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

[2022] SGHC 39

Suit No 1044 of 2018

Between

1. R Manokaran
2. Muniandy Barvathi
3. M Priyatharsini
4. Navindran s/o Manokaran

… *Plaintiffs*

And

1. Chuah Ah Leng
2. Zenwan (M) Sdn Bhd
3. Grassland Express & Tours Pte Ltd

… *Defendants*

Suit No 1307 of 2018

Between

1. Wee Chye Hee
2. Xie Lianzhu @ Ye Lianzhu

… *Plaintiffs*

And

1. Chuah Ah Leng
2. Zenwan (M) Sdn Bhd
3. Grassland Express Pte Ltd

… *Defendants*

JUDGMENT

[Tort — Negligence — Defences — Contributory Negligence]
[Tort — Vicarious liability]
[Contract — Contractual terms — Rules of construction]
[Contract — Contractual terms — Unfair Contract Terms Act]
[Contract — Contractual terms — Implied terms]

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R Manokaran and others
v
Chuah Ah Leng and others and another suit

[2022] SGHC 39

General Division of the High Court — Suit No 1044 of 2018 and Suit No 1307 of 2018
Dedar Singh Gill J
11, 12 December 2019, 25 November 2020, 3, 5 August, 24 September 2021

24 February 2022 Judgment reserved.

Dedar Singh Gill J:

1 The plaintiffs in both actions ("the Plaintiffs") were holiday makers who were travelling from Genting Highlands back to Singapore on 31 August 2016. They were on board a double decker luxury coach ("the Bus").[1] En route to Singapore, the Bus was involved in a road accident. The Plaintiffs sustained injuries. They now claim damages.

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[1] Statement of Claim dated 19 October 2018 in Suit 1044 of 2018 ("SOC 1044") at para 1 (Plaintiffs Set Down Bundle (Trial on Liability against the 1st and 2nd Defendants in Suit 1044 of 2018 ("PSDB 1044 (Zenwan)") at p 5); Statement of Claim dated 27 December 2018 in Suit 1307 of 2018 ("SOC 1307") at para 1 (Plaintiffs Set Down Bundle (Trial on Liability against the 1st and 2nd Defendants in Suit 1307 of 2018 ("PSDB 1307 (Zenwan)") at p 5).

Facts

2 The Plaintiffs in both actions are as follows. In Suit 1044 of 2018 ("Suit 1044"), R Manokaran ("Manokaran") and Muniandy Barvathi ("Barvathi") are spouses. M Priyatharsini ("Priyatharsini") and Navindran s/o Manokaran ("Navindran") are their children.[2] In Suit 1307 of 2018 ("Suit 1307"), Wee Chye Hee ("Wee") and Xie Lianzhu @ Ye Lianzhu ("Xie") are spouses.[3]

3 The first defendant ("Chuah") was the driver of the Bus at the material time. The second defendant ("Zenwan") was the registered owner of the Bus.[4]

4 Grassland Express & Tours Pte Ltd ("GET") and Grassland Express Pte Ltd ("GE") are companies incorporated in Singapore. GET and GE are the third defendants in Suit 1044 and Suit 1307 respectively. For convenience, I shall refer to them collectively as "Grassland" (in the singular) unless it is appropriate to identify each entity separately. The Plaintiffs booked two-way bus trips from Singapore to Genting Highlands.[5] Manokaran booked the trip for his family from GET's outlet at Boon Lay Shopping Centre ("the Boon Lay Office"), Singapore, on 20 August 2016.[6] Wee did the same for himself and Xie at GE's outlet at Golden Mile Complex ("the Golden Mile Office"), Singapore, on 25 August 2016.[7]

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2 SOC 1044 at para 2 (PSDB 1044 (Zenwan) at p 5).

3 SOC 1307 at para 2 (PSDB 1307 (Zenwan) at p 5).

4 SOC 1044 at paras 3–5 (PSDB 1044 (Zenwan) at p 6); SOC 1307 (Zenwan) at paras 3–5 (PSDB 1307 (Zenwan) at p 6.

5 SOC 1044 at paras 8–9 (PSDB 1044 (Zenwan) at p 6); SOC 1307 at paras 8–9 (PSDB 1307 (Zenwan) at p 6)

6 SOC 1044 at paras 8–9 (PSDB 1044 (Zenwan) at p 6).

7 SOC 1307 at paras 8–9 (PSDB 1307 (Zenwan) at p 6).

5 The journey from Singapore to Genting Highlands on 28 August 2016 was uneventful.[8] On 31 August 2016, the Plaintiffs boarded the Bus to return to Singapore. The Bus departed the Mushroom Farm Bus Terminal, Genting Highlands, at about 3pm that day.[9] The Plaintiffs were seated on the upper deck of the Bus.[10]

6 At around 4.40pm, Chuah was driving the Bus along the left-most lane of Karak Highway towards Singapore. The Bus then swerved from the left-most lane of Karak Highway towards the road divider on the right. It collided with the road divider, spun and overturned onto its left side ("the Accident"). The Plaintiffs were injured in the Accident.[11] The Plaintiffs plead that the Accident was sudden and occurred "without any warning and/or signal". They also plead that they believed that the Bus belonged to Grassland and that they knew nothing about Zenwan or its relationship to the Bus or Chuah.[12]

7 As the trials for both actions are bifurcated,[13] I need not say more on the nature of their injuries.

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8 SOC 1044 at para 11 (PSDB 1044 (Zenwan) at p 7); SOC 1307 at para 11 (PSDB 1307 (Zenwan) at p 7).

9 SOC 1044 at para 12 (PSDB 1044 (Zenwan) at p 7); SOC 1307 at para 12 (PSDB 1307 (Zenwan) at p 7).

10 SOC 1044 at para 14 (PSDB 1044 (Zenwan) at p 7); SOC 1307 at para 14 (PSDB 1307 (Zenwan) at p 7).

11 SOC 1044 at paras 14–16 (PSDB 1044 (Zenwan) at pp 7–8); SOC 1307 at paras 14–16 (PSDB 1044 (Zenwan) at pp 7–8).

12 SOC 1044 at para 13 (PSDB 1044 (Zenwan) at p 7); SOC 1307 at para 13 (PSDB 1307 (Zenwan) at p 7).

13 Plaintiffs' in HC/S 1044/2018 & HC/S 1307/2018 Joint Written Closing Submissions in respect of the Trial on Liability against the 3rd Defendants in HC/S 1044/2018 & HC/S 1307/2018 dated 20 January 2021 ("PCS (Grassland)") at para 73; see Minute Sheet for HC/SUM 3096/2019 and HC/SUM 3097/2019 on 31 July 2019.

The Plaintiffs' claims

8 I now outline the Plaintiffs' claims against each defendant.

Chuah – negligence

9 The Plaintiffs claim that Chuah's negligence in the "driving, management and/or control" of the Bus "caused and/or contributed to" the Accident.[14] Pleaded particulars of negligence include that Chuah failed to: (a) keep a proper lookout; (b) see and/or give way to any and all other vehicles; and (c) take evasive measures to avoid the Accident.[15]

10 Chuah and Zenwan originally failed to enter an appearance in the actions and had judgment in default entered against them. However, they later successfully set aside these judgments. In exchange, Chuah and Zenwan had to post security towards damages and costs of S$200,000 and S$250,000 in Suit 1307 and Suit 1044 respectively.[16] They filed their Defence on 4 December 2019. However, Chuah's solicitors applied to discharge themselves in both actions on 18 January 2021 and I granted the applications.[17]

11 The following efforts were undertaken to notify Chuah of the trial. The Setting Down Notices and Setting Down Bundles for the trial against Chuah were served on him at his last known address in Malaysia. His last known

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14 SOC 1044 at para 17 (PSDB 1044 (Zenwan) at p 8); SOC 1307 at para 17 (PSDB 1307 (Zenwan) at p 8).

15 SOC 1044 at paras 17(d), 17(g) and 17(l) (PSDB 1044 (Zenwan) at pp 8–9); SOC 1307 at paras 17(d), 17(g) and 17(l) (PSDB 1307 (Zenwan) at pp 8–9).

16 HC/ORC 2711/2020 in HC/SUM 5663/2019 (Suit 1307); HC/ORC 2710/2020 in HC/SUM 5664/2019 (Suit 1044).

17 Minute Sheet dated 18 January 2021 at p 4; HC/SUM 1917/2020; HC/SUM 1918/2020.

address was obtained from his counsel's Notice of Ceasing to Act as Solicitor filed on 18 May 2021. The Plaintiffs also instructed solicitors in Malaysia to take out an advertisement in Malaysia in the English, Malay and Chinese newspapers informing Chuah about the setting down of the action.[18] The Registry also sent to Chuah the Registrar's Notices dated 20 April 2021, 23 April 2021 and 17 June 2021 pertaining to the trial dates. In addition, the Plaintiffs instructed solicitors in Malaysia to send these Registrar's Notices to Chuah informing him of the trial dates.[19]

12 Despite these efforts, Chuah did not attend the trial on 3 August 2021. He also failed to communicate his position to the court or to the Plaintiffs.[20] The Plaintiffs applied to admit all of the Affidavits of Evidence-in-Chief ("AEICs") filed by the Plaintiffs and their witnesses against Chuah, and for a judgment to be issued on the merits against him.[21] The Plaintiffs relied on O 35 r 1(2) of the Rules of Court (2014 Rev Ed), which provides that:

> If, when the trial of an action is called on, one party does not appear, the Judge may proceed with the trial of the action or any counterclaim in the absence of that party, or may without trial give judgment or dismiss the action, or make any other order as he thinks fit.

13 The Plaintiffs submitted that *Indian Overseas Bank v Svil Agro Pte Ltd and others* [2014] 3 SLR 892 recognises the High Court's power to order

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18 Plaintiff's Joint Submissions in HC/S 1044/2018 & HC/S 1037/2018: Plaintiff's Application for Judgment against the 1st Defendant dated 3 August 2021 ("PS(1D)") at para 20.

19 PS(1D) at para 21.

20 PS(1D) at para 23.

21 PS(1D) at paras 24, 28 and 29.

judgment against a party who fails to attend trial without having to go through a trial (at [32]–[33]):[22]

> 32 Once the trial of the action comes on and a party does not appear, the Judge has the full power to proceed with a trial on the merits, even in the absence of the defendant. This appears from O 35 r 1(2) …
>
> 33 Thus, the court has full discretion to decide whether to proceed with the case and hear the merits or even give judgment without trial. I am satisfied therefore that the court does have *inherent power to try an action* even though the defendant may be absent. It may then grant *judgment on the merits* if justified in doing so by the evidence.
>
> [emphasis added]

14 The Plaintiffs submitted that Chuah was fully aware of both actions, actively participated in earlier proceedings (*eg*, by applying to set aside the default judgments against him), but ignored all communications relating to the trial.[23] Yet, they submit that he has taken "no steps to contact the Registry, to appoint solicitors or to contact [the Plaintiffs]".[24]

15 I agreed with the Plaintiffs' submissions and admitted into evidence against Chuah the AEICs of Wee and Xie in Suit 1307, and that of Manokaran, Barvathi, Priyatharsini and Navindran in Suit 1044. I then issued a judgment on the merits against Chuah, in both actions, for general and special damages to be assessed, with interest on damages at a rate of 5.33 per annum from the date of the Writ of Summons until the date of full payment and costs of the action.[25] Given that the numerous attempts to notify Chuah of the trial had not proven effective, I considered it necessary in the justice of the case to enter judgment

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22 PS(1D) at para 24.

23 PS(1D) at paras 26–27.

24 Notes of Evidence ("NE"), 3 August 2021, p 4:21–22.

25 NE, 3 August 2021, pp 5:22–26, 7:3–22, 8:3–6.

against Chuah despite his absence. A party to an action should not be permitted to frustrate the administration of justice by absenting himself from trial, especially after participating in earlier proceedings in the action.

16 I was satisfied that the totality of the evidence admitted in each suit established that Chuah had negligently driven the Bus at the time of the Accident. The issue was whether Chuah breached the standard of care expected of a bus driver for holiday makers. Wee and Navindran's AEICs stated that the weather was sunny and the road was dry. Wee, who was awake at the material time, also stated that there were "no motor vehicles in front of the Bus".[26] Yet, the Bus swerved from the *left-most* lane of Karak Highway into the road divider on the *right*. It also spun and overturned onto its left side. Wee and Navindran further recounted that the swerve was sudden and came without warning.[27] Given the absence of evidence of hazardous road conditions that day which could have contributed to the Accident, and seeing that the Bus had collided into the centre divider with enough force to overturn, I found that Chuah failed to exercise due care when driving, managing and/or controlling the Bus. He is liable to the Plaintiffs for the tort of negligence.

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26 Wee Chye Hee's Affidavit of Evidence-in-Chief in Suit 1307 dated 23 October 2020 AEIC ("Wee's Oct 2020 AEIC (1307)") at para 40 (Plaintiffs' Bundle of Affidavits of Evidence-in-Chief (Trial on Liability against the 1st and 2nd Defendants) in Suit 1307 dated 9 April 2021 ("PBAEIC 1307 (Zenwan)") at p 11; Wee Chye Hee's Affidavit of Evidence-in-Chief in Suit 1044 dated 23 October 2020 AEIC ("Wee's Oct 2020 AEIC (1044)") at para 14 (Plaintiffs' Bundle of Affidavits of Evidence-in-Chief (Trial on Liability against the 1st and 2nd Defendants) in Suit 1044 dated 9 April 2021 ("PBAEIC 1044 (Zenwan)") at p 173).

27 Wee's Oct 2020 AEIC (1307) at paras 33–35 (PBAEIC 1307 (Zenwan) at p 10); Navindran s/o Manokaran's Affidavit of Evidence-in-Chief 23 October 2020 ("Navindran's Oct 2020 AEIC") at para 27 (PBAEIC 1044 (Zenwan) at p 140).

Zenwan – vicarious liability for Chuah's negligence

17 The Plaintiffs plead that Zenwan is vicariously liable for Chuah's negligence in respect of the Accident. They claim that Chuah was driving the Bus as Zenwan's "employee, servant and/or agent, and/or … authorized driver".[28] Although they further pleaded, in the alternative, that Zenwan owed a non-delegable duty of care to the Plaintiffs,[29] this was not pursued in submissions.

18 Zenwan contests its liability on two key grounds. First, it argues that there is no evidence that Chuah's tortious act was committed within the scope of his employment since Chuah did not give evidence.[30] Second, it argues that the Plaintiffs' contributory negligence renders vicarious liability inappropriate as the policy of victim compensation is inapplicable.[31] It submits that the Plaintiffs contributed to their injuries by not wearing seatbelts at the time of the Accident.[32] It also relies on the fact that Wee had stood up at the time of the Accident, thereby placing himself in harm's way.[33]

19 The Plaintiffs, in response, argue that Zenwan is precluded from raising contributory negligence as: (a) it was not put in issue by Chuah; and (b) issue estoppel arising from the judgment against Chuah prevents Zenwan from re-

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28 SOC 1044 at paras 21–22 (PSDB 1044 (Zenwan) at pp 9–10); SOC 1307 at paras 21–22 (PSDB 1044 (Zenwan) at p 10).

29 SOC 1044 at para 23 (PSDB 1044 (Zenwan) at p 10); SOC 1307 at para 23 (PSDB 1307 (Zenwan) at p 10).

30 2nd Defendant in HC/S 1307/2018 and HC/S 1044/2018 Joint Closing Submissions dated 16 September 2021 ("2DCS") at para 9.

31 2DCS at paras 7 and 14.

32 2DCS at para 27.

33 2DCS at para 28.

litigating the question of contributory negligence.[34] The Plaintiffs further submit that there is no evidence that the Bus was fitted with seatbelts and that it was a reasonable reaction for Wee to stand up to take stock of the impending danger.[35]

Grassland – breach of contract

20 The Plaintiffs sue Grassland for breaching the contracts entered into by Wee and Manokaran on behalf of their respective families ("the Contracts"). They submit that the Contracts were executed when Wee and Manokaran attended Grassland's offices to sign a booking form each ("the Booking Form").[36] They allege that the Contracts were breached by the negligent driving of the Bus.[37]

21 Grassland's defence is that it was merely selling tickets on behalf of Zenwan as the latter's "Authorized Sole Agent".[38] In the alternative, it submits that it was merely a booking agent for the Plaintiffs and arranged for bus services to be provided by a third-party service supplier.[39] Accordingly,

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34 Plaintiffs' in HC/S 1044/2018 & HC/S 1307/2018 Joint Written Closing Submissions in respect of the Trial on Liability against the 2nd Defendant in HC/S 1044/2018 & HC/S 1307/2018 dated 2 September 2021 ("PCS (Zenwan)") at paras 10 and 50.

35 PCS (Zenwan) at paras 79, 85 and 88.

36 PCS (Grassland) at paras 6, 16, 40, 46 and 86.

37 PCS (Grassland) at para 18.

38 Grassland's Defence in Suit 1044 of 2018 (Amendment No. 1) dated 14 October 2019 ("Grassland's Defence 1044 (Amd 1)") at paras 6.2, 7 and 13.1 (Plaintiffs' Set Down Bundle in Trial on Liability against 3rd Defendant in Suit 1044 of 2018 dated 22 November 2019 ("PSDB 1044 (Grassland)") at pp 60–63); Grassland's Defence in Suit 1307 of 2018 (Amendment No. 1) dated 14 October 2019 ("Grassland's Defence 1307 (Amd 1)") at paras 5.2, 6 and 12.1 (Plaintiffs' Set Down Bundle in Trial on Liability against 3rd Defendant in Suit 1307 of 2018 dated 22 November 2019 ("PSDB 1307 (Grassland)") at pp 42–44).

