intensity in different situations, but would "clearly [be] very substantial in the case of schoolchildren" (see *Woodland* at [23]).

(iii) The claimant had no control over how the defendant chose to perform the obligations arising from the positive duty which it had assumed towards the claimant, that is to say, whether personally or through employees or third parties.

(iv) The defendant had delegated to a third party some function that was an integral part of the positive duty which it had assumed towards the claimant; and at the time of the tortious conduct, the third party was exercising, for the purposes of the function thus delegated to him, the defendant's custody, charge

or care of the claimant and the element of control that went with it.

(v) The third party had been negligent not in some collateral respect, but in the performance of the very function assumed by the defendant and delegated by the defendant to him.

83 Relevant for present purposes, we also observed in *Tiong Aik* that one established category of non-delegable duties that other jurisdictions had recognised related to cases involving ultra-hazardous acts (at [47(c)]). However, we declined to rule on whether and to what extent Singapore law should recognise a non-delegable duty in such a scenario as that question did not arise on the facts in *Tiong Aik* (at [48]).

84 We then briefly discussed the second stage of the *Tiong Aik* framework, which would be triggered only upon the claimant satisfying the threshold requirement at the first stage. We stated that at the second stage, the court would additionally take into account the fairness and reasonableness of imposing a non-delegable duty of care on the defendant in the particular circumstances of the case, as well as the relevant policy considerations in our local context (at [62] of *Tiong Aik*).

85 In explaining the reasons for our decision in *Tiong Aik*, we were careful to emphasise that non-delegable duties "should remain *exceptional*" [emphasis in original] (at [63]). We cautioned that the development of such duties should proceed "only 'on the basis of a clear analogy to a recognised class [of non-delegable duties] and then only for compelling reasons of legal principle and policy'" (at [63], citing *Leichhardt Municipal Council v Montgomery* (2007) 230 CLR 22 at [104] *per* Kirby J). This was because in many instances, it would

be unrealistic or even impossible for the duty-bearer to fulfil the non-delegable duty in question, and this could lead to very artificial outcomes.

86 The *Tiong Aik* framework sets the stage for the analysis of the non-delegable duty of care issue in this case, and we now turn to apply it to the facts before us. We observe that whereas the doctrine of vicarious liability focuses on the relationship between the defendant and the tortfeasor, the doctrine of non-delegable duties focuses on the situation of the claimant in relation to the defendant; and, at least in the context of the category of cases which possess the five defining features outlined at [82(b)] above, on the specific type of relationship between the claimant and the defendant, in the course and context of which a tort is committed by the tortfeasor, whom the defendant has engaged to carry out a function integral to the positive duty which the defendant has assumed towards the claimant by virtue of its underlying relationship with the latter.

Whether a non-delegable duty of care arose on the facts of this case

87 In the present case, there were, as we indicated earlier, two ways in which we could approach the analysis under the first stage of the *Tiong Aik* framework: either by showing that the demolition works on the respondents' property fell within an established category of non-delegable duties; or alternatively, by showing that the facts of this case possessed the five defining features set out at [82(b)(i)]–[82(b)(v)] above which indicated the presence of a non-delegable duty.

(1) Did this case fall within an established category of non-delegable duties?

88 The first of the aforesaid approaches raised the preliminary question of whether ultra-hazardous acts should be recognised as an established category of non-delegable duties under Singapore law.

89 In this regard, we note the criticisms that have been levelled against the doctrine of ultra-hazardous acts, some of which were set out by the Judge at [89] of the High Court GD. These include arguments that the doctrine is premised on outmoded concepts of the law of negligence and operates based on "an unworkable distinction between ultra-hazardous activities and activities which are 'merely' dangerous" (see likewise [89] of the High Court GD). In the light of the difficulties presented, Australia, for one, appears to have rejected the doctrine altogether: see *Stevens v Brodribb Sawmilling Company Proprietary Limited* (1986) 160 CLR 16. For the purposes of the present appeal, it was not necessary for us to come to a firm conclusion as to whether the doctrine should be recognised as part of our law. That is because even assuming it were so recognised, on a proper conception of this doctrine, the facts of the present case could not, as we explain below, possibly come within its ambit.