39 Grassland's Defence 1044 (Amd 1) at para 13.2 (PSDB 1044 (Grassland) at p 63); Grassland's Defence 1307 (Amd 1) at para 12.2 (PSDB 1307 (Grassland) at p 45).

Grassland denies that it owed a duty to the Plaintiffs to take reasonable care to transport the Plaintiffs from Genting to Singapore.[40]

22 In response, the Plaintiffs dispute the allegation that Grassland was merely an agent for Zenwan or the Plaintiffs. They argue that Grassland: (a) undertook to, itself, provide transport to the Plaintiffs; or (b) was an agent for an undisclosed principal, Zenwan.[41] On either ground, the Plaintiffs claim to be entitled to proceed against Grassland for Chuah's negligent driving.[42] They further argue that clauses in the "Terms & Conditions" on the reverse side of the Booking Form ("Booking Form Terms and Conditions") which have the effect of excluding Grassland's liability for Chuah's negligence are (a) not incorporated into the Contracts; and/or (b) unenforceable under the Unfair Contract Terms Act (Cap 396, 1994 Rev Ed) ("the UCTA").[43]

Issues to be determined

23 In light of the foregoing, the following issues arise in relation to Zenwan's liability:

(a) Is Zenwan vicariously liable for Chuah's negligence in driving the Bus at the time of the Accident?

(b) Were any or all of the Plaintiffs contributorily negligent?

24 In relation to Grassland's liability, the issues for my determination are:

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40 Closing Submissions by 3rd Defendant for HC/S 1044/2018 filed 20 January 2021 ("3DCS 1044") at para 117.

41 PCS (Grassland) at paras 177 and 181.

42 PCS (Grassland) at paras 17–18.

43 PCS (Grassland) at paras 168, 170, 174, 192 and 216.

(a) What is the nature and scope of Grassland's contractual undertaking under the Contracts? In particular:

(i) Was Grassland an agent for Zenwan?

(ii) Did Grassland undertake to provide the bus transportation service itself, or merely to act as an intermediary between the Plaintiffs and a third-party bus transport supplier?

(b) Did Grassland breach the Contracts?

(c) Were the plaintiffs other than Wee and Manokaran privy to the respective Contracts?

Zenwan's liability

Whether Zenwan is vicariously liable

25 Vicarious liability is a form of secondary liability. Under this doctrine, the law holds a defendant liable for the negligence of another even if the defendant had not been negligent at all: *Ng Huat Seng and another v Munib Mohammad Madni and another* [2017] 2 SLR 1074 ("*Ng Huat Seng*") at [41]. There is a two-stage inquiry to determine whether vicarious liability should be imposed, both of which must be fulfilled.

26 First, the relationship between the primary tortfeasor and defendant must be sufficiently close so as to make it fair, just and reasonable to impose vicarious liability on the defendant for the primary tortfeasor's acts (*Ng Huat Seng* at [42]) ("the First Inquiry"). The classical situation in which vicarious liability is recognised is the employer-employee relationship. However, the law does not confine vicarious liability to employment relationships: *Clerk & Lindsell on Torts* (Michael A Jones gen ed) (Sweet & Maxwell, 23rd Ed, 2020) ("*Clerk &*

Lindsell 23rd Ed") at para 6-01. Vicarious liability may be imposed in relationships which are closely analogous to employment relationships, and in which context it is fair, just and reasonable to impose liability on the defendant for the tortious acts of the primary tortfeasor (*Ng Huat Seng* at [62]).

27 Second, there must be a sufficient connection between the defendant and the primary tortfeasor's relationship on the one hand, and the commission of the tort on the other ("the Second Inquiry"). 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 primary tortfeasor's wrongful acts (*Ng Huat Seng* at [66]).

28 The First Inquiry is satisfied by virtue of an admission in Zenwan's pleadings. The Plaintiffs pleaded that Chuah was Zenwan's "employee, servant and/or agent, and/or … authorized driver" at the time of the Accident.[44] Zenwan admitted to this fact in its Defence.[45] Further, in his AEIC, Abdul Ghani Bin Ariffin ("Abdul Ghani"), the director and a shareholder of Zenwan, states that Chuah was "initially *employed*" [emphasis added] by Zenwan in 2004. He further confirms that the Bus was driven by Chuah at the time of the Accident as "the servant and/or agent" of Zenwan and that Chuah was employed by Zenwan at that time.[46]

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44 SOC 1044 at para 6 and paras 21–22 (PSDB 1044 (Zenwan) at pp 6 and 9–10); SOC 1307 at para 6 and paras 21–22 (PSDB 1307 (Zenwan) at pp 6 and 10).

45 Zenwan's Defence in Suit 1044 of 2018 filed on 4 December 2019 (PSDB 1044 (Zenwan) at p 49); Zenwan's Defence in Suit 1307 of 2018 filed on 4 December 2019 at para 4 (PSDB 1307 (Zenwan) at p 31).

46 Abdul Ghani Bin Ariffin's Affidavit of Evidence-in-Chief dated 28 October 2020 ("Abdul Ghani's Oct 2020 AEIC") at paras 6 and 14 (2nd Defendant's Bundle of Affidavit of Evidence in Chief in Suit 1044 of 2018 dated 4 August 2021 ("2DBAEIC 1044") at Tab A; 2nd Defendant's Bundle of Affidavit of Evidence in Chief in Suit 1307 of 2018 dated 4 August 2021 ("2DBAEIC 1307") at Tab A).

29 However, Zenwan argues that the Second Inquiry is not fulfilled. Its case is that there is no evidence as to whether Chuah's conduct was an unauthorised mode of doing an act authorised by the employer, as opposed to an act outside the scope of Chuah's employment. Zenwan argues that it would be vicariously liable for Chuah's conduct only if the former is proven, but that Chuah's failure to give evidence is fatal to the Plaintiffs' ability to discharge their burden of proof.[47]

30 The Plaintiffs argue that Zenwan is vicariously liable as Chuah negligently managed the Bus and caused the Accident during the course of his work as Zenwan's employee.[48]

31 I am unable to agree with Zenwan's submissions. It follows from my judgment against Chuah that his negligent driving had caused the Accident. In my view, such negligent driving was so closely connected to his employment with Zenwan that it is fair and just for the latter to be vicariously liable. This is because on 31 August 2016, Chuah was negligent when performing the task he was employed to do – transporting passengers safely from one destination to another. For context, I surmise that Zenwan owned buses and employed bus drivers to service various routes, including routes between Singapore and Malaysia.[49] Chuah was employed in 2004 as one such driver and has since accumulated "many years of driving experience".[50]

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47 2nd Defendants in HC/1307/2018 and HC/S 1044/2018 Joint Closing Submissions dated 16 September 2021 ("2DCS") at paras 8–9.

48 PCS (Zenwan) at para 25.

49 Abdul Ghani's Oct 2020 AEIC at paras 4–5 (2DBAEIC 1044 at p 2; 2DBAEIC 1307 at pp 1–2).

50 Abdul Ghani's Oct 2020 AEIC at para 6 (2DBAEIC 1044 at p 2; 2DBAEIC 1307 at p 2).

32 In addition, Zenwan created, by virtue of its employer-employee relationship with Chuah, the very risk that materialised. By employing Chuah to drive its buses on designated routes, including from Genting Highlands to Singapore, Zenwan created the risk of Chuah's negligent driving causing a road accident, thereby injuring passengers on board its bus. Zenwan also failed to persuade me that all precautionary measures within its power had been taken (see [40] below). Accordingly, there is nothing to displace the inference that the Bus passengers were vulnerable to Chuah's negligence.

33 In these circumstances, I find that the Second Inquiry is satisfied. I need not go further to examine Zenwan's submission that Chuah's conduct was an unauthorised mode of doing an act authorised by Zenwan, rather than an act outside the scope of his employment. The need to prove the former no longer forms part of the test for vicarious liability in Singapore: *Skandinaviska Enskilda Banken AB (Publ), Singapore Branch v Asia Pacific Breweries (Singapore) Pte Ltd and another and another appeal* [2011] 3 SLR 540 ("*Skandinaviska*") at [66]–[68], [71] and [75].

34 Zenwan further argues that vicarious liability should not be imposed because the policy considerations of victim compensation and deterring employers from causing future harm do not apply. I deal with each policy consideration in turn.

35 The policy of victim compensation is the law's recognition that the "employer is usually the person best placed and most able to provide effective compensation to the victim": *Skandinaviska at* [77]. For instance, the employer may redistribute the cost of providing compensation for his employee's torts through mechanisms such as insurance. However, having noted that vicarious liability is a form of "strict" liability which is imposed anomalously by the law

without requiring any fault on the defendant's part, the Court of Appeal went on to remark that "vicarious liability can only be justified if the victim of the tort is himself not at fault, or is less at fault than the blameworthy party and/or the ultimate defendant": *Skandinaviska* at [78].

36 Zenwan submits that the Plaintiffs were contributorily negligent (for reasons described at [18] above) and are therefore precluded from claiming it is vicariously liable. However, as I later explain, I am not satisfied that the Plaintiffs were contributorily negligent (see [63] and [79] below). This objection, therefore, does not negate the interest in victim compensation in this case.

37 I turn next to the policy of deterrence of future harm. This was described by McLachlin J in the Canadian Supreme Court's decision of *The Children's Foundation, the Superintendent of Family and Child Services in the Province of British Columbia and Her Majesty The Queen in Right of the Province of British Columbia as represented by the Ministry of Social Services and Housing v Patrick Allan Bazley* [1999] 2 SCR 534 at [33] (affirmed in *Skandinaviska* at [79]) as follows:

> Beyond the narrow band of employer conduct that attracts direct liability in negligence lies a vast area where imaginative and efficient administration and supervision can reduce the risk that the employer has introduced into the community. Holding the employer vicariously liable for the wrongs of its employee may encourage the employer to take such steps, and hence, reduce the risk of future harm.

38 The Court of Appeal in *Skandinaviska* explained that this policy rests on the fundamental premise that the employer is best placed, relative to everybody else, to manage the risks of his business enterprise and prevent wrongdoing from occurring. In many cases, this premise may hold true. However, in some cases,

the person better placed to prevent the tort may well be the victim himself or a third party (at [80]):

> This may occur, for example, where an independent contractor or some other third party independent of the employer supplies all the equipment required to perform a job which is part and parcel of the employer's business enterprise. In yet other cases, the type of tort that occurs is, realistically speaking, uncontrollable and, therefore, not amenable to deterrence. This is particularly relevant to torts committed in the course of excessively risky business enterprises, spur-of-the-moment torts and intentional torts. In such situations, it may well be possible to find that the employer has done *all that is reasonable to deter the tort and yet has failed to prevent the commission of the tort*. In such situations, deterrence as a justification for imposing vicarious liability loses much of its force.
>
> [emphasis added]

39 Zenwan argues that it has done everything within its power to ensure the safety of its passengers, including by training Chuah and providing him with a vehicle which was in proper working order, regularly serviced, and included seatbelts. Its point is that driving on roads "poses such unlimited circumstances and situations which cannot be foreseen" and that accidents may happen "no matter how much precautionary measures are taken".[51] The Plaintiffs submit that Zenwan's position "goes completely against the weight of the law and makes nonsensical [*sic*] of the principle of vicarious liability".[52]

40 I do not accept Zenwan's submissions. I am satisfied that Zenwan, being the owner of the Bus and Chuah's employer, was in the best position to reduce the risk of negligent driving causing road accidents and injury to passengers. Although Zenwan insists that it has taken all precautionary measures within its

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51 2DCS at paras 12, 17–18.

52 Plaintiffs' in HC/S 1044/2018 & HC/S 1307/2018 Joint Written Reply Submissions in respect of the Trial on Liability against the 2nd Defendant in HC/S 1044/2018 & HC/S 1307/2018 dated 24 September 2021 ("PRS (Zenwan)") at para 4.

power, this contention is unsupported by the evidence. For one, as I later explain at [63] below, there is insufficient evidence to prove that the Bus was fitted with seatbelts for its passengers. In addition, besides the fact that Chuah was employed in 2004 and is alleged to have had "years of experience ferrying passengers to and from various parts of Malaysia",[53] there is no evidence of the nature of the training which Zenwan had provided to Chuah, or which Chuah had received before joining Zenwan. Finally, Zenwan has not furnished evidence pertaining to how much rest Chuah was afforded before embarking on the fateful journey back to Singapore, the schedule of Zenwan's buses and how often Chuah was rostered to drive for Zenwan. For these reasons, the policy of deterrence of future harm applies with full force. Bus owners and employers in Zenwan's position should be incentivised to effectively manage the risks posed to their customers or passengers in the course of their business activities.

41 In all these circumstances, it is just, fair and reasonable to impose vicarious liability on Zenwan for Chuah's negligence.

Whether the Plaintiffs were contributorily negligent

42 As set out at [19] above, the Plaintiffs raise several objections to the contention that they were contributorily negligent. Two of which are that: (a) the defendant who is vicariously liable cannot raise contributory negligence if the primary tortfeasor has not ("the Primary Tortfeasor Argument"); and (b) Zenwan is prevented from re-litigating the issue due to issue estoppel arising from the judgment against Chuah ("the Issue Estoppel Argument").

43 I will assume, without deciding, that the Primary Tortfeasor Argument and Issue Estoppel Argument are resolved in Zenwan's favour (*ie*, Zenwan is

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[53] 2DCS at para 18.

not barred from raising the issue of contributory negligence). Even if this is correct, in my judgment, Zenwan is unable to prove the elements of contributory negligence. I begin by outlining some basic principles.

44 Contributory negligence is a partial defence which is statutorily enacted in the Contributory Negligence and Personal Injuries Act 1953 (2020 Rev Ed) ("Contributory Negligence Act"). Section 3(1) of the Contributory Negligence Act reads:

> **3.**—(1) Where any person suffers damage as the ***result*** partly of his own fault and partly of the fault of any other person or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage.
>
> [emphasis added]

In essence, the claimant must have failed to take due care for his own safety and thus *caused* loss to himself: *Asnah bte Ab Rahman v Li Jianlin* [2016] 2 SLR 944 ("*Asnah*") at [18]).

45 The defendant bears the burden of establishing the defence of contributory negligence: *Munshi Mohammad Faiz v Interpro Construction Pte Ltd and others and another appeal* [2021] 4 SLR 1371 at [37]; *Asnah* at [113] and [178]. To establish contributory negligence, the defendant must prove that the plaintiff owes himself a duty to take care of his own safety in the prevailing circumstances of the case and that the plaintiff breached the requisite standard of care (*Asnah* at [19]–[20]). As a general rule, the standard of care expected of the plaintiff is measured against a person of ordinary prudence, corresponding in most cases to the standard of care in negligence (*Asnah* at [20]).

46 If the plaintiff is found to have been contributorily negligent, the court proceeds to determine the appropriate reduction in the plaintiff's damages for his contributory negligence. To re-iterate, s 3(1) of the Contributory Negligence Act requires the damages to "be reduced to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage." Amongst the many considerations that may fall to guide the exercise of the court's discretion, the Court of Appeal in *Asnah* at [118] highlighted two in particular: (a) the relative causative potency of the parties' conduct; and (b) the relative moral blameworthiness of the parties' conduct.

Whether the Plaintiffs failed to wear seatbelts

47 Zenwan submits that all of the Plaintiffs were contributorily negligent for failing to wear their seatbelts at the time of the Accident. It argues that the Bus had seatbelts and that Zenwan had made this a term of their booking. In particular, it blames Manokaran's family in Suit 1044 for not noticing this term in the Booking Form given that Priyatharsini's job as a Patient Assistant Specialist required her to explain the terms and conditions of consent forms for medical procedures to patients.[54]

48 The Plaintiffs instead point to the lack of evidence that the Bus was fitted with seatbelts. They argue that the newspaper report stating that the Manokarans had not been wearing their seatbelts is inadmissible hearsay.[55] They further argue that if the Bus had seatbelts, Zenwan could easily have led evidence from Abdul Ghani or Tan Chor Theng ("Tan") on this point.[56] Tan is the managing director of Tact Coach & Seat Mfg Sdn Bhd ("Tact"), which repaired the Bus

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54 2DCS at para 27.

55 PCS (Zenwan) at para 78.

56 PCS (Zenwan) at para 85.

after the Accident.[57] They highlight that no such evidence was led by Zenwan. The Plaintiffs also rely on their evidence that to their best recollection, the Bus did not have seatbelts, or that even if they are unable to recall if there were seatbelts or not, they would have worn the seatbelts if they had been provided.[58]

49 I agree with the Plaintiffs. There is insufficient evidence showing that the Bus was fitted with seatbelts at the time of the Accident. As such, Zenwan has failed to establish that the Plaintiffs breached the standard of care expected of passengers on a tour bus. My reasons are as follows.

50 First, the Straits Times newspaper article dated 4 September 2016 ("the ST Article") exhibited in Abdul Ghani's Affidavit of Evidence-in-Chief dated 28 October 2020 ("Abdul Ghani's 28 Oct AEIC")[59] is inadmissible hearsay. In their Notice of Objections to the AEICs filed on behalf of Zenwan,[60] the Plaintiffs objected to admitting the ST Article on this ground. The article is about Manokaran and his family's involvement in the Accident. Presumably, Zenwan relies on the portion of the article which reads: "The family, who *had not been wearing seatbelts*, had been sitting at the upper deck and Mr Manokaran ended up in the stairwell after the crash." [emphasis added].[61]

51 Insofar as Zenwan relies on the foregoing statement in the ST Article to prove that the Bus had been fitted with seatbelts, the article is hearsay evidence.

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57 Tan Chor Theng's Affidavit dated 14 August 2020 ("Tan's AEIC") at paras 1 and 5 (2DBAEIC 1044, Tab B; 2DBAEIC 1307, Tab B).

58 PCS (Zenwan) at paras 79–80, 83–84.

59 Abdul Ghani's Oct 2020 AEIC at para 8 (2DBAEIC 1044, Tab A; 2DBAEIC 1307, Tab A).

60 Notice of Objection dated 11 November 2020 at p 3.

61 Abdul Ghani's Oct 2020 AEIC at p 23 (2DBAEIC 1044, Tab A; 2DBAEIC 1307, Tab A).

Since Zenwan has neither argued nor proved that any of the provisions in s 32(1) of the Evidence Act (Cap 97, 1997 Rev Ed) ("the Evidence Act") apply, the ST Article is inadmissible.

52 I am fortified in my decision by Aedit Abdullah J's conclusion in *Ajit Chandrasekar Prabhu and another v Yan Beng Kooi and another* [2015] SGHC 280 ("*Ajit*") that newspaper articles are inadmissible under s 32(1)(*b*) of the Evidence Act. That provision reads as follows:

> **or is made in course of trade, business, profession or other occupation;**
>
> (*b*) when the statement was made by a person in the ordinary course of a trade, business, profession or other occupation and in particular when it consists of —
>
> (i) any entry or memorandum in books kept in the ordinary course of a trade, business, profession or other occupation or in the discharge of professional duty;
>
> (ii) an acknowledgment (whether written or signed) for the receipt of money, goods, securities or property of any kind;
>
> (iii) any information in market quotations, tabulations, lists, directories or other compilations generally used and relied upon by the public or by persons in particular occupations; or
>
> (iv) a document constituting, or forming part of, the records (whether past or present) of a trade, business, profession or other occupation that are recorded, owned or kept by any person, body or organisation carrying out the trade, business, profession or other occupation,
>
> and includes a statement made in a document that is, or forms part of, a record compiled by a person acting in the ordinary

> course of a trade, business, profession or other occupation based on information supplied by other persons;
>
> [emphasis in original in bold]

53 In gist, Abdullah J was of the view that articles in newspapers may not be prepared with the same care and accuracy as business records which are admissible under s 32(1)(*b*) (*Ajit* at [51]). For the same reasons, I view the accuracy of the ST Article with circumspection.

54 Even if the ST Article was admitted, I would exercise my discretion under s 32(5) of the Evidence Act to accord it little weight. The ST Article simply asserts that the plaintiffs in Suit 1044 "had not been wearing seatbelts". However, the Plaintiffs' evidence is more equivocal. *All* of the Plaintiffs state in their AEICs that they are unable to recall if they had worn a seatbelt on the Bus.[62] In any case, the ST Article does not clarify whether the Bus was fitted with seatbelts which the Plaintiffs negligently failed to use. Therefore, even taking the ST Article at face value, I find little support for Zenwan's case that the Bus had been fitted with seatbelts.

55 Second, I agree with the Plaintiffs that Zenwan failed to adduce any other evidence that the Bus had been fitted with seatbelts. As Zenwan was the registered owner of the Bus, it would have had knowledge of this information.

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62 Wee's Oct 2020 AEIC at para 41 (PBAEIC 1307 (Zenwan) at p 11); Xie Lianzhu @ Ye Lianzhu's Affidavit of Evidence-in-Chief dated 23 October 2020 ("Xie's Oct 2020 AEIC") at para 27 (PBAEIC 1307 (Zenwan) at p 58); R Manokaran's Affidavit of Evidence-in-Chief dated 23 October 2020 ("Manokaran's Oct 2020 AEIC") at para 35 (Plaintiff's Bundle of Affidavits of Evidence-in-Chief (Trial on Liability against the 1st and 2nd Defendants) in Suit 1044 dated 9 April 2021 ("PBAEIC 1044 (Zenwan)") at p 10); Muniandy Barvathi's Affidavit of Evidence-in-Chief dated 23 October 2020 ("Barvathi's Oct 2020 AEIC") at para 37 (PBAEIC 1044 (Zenwan) at p 63); M Priyatharsini's Affidavit of Evidence-in-Chief dated 23 October 2020 ("Priyatharsini's Oct 2020 AEIC") at para 37 (PBAEIC 1044 (Zenwan) at p 105); Navindran's Oct 2020 AEIC at para 36 (PBAEIC 1044 (Zenwan) at p 135).

Alternatively, it could have led evidence from Tan on this issue. As the Plaintiffs observe, Tan would have been privy to whether the Bus had been fitted with seatbelts.[63] This is because after the Bus was inspected by the police, the company that Tan managed, Tact, towed the Bus back to its workshop to conduct repairs. Tact has also been servicing Zenwan's buses for "many years".[64]

56 Abdul Ghani's AEICs dated 24 September 2019, filed in both actions for the trial on Grassland's liability ("Abdul Ghani's 24 Sep AEIC"), state that "[a]ll Zenwan buses were equipped with seatbelts on all seats and passengers would be reminded to wear such seatbelts for safety".[65] However, (a) this piece of evidence is *not found* in Abdul Ghani's *later* AEICs sworn for the purpose of determining Zenwan's liability; and (b) even if this evidence is admissible against Zenwan, it is merely a general comment that does not prove that the *Bus* was fitted with seatbelts.

57 Since proving that the Bus had been fitted with seatbelts forms part of Zenwan's defence, and the truth of this fact is within its own knowledge or that of its witnesses, I draw an adverse inference against it for failing to lead credible evidence on this point. I do so under Illustration (*g*) to s 116 of the Evidence Act, which provides that:

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63 PCS (Zenwan) at para 85.

64 Tan's AEIC at para 5 (2DBAEIC 1044, Tab B; 2DBAEIC 1307, Tab B).

65 Abdul Ghani's Affidavit of Evidence-in-Chief in Suit 1044 of 2018 dated 24 September 2019 ("Abdul Ghani's Sep 2019 AEIC (1044)") at para 17(c) (3rd Defendant's Bundle of Affidavits of Evidence-in-Chief in Suit 1044 ("3DBAEIC 1044") at p 18); Abdul Ghani's Affidavit of Evidence-in-Chief in Suit 1307 of 2018 dated 24 September 2019 ("Abdul Ghani's Sep 2019 AEIC (1307)") at para 17(c) (3rd Defendant's Bundle of Affidavits of Evidence-in-Chief in Suit 1307 ("3DBAEIC 1307") at p 18).

> **Court may presume existence of certain fact**
>
> 116. The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct, and public and private business, in their relation to the facts of the particular case.
>
> *Illustrations*
>
> The court may presume —
>
> …
>
> (*g*) that evidence which could be and is not produced would if produced be unfavourable to the person who withholds it;
>
> …
>
> [emphasis in original in bold and italics]

58 Finally, portions of the Plaintiffs' evidence contradict there having been seatbelts on the Bus at the time of the Accident.

59 In Suit 1307, Wee and Xie's evidence suggests that there were no seatbelts on the Bus. In Wee and Xie's AEICs, they both state that "[t]o the best of [their] recollection, [they] do not think the Bus had been fitted with seatbelts".[66] Both maintained this position under cross-examination.[67] Xie added that if she had seen a seat belt, she would "definitely fasten" it.[68] The relevant portions of Wee and Xie's testimony read as follows:[69]

> [***Wee's cross-examination***]

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66 Wee's Oct 2020 AEIC at para 41 (PBAEIC 1307 (Zenwan) at p 11); Xie's Oct 2020 AEIC at para 27 (PBAEIC 1307 (Zenwan) at p 58).

67 NE, 3 August 2021, pp 19:23 (Wee), 25:23 (Xie).

68 NE, 3 August 2021, p 26:17–20.

69 NE, 3 August 2021, pp 19:17–23. 22:1–7 and 26:4–20.

Q: Your evidence is different, slightly different. You are saying that Singapore to Genting, no seatbelts. Genting to Singapore, no seatbelts.

A: Yes, correct.

Q: But you mention here, "I can't remember whether I was wearing a seatbelt."

A: Yah. It's already so many years at least.

Q: So can you clearly or you can't remember?

A: ***To my best of my recollection, it's that there is no seatbelt***.

…

Q: Okay, but, Mr Wee, whatever it is, you're not wearing a seat belt. That's it---that's---

A: No---

Q: ---correct?

A: ---***no seat belt***.

Q: Okay.

A: ***No seat belt***.

[***Xie's cross-examination***]

Q: Alright. So, Mrs Wee, you would agree that if there were seat belts, you would have put it on, correct?

A: ***Yes, I agree***.

Q: Okay. So, Mrs Wee, why didn't you raise this with your husband or the bus driver?

A: Once I'm up on the bus, to me, it's already okay, because I'm taking---occupying the first-row seats. I ***didn't pay much attention*** whether there were seat belts on the coach or not.

…

Q: Alright, Mrs Wee, my instructions were that, actually, there are seat belts in the coach; it's just that you did not wear it. Would you agree or disagree?

> A: I disagree, because if I were to see the seat belt, I ***would definitely fasten*** the seat belt.
>
> [emphasis added in bold italics]

60 I accept that Wee and Xie do not have perfect recollections of the day of the Accident. Wee admits in his AEIC that he "cannot remember if [he] was wearing a seatbelt during the journey from Genting to Singapore" as it was about three years ago at that time.[70] Xie also testified that she "didn't pay much attention whether there were seat belts on the coach or not" (see excerpt at [59] above).[71]

61 Although Wee and Xie's evidence is not entirely reliable, it casts doubt on Zenwan's contention that the Bus was fitted with seatbelts. In any case, the Plaintiffs do not bear the burden of proving that the Bus was *not* fitted with seatbelts.

62 In Suit 1044, the evidence of Manokaran's family is neutral because all four family members are unable to recall if the Bus was fitted with seatbelts or if they had worn seatbelts or not. However, each testified that they would have worn the seatbelt if it had been provided.[72] Additionally, Wee's oral evidence in Suit 1307 was received in Suit 1044 by virtue of HC/ORC 7071/2020 without him taking the stand in the latter suit, and he swore an affidavit of evidence-in-chief dated 23 October 2020 in Suit 1044. These steps were taken because Wee

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70 Wee's Oct 2020 AEIC at para 41 (PBAEIC 1307 (Zenwan) at p 11).

71 NE, 3 August 2021, p 26:9–11.

72 Manokaran's Oct 2020 AEIC at para 35 (PBAEIC 1044 (Zenwan) at p 10); Barvathi's Oct 2020 AEIC at para 37 (PBAEIC 1044 (Zenwan) at p 63); Priyatharsini's Oct 2020 AEIC at para 37 (PBAEIC 1044 (Zenwan) at p 105); Navindran's Oct 2020 AEIC at para 36 (PBAEIC 1044 (Zenwan) at p 135); NE, 3 August 2021, pp 37:18, 39:2–9 (Manokaran), 43:30–32, 44:1–3, 45:5 (Barvathi), 51:24–26, 52:19–23 (Priyatharsini), 56:22–23 (Navindran).

was the only one who claims to have observed that there were no other motor vehicles in front of the Bus before the Accident.[73] Hence, my views on Wee's evidence at [59]–[61] above apply equally in Suit 1044.

63 Considering the evidence in totality, I am not satisfied that Zenwan has proved on a balance of probabilities that the Bus had been fitted with seatbelts which the Plaintiffs failed to use in breach of the standard of care expected of them. This is especially given the adverse inference weighing against Zenwan (see [57] above). The Plaintiffs are therefore not contributorily negligent in respect of the non-use of seatbelts.

Whether Wee had caused or contributed to his injuries by standing up

64 Zenwan submits that Wee was contributorily negligent by standing up before the Bus collided with the centre divider on Karak Highway and thereby placed himself in harm's way. It stresses that there was "no need to stand since [Wee] was seated at the very front with a clear view of the highway".[74]

65 Wee admits, in his submissions, to having stood up "when he noticed that the bus was swerving just prior to the accident". However, he submits that he "cannot be faulted for standing as that was a reasonable reaction on the part of anyone who was seated without a seatbelt, i.e. to stand up to take stock of the impending danger."[75]

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73 HC/ORC 7071/2020 in HC/SUM 6017/2019; See, *eg*, R Manokaran's Affidavit of Evidence-in-Chief dated 16 September 2019 ("Manokaran's Sep 2019 AEIC") at para 39 (Plaintiffs' Bundle of Affidavits of Evidence-in-Chief in Suit 1044 of 2018 dated 2 December 2019 ("PBAEIC 1044 (Grassland)") at p 13).

74 2DCS at para 28.

75 PCS (Zenwan) at para 88.

66 The relevant issue is one of causation. If Wee's act of standing up did not cause or contribute to the injuries of which he now complains, he cannot have been contributorily negligent.

67 Proving causation is a necessary element to establishing the defence of contributory negligence. It is statutorily provided for in s 3(1) of the Contributory Negligence Act, which requires the damage suffered by the plaintiff to "result" partly from his own fault. In my view, the presence of causation should be determined before the court apportions liability by weighing factors such as the relative causative potency of the parties' conduct. I regard the factor of relative causative potency as going to the comparative *strengths* of the causal links from each party's conduct to the injury sustained by the plaintiff. This factor therefore presupposes the existence of a causal link between the plaintiff's conduct and his injury.

68 The Court of Appeal in *Fong Maun Yee and another v Yoong Weng Ho Robert* [1997] 1 SLR(R) 751 ("*Fong Maun Yee*") at [59] endorsed the proposition, in *Clerk & Lindsell on Torts* (Margaret R Brazier gen ed) (Sweet & Maxwell, 17th Ed, 1995) at para 3-13, that the principles governing whether the plaintiff's own fault contributed to his injuries should be the same as those governing whether the defendant caused those injuries. Further, broad common sense should be used to judge cause and effect on the facts of each particular case. These same principles are re-iterated in *Clerk & Lindsell* 23rd Ed at para 3-62.

69 To establish the tort of negligence, both factual and legal causation must be proved.

70 The Court of Appeal's classic statement of the requirement of factual causation in *Sunny Metal & Engineering Pte Ltd v Ng Khim Ming Eric* [2007] 3 SLR(R) 782 ("*Sunny Metal*") reads as follows (at [52]):

> Causation in fact is concerned with the question of whether the relation between the defendant's breach of duty and the claimant's damage is one of cause and effect in accordance with scientific or objective notions of physical sequence. It is concerned with establishing the *physical connection* between the defendant's wrong and the claimant's damage. The universally accepted test in this regard is the 'but for' test …
>
> [emphasis in original]

71 However, even if factual causation is proved, the plaintiff must go further to show that the defendant's wrongful conduct constituted the "legal cause" of the damage. Where it can be established that a *novus actus interveniens* has broken the chain of causation, the defendant will be freed from liability. The requirement of legal causation assists the court to determine "how best to *attribute responsibility* for the claimant's damage" [emphasis in original] based on convenience, public policy and a rough sense of justice: *Sunny Metal* at [54]–[55].

72 It follows from *Fong Maun Yee* and *Clerk & Lindsell* 23rd Ed that these principles also govern the determination of causation in contributory negligence. The following remarks add further clarity to the inquiry of causation in the context of contributory negligence (*Clerk & Lindsell* 23rd Ed at para 3-59):

> (a) The defence of contributory negligence is available when the plaintiff's own negligence contributes to the damage of which he complains. It is *not limited* to cases where the plaintiff's fault contributes to the occurrence inflicting that damage.

(b) Contributory negligence remains relevant if the plaintiff contributes to the *extent or nature* of his ensuing injury.

73 I now return to the relevant facts of this case.

74 In his AEIC, testimony under cross-examination and closing submissions, Wee's position is that he stood up when he noticed the Bus starting to swerve to the right.[76]

75 However, and crucially, it remains unclear to me whether Wee had sat back down before the Bus collided with the centre divider and overturned. Wee's AEIC sworn on 23 October 2020 in Suit 1307 ("Wee's Oct 2020 AEIC (1307)") states that after standing up, he "did not see any other motor vehicles in front of the Bus" and "immediately *sat back down*" [emphasis added]. After sitting back down, Wee continued to feel the Bus "swerve" towards the centre divider on Karak Highway.[77] On this account in his AEIC, Wee had returned to a sitting position before the Bus collided with the centre divider. In contrast, Wee's police report filed on 2 September 2016 with the police in Malaysia ("Wee's Malaysian Police Report") states that *when* Wee was standing, suddenly, the Bus "SWIFTED [*sic*] TO THE RIGHT AND HIT THE CENTER DIVIDER AND TOPPLE DOWN."[78] Wee's Malaysian Police Report suggests that Wee was still standing when the Accident occurred.

76 In the version of events in Wee's Oct 2020 AEIC (1307), Wee was sitting down by the time the Accident occurred. If this is true, even if Wee had

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76 Wee's Oct 2020 AEIC at para 43 (PBAEIC 1307 (Zenwan) at p 9); NE, 3 August 2021, p 19:27–29; PCS (Zenwan) at para 88.

77 Wee's Oct 2020 AEIC at para 43 (PBAEIC 1307 (Zenwan) at p 9).

78 Wee's Oct 2020 AEIC at para 46, p 37 (PBAEIC 1307 (Zenwan) at pp 12 and 39)

stood up at some point, Wee would still have suffered the same type and severity of injuries. Any additional danger or risk he placed himself in by standing could have extinguished by the time the Bus collided with the centre divider.