90 We noted earlier (at [23] above) that there are two contrasting judicial approaches to the ambit of the doctrine of ultra-hazardous acts. The first is the approach adopted in *Honeywill*. There, the employers had engaged independent contractors (referred to as "the photographers" in our discussion of this case) to take photographs of the interior of a cinema. In the process, a chemical flashlight was used to light up the cinema's interior. This involved igniting magnesium flash powder in a tray held above the camera lens. The photographers negligently set up the camera too close to a curtain in the cinema, resulting in the curtain catching fire when the magnesium flash powder ignited.

Considerable damage was caused to the cinema, and the employers, acting on advice, paid compensation to the cinema owners for the damage. The employers then sued the photographers for an indemnity. In their defence, the photographers argued that the employers were not legally liable to the cinema owners to begin with since the damage had been caused by the photographers in their capacity as independent contractors.

91 Slesser LJ, who delivered the judgment of the English Court of Appeal, noted that the general rule was that an employer was not liable for the acts of an independent contractor. An exception to the rule, however, was where an employer engaged an independent contractor to perform ultra-hazardous acts. His Lordship enunciated a general principle of liability in respect of ultra-hazardous acts as follows (at 200–201):

> … Even of [ultra-hazardous operations,] it may be predicated that if carefully and skilfully performed, no harm will follow: as instances of such operations may be given those of removing support from adjoining houses, doing dangerous work on the highway, or creating fire or explosion: hence it may be said, in one sense, that such operations are not necessarily attended with risk. But the rule of liability for independent contractors' acts attaches to these operations, because they are inherently dangerous, and hence are done at the principal employer's peril.

In other words, an activity might be considered ultra-hazardous on account of its "inherently dangerous" nature even if, when proper precautions were taken, no harm was likely to follow. On the facts of *Honeywill*, the English Court of Appeal held that the taking of photographs in a cinema with the use of magnesium flash powder was "a dangerous operation in its intrinsic nature, involving the creation of fire and explosion on [the] premises" (at 200). This therefore gave rise to a duty on the employers' part to take reasonable precautions, which they could not delegate even by engaging independent contractors to take the required photographs. Accordingly, the court held that

the employers were legally liable to the cinema owners for the damage to the cinema and were therefore entitled to an indemnity from the photographers in respect of such damage.

92 The doctrine of ultra-hazardous acts as it was articulated in *Honeywill* has been the subject of trenchant criticism, most of which centres on the difficulties that inhere in identifying what activities may be considered "ultra-hazardous" and what activities may not. It was in the light of these criticisms that the English Court of Appeal in *Biffa Waste* sought to narrow the ambit of the doctrine by setting out an alternative approach.

93 *Biffa Waste* concerned a fire at a recycling plant which was under construction. A main contractor had been engaged to undertake some works at the plant, and it in turn had engaged third-party contractors to perform certain welding works. The third-party contractors were negligent in carrying out the welding works, which led to a fire breaking out. In holding that the welding works were not "ultra-hazardous" in nature, Stanley Burnton LJ stated that the doctrine of ultra-hazardous acts should be applied only to activities that were "*exceptionally* dangerous *whatever precautions are taken*" [emphasis added] (at [78]). As noted earlier, this was in view of the numerous difficulties associated with the *Honeywill* approach, which, because it excluded from consideration the availability of precautionary measures to ameliorate the potential risks posed by the activity in question, made the doctrine hard to apply as it gave rise to problems in distinguishing between activities that were "inherently dangerous" (*per* Slesser LJ in *Honeywill* at 201) and those that were not.