77 Conversely, in the version of events in Wee's Malaysian Police Report, Wee's act of standing up would have a causal link to the extent or nature of his injuries. But for Wee's act of standing up after the Bus had begun to swerve and remaining standing as the Bus overturned, Wee would have suffered less severe injuries.

78 I have reservations about the credibility of the Malaysian Police Report. Wee testified that his Malaysian Police Report was not accurate and challenged the completeness of, at least, one part of the report. With regards the latter challenge, Wee claimed to have told the Malaysian police officers that he "stood up and take a look", but the report only recorded that he had stood up.[79] It is also significant that the Malaysian Police recorded Wee's statement on 2 September 2016 in Kuala Lumpur Hospital some two days after the Accident.[80] It is unclear to me if Wee was in the right frame of mind to carefully recount the details of the Accident at that time. As Wee testified, his "mind [was] not in a stable condition" then.[81]

79 In view of these doubts about the completeness of Wee's Malaysian Police Report and the contradictory account in Wee's Oct 2020 AEIC (1307), I am not prepared to find that Wee's act of standing up was a factual cause of his injuries. The question of legal causation is therefore moot. Accordingly,

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79 NE, 3 August 2021, p 21:19–31.

80 NE, 3 August 2021, p 21:14–18; Wee's Oct 2020 AEIC at paras 46 and 50 (PBAEIC 1307 (Zenwan) at pp 12–13).

81 NE, 3 August 2021, p 21:16–18.

Zenwan has failed to prove that Wee was contributorily negligent for standing up as the Bus was swerving.

Conclusion

80 Based on the foregoing, both inquiries in the test for vicarious liability are met and Zenwan has failed to prove that any of the Plaintiffs was contributorily negligent. As such, Zenwan is vicariously liable for Chuah's negligent driving.

Grassland's liability

81 While the Plaintiffs' claim against Zenwan lies in tort, their claim against Grassland is for breach of contract. The trial on Grassland's liability was completed in an earlier tranche which closed on 25 November 2020.

82 The outcome of the first issue at [24(a)] will determine whether Grassland is party to the Contracts with the Plaintiffs and whether it is contractually liable thereunder for Chuah's negligent driving of the Bus. There are several possible outcomes:

(a) If Grassland is an *agent for Zenwan*, and Zenwan is a disclosed principal, the Contracts are contracts of carriage to which only the Plaintiffs and Zenwan are parties. In this first situation, the agent drops out from the contract: *The Law of Contract in Singapore* (Andrew Phang Boon Leong gen ed) (Academy Publishing 2012) ("*The Law of Contract in Singapore*") at para 15.047. In this first situation, there would be no cause of action in contract against Grassland.

(b) However, if Grassland is Zenwan's agent, but Zenwan is an *undisclosed principal*, contractual liability for Chuah's negligence may

be enforced against Grassland. This is because an agent for an undisclosed principal "*remains* liable *and* entitled under the contract" [emphasis in original] if entered into on behalf of the latter: *The Law of Contract in Singapore* at para 15.047. In this second situation, Grassland is liable as the Plaintiffs may elect to sue either the agent (Grassland) or the undisclosed principal (Zenwan) under the Contracts.

(c) If Grassland is not an agent for Zenwan, but merely undertook to arrange for the performance of transportation services by others (as compared to performing the services itself), then it would have fulfilled its contract by exercising due care in the selection of a competent transport supplier: *Craven v Strand Holidays (Canada) Ltd* (1982) 40 OR (2d) 186 ("*Craven*") at [16]; *Wong Mee Wan v Kwan Kin Travel Services Ltd and others* [1995] 4 All ER 745 ("*Wong Mee Wan*") at 749–750. In my view, the foregoing analysis applies if Grassland is an agent *for the Plaintiffs*.

(d) If Grassland is an agent for no one, and undertook to perform the transportation service itself, it cannot escape liability by delegating or sub-contracting the work to Zenwan: *Craven* at [16].

Whether Grassland was an agent for Zenwan?

83 Grassland pleads that it "merely sold tickets on behalf of [Zenwan], as [Zenwan's] Authorized Sole Agent and that the tickets are and were at all material times issued in the name of [Zenwan]".[82] Grassland avers that the Plaintiffs knew this at the time the Contract was entered into and refer, in this

[82] Grassland's Defence 1044 (Amd 1) at paras 6.2, 7 and 13.1 (PSDB 1044 (Grassland) at pp 60–63); Grassland's Defence 1307 (Amd 1) at paras 5.2, 6 and 12.1 (PSDB 1307 (Grassland) at pp 42–45).

regard, to cl 19 in the "Terms & Conditions" on the reverse side of the Booking Form ("the Booking Form Terms and Conditions"). Clause 19 states that:[83]

> The Company and/or its associated agents act only in the capacity of agent for passengers in making all arrangements for transportation and accommodation. All receipts and tickets issued by the Company are subject to the terms and conditions stipulated by the supplier.

The Plaintiffs accept that the "Company" refers to GE in the Wees' Booking Form and GET in the Manokarans' Booking Form.[84]

84 Abdul Ghani's 24 Sep AEIC states that GET, a company associated with GE, was appointed by Zenwan as its ticketing agent in Singapore since 1992.[85] He explains that both GET and GE would sell seats to passengers on buses owned and operated by Zenwan, but that he does not know what the arrangement between GET and GE is.[86] He also testified under cross-examination that GE is not an authorised ticketing agent for Zenwan.[87] To show that GET is Zenwan's ticketing agent, Abdul Ghani exhibits: (a) a letter titled "RE: APPOINTMENT OF AUTHORISED SOLE AGENT" from Zenwan to GET dated 24 August 1992 ("Letter of Appointment"); and (b) an email from

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83 Plaintiffs' Bundle of Documents (in the Trial on Liability against the 3rd Defendant) in Suit 1307 of 2018 dated 2 December 2019 ("PBD 1307 (Grassland)") at p 4; Plaintiffs' Bundle of Documents (in the Trial on Liability against the 3rd Defendant) in Suit 1044 of 2018 dated 2 December 2019 ("PBD 1044 (Grassland)") at p 5.

84 PCS (Grassland) at para 58.

85 Abdul Ghani's Sep 2019 AEIC (1044) at para 4 (3DBAEIC 1044 at p 15; Abdul Ghani's Sep 2019 AEIC (1307) at para 4 (3DBAEIC 1307 at p 15)

86 Abdul Ghani's Sep 2019 AEIC (1044) at paras 4–5 (3DBAEIC 1044 at p 15); Abdul Ghani's Sep 2019 AEIC (1307) at paras 4–5 (3DBAEIC 1307 at p 15).

87 NE, 12 December 2019, p 21:1–6.

the Bus Licence Services, Public Transport Group of the Land Transport Authority to Grassland's counsel dated 24 June 2019 ("the LTA Email").[88]

85 The Letter of Appointment states: "It is hereby confirmed that [GET] has been appointed as the Authorised Sole Agent for our Express services running from *Kuala Kedah – Johore Bahru/Singapore – Kuala Kedah named 'Zenwan (M) Sdn. Bhd. – Langkawi Express.*'" [emphasis added]. The LTA Email states that "Based on LTA's current records, [GET] is the authorised ticketing agent for [Zenwan]".

86 In response, the Plaintiffs submit that the Letter of Appointment only evidences GET's appointment as Zenwan's sole authorised agent in respect of services running from "Kuala Kedah – Johore Bahru/Singapore – Kuala Kedah" ("the Kuala Kedah Route") and not for any services running between Singapore and Genting ("the Genting Route").[89] They point out that Abdul Ghani admitted under cross examination that the Letter of Appointment only showed Zenwan appointing GET for the Kuala Kedah Route.[90] This was his evidence in Suit 1044. However, when he had testified earlier in respect of Suit 1307, he disagreed that the Letter of Appointment did *not* evidence GET's agency in respect of the Genting Route. The relevant portion of Abdul Ghani's testimony under Suit 1307 is as follows:[91]

> Q: … Do you confirm looking at page 39, it only shows Zenwan appointing Grassland Express & Tours Pte Ltd as the authorised sole agent for express service running

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88 Abdul Ghani's Sep 2019 AEIC (1044) at para 4 and pp 32–33 (3DBAEIC 1044 at pp 15, 45–46); Abdul Ghani's Sep 2019 AEIC (1307) at para 4 and pp 39–40 (3DBAEIC 1307 at pp 15, 52–53).

89 PCS (Grassland) at paras 90, 92 and 94.

90 PCS (Grassland) at para 90.

91 NE, 12 December 2019, p 20:10–32.

> from Kuala Kedah to Johor Bahru/Singapore. Do you confirm that?
>
> A: ***Yes***.
>
> Q: So this is not a document that evidences that Grassland Express Tours Pte Ltd was appointed as an authorised sole agent for the sale of tickets on express bus service from Singapore to Genting, and from Genting to Singapore. Do you agree with me?
>
> A: ***I disagree***, Your Honour.
>
> …
>
> Q: This document dated 24th August 1992, that it actually states that you are the authorised---sorry, that *Grassland Express & Tours Pte Ltd is the authorised sole agent* on your behalf, or on your company's behalf for express service running from Singapore to Genting, and from Genting to Singapore.
>
> A: ***Yes***, Your Honour.
>
> [emphasis added]

87 In the final analysis, I am unpersuaded by Grassland's submissions.

88 Even if Grassland was Zenwan's agent in respect of the Genting Route, Zenwan was an undisclosed principal. If so, the Plaintiffs were entitled to elect to sue the agent under the Contracts (as they have done under this contractual claim).

89 Zenwan would have been an undisclosed principal because the Plaintiffs and Grassland did not contract with each other on the basis of Grassland being an agent of Zenwan. This is for two reasons.

90 First, cl 19 indicates to a reasonable reader that Grassland *was not* an agent for Zenwan (or transport suppliers in general). Although Grassland took pains in cl 19 to state that it acted "only in the capacity of *agent* for passengers"

[emphasis added], the same clause *does not* confine Grassland's role to that of a mere agent for the transport "supplier". The logical inference is that Grassland undertook to perform the transportation service itself and was merely sub-contracting the work to another party. Importantly, Grassland still remains liable if the sub-contractor performs the service in a manner which breaches Grassland's contract with its customer. The fact that the supplier of services may under the contract arrange for some or all of them to be performed by others does not absolve the supplier from his contractual obligation: *Wong Mee Wan* at 750; *Chitty on Contracts* vol 1 (H G Beale gen ed) (Sweet & Maxwell, 34th Ed, 2021) ("*Chitty*") at paras 22-084 and 22-087. Thus, an objective reading of cl 19 conveys the impression that a customer is contracting *with Grassland alone* for the provision of transportation services.

91 Second, as I later explain, the evidence does not establish that Zenwan issued bus tickets (separate from Grassland's Booking Form) to the Plaintiffs (see [197]–[201] below) at the time that the Contracts were formed or thereafter. The upshot is that the Booking Forms functioned as the tickets which the Plaintiffs used to board the Bus.[92] It follows that the Plaintiffs did not know of the identity of Zenwan or any other supplier for that matter. Even if Grassland were an agent for Zenwan, the latter would have been an undisclosed principal to the Plaintiffs.

92 Even if I am wrong that Zenwan's identity and status as Grassland's principal was *undisclosed*, there is insufficient evidence to establish that Grassland was Zenwan's ticketing agent in respect of the Genting Route.

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92 Manokaran's Sep 2019 AEIC at paras 30 and 33 (PBAEIC 1044 (Grassland) at pp 11–12); Wee Chye Hee's Affidavit of Evidence-in-Chief dated 16 September 2019 ("Wee's Sep 2019 AEIC") at paras 29 and 32 (Plaintiffs' Bundle of Affidavits of Evidence-in-Chief in Suit 1307 of 2018 dated 2 December 2019 ("PBAEIC 1307 (Grassland)") at pp 10–11).

93 The Letter of Appointment expressly authorises GET to act as Zenwan's ticketing agent in respect of the Kuala Kedah Route *only*. GET has no express actual authority in respect of the Genting Route. In Suit 1044, Abdul Ghani also confirmed that there are no other documents which shed light on the relationship between Zenwan and Grassland.[93]

94 From the Letter of Appointment, there is also no basis for finding that GET has the implied actual authority to act as Zenwan's ticketing agent for the Genting Route. Implied actual authority may arise in several ways. First, an agent has authority to do things incidental to the fulfilment of tasks he is expressly authorised to do. Second, an agent has the authority to do things a person in such a position usually does. Third, a corporate agent may be given implied authority by the acquiescence of his superiors (*Halsbury's Laws of Singapore* vol 6 (LexisNexis, 2021) at para 70.084). None of these grounds apply in this case.

95 Further, GET does not have the ostensible authority to act as Zenwan's agent for the Genting Route. To establish ostensible authority, three elements must be proved (*Millenia Pte Ltd (formerly known as Pontiac Marina Pte Ltd) v Dragages Singapore Pte Ltd (formerly known as Dragages et Travaux Publics (Singapore) Pte Ltd) and others (Arup Singapore Pte Ltd, third party)* [2019] 4 SLR 1075 at [512(b)], citing *Banque Nationale de Paris v Tan Nancy and another* [2001] 3 SLR(R) 726 at [67]–[69]):

(a) the principal represented that the agent has authority to act for the principal;

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93 NE, 12 December 2019, p 85:1–5.

(b) the agent acted within the scope of the authority which the principal represents that the agent has; and

(c) the third party relied on the representation.

96 The Letter of Appointment does not at all refer or allude to the Genting Route and there is no evidence that Zenwan represented to the Plaintiffs that GET or GE had the authority to act for it in respect of the Genting Route. Accordingly, the first requirement for ostensible authority is unfulfilled.

97 The LTA Email does not take Grassland's case any further. This is because it is silent on the issue of whether Grassland was appointed as Zenwan's authorised ticketing agent for the Genting Route. It does not, without more, provide a sufficient ground to infer that Grassland's authority in the Letter of Appointment had been extended to other routes by Zenwan.

98 Finally, Grassland did not plead any other bases for their purported agency in respect of the Genting Route. For instance, it did not allege that the scope of its agency, originating from the Letter of Appointment, was widened to include other routes by virtue of the parties' subsequent dealings or agreement. No evidence was led in these regards either.

99 For these reasons, Zenwan is either: (a) an undisclosed principal, in which case the Plaintiffs are well within their rights to select to sue Grassland *qua* agent; or (b) not Grassland's principal for the Genting Route, in which case the Plaintiffs can only sue Grassland in contract. In both situations, it falls on me to determine whether Grassland breached the Contracts.

Whether Grassland undertook to provide the bus transportation service itself

100 Since Grassland was not an agent for Zenwan, I am satisfied that Grassland is a party to the Contracts which are alleged to have been breached. However, it still remains to be seen what the nature and scope of Grassland's undertaking under the Contracts is. The issue, as crystallised by the Plaintiffs, is whether Grassland had (a) merely agreed to assist them to get in touch with a third-party transport provider, or (b) agreed to transport the Plaintiffs to Genting Highlands and back.[94]

101 Grassland pleads, in the alternative to being the agent of Zenwan, that it:[95]

> … only undertook to arrange for the services under the Contract to be provided by the bus supplier. Further, [Grassland] exercised reasonable care and skill in selecting the bus supplier. [Grassland] refer[s] to and rel[ies] on the terms and conditions of the Booking Form, in particular Clause 19 in this regard.
>
> [emphasis in original omitted]

102 In its submissions, Grassland argues that it was "merely the booking [agent] and [did] not provide any bus".[96] It denies having sold any tickets to the Plaintiffs and argues that it only made "booking reservation[s]" for Wee and Manokaran.[97] In effect, Grassland is submitting that it was only obliged to connect the Plaintiffs with a third-party transport supplier, such as Zenwan.

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94 PCS (Grassland) at para 139.

95 Grassland's Defence 1044 (Amd 1) at para 13.2 (PSDB 1044 (Grassland) at p 63); Grassland's Defence 1307 (Amd 1) at para 12.2 (PSDB 1307 (Grassland) at p 45).

96 3DCS 1044 at para 117; Closing Submissions by 3rd Defendant for HC/S 1307/2018 filed 20 January 2021 ("3DCS 1307") 1307 at para 117.

97 3DCS 1044 at para 6; 3DCS 1307 at para 6.

103 The Plaintiffs take the converse view. They submit that Grassland's contractual obligation was to transport them to Genting and back to Singapore and not merely to connect them with a third-party transport provider.[98] The Plaintiffs argue that the Contract contains no clear statement that Grassland was merely arranging coach transport as agents for them.[99] In respect of cl 19 of the Booking Form Terms and Conditions, the Plaintiffs argue that cl 19 was not incorporated into the Contract because it is onerous and wholly unreasonable and was not brought to the attention of the Plaintiffs at the time the Contracts were entered into.[100] However, even if it was incorporated, the Plaintiffs submit that cl 19's application should be "restricted to situations where [Grassland] arranges transportation" and does not "apply to situations where [Grassland] directly sells coach tickets as a principal or an agent of an undisclosed principal".[101] Further, they argue that despite cl 19 making reference to a third party transport supplier, this does not preclude Grassland from being the supplier of transport. They point out that in *Emma Moore v Hotelplan Limited t/a Inghams Travel* [2010] EWHC 276 (Ch) ("*Inghams Travel*"), the defendant-tour operator was held to be *the supplier of* a snowmobile excursion service even though it had disseminated a welcome pack to its customer making reference to other parties as its supplier.[102]

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98 PCS (Grassland) at para 139.

99 PCS (Grassland) at para 151(f).

100 PCS (Grassland) at paras 163, 165 168 and 170.

101 PCS (Grassland) at para 181.

102 PCS (Grassland) at para 151(m).

104 Further, they claim that other Booking Form Terms and Conditions "gave the impression" that Grassland owned the Bus and/or was supplying the bus transportation to the Plaintiffs directly:[103]

<table>
<tr><th>Clause in Booking Form Terms and Conditions[104]</th><th>Plaintiffs' submissions</th></tr>
<tr><td>Clause 1: For safety reasons, passengers must fasten their safety belts once the bus is on the highway.</td><td rowspan="2">If Grassland was truly a mere arranger, and not supplier, of the coach transportation, it seems unnecessary and irrelevant for it to directly impose such requirements / duties on its passengers.[105]</td></tr>
<tr><td>Clause 2: Hotel vouchers and tickets / receipts are not transferable. If lost, the Company should be notified immediately.</td></tr>
<tr><td>Clause 6:
(a) Passengers shall be responsible for ensuring the following:-
(i) Passport must have a valid period of more than 6 months from the date of entry into the destined country or countries of destination.
(ii) Possession of an International passport.
(iii) Necessary documents for immigration and customs clearance.
(b) The Company shall not be liable to refund the passenger the whole or any part of the payment for the tour package in the event the passenger is refused entry into Malaysia or Singapore for any reason whatsoever.</td><td>Grassland had the right to render the coach tickets invalid and non-refundable in certain circumstances stipulated by itself.[106]</td></tr>
</table>

103 PCS (Grassland) at para 151(h).

104 PBD 1044 (Grassland) at p 5; PBD 1307 (Grassland) at p 4.

105 PCS (Grassland) at para 151(h)(i).

106 PCS (Grassland) at para 151(h)(ii).

Clause 7: The hotel voucher and two-way coach tickets are not refundable and will become invalid in the case of passenger deportation or refusal of entry by the immigration.	
Clause 11: Passengers must check in half an hour before departure. All tickets / receipts / vouchers will become invalid and are non-refundable should passengers fail to board the coach at the stipulated time.	
Clause 12: In the event of breakdown of a coach the Company reserves the right to replace it with other types of coaches.	Grassland decided which coach to use as Grassland had the right to replace the coach in the event of a breakdown.[107]
Clause 13: Coach seating is arranged by the Company, any request for re-arrangement of seat(s) will not be entertained.	Grassland had the right to arrange the coach seating and stated that any request to re-arrange seats will not be entertained.[108]
Clause 16: The price paid to the Company is solely for the ticket and does not include any other costs. In the case of a package tour, the price paid to the Company is for the ticket and accommodation only.	The payment for the coach tickets was to be made by the passengers to Grassland directly. The Plaintiffs made payment directly to Grassland.[109]

105 The Plaintiffs also argue that cll 6, 9, 12 and 13, which operate to exclude Grassland's liability for passengers' losses and/or to reserve certain

107 PCS (Grassland) at para 151(h)(iii).

108 PCS (Grassland) at para 151(h)(iv).

109 PCS (Grassland) at para 151(h)(v).

rights to itself, are not needed if Grassland was merely their booking agent. On this basis, they submit that the inclusion of these clauses by Grassland "clearly demonstrate[s] that the relationship between [Grassland] and the Plaintiffs was one arising from a contract of carriage".[110] While the remaining clauses are reproduced above, cl 9 states as follows:[111]

> 9. (a) The Company shall not be liable for any loss or damage to the passenger's personal belongings and luggage (kept in the luggage compartment of the coach) during the entire journey.
>
> (b) Passengers shall personally carry their belongings and luggage to and from the customs.
>
> (c) Passengers are advised to keep cash and valuables with them and shall not keep the same in the luggage kept in the luggage compartment of the coach.

106 In a similar vein, the Plaintiffs argue that the "clauses" on the front of the Booking Form demonstrate that Grassland entered into a contract of carriage with the Plaintiffs.[112] By way of example, the "clauses" on the front of the Booking Form provide information including the date and time of departure, pickup and alighting location and state "Two way Tkt" under the heading "Description".[113]

107 Further the Plaintiffs argue that the Booking Forms are Grassland documents. They highlight that the Booking Forms only feature the Grassland logo and GE or GET's name but do not mention Zenwan.[114] The Booking Forms are also described as tickets, giving the impression that Grassland provided the

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110 PCS (Grassland) at para 178.

111 PBD 1307 (Grassland) at p 4; PBD 1044 (Grassland) at p 5.

112 PCS (Grassland) at para 178.

113 PBD 1307 (Grassland) at p 3; PBD 1044 (Grassland) at p 4.

114 PCS (Grassland) at para 151(a).

transport directly.[115] For this reason, the Plaintiffs also claim to have believed that Grassland was the registered owner of the Bus.[116]

108 Moreover, the Plaintiffs highlight that Zenwan's involvement was not brought to their attention. They argue that the entrance of the Boon Lay Office had GET's name and Grassland's logo "printed on the front of the office in a large font" while the entrance of the Golden Mile Office had GE's name and the Grassland logo similarly displayed.[117] The Plaintiffs argue that they were also not informed that they would be travelling on a coach that was *not* Grassland's at the time that the Contracts were formed.[118] The Bus also had the word "Grassland" painted on its left side and the back in large letters. Grassland's website (www.grassland.com.sg) and its logo (the image of a running horse) were also painted on the back of the Bus.[119] The Plaintiffs submit that they did not notice any reference to Zenwan on the Bus.[120] They also assumed Chuah was appointed by Grassland.[121]

109 In addition, the Plaintiffs argue that Grassland has greater opportunity to insure itself against claims made "in respect of services performed by others" and that the Plaintiffs were not in a position to negotiate any contractual terms with it or Zenwan. They also lament the difficulty of pursuing claims against Zenwan in Malaysia if they did not have a right to sue Grassland.[122] Such

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115 PCS (Grassland) at para 151(g).

116 PCS (Grassland) at para 151(c).

117 PCS(Grassland) at para 151(b).

118 PCS (Grassland) at para 151(d).

119 PCS (Grassland) at para 151(i).

120 PCS (Grassland) at para 151(i).

121 PCS (Grassland) at paras 151(d) and 151(e).

122 PCS (Grassland) at paras 151(j) and 151(l).

difficulty was mentioned in *Wong Mee Wan* as a policy factor weighing in favour of the first defendant travel company having undertaken to provide certain services to the plaintiff's daughter with reasonable skill and care (at 754).

110 From the foregoing, I surmise that the only basis for Grassland to escape liability, by bringing itself within the situation described at [82(c)] above, is cl 19 of the Booking Form Terms and Conditions. I therefore begin by analysing the anterior question of whether cl 19 is incorporated as a term in the Contract.

Was cl 19 incorporated into the Contracts?

111 The Plaintiffs accept that the Booking Forms were signed by Wee and Manokaran.[123] However, Grassland denies that Wee and Manokaran entered into the Contracts on behalf of their respective family members.[124] I will deal with this issue of privity of contract at [237]–[244] below. For now, I focus on the issue of incorporation of contractual terms. In this regard, the Court of Appeal in *Bintai Kindenko Pte Ltd v Samsung C&T Corp and another* [2019] 2 SLR 295 ("*Bintai*") elucidated at [58] the "well-established principle that in the absence of fraud or misrepresentation, a party is bound by all the terms of a contract that it signs, even if that party did not read or understand those terms". The court went further to explain that "[r]egardless of whether the terms sought to be incorporated [are] standard or non-standard terms, the onus [is] always on the [party signing the contract] to ascertain what those terms were before agreeing to them" (at [63]).

123 PCS (Grassland) at para 52.

124 3DCS 1044 at para 68; 3DCS 1307 at para 51.

112 However, the Plaintiffs submit that *even if a contract has been signed*, "a condition which is 'particularly onerous or unusual' will not be incorporated into the contract, unless it has been fairly and reasonably brought to [the signatory's] attention" [emphasis in original omitted].[125] The Plaintiffs refer to this as "the *Interfoto* Principle", owing to its namesake, *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd* [1988] 1 All ER 348.

113 The Plaintiffs note that whether the *Interfoto* Principle applies to a signed contract remains unsettled in English law,[126] as was recognised in *Higgins & Co Lawyers Ltd v Evans* [2019] EWHC 2809 ("*Higgins*") at [77]. Like Saini J in *Higgins*, I find Andrew Popplewell QC's exposition of the relevant case law in *Do-Buy 925 Ltd v National Westminster Bank plc* [2010] EWHC 2862 to be helpful:

> 91. I agree with [counsel for the defendant] that such principles have no application to cl 21.2 in the present case. He rightly points out that it remains an ***undecided question*** whether the Interfoto principle can ever apply to a signed contract. In that case the Defendant was held not to be bound by a term in a printed set of conditions which had been provided to him in the form of a delivery note, but which he had neither signed nor read. In *Ocean Chemical Transport v Exnor Crags Ltd* [2000] 1 Lloyd's Rep 446, [2000] 1 All ER (Comm) 519, Evans LJ, with whom Henry and Waller LLJ agreed, was prepared to assume that the principle might apply to onerous and unusual clauses in a signed contract "in an extreme case where a signature was obtained under pressure of time or other circumstances". In *HIH v New Hampshire*[2001] EWCA Civ 735, [2001] 2 All ER (Comm) 39, [2001] 2 Lloyd's Rep 161, Rix LJ doubted whether the principle was properly applicable outside the context of incorporation by notice (see para 209). In *Amiri Flight Authority v BAE Systems plc*[2003] EWCA Civ 1447, [2004] 1 All ER (Comm) 385, 392, [2003] 2 Lloyd's Rep 767, Mance LJ, with whom Rix and Potter LLJ agreed, noted the doubts of Rix LJ in *HIH v New Hampshire* and stated that it was *unnecessary to decide whether the principle could ever apply to signed contracts*.

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125 PCS (Grassland) at para 158.

126 PCS (Grassland) at para 161.

He envisaged that ***it might do so where for example a car owner was asked to sign a ticket on entering a car park or a holiday maker asked to sign a long small print document when hiring a car which in either case proved to have a provision of "an extraneous or wholly unusual nature"; but that such cases might be ones where the application of the provision was precluded by an implied representation as to the nature of the document***. He reiterated the normal rule that in the absence of any misrepresentation, the signature of a contractual document must operate as an incorporation and acceptance of all its terms. This is a reflection of the well known principle whose existence and importance was recently emphasised by Moore-Bick LJ in *Peekay v Australia and New Zealand Banking Group*[2006] EWCA Civ 386, [2006] 2 Lloyd's Rep 511, 520 at para 43::

> 'It was accepted that a person who signs a document knowing that it is intended to have legal effect is generally bound by its terms, whether he has actually read them or not. The classic example of this is to be found in *L'Estrange v Graucob*[1934] 2 KB 394. It is an important principle of English law which underpins the whole of commercial life; any erosion of it would have serious repercussions far beyond the business community.'

92. This is not an extreme case, nor one in which there is any reason to depart from the principle that a party should be bound by a contract he has signed. ***The signature on the Application Form was immediately below an acknowledgement that the signatory had read the General Terms and Conditions*** which came at the end of a section headed "Important-you should read this carefully". Ms Searle accepted that she was provided with the General Terms and Conditions and had had an opportunity to read them; and that the Bank were entitled to assume that she had done so. I see

> no room for the application of the *Interfoto* principle in this case, even were it capable of applying to some signed contracts.
>
> [emphasis added in italics and bold italics]

114 As I understand the Plaintiffs' submission, they argue that the *Interfoto* Principle should apply to a signed contract when the clause is onerous and unfair.[127]

115 I reject the Plaintiffs' submission.

116 First, the Court of Appeal made clear in *Bintai* at [58] that only "fraud or misrepresentation" will free a party from the terms of a *signed* contract.

117 Second, this question was squarely considered by Judith Prakash J (as she then was) in *Press Automation Technology Pte Ltd v Trans-Link Exhibition Forwarding Pte Ltd* [2003] 1 SLR(R) 712 ("*Press Automation Technology*"). Prakash J refused to extend the *Interfoto* Principle to signed contracts and held that the principle only applied to cases in which there was no signed contract (*Press Automation Technology* at [39] and [40]). In my view, this position holds true even for contracts between businesses and consumers. It is telling that Prakash J declined to follow the Canadian case, *Tilden Rent-A-Car Co v Clendenning* [1978] 83 DLR 3d 400. In the context of a business-consumer contract, the Canadian court held that a signature can only be relied on as manifesting assent to a document when it is *reasonable* for the party relying on the signed document to believe that the signor really did assent to its contents. This does not represent the law in Singapore. Prakash J's holding and analysis at [39] and [40] of *Press Automation Technology* were endorsed by the Court of Appeal in *Bintai* at [61].

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127 PCS (Grassland) at para 162.

118 I am guided by the Court of Appeal's endorsement of Prakash J's reasons, two of which bear highlighting. First, as Prakash J cautioned, "[c]ontracting parties must have a care for their own legal positions by ascertaining what terms are to be part of a contract before signing it" (*Press Automation Technology* at [40]). Second, she cited Hobhouse LJ's remark in *AEG (UK) Ltd v Logic Resource Limited* [1996] CLC 265 that recourse against onerous terms is already statutorily provided for in the Unfair Contract Terms Act 1977 (c 50) (UK). Therefore, it is no longer necessary to introduce additional strict criteria to prevent particular terms from being incorporated into a contract. Third, and in addition to Prakash J's views, it would result in unacceptable levels of uncertainty if signatories to a contract were allowed to disclaim terms which they find to be onerous or unreasonable. In these premises, I see no practical need to extend the *Interfoto* Principle to signed contracts.

119 Returning to the present case, the Booking Form has been signed by Wee and Manokaran. In addition, it is *twice* stated on the front of the Booking Form that the Contract is subject to the Booking Form Terms and Conditions on the reverse side of the Booking Form. This will include cl 19. At the top of the Booking Form, in between Grassland's letterhead and the title "Booking Form", the following note is printed:[128]

> Note: Passengers are carried subject to ***the terms and conditions printed overleaf***.
>
> [emphasis added]

At the bottom of the Booking Form, above the signature line, there are also "Special Instructions" which read as follows: [129]

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128 PBD 1044 (Grassland) at p 4; PBD 1307 (Grassland) at p 3.

129 PBD 1044 (Grassland) at p 4; PBD 1307 (Grassland) at p 3.

> I/We have read/have been explained, the contents of the booking form and fully understand the same. My/Our attention has also been ***drawn to the terms and conditions printed overleaf***.
>
> [emphasis added]

120 On an objective reading, I am satisfied that (a) the "terms and conditions printed overleaf" refer to the Booking Form Terms and Conditions on the reverse side of the Booking Form;[130] and (b) the "Note" and "Special Instructions" on the front of the Booking Form incorporate the Booking Form Terms and Conditions, of which cl 19 is a part, into the Contract.

121 In view of the above, applying the rule in *Bintai* (see [111] above), by virtue of Wee and Manokaran's signatures on the Booking Forms, the Plaintiffs are bound by all the Booking Form Terms and Conditions, including cl 19. This is because the Plaintiffs have neither pleaded nor argued any fraud or misrepresentation on the part of Grassland. As such, it is irrelevant whether Grassland's representatives – Lye Poh Choo ("Lye") in Suit 1044 and Xing Lina in Suit 1307[131] – drew Wee and Manokaran's attention to the Booking Form Terms and Conditions. Although the Plaintiffs also argue that Wee and Manokaran are not proficient in English and were unable to understand the Booking Form Terms and Conditions,[132] *Bintai* makes clear that the Plaintiffs remain bound even if they "did not read or understand those terms" (at [58]).

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130 PBD 1044 (Grassland) at p 4; PBD (Grassland) at p 4.

131 Lye Poh Choo's Affidavit of Evidence-in-Chief dated 24 September 2019 ("Lye's AEIC") at para 1 (3DBAEIC 1044 at p 1); Xing Lina's Affidavit of Evidence-in-Chief dated 24 September 2019 ("Xing Lina's AEIC") at para 1 (3DBAEIC 1307 at p 1).

132 PCS (Grassland) at para 169(d).

Whether cl 19 is unenforceable under the UCTA

122 The Plaintiffs argue that cl 19 of the Booking Form Terms and Conditions is unenforceable under ss 2(1) and 3(2) of the UCTA.[133] These provisions read as follows:

> **Negligence liability**
>
> **2**.—(1) A person cannot by reference to any contract term or to a notice given to persons generally or to particular persons exclude or restrict ***his liability*** for death or personal injury resulting from negligence.
>
> (2) In the case of other loss or damage, a person cannot so exclude or restrict his liability for negligence except in so far as the term or notice satisfies the requirement of reasonableness.
>
> …
>
> **Liability arising in contract**
>
> **3**.—(1) This section applies as between contracting parties where one of them deals as consumer or on the other's written standard terms of business.
>
> (2) As against that party, the other cannot by reference to ***any*** contract term —
>
> > (*a*) when himself in breach of contract, exclude or restrict any liability of his in respect of the breach; or
> >
> > (*b*) claim to be entitled —
> >
> > > (i) to render a contractual performance substantially different from that which was reasonably expected of him; or
> > >
> > > (ii) in respect of the whole or any part of his contractual obligation, to render no performance at all,
>
> except in so far as (in any of the cases mentioned in this subsection) the contract term satisfies the requirement of reasonableness.

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133 PCS (Grassland) at paras 199 and 201.