94 We agree with the Judge (at [77] of the High Court GD) that the observations of Burnton LJ in *Biffa Waste* present an attractive approach to defining the ambit of the doctrine of ultra-hazardous acts, not least because it is

informed by a keen appreciation of the difficulties which the doctrine presents. Indeed, the *Biffa Waste* approach was formulated so as to present an analytical framework that would mitigate these difficulties. As we have just mentioned, Burnton LJ confined "ultra-hazardous" acts to those which were "exceptionally dangerous whatever precautions [were] taken" (see *Biffa Waste* at [78]). The key attraction of this approach, as the Judge recognised (at [74]–[77] of the High Court GD), is that it introduces a measure of certainty as to what would constitute an "ultra-hazardous" act. This is critical because even the most mundane of daily activities can turn out to be "ultra-hazardous". As Lord Macmillan stated in *Read v J Lyons & Company, Limited* [1947] AC 156 at 172, "[e]very activity in which man engages is fraught with some possible element of danger to others[;] [e]xperience shows that even from acts apparently innocuous[,] injury to others may result". Driving a vehicle, charging electronic devices and using kitchen appliances all spring to mind as activities that would strike most people as routine; yet, there could potentially be catastrophic consequences if reasonable care is not exercised while performing these activities (see, for instance, the example given by the Judge, in the context of driving, of "speed[ing] through a school zone at 100km/h resolving all the while never to check for students crossing the road" (at [74] of the High Court GD)). On the other hand, with the exercise of reasonable care, which includes the taking of proper precautions, most of these activities would be regarded as tolerably safe. Mishaps might still occur even when these activities are carried out with reasonable care: the brakes in a car driven by a prudent driver might unexpectedly fail, or a charging device or kitchen appliance containing an unknown manufacturing defect might unexpectedly explode despite the user observing all the safety guidelines. But that is beside the point. Despite the possibility of such unexpected and unforeseeable incidents occurring, we would

not regard driving, charging electronic devices and using kitchen appliances as "ultra-hazardous" activities.

95 In contrast, some activities remain "exceptionally dangerous" even if precautions are taken, in that these activities pose a material risk of causing exceptionally serious harm to others even if they are carried out with reasonable care. Using explosives for a legitimate purpose is an example of such an activity; another might be the use of extremely hazardous chemicals for a legitimate purpose. We emphasise here that we furnish these examples not to suggest that any activity involving the use of explosives or highly hazardous chemicals will necessarily be regarded as "ultra-hazardous". Rather, we do so to provide an illustration of what activities *might* be found to be (as Burnton LJ put it in *Biffa Waste* at [78]) "exceptionally dangerous whatever precautions are taken", having regard to:

(a) the persistence of a material risk of exceptionally serious harm to others arising from the activity in question;

(b) the potential extent of harm if the risk materialises; and

(c) the limited ability to exclude this risk despite exercising reasonable care.

96 It will be evident from this that the doctrine of ultra-hazardous acts imposes an extremely stringent duty on the duty-bearer. For this reason, it should only be applied in very limited circumstances, namely, where an activity poses a material risk of causing exceptionally serious harm to others *even if* it is carried out with reasonable care. It is the *persistence* of such a risk *despite* the exercise of reasonable care which makes it fair, just and reasonable to hold the defendant liable for any negligence in the performance of the activity even if

the negligent conduct was on the part of an independent contractor whom the defendant had engaged to carry out the activity.

97 Applying these principles, it was evident to us that the demolition works in this case could not reasonably be said to be ultra-hazardous. In this connection, we noted the following points in particular:

(a) The appellants did not put forward anything to explain how the damage to their property ensued from a particular risk arising from the demolition works on the respondents' property that remained substantial despite the exercise of reasonable care.

(b) Demolition works are routinely done and there is nothing to suggest that despite the exercise of reasonable care, there remains a material risk of exceptionally serious harm arising from such works.

(c) This analysis does not change even though landed properties in Singapore tend to be located in close proximity to one another. That simply establishes the element of factual proximity and the foreseeability of harm being caused if reasonable care is not taken when demolition works are carried out. It does not in any way shed light on whether such works are "exceptionally dangerous whatever precautions are taken" (*per* Burnton LJ in *Biffa Waste* at [78]), which was the central issue here.

98 For these reasons, we were satisfied that the doctrine of ultra-hazardous acts did not apply to the demolition works carried out on the respondents' property in this case.

(2) Alternatively, did this case possess the five defining features which would indicate the existence of a non-delegable duty?