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

123 A contractual term may be rendered unenforceable under s 2(1) of the UCTA without needing to examine the test of reasonableness under s 11. In contrast, for a term to be unenforceable under s 3(2), the party relying on the term must fail to establish its reasonableness under s 11 of the UCTA:

> **11.**—(1) In relation to a contract term, the requirement of reasonableness for the purposes of this Part and section 3 of the Misrepresentation Act [Cap. 390] is that the term shall have been a fair and reasonable one to be included having regard to the circumstances which were, or ought reasonably to have been, known to or in the contemplation of the parties when the contract was made.

124 I begin by examining the Plaintiffs' case under s 3(2)(*b*)(i) of the UCTA. Preliminarily, for s 3(2) to apply, the Plaintiffs must be dealing as consumers, or on Grassland's written standard terms of business: s 3(1) of the UCTA. Section 12(1) of the UCTA states that:

> **12.**—(1) A party to a contract 'deals as consumer' in relation to another party if —
>
> (*a*) he neither makes the contract in the course of a business nor holds himself out as doing so;
>
> (*b*) the other party does make the contract in the course of a business; and
>
> (*c*) in the case of a contract governed by the law of sale of goods or hire-purchase, or by section 7, the goods passing under or in pursuance of the contract are of a type ordinarily supplied for private use or consumption.

125 The Plaintiffs are consumers as both requirements in ss 12(*a*) and 12(*b*) of the UCTA are met. First, the Plaintiffs did not enter into the Contracts in the course of a business, nor did they hold themselves out as doing so. Wee told Xing Lina that he wanted bus tickets "on behalf of [his] wife and [himself] for travel from Singapore to Genting and for return trips from Genting to

Singapore."[134] Manokaran spoke to Lye about purchasing bus tickets "for [his] Family and [himself] for travel from Singapore to Genting and for return trips from Genting to Singapore".[135] The natural inference is that Manokaran and Wee were booking tickets in their personal capacities and for their families. Second, GET and GE entered into the Contracts in the course of a business. This much is evident from the fact that Xing Lina and Lye, a supervisor and Front Desk Officer with GE and GET respectively, were tasked to "make seat bookings for customers for bus transport between Singapore and Malaysia".[136] The first limb of s 3(1) is satisfied and thereby avails the Plaintiffs of s 3(2).

126 In relation to s 3(2)(*b*) of the UCTA, the Plaintiffs submit that Grassland's attempt to clothe itself as an agent of the Plaintiffs is an attempt to render contractual performance which is substantially different from that which was reasonably expected of it or to render no performance at all.[137]

127 Section 3(2)(*b*)(i) of the UCTA demands consideration of three questions: (a) what contractual performance did the Plaintiffs reasonably expect of Grassland under the Contracts; (b) what contractual performance did Grassland, by reference to cl 19, claim to be entitled to render; and (c) whether that contractual performance was substantially different from that which was reasonably expected by the Plaintiffs (*Zockoll Group Ltd v Mercury Communications Ltd* [1999] EMLR 385 ("*Zockoll (CA)*") at 395).

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134 Wee's Sep 2019 AEIC at para 17 (PBAEIC 1307 (Grassland) at p 7).

135 Manokaran's Sep 2019 AEIC at para 18 (PBAEIC 1044 (Grassland) at p 7).

136 Xing Lina's AEIC at paras 1, 4 and 5 (3DBAEIC 1307 at pp 1–2); Lye's AEIC at paras 1, 4 and 5 (3DBAEIC 1044 at pp 1–2).

137 PCS (Grassland) at para 205.

128 Under the first question, the Plaintiffs submit that they expected transportation services to and from Genting to be provided directly by Grassland. They did not expect Grassland to be acting as the "agent and/or sub-agent of Zenwan and/or to outsource the transportation services to Zenwan." They also expected that Grassland would transport them with reasonable skill and care.[138]

129 The answer to the first question cannot depend on the proper construction of the contract. If this was so, the reasonable expectations of an aggrieved party would be circumscribed by the impugned term itself: *Zockoll (CA)* at 395. Thus, in considering this question, the courts have not been confined to the four corners of the contract: *The Law of Contract in Singapore* at para 07.119. Additionally, the reasonable expectations referred to in s 3(2)(*b*)(i) of the UCTA are those which would have been formed at the time the contract was made: *Shearson Lehman Hutton Inc. and another v Maclaine Watson & Co. Ltd., J.H. Rayner (Mincing Lane) Ltd and others* [1989] 2 Lloyd's Rep 570 at 612.

130 I agree with the Plaintiffs' submission. The following factors illustrate the reasonableness of the Plaintiffs' expectation that Grassland would be providing the transportation service.

131 First, the Booking Form (less cl 19) objectively gives one the impression that Grassland is the provider of the bus transportation service. As I later explain when determining the nature of Grassland's contractual undertaking, the visual design of the Booking Form, the information conveyed on the front page, and

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138 PCS (Grassland) at para 203.

the Booking Form Terms and Conditions (less cl 19) are consistent with Grassland being the transport provider (see [204]–[218] below).

132 Even if cl 19 is part of the Contracts, I accept that lay persons like the Plaintiffs may remain under the impression that Grassland is the transport provider. The statement that Grassland is only an "agent for passengers in making all arrangements for transportation …" is inconclusive. This is because the label "agent" is not determinative of the person's status, even in law: Tan Cheng Han, *The Law of Agency* (Academy Publishing, 2nd Ed, 2017) at para 01.003. In fact, there are at least two meanings of the word agent. The first is a technical legal meaning entailing all the powers and duties associated with agency. The second is a non-technical meaning which refers to any form of intermediary who simply performs functions for others: *Bowstead and Reynolds on Agency* (Peter Watts gen ed) (Sweet & Maxwell, 22nd Ed, 2020) ("*Bowstead and Reynolds*") at para 1-023; John Nelson-Jones & Peter Stewart, *A Practical Guide to Package Holiday Law and Contracts* (Fourmat Publishing, 2nd Ed, 1989) at 164.

133 I doubt that the word "agent" will be understood by a lay person in a legal sense. It is entirely possible that a lay person would construe "agent" as a short-hand for travel agency. The word "arrangements" is also vague and, on a plain reading, is not necessarily inconsistent with Grassland being the transport supplier. I maintain this view even though the second sentence of cl 19 references a third-party "supplier". A possible reading is that Grassland sub-contracted the provision of transport to a third-party (who could be an independent contractor) but remains, vis-à-vis its own customer, the transport provider. I find support for this last-mentioned reading of cl 19 in *Inghams Travel* and *Wong Mee Wan* (see [169(b)] below). Clause 19 is, in my judgment,

not sufficiently clear to bring home to the reasonable reader that Grassland is not the transport supplier.

134 In addition, the evidence reveals that Xing Lina (who served Wee) and Lye (who served Manokaran, Barvathi and Priyatharsini) did not draw specific attention to or explain cl 19. Xing Lina admits that if a customer does not ask about cll 18 and 19, she will not explain them.[139] She only claims to explain "important terms, such as the requirement to wear seatbelts, the passport validity, the luggage entitlement, etc."[140] Similarly, Lye states that if the customer does not have questions about the Booking Form Terms and Conditions, she will only explain terms related to common problems like "leaving behind their passports or handphone on the bus as well as … their passport validity period and also to remind them to fasten their seat belts while travelling on the buses. Other terms and conditions are equally important but [she] would just get the customers to read through other terms and conditions themselves."[141] Neither Xing Lina nor Lye suggest that the Plaintiffs asked about cl 19. Further, in Suit 1044, Lye admits that she knew, at the time that the Booking Form was signed, that the Manokarans were booked on a Zenwan bus.[142] In other words, she did not provide this information to Manokaran. As such, there was nothing to dispel the Plaintiffs' expectation that Grassland would be the transport provider.

135 While the Plaintiffs further allege that they were *not* notified that the reverse side of the Booking Forms contained additional terms and conditions, I

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139 NE, 11 December 2019, p 63: 13–31.

140 Xing Lina's AEIC at para 10 (3DBAEIC 1307 at p 3).

141 NE, 12 December 2019, p 76:17–24.

142 NE, 12 December 2019, p 77:22 – 31.

need not go that far. Even if this was done by Xing Lina and Lye, cl 19 was not explained to the Plaintiffs. As stated, cl 19 is not necessarily inconsistent with Grassland being the transport provider. As such, the presence of cl 19 does not make the Plaintiffs' expectation unreasonable.

136 The design of the entrances of the Boon Lay Office and Golden Mile Office, which Manokaran and Wee attended respectively, would have strengthened the impression that Grassland was the transport provider. GET or GE's name, alongside the Grassland logo, was emblazoned at the entrance of each office. A list of destinations at each entrance, which Grassland assumedly serviced, included "Genting" and other destinations in Malaysia (*eg*, Kuala Lumpur and Seremban). Significantly, Grassland failed to direct my attention to any portion of the photographs of the entrances of the Boon Lay Office and Golden Mile Office ("the Photographs")[143] which would have indicated to the Plaintiffs that the transport supplier was a third-party like Zenwan. Grassland did, however, put into evidence a poster of a bus ("the Poster") which was allegedly displayed in the Boon Lay Office and Golden Mile Office.[144] Grassland claims that the bus in the Poster features both Grassland's and the bus supplier's name. However, no evidence was led as to where, within each office, the Poster was hung and whether the bus supplier's name was large enough to be observable by customers.

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143 Tan Boon Huat's Affidavit of Evidence-in-Chief dated 24 September 2019 in Suit 1044 of 2018 ("TBH's Sep 2019 AEIC (1044)") at p 99 (3DBAEIC 1044 at p 203); Tan Boon Huat's Affidavit of Evidence-in-Chief dated 24 September 2019 in Suit 1307 of 2018 ("TBH's Sep 2019 AEIC (1307)") at p 106 (3DBAEIC 1307 at p 214)

144 TBH's Sep 2019 AEIC (1044) at para 17 and p 101 (3DBAEIC 1044 at pp 109 and 205); TBH's Sep 2019 AEIC (1307) at para 17 and p 108 (3DBAEIC 1307 at pp 113 and 216)

137 I also note that because Tan was not called as a witness in Suit 1044, his AEIC (exhibiting the photograph of the entrance of the Boon Lay Office) was not received into evidence in that action. However, even if the Photographs cannot be taken into account in Suit 1044, the factors at [131]–[135] above sufficiently demonstrate the reasonableness of the Plaintiffs' expectation that Grassland was itself the transport supplier. In so far as Suit 1307 is concerned, while I later dismiss the Photographs as extrinsic evidence which is inadmissible for the purpose of *contractual interpretation* (see [183]–[187] below), I do not think I am hamstrung by those rules of admissibility when assessing the reasonableness of the Plaintiffs' expectations under s 3(2)(*b*)(i) of the UCTA. This is because this inquiry is not undertaken by reference to the principles on contractual interpretation (see [129] above). However, if I am wrong in this regard, my decision similarly remains unchanged in light of the factors at [131]–[135] above.

138 In sum, I accept that the Plaintiffs' expectation that Grassland was itself the transport supplier was reasonable.

139 Under the second question, by reference to cl 19, Grassland pleads that it is only obliged to select a third-party supplier of the transport with reasonable care.[145]

140 Under the third question, whether the discrepancy between the reasonably expected performance and the contractual performance which Grassland claims to be entitled to render is substantial is a matter of degree. The discrepancy must be "significant in a practical sense": *Zockoll (CA)* at 397.

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145 Grassland's Defence 1044 (Amd 1) at para 13.2 (PSDB 1044 (Grassland) at p 63); Grassland's Defence 1307 (Amd 1) at para 12.2 (PSDB 1307 (Grassland) at p 45).

141 I accept that the performance which Grassland claims to be obliged to render substantially differs from the Plaintiffs' reasonable expectation. Grassland claims that it is merely an intermediary to connect the Plaintiffs with a third-party transport supplier for whose performance Grassland is not liable. This is wholly different from the Plaintiffs' expectation that Grassland would be the transport provider.

142 As such, s 3(2)(*b*)(i) of the UCTA applies to cl 19. For it to be enforceable, Grassland bears the burden of proving that it was fair and reasonable to include such a contractual term having regard to the circumstances which were, or ought reasonably to have been, known to or in the contemplation of the parties when the contract was made: ss 11(1) and 11(5) of the UCTA.

143 The Second Schedule of the UCTA contains guidelines for determining whether the relevant contractual term satisfies the reasonableness test:

> (*a*) the strength of the bargaining positions of the parties relative to each other, taking into account (among other things) alternative means by which the customer's requirements could have been met;
>
> (*b*) whether the customer received an inducement to agree to the term, or in accepting it had an opportunity of entering into a similar contract with other persons, but without having to accept a similar term;
>
> (*c*) whether the customer knew or ought reasonably to have known of the existence and extent of the term (having regard, among other things, to any custom of the trade and any previous course of dealing between the parties);
>
> (*d*) where the term excludes or restricts any relevant liability if some condition is not complied with, whether it was

> reasonable at the time of the contract to expect that compliance with that condition would be practicable;
>
> (*e*) whether the goods were manufactured, processed or adapted to the special order of the customer.

Although these guidelines are laid down in specific reference to ss 6(3), 7(3) and 7(4) of the UCTA, the courts have treated them to be of general application: *Singer Co (UK) Ltd v Tees and Hartlepool Port Authority* [1988] 2 Lloyd's Rep 164 at 169, cited in *Terrestrial Pte Ltd v Allgo Marine Pte Ltd and another* [2014] 1 SLR 985 at [23]. I will examine the relevant factors in turn.

144 First, the Plaintiffs submit that there was a "vast disparity" in the bargaining positions of the parties. They argue that Grassland is an entity dealing in the course of business who is experienced in commercial matters. In contrast, the Plaintiffs paint themselves as lay persons lacking experience in commercial matters. They also claim that most of them are "not proficient in English".[146]

145 I agree with the Plaintiffs for the following reasons. In my view, they were not in a position to negotiate the Booking Form Terms and Conditions. Both Wee and Manokaran had made payment before the Booking Form was presented for signing.[147] Grassland has also not suggested that it was willing to amend or omit cl 19 if requested by a customer. Further, it would not have made any financial sense for the Plaintiffs to seek legal advice on the Booking Form Terms and Conditions before signing the Booking Form. I say this in light of

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146 PCS (Grassland) at paras 210(a) and 210(b).

147 Wee's Sep 2019 AEIC at paras 20–22 (PBAEIC 1307 (Grassland) at p 8); Manokaran's Sep 2019 AEIC at paras 21–23 (PBAEIC 1044 (Grassland) at p 8).

the sums involved in each transaction – the Manokarans paid GET S$180 in total[148] while the Wees paid GE S$90.[149]

146 One important question in considering the parties' relative bargaining power is whether the injured party could have gone elsewhere and whether the alternative source used the same terms: Elizabeth Macdonald, *Exemption Clauses and Unfair Terms* (Tottel publishing, 2nd Ed, 2006) ("Macdonald") at 175. However, no evidence has been placed before me to make a meaningful finding on this point. Therefore, there is nothing to displace the finding that the Plaintiffs were in a weaker bargaining position.

147 Second, the Plaintiffs argue that Grassland failed to draw their attention to and explain the Booking Form Terms and Conditions, including cl 19. They accuse Grassland of failing to disclose risks that would adversely affect their interests.[150] Presumably, the Plaintiffs mean to argue that they did not know, nor would they reasonably have known, of the existence and extent of cl 19. I have already found that Grassland's representatives failed to draw the Plaintiffs' attention to cl 19. I accept, therefore, that they did not have actual knowledge of cl 19 at the time the Contracts were formed. The more pertinent question is whether the Plaintiffs *ought* to have known of the existence and extent of cl 19.

148 In Suit 1307, I find that while Wee may not have had actual knowledge of the existence of cl 19, he ought to have known of its existence. This is because he admits to being proficient in English, even if he claims to be more "comfortable" using Mandarin.[151] If so, he should have been aware that there

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148 Manokaran's Sep 2019 AEIC at para 22 (PBAEIC 1044 (Grassland) at p 8).

149 Wee's Sep 2019 AEIC at para 21 (PBAEIC 1307 (Grassland) at p 8).

150 PCS (Grassland) at para 210(c).

151 NE, 11 December 2019, p 32:17; PCS (Grassland) at para 37.

were terms and conditions on the reverse side of the Booking Form, including cl 19. This is because it is *twice* stated on the front of the Booking Form that the Contract is subject to the Booking Form Terms and Conditions, including cl 19: (a) once at the top "Note: Passengers are carried subject to the terms and conditions printed overleaf"; and (b) under the "Special Instructions" above the signature line at the bottom.[152]

149 However, even if the relevant party knew of the existence of the term, he may not know, and could have reasonably lacked knowledge of, its content: *Overseas Medical Supplies Ltd v Orient Transport Services Ltd* [1999] 1 All ER (Comm) 981 at [12] and [18]. In this regard, GE has not demonstrated that Wee ought to have appreciated the *extent* of cl 19, *ie*, that it was intended to limit GE's role to a mere agent or intermediary of the Plaintiffs. To the contrary, as explained above at [132] to [138], it is reasonable for Wee not to view cl 19 to be inconsistent with Grassland being the transport supplier. In other words, while Wee's signature represents his consent in law to the Booking Form Terms and Conditions, I see no evidence that he consented in fact or that his signature ought to represent his consent in fact to cl 19.

150 In Suit 1044, I also accept that the Manokarans ought to have known of the existence of cl 19. Even though Manokaran and Barvathi claim to lack proficiency in English, Priyatharsini was also present at the Boon Lay Office.[153] She does not claim to lack proficiency in English.

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152 Wee's 19 Sep AEIC at p 39 (PBAEIC 1307 (Grassland) at p 39).

153 Manokaran's Sep 2019 AEIC at para 4 (PBAEIC 1044 (Grassland) at p 4); Muniandy Barvathi's Affidavit of Evidence-in-Chief dated 16 September 2019 in Suit 1044 of 2018 ("Barvathi's Sep 2019 AEIC ") at para 4 (PBAEIC 1044 (Grassland) at p 70); M Priyatharsini's Affidavit of Evidence-in-Chief dated 16 September 2019 in Suit 1044 of 2018 ("Priyatharsini's Sep 2019 AEIC") at para 4 (PBAEIC 1044 (Grassland) at p 126).

151 However, like in the Wees' case (see [149] above), GET has not shown that the Manokarans ought to have appreciated the extent of cl 19. I am not convinced that Manokaran's signature on the Booking Form ought to represent his consent in fact to cl 19 qualifying the nature of Grassland's contractual undertaking.

152 Finally, the Plaintiffs argue that they had no opportunity to seek legal advice. They submit that it is absurd if customers of tour operators, especially those looking to purchase tickets for travel for short distances, are expected to seek legal advice before purchasing packages from tour operators.[154] For the reason canvassed at [145], I agree. It would be wholly unrealistic to expect customers in the Plaintiffs' position to seek legal advice before completing their purchases.

153 Based on the foregoing, Grassland has failed to prove that it is fair and reasonable for cl 19 to be included in the Contracts. The clause is therefore unenforceable under s 3(2)(*b*)(i) of the UCTA for the purpose of proving that Grassland's contractual undertaking was merely to act as an agent for the Plaintiffs. Given my conclusion, it is unnecessary to examine the Plaintiffs' case under ss 2(1) and 3(2)(*b*)(ii) of the UCTA in relation to cl 19. I do, however, briefly consider s 2(1) of the UCTA in relation to cl 18 at [234] below.

154 Although the Plaintiffs appear to take the view that cl 19 must be a clause which excludes or restricts liability before s 3(2)(*b*)(i) of the UCTA applies, and make submissions to support such a characterisation of cl 19, this is unnecessary. While s 3(2)(*a*) only applies to terms of such a nature, s 3(2)(*b*) is not similarly circumscribed. Section 3(2)(*b*) of the UCTA applies where a party,

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[154] PCS (Grassland) at para 210(d).

by reference to any contract term, claims to be entitled to either render performance substantially different from that which was reasonably expected of him (s 3(2)(*b*)(i)) or in respect of the whole or any part of his contractual obligation, to render no performance at all (s 3(2)(*b*)(ii)): *The Zockoll Group Limited v Mercury Communications Limited and Another* [1997] Lexis Citation 15, upheld in *Zockoll (CA)*; The Law Commission and The Scottish Law Commission, *Exemption Clauses: Second Report* (Law Com. No. 69; Scot. Law Com. No. 39) ("Joint Law Commission Report") at paras 143–146 and p 119; *Chitty* at para 17-079 n 475; Macdonald at 101 (n 127) and 116; *The Law of Contract* (Michael Furmston gen ed) (LexisNexis, 6th Ed, 2017) at para 3.72 n 1.

The nature of Grassland's contractual undertaking

155 I now examine the nature of Grassland's undertaking under the Contracts, given that cl 19 is unenforceable. The question is whether Grassland agreed to provide the transportation service itself, or merely to arrange for the provision of the transportation service by a third party as the Plaintiffs' agent. The distinction between the two situations was outlined by the Ontario Court of Appeal in *Craven* at [16] (cited affirmatively by the Privy Council in *Wong Mee Wan* at 750):

> If a person agrees to perform some work or services, he cannot escape contractual liability by delegating the performance to another. It is his contract. But if the contract is only to provide or arrange for the performance of services then he has fulfilled his contract if he has exercised due care in the selection of a competent contractor. He is not responsible if that contractor is negligent in the performance of the actual work or service, for the performance is not part of his contract.

156 The Plaintiffs submit that Grassland's role was to transport the Plaintiffs, and not merely to link them up with a third-party transport provider. Their

submissions in this regard are set out at [103]–[109] above. The Plaintiffs also rely on these authorities to make their case: *Wong Mee Wan*, *Inghams Travel*, *Chea Kam Wing Victor v Kwan Kin Travel Services Ltd* [2007] HKCU 1964 ("*Victor Chea*") and *Moran v First Choice Holidays and Flights Ltd and another* [2005] EWHC 2478 (QB) ("*First Choice Holidays*").[155]

157 I first analyse the authorities relied on by the Plaintiffs. I will set out the facts and holdings of each case before synthesising my views.

(1) The relevant authorities

158 In *Wong Mee Wan*, the plaintiff's daughter drowned on a boat ride while on a tour in China. The deceased had bought the tour package from the first defendant, a Hong Kong travel company. The tour guide accompanying the deceased and the boat captain at the material time were not employees of the first defendant (at 748). On appeal, it was not in dispute that the tour guide and boat captain had been negligent (at 749). The issue on appeal was whether the first defendant was liable for the negligence of the tour guide and boat captain. This turned on a question similar to that at [155] above – did the first defendant agree to arrange for services to be provided by others as their agents, or to supply the services itself (at 749)?

159 The Privy Council ("PC") held that the first defendant "undertook to provide … all the services included in the programme, even if some activities were to be carried out by others" (at 754). It reached this conclusion by considering the contract as a whole. In particular, Lord Slynn, delivering the judgment of the PC, made the following observations (at 753–754):

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155 PCS (Grassland) at paras 103, 141, 145 and 149.

(a) In the terms of the first defendant's brochure, which was part of the contractual arrangements, there were "*no clear statements* that the first defendant was doing no more than arranging the tour as agent for the travellers" [emphasis added].

(b) The heading of the brochure, "Kwan Kin Travel Tours– everything more comprehensively and thoughtfully worked out", indicated that the first defendant was undertaking the task of supplying the package tours.

(c) The detailed itinerary always stated that it was "we" who would do things, including board the bus, go for lunch, live in a hotel. The court found that "we" included the first defendant and "integrate[d] the company into each stage of the tour". For instance, there was nothing indicating that the tour guide was not the first defendant's employee.

(d) The "all-in price" included "[t]ransportation as specified in itinerary". "Transportation" encompassed the fateful boat trip.

160 In support of the PC's decision, Lord Slynn also outlined the following policy considerations (at 754):

> … It must, however, be borne in mind that the tour operator has the opportunity to seek to protect himself against claims made against him in respect of services performed by others by ***negotiating suitable contractual terms*** with those who are to perform those services. He may also provide for ***insurance*** cover. He may include an appropriate ***exemption clause*** in his contract with the traveller. It also has to be borne in mind, in considering what is 'tolerable' or reasonable between the parties, that a traveller in the position of [the deceased] could have ***no influence on the terms*** negotiated by the tour operator with third parties, and if injured by their lack of care would, if having no right against the package tour operator, be

> ***obliged to pursue a claim in a foreign country***. The difficulty involved in doing so does not need to be elaborated.
>
> [emphasis added in bold italics].

161 I pause here to highlight that in *Wong Mee Wan*, the first defendant's brochure had *no clear statement* that it was only acting as agent for the travellers.

162 In *Inghams Travel*, the plaintiff was on a skiing holiday organised by the defendant, a holiday tour operator (at [2]). She was injured while on a snowmobile excursion. The snowmobiles (referred to as "skidoo") were provided by a third party, Adriano Tantera, who both instructed the tour group in their use and led the excursion. The original contract for the skiing holiday did not include the snowmobile excursion (at [22]). After arrival at the ski resort, the claimant had asked the defendant's resort representative to arrange the snowmobile excursion (at [12]). The claimant sued the defendant for damages.

163 The court held that the defendant undertook to supply the snowmobile excursion (at [27]). The court reached this conclusion despite the defendant's event list stating that the snowmobile excursion was provided by the defendant's "supplier" (at [11]). Its reasons included the following. First, the defendant's information pack stated that "we" (*ie*, the defendant) could offer snowmobiling at the resort (at [24]). Second, the event list distributed to the plaintiff upon arrival at the ski resort made clear that the defendant would make arrangements for the snowmobile excursion (at [24]). Third, the receipt for payment for the snowmobile excursion bore the defendant's logo (at [25]). Further, "[t]here was ***no suggestion*** … that [the defendant's resort representative] was acting as agent for [Adriano Tantera]" [emphasis added] (at [25]). In addition, the defendant's resort representative also gave evidence that she would normally have asked the skidoo excursion participants to sign the defendant's disclaimer, but that she did

not have the defendant's forms with her at the time (at [14]). The court observed that this practice "could only be consistent with her contracting with the customers for the supply of the skidoo excursion on behalf of [defendant]" (at [25]). Fifth, Adriano Tantera testified that members of the snowmobile excursion were the defendant's customers (at [16] and [26]).

164 Once again, in *Inghams Travel*, the contractual documents did not suggest that the defendant acted as the agent for the third-party service provider (or as agent for the plaintiff).

165 In *Victor Chea*, the plaintiff was injured while on a tour to Taiwan organised by the defendant. A double decker tourist bus he was on fell down a hillside and overturned (at [3]). Although a term of the contract stated that the transport which was "arranged by [the defendant] for the tour members [was] not owned, managed or operated by [the defendant]" (at [10]), the court said in *obiter dicta* that the defendant was the service provider, and not merely the plaintiff's booking agent (at [18]–[19]). In reaching this view, the court endorsed the reasons of the judge below, which included the following:

> (a) It was significant that there was "***no reference anywhere*** to the defendant being the agent of the plaintiff in contracting with these third parties, nor [was] there any mention of the names of the third parties" [emphasis added].
>
> (b) The contract as a whole made clear that the tour was organised and arranged by the defendant using third parties to carry it out. The court said that this was clear from the following statement in a contractual document: "The transport, accommodation, places for meal, sightseeing or entertainment programmes ***arranged by our company*** for the tour members are not owned, managed or operated by our company."

[emphasis added] (at [10] and [19]). The defendant decided the itinerary and which airline to use.

(c) Other terms in the contractual documents were also consistent with the defendant being the organiser and provider of the tour rather than simply the plaintiff's agent making a booking or bookings on the plaintiff's behalf. These terms included the defendant's right to refuse to accept any application, to adjust the price before departure, to change the accommodation, meals or sightseeing programmes and even to cancel the tour if there were insufficient participants.

166 Similar to both *Wong Mee Wan* and *Inghams Travel*, the Hong Kong Court of Appeal highlighted the significance of the contract not stating that the defendant was acting as an agent for the plaintiff.

167 Finally, in *First Choice Holidays*, the plaintiff was injured on a quad bike excursion while on holiday in the Dominican Republic. She sued her tour operator, First Choice Holidays and Flights Ltd ("FCHF"), even though the excursion was provided by a third party, Dominican Quad Bike Adventure ("DQBA") (at [1] and [3]). She claimed that FCHF was either the principal to the excursion contract or an agent for an undisclosed principal. The court held that FCHF was agent for DQBA, and that the latter was an undisclosed principal (at [22]). FCHF was therefore liable for DQBA's wrongs.

168 The court found the following facts relevant:

(a) The defendant's welcome pack and front page of its booking form gave the impression that the excursion was provided by FCHF (at [21]). There was ***no reference*** within the defendant's welcome pack that excursions which were "supplied" by FCHF were operated or provided

by another company (at [20] and [22]). The booking form stated that all tours operated by FCHF complied with stringent "health and hygiene checks" and passed a rigorous safety test (at [20]);

(b) DQBA was not mentioned in any documents given to the plaintiff (at [22]). These documents had the logos of FCHF and other entities, such as FCHF's local agent in the Dominican Republic. However, the logo of DQBA was not displayed.

(c) The documents provided by FCHF used language such as "On behalf of First Choice" and "All tours operated by First Choice" (at [20]).

169 I distil some salient points from these authorities:

(a) The courts in all four cases found it significant that the contract between the tour operator and its customer lacked a clear statement that the former was merely acting as an agent for the customer (or the third-party service provider). As observed by David Grant & Paul Urbanowicz in "Tour operators, package holiday contracts and strict liability" (2001) JBL 253 ("Grant & Urbanowicz") at 256, *Wong Mee Wan* "seems to confirm the possibility that if a tour operator words his brochure and other contractual documents appropriately then he will be able to avoid liability for the negligence of his subcontractors". The same can be said about the other decisions cited by the Plaintiffs.

(b) Even though the tour operator's contract states that certain activities are provided by third party suppliers (*eg*, *Inghams Travel*), this does not preclude the tour operator from having, in law, undertaken to provide the service itself. In my view, in such situations, the tour

operator has merely sub-contracted the supply of the service to the third-party. The tour operator "may be liable if the service is performed without the exercise of due care and skill on the part of the sub-contractor just as he would be liable if the sub-contractor failed to provide the service or failed to provide it in accordance with the terms of the contract" (*Wong Mee Wan* at 750).

(c) The court examines all the terms of the contract in totality, and the relevant context, to arrive at a decision. As a result, each decision is resolutely grounded in its own facts: Grant & Urbanowicz at 256.

170 The four authorities cited by the Plaintiffs may be contrasted to cases in which the contractual documentation *did* contain an express statement which was inconsistent with the relevant entity having undertaken to provide transportation itself.

171 In *Craven*, the plaintiffs booked a tour to Colombia operated by the defendant. In Colombia, the bus in which they were travelling overturned due to the driver's negligence, injuring the plaintiffs (at [2]–[3]). Under Colombian law, the defendant had to arrange for transportation services through an appointed government travel agent and was not allowed to deal directly with local transportation companies (at [7]). The issue was whether the defendant was liable for the bus driver's negligence. The defendant's brochure, which formed part of the contract with the plaintiffs, contained a clause which stated (at [6]):

> The Strand Companies make ***arrangements*** with airlines, cruise lines, coach companies, transfer operators, shore excursion operators, hotels, and other ***independent parties***, to provide you with the travel services and other services you purchase. Although the Strand Companies take great care in selecting these suppliers, the Strand Companies are ***unable***

> ***and do not have any control over them and therefore cannot be responsible for their acts or omissions***. The travel services and other services provided are ***subject to the conditions imposed by these suppliers*** and their liability is limited by their tariffs, conditions of carriage, tickets and vouchers and international conventions and agreements.
>
> [emphasis added in bold italics]

172 The court held that the defendant never undertook to perform the bus transfers but merely to arrange for this service by a third party (at [19]). Significantly, it reasoned that the explicit statement in the contract that the defendant's responsibility was to arrange with "independent parties" for the provision of travel "cannot be interpreted as imposing a personal obligation upon [the defendant] to perform those services" (at [21]). It went on to say that the excerpted disclaimer in the defendant's brochure was "*inconsistent with an agreement or an intent to assume any implied obligation for the safety of the transportation*" [emphasis added] (at [22]).

173 *Craven* was cited affirmatively by the Privy Council in *Wong Mee Wan* at 750 for the proposition set out at [155] above and was referred to in *Victor Chea* at [12] for the same purpose. *Craven* has also been applied in subsequent Canadian cases, including *Bridges v Classic Sports Tours Ltd* [2004] BCPC 366 ("*Bridges*") and *Garofoli and another v Air Canada Vacations* [2012] ONSC 4698.

174 In *Bridges*, the plaintiff claimed damages for breach of a golf holiday contract which he entered into with the defendant. The defendant's brochure stated that the package price included air fares (at [2]). However, the flight on which the plaintiff was booked on was grounded and he had to rebook his flight through other carriers (at [4] and [5]).

175 The express terms of the contract printed on the brochure included the following clause (at [11]):

> Responsibility and Waiver:
>
> Pertaining to Classic Sports Tours Ltd. and Pro Team Classic, the passenger waives and releases Classic Sports Tours Ltd. and Pro Team Classic from any loss, damage, expense, cost or injury, from any clause (sic) except the gross negligence or wilful misconduct of Classic Sports Tours Ltd., incurred by the passenger on any part of the tour. Classic Sports Tours Ltd. ***shall not be responsible for any actions or inactions of its contracted suppliers***. Classic Sports Tours reserves the right to cancel, or modify in its sole discretion any part of the tour and will, when it reasonably can do so, give notice to the passenger of any material change in the tour. In the event that the tour is cancelled, Classic Sports Tours Ltd. will repay to all passengers pro rata all monies returned to Classic Sports Tours Ltd. by contracted suppliers in respect of the cancelled tour Classic Sports Tours Ltd. reserves the right to charge for increases in land or air costs that arise due to currency fluctuations or airfare increases that occur between tariffs in effect as of January 31, 2001 and the final payment of the tour cost.
>
> [emphasis added in bold italics]

176 The court held that the aforementioned "limiting clause" in the brochure supported the interpretation that the defendant "did not assume liability if the contractor defaulted in the provision of the goods and services". The defendant had agreed to "put together a holiday package for golf enthusiasts *by contracting **as their agent** with various suppliers*. It is likely that the defendant charged for this service which was incorporated in the price of the package" [emphasis added] (at [15]). In this case, it was indeed one of the defendant's contracted suppliers, Canada 3000 (*ie*, the airline which was grounded), which failed to provide transportation to Mexico. However, the court held that the defendant had fulfilled its obligation to "retain a competent carrier and is not responsible under contract law for the loss caused to the Claimant due to the grounding of

Canada 3000 airplanes" (at [17]). The court expressly noted that its analysis was supported by *Craven* (at [16]).

177 In light of the foregoing authorities, the question is whether, on a contextual interpretation of the Contracts, Grassland merely undertook to exercise due care in selecting a competent carrier, and not to provide the transportation itself.