99 We next considered whether the facts of the present case possessed the five defining features set out at [82(b)(i)]–[82(b)(v)] above so as to give rise to a non-delegable duty of care on the respondents' part in relation to the demolition works carried out by Esthetix on their property.

100 When the established categories of non-delegable duties and the principles affecting the finding of a non-delegable duty of care are examined, it immediately becomes apparent that such a duty generally arises as a result of a distinctive type of relationship under which the defendant is, in effect, under a positive duty to care for the claimant. As we observed in *Tiong Aik*, although there are some misgivings about the prospect of finding conceptual unity among the different categories of non-delegable duties, one common thread which might be said to run through these categories is a relationship between the defendant and the claimant under which the claimant has a "special dependence" on or "particular vulnerability" in relation to the defendant (at [50] and [54]). Such dependence or vulnerability arises by virtue of the defendant (the duty-bearer) undertaking or assuming some form of responsibility to the claimant. In keeping with this, non-delegable duties have typically been found in the context of custodial relationships – for instance, hospitals with regard to patients under their care (see *Cassidy v Ministry of Health* [1951] 2 KB 343) and schools with regard to their pupils' physical safety (see *Commonwealth of Australia v Introvigne* (1982) 150 CLR 258).

101 On the facts before us, the nature of the relationship between the appellants and the respondents bore no resemblance at all to the types of relationships within which non-delegable duties of care had previously been

found. In our judgment, none of the five defining features outlined at [82(b)(i)]–[82(b)(v)] above were present in this case.

102 As we mentioned earlier at [32] above, the appellants sought to argue that:

(a) in electing to demolishing the existing property on their land and build a new house there, the respondents had "assumed responsibility" towards their neighbours, the appellants;

(b) the appellants were especially vulnerable because their property was 2m lower than the respondents' property and they had no control over the demolition works carried out there; and

(c) in contrast, the respondents had control over the performance of the demolition works as they had control of the work site and the method of work, and could also make decisions on workplace safety and health.

103 We, however, agreed with the Judge (at [83] of the High Court GD) that the relationship which the appellants described was essentially that which would ordinarily exist between neighbours owning adjoining plots of land. Under such a relationship, liability would arise if one of the neighbours acted negligently and caused foreseeable harm to the other. There was nothing distinctive about the facts here which demonstrated the particular kind of relationship described in *Tiong Aik* so as to found a non-delegable duty of care on the respondents' part in respect of the demolition works carried out on their property. What was critical in this case was that unlike the relationship between a school and its students or that between a hospital and its patients, where it could meaningfully be said that the latter was in the "custody, charge or care" of the former, there

was nothing to indicate that the appellants were in any sort of relationship of "special dependence" on or "particular vulnerability" in relation to the respondents so as to warrant the imposition of a non-delegable duty of care on the latter. Indeed, it could not be said that the respondents exercised any control over the appellants from which it was possible to impute to the respondents the assumption of a *positive duty to protect the appellants from harm* arising from the demolition works carried out on the respondents' property, as opposed to merely a duty to refrain from conduct which could foreseeably cause harm to the appellants.

104 For these reasons, we were satisfied that there was no basis at all for finding that the respondents were subject to a non-delegable duty of care in respect of the demolition works that they had engaged Esthetix to undertake on their property. As this was sufficient to dispose of the non-delegable duty of care issue, we did not need to move on to the second stage of the *Tiong Aik* framework, which would have involved assessing the fairness and reasonableness of imposing a non-delegable duty on the respondents in the particular circumstances of this case, as well as the relevant policy considerations in our local context.

Whether the doctrine of ultra-hazardous acts should be recognised as part of our law

105 In closing, we touch briefly on whether the doctrine of ultra-hazardous acts should be recognised as part of our law. As mentioned above, this doctrine has been the subject of trenchant criticism in both judicial and academic circles. This has led the UK to limit the doctrine within very narrow confines, while Australia appears to have chosen to abolish it altogether.