(2) The Contracts between the Plaintiffs and Grassland

178 To recapitulate, Grassland relies on cl 19 of the Booking Form Terms and Conditions to prove that it was the Plaintiffs' "booking agent" and is therefore not liable for Chuah's negligent driving. However, I have found that cl 19 is unenforceable under s 3(2)(*b*)(i) of the UCTA. I will therefore examine the remaining terms in the Contracts to ascertain the nature of Grassland's contractual undertaking.

179 The contextual approach to contractual interpretation proceeds in two broad steps (*Yap Son On v Ding Pei Zhen* [2017] 1 SLR 219 ("*Yap Son On*") at [28]):

> (a) The first step requires consideration of whether the extrinsic evidence sought to be adduced in aid of interpretation is admissible. This is a matter governed by the procedural rules of the law of evidence, which governs what and how facts may be proved.
>
> (b) The second step is the task of interpretation itself, which involves ascertaining the meaning of expressions used in a contract, taking into account the admissible evidence. The rules which govern this process may be found in the substantive law of contract.

180 The following principles summarised by the Court of Appeal in *Y.E.S. F&B Group Pte Ltd v Soup Restaurant Singapore Pte Ltd (formerly known as Soup Restaurant (Causeway Point) Pte Ltd)* [2015] 5 SLR 1187 and re-iterated by the Court of Appeal in *Yap Son On* at [30] are also relevant:

> In gist, the purpose of interpretation is to give effect to the objectively ascertained expressed intentions of the contracting parties as it emerges from the contextual meaning of the relevant contractual language. Embedded within this statement are certain key principles: (a) first, in general both the text and context must be considered (at [2]); (b) second, it is the objectively ascertained intentions of the parties that is relevant, not their subjective intentions (at [33]); and (c) third, the object of interpretation is the verbal expressions used by the parties and so, the text of their agreement is of first importance (at [32]).

(A) ADMISSIBLE EXTRINSIC EVIDENCE

181 I turn now to the first step in contextual contractual interpretation. Under s 94(*f*) of the Evidence Act, extrinsic evidence of the surrounding circumstances accompanying the conclusion of a contract may be admitted, even in the absence of any ambiguity, to aid in the exercise of the interpretation (as distinguished from the contradiction, variation, addition or subtraction) of the expressions used by the parties (see *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR(R) 1029 ("*Zurich Insurance*") at [132(c)], cited in *Yap Son On* at [41]). However, the general admissibility of extrinsic evidence is subject to several restrictions which may be found in the Evidence Act and the common law (see *Sembcorp Marine Ltd v PPL Holdings Pte Ltd and another and another appeal* [2013] 4 SLR 193 ("*Sembcorp*") at [38] and [65(b)]), cited in *Yap Son On* at [42]). In the main, these are:

(a) The pleading requirements set out at [73] of *Sembcorp*, which require the nature, particulars, and effect of the extrinsic evidence sought to be used to be pleaded with specificity.

(b) The exclusionary provisions of the Evidence Act, chiefly those found at ss 95 and 96, which act as an absolute bar to the admissibility of extrinsic evidence in certain cases (see *Sembcorp* at [65(c)])

(c) The continued bar against the admissibility of parol evidence of the drafters' subjective intentions at the time of the conclusion of the contract outside situations in which there is latent ambiguity (see *Sembcorp* at [59] and [65(d)]).

(d) The general requirement that the extrinsic evidence sought to be admitted must be relevant, reasonably available to all the contracting parties, and relate to a clear or obvious context (see *Zurich Insurance* at [132(d)]).

182 With these principles in mind, I now consider each piece of extrinsic evidence sought to be admitted.

183 First, the Plaintiffs argue that the design of the entrances of GET's Boon Lay Office and GE's Golden Mile Office supports the contention that Grassland undertook to provide the transport service. They argue that this is because there was no reference to Zenwan on the entrances to both offices.[156] Instead, they say that the entrance of the Boon Lay Office had GET's name and Grassland's logo "printed on the front of the office in a large font" while the entrance of the Golden Mile Office had GE's name and the Grassland logo similarly displayed. Although this extrinsic evidence would strengthen the Plaintiffs' case (see [136] above), I cannot take it into account for the purpose of contractual interpretation because the pleading requirements laid down in *Sembcorp* are not met.

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156 PCS (Grassland) at para 151(b).

184 The Court of Appeal in *Sembcorp* at [73] outlined four requirements of civil procedure which must be satisfied by parties seeking to rely on extrinsic evidence for the purpose of contractual interpretation:

> (a) first, parties who contend that the factual matrix is relevant to the construction of the contract must plead with specificity each fact of the factual matrix that they wish to rely on in support of their construction of the contract;
>
> (b) second, the factual circumstances in which the facts in (a) were known to both or all the relevant parties must also be pleaded with sufficient particularity;
>
> (c) third, parties should in their pleadings specify the effect which such facts will have on their contended construction; and
>
> (d) fourth, the obligation of parties to disclose evidence would be limited by the extent to which the evidence are relevant to the facts pleaded in (a) and (b).

185 The requirements in (a) and (c) are not met in this case. In respect of the requirement in (a), the Plaintiffs' pleadings in both actions, comprising a Statement of Claim and Reply, *do not* make averments as to the design of the office entrances and no mention is made of Zenwan. Naturally, in respect of the requirement in (c), there is also no explanation as to the effect of such facts on the Plaintiffs' contended construction of the Contracts.

186 In general, extrinsic evidence which is placed before the court in a manner that is not consistent with the above requirements will not be accorded any weight when a court is construing a contract: *Sembcorp* at [74]. The Court of Appeal in *Yap Son On* summarised three key benefits which accrue from adherence to the pleading requirements set out in *Sembcorp* at [73]: (a) it reduces the practical burdens of litigation; (b) it ensures procedural fairness and substantive justice; and (c) it allows matters to proceed more expeditiously (at [49]). For present purposes, the second benefit – procedural and substantive justice – assumes particular importance. As the Plaintiffs failed to plead their

reliance on the design of the office entrances, Grassland was not given a fair opportunity to adduce countervailing evidence. In theory, this could have included promotional material (other than the Poster) displayed in the offices which mention Zenwan or other third-party transport suppliers. Grassland may also have led evidence as to the location in which the Poster was displayed in the Boon Lay Office and Golden Mile Office and its size so as to shed light on how prominent it was to customers.

187 In this light, I am not prepared to admit the evidence relating to the appearance of the entrances of the Boon Lay Office and Golden Mile Office for the purpose of interpreting the Contracts.

188 Second, I am also not minded to admit evidence of the get-up of the Bus under s 94(*f*) of the Evidence Act. The Plaintiffs rely on this evidence to establish that Zenwan's involvement was not brought to their attention (see [108] above). I regard this as evidence of subsequent conduct as there is no proof that Grassland knew, at the time the Contracts were entered into, that Zenwan would be using a bus with a particular design.

189 The Court of Appeal in *Zurich Insurance* at [132(d)] stated that there "should be no absolute or rigid prohibition against evidence of … subsequent conduct, although, in the normal case, such evidence is likely to be inadmissible …". The Court of Appeal subsequently confirmed in *MCH International Pte Ltd and others v YG Group Pte Ltd and others and other appeals* [2019] 2 SLR 837 ("*MCH International*") at [20] that it has not expressed a definitive view as to the admissibility of parties' subsequent conduct for contractual interpretation. Nevertheless, in *MCH International* at [18]–[19], the court identified some "***provisional*** parameters" [emphasis in original in bold

italics] for when evidence of subsequent conduct is admissible. Namely, the court must bear the following criteria in mind:

(a) the subsequent conduct must be relevant, reasonably available to all the contracting parties, and relate to a clear and obvious context;

(b) the principle of objectively ascertaining contractual intention(s) remains paramount; and accordingly,

(c) the subsequent conduct must always go toward proof of what the parties, from an objective viewpoint, ultimately agreed upon.

190 In this case, the evidence of the Bus's exterior does not relate to a clear and obvious context. Evidence relates to a clear or obvious context if it would "allow the court to objectively ascertain a clearly defined or definable intention held by both parties with respect to how the contractual term in question should be interpreted" (see *Smile Inc Dental Surgeons Pte Ltd v Lui Andrew Stewart* [2012] 4 SLR 308 at [43]).

191 In my judgment, it is fatal that the evidence adduced does not even prove that the Bus did not feature *any* words or logos referencing Zenwan. All of the Plaintiffs' AEICs, in both suits, contain the same stock paragraph stating that Grassland's name, logo and website were painted on various parts of the Bus's exterior:[157]

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157 Manokaran's Sep 2019 AEIC at para 34 (PBAEIC 1044 (Grassland) at p 12); Barvathi's Sep 2019 AEIC at para 34 (PBAEIC 1044 (Grassland) at pp 77–78); Priyatharsini's Sep 2019 AEIC at para 34 (PBAEIC 1044 (Grassland) at p 134); Navindran s/o Manokaran's Affidavit of Evidence-in-Chief dated 16 September 2019 in Suit 1044 of 2018 ("Navindran's Sep 2019 AEIC") at para 25 (PBAEIC 1044 (Grassland) at p 183); Wee's Sep 2019 AEIC at para 33 (PBAEIC 1307 (Grassland) at p 11); Xie Lianzhu @ Ye Lianzhu's Affidavit of Evidence-in-Chief dated 16 September 2019 in Suit 1307 of 2018 at para 20 (PBAEIC 1307 (Grassland) at p 74).

> I noticed that the word 'Grassland' was printed on the left side of the Bus, in between the two (2) doors of the Bus, in large letters. I also noticed that the word 'Grassland' was printed on the back of the Bus in large letters. Grassland's website, i.e. 'www.grassland.com.sg' and Grassland's logo, i.e. the image of a running horse, were also printed on the back of the Bus. I thus believed and was given the impression that [I was] travelling on a Grassland bus, operated and managed by [Grassland], from Genting to Singapore. I also believed, and was also given the impression that the driver of the bus, i.e. [Chuah], was the servant, agent and/or employee of [Grassland].
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> [emphasis in original in underline]

192 The foregoing paragraph, however, conspicuously does not deny that Zenwan's name, logo, or contact information were *also* displayed on the Bus's exterior.

193 Moreover, in Suit 1307, what is of additional significance is GE's evidence that the "buses … booked through Grassland and operated by Zenwan have paintwork that set out Zenwan's name/logo as well as Grassland's name/logo and other ticketing agents that use Zenwan's buses."[158] The photograph of one of Zenwan's buses exhibited by GE also depicts both Zenwan and Grassland's names painted on the Bus's exterior.[159] GE's evidence was given by Tan Boon Huat, the director of GE.[160] Tan Boon Huat's cross-examination was not completed because he was hospitalised and Grassland instructed its counsel to close its case notwithstanding.[161] The Plaintiffs therefore urge me to disregard his evidence entirely in Suit 1307 as they claim

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158 TBH's Sep 2019 AEIC (1307) at para 17 (3DBAEIC 1307 at p 113).

159 TBH's Sep 2019 AEIC (1307) at p 102 (3DBAEIC 1307 at p 210).

160 TBH's Sep 2019 AEIC (1307) at para 1 (3DBAEIC 1307 at p 109).

161 NE, 25 November 2020, p 1:17–20.

to have suffered prejudice.[162] However, because (a) I am *not* finding as a fact that the Bus also displayed Zenwan's name on its exterior and (b) the prejudice described by the Plaintiffs pertains to their inability to question Tan Boon Huat on the reasonableness of cll 18 and 19 of the Booking Form Terms and Conditions, and not the get-up of the Bus, I am prepared to consider his evidence in relation to the get-up of the Bus. I find that his evidence in this regard casts doubt on whether only Grassland's name was painted on the Bus's exterior.

194 Further in Suit 1044, when questioned whether Zenwan's name was painted on the Bus, Navindran did not deny this as a fact. He merely stated that he did not notice Zenwan's name, and that Zenwan's name was not noticeable. For ease of reference, the relevant portion of Navindran's testimony under cross-examination is as follows:[163]

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162 PCS (Grassland) at para 14.

163 NE, 12 December 2019, pp 64:25–65:1.

Court:	Did the bus not state Zenwan?
Witness:	No, I didn't notice, Your Honour.
Court:	You did not notice?
Witness:	I didn't notice, Your Honour. But the Grassland logo was very big.
Court:	And---
Witness:	You know---
Court:	---the Zenwan was not noticeable at all?
Witness:	Not noticeable, Your Honour.

In this light, I am not satisfied that Zenwan's name was not painted on the Bus's exterior. This is even though Tan Boon Huat's AEIC was not admitted in Suit 1044 as he was not called by GET as a witness.

195 Accordingly, I cannot, from the foregoing evidence, objectively ascertain a clearly defined or definable intention by Grassland to undertake responsibility for the provision of the transport service. I decline to admit such extrinsic evidence for the purpose of interpreting the Contract as it does not relate to a clear and obvious context.

196 Third, Grassland's evidence that the Plaintiffs were issued "Zenwan tickets" when boarding the bus bound for Genting Highlands is inadmissible.[164] Presumably, Grassland relies on this extrinsic evidence of subsequent conduct (as the Contract was formed before this) to show that Zenwan is the true transport provider. However, this evidence does not relate to a clear and obvious context.

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164 3DCS 1044 at para 27; 3DCS 1307 at para 26.

197 For one, Grassland's evidence that the Zenwan tickets were issued to the Plaintiffs is, with respect, speculative.

198 In Suit 1044, Lye's AEIC alleges that after a passenger presents his or her Booking Form to Zenwan's driver to board the bus departing from Singapore, the driver will issue Zenwan's tickets to the passengers on the bus. She states that the Zenwan ticket shows that Zenwan is the supplier and that Grassland is their "Singapore Contact".[165] Although she professed to have personal knowledge that the Zenwan tickets were handed over to the Plaintiffs, I reject this contention. She revealed that the basis of her "personal knowledge" is that it is "part of [Zenwan's] procedure" to issue their own tickets so that passengers may board the bus.[166] For obvious reasons, it is a leap of logic to say that Zenwan's tickets were actually issued to the Manokarans.

199 In Suit 1307, Xing Lina's AEIC similarly alleges that at the time of boarding, "[t]he driver will … issue Zenwan's tickets to the passengers on the bus. The Zenwan's tickets clearly show amongst other things, that Zenwan is the supplier, [and] that Grassland is their 'Singapore contact' …".[167] Tan Boon Huat refers to Xing Lina's AEIC for the "process of the issuance of the bus tickets by Zenwan".[168] However, Xing Lina admitted under cross-examination that she had no personal knowledge of whether the Zenwan tickets were issued to the Wees because on the day on which the Wees departed from Singapore, she "wasn't the one who handled the departure matters".[169] Even Abdul Ghani's

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165 Lye's AEIC at para 19 (3DBAEIC 1044 (Grassland) at p 4).

166 NE, 12 December 2019, p 78:12–28.

167 Xing Lina's AEIC at para 19 (3DBAEIC 1307 (Grassland) at pp 4–5).

168 TBH's Sep 2019 AEIC (1307) at para 25 (PBAEIC 1307 (Grassland) at p 115).

169 NE, 11 December 2019, p 53:8–11.

evidence that the driver had, before departing from Singapore or Genting Highlands, issued Zenwan's tickets to the Plaintiffs is based on what the driver had told him and Zenwan's standard operating procedure.[170] The former portion is inadmissible hearsay while the latter is, as stated in the preceding paragraph, speculative. Abdul Ghani even admits that the best person to testify as to whether Zenwan's tickets were issued is Chuah.[171] I, however, do not have the benefit of Chuah's evidence.

200 Further, the fact that Grassland disclosed *both* halves of the Zenwan tickets casts doubt on the allegation that one half was issued to the Plaintiffs. This is because Abdul Ghani's evidence, in Suit 1307, is that Zenwan's practice is to tear each ticket along the perforated line, and to retain one half while giving the other half to the passenger.[172] Each half of the Zenwan ticket is a carbon copy of the other, and reflects details including the bus number, departure date and time and assigned seat number.[173] Xing Lina, in Suit 1307, also conceded that it "[s]hould be" the case that the bus driver retains one portion of the Zenwan ticket while the other is handed over to the passenger.[174] Therefore, that Grassland was able to produce *both halves* of the Zenwan tickets raises immediate questions as to whether one half was presented to the Plaintiffs.

201 The portions of Abdul Ghani and Xing Lina's evidence canvassed in [200] are, strictly, adduced in Suit 1307 only. Similarly, for the reasons at [198], Grassland has not proved that Zenwan's tickets were issued to the Plaintiffs in

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170 NE, 12 December 2019, p 18:9–24.

171 NE, 12 December 2019, p 18:25–30.

172 NE, 12 December 2019, pp 14:19–24, 17:2–12.

173 3rd Defendant's Bundle of Documents dated 3 December 2019 ("3DBD") at pp 3–6.

174 NE, 11 December 2019, p 64:27–32.

Suit 1044 either. As a result, I am unable to objectively ascertain a clearly defined or definable intention by Grassland to act merely as an agent for Zenwan or a booking agent for the Plaintiffs. I hence decline to admit this extrinsic evidence to aid the construction of the Contracts.

202 While the following piece of extrinsic evidence was not specifically raised by Grassland, it warrants brief attention as it is part of the backdrop to the Contracts. Namely it appears to me that Grassland does not control the day-to-day operations of at least *some* of its third-party suppliers. Zenwan is obviously one such supplier. From Abdul Ghani's evidence, I surmise that it is Zenwan who controlled the delivery of the bus