106 As we noted earlier at [89] above, it was not necessary for us to reach a conclusive view on the aforesaid question in order to determine the present appeal. We therefore leave this question and, by extension, the question at [2] above of whether the doctrine of ultra-hazardous acts should be subsumed under the general law of negligence in Singapore (as opposed to being analysed as a separate and independent basis of liability) open until it is necessary for this court to resolve them. However, we make some preliminary observations so that these issues may be revisited at the appropriate time in this light. In our judgment, by restricting the doctrine of ultra-hazardous acts to the scope outlined in *Biffa Waste* (see above at [93]), we would have addressed some of the harshest criticisms that have been directed against it, while preserving at the same time its potential utility in cases which fall within that scope. The most serious difficulties that have been raised pertain to the need to distinguish between, on the one hand, activities which might properly be considered to be "ultra-hazardous", and, on the other hand, activities which merely carry ordinary risks that might materialise, even with potentially grave consequences, but generally only when reasonable care is not taken when performing those activities. In our judgment, much of this difficulty can be avoided by adopting the restrictive approach to the doctrine of ultra-hazardous acts that was taken in *Biffa Waste*.

107 In *Biffa Waste*, Burnton LJ, as we stated earlier, confined this doctrine to activities which remained "exceptionally dangerous whatever precautions are taken" (at [78]). In this regard, we observe that there are some activities which carry material risks of causing exceptionally serious harm that are unpredictable and that might materialise *even if there is no negligence in the way these activities are carried out*. In our view, such activities can properly be regarded as "ultra-hazardous". In cases involving this category of activities, the party for

whom or at whose behest the particular activity in question is being carried out (referred to in this context as the "principal" for convenience) cannot avoid liability by delegating the performance of that activity to a third party, even if that third party is an independent contractor. But – and this is important to note – the basis for liability remains negligence. In other words, the doctrine of ultra-hazardous acts does not create or impose liability in the absence of negligence. What the doctrine does is to retain the responsibility and liability of the principal by imposing on it a separate duty to *ensure* that the party who is actually performing the activity does so with reasonable care. If the principal fulfils its duty (that is, if the principal takes reasonable care to ensure that the party performing the activity does so in a non-negligent manner *and* the latter does indeed perform the activity non-negligently) but some harm nonetheless ensues, there will be no liability on the basis of negligence on the part of the party performing the activity, nor will there be liability for breach of a non-delegable duty on the principal's part. But if, due to the negligence of the party carrying out the activity, harm ensues, then that party will be liable in negligence; and in addition, the principal too will be liable, albeit on the basis of breach of its non-delegable duty rather than on the basis of negligence in performing that activity.

108 It might be said that the approach in *Biffa Waste* restricts the application of the doctrine of ultra-hazardous acts so severely that it loses its vitality altogether. We think this misses the point. In our view, this doctrine, if it is recognised as part of our law, should only be invoked in exceptional circumstances precisely because it can potentially provide a claimant with an exceptionally far-reaching remedy: a claimant whose case comes within the ambit of this doctrine is in a position to make a *principal* answer for the negligent acts and/or omissions of another *even if the latter is an independent*

contractor. Indeed, it is the very nature of the exceptional setting in which such a remedy can be availed of that makes it appropriate to extend liability in that setting beyond the party who actually performs the activity in question to the principal for whom that activity is performed. Because that activity poses a material risk of causing exceptionally serious harm to innocent parties, it is appropriate that the net of liability be widened as far as it may reasonably be, so that a person who suffers harm from that activity is unlikely to be left without a real remedy.

Conclusion

109 For the foregoing reasons, we dismissed this appeal on all of the three grounds of liability outlined at [1] above. We awarded costs in favour of the respondents fixed at $35,000 (inclusive of reasonable disbursements), and also made the usual consequential orders.

Sundaresh Menon Chief Justice	Chao Hick Tin Judge of Appeal	Andrew Phang Boon Leong Judge of Appeal

Judith Prakash Judge of Appeal	Tay Yong Kwang Judge of Appeal

N Sreenivasan SC, Lim Jie and Jason Lim (Straits Law Practice LLC), and Tan Cheow Hin (CH Partners) for the appellants;

Os Agarwal and Raymond Wong (Wang Xukuan) (Wong Thomas & Leong) for the respondents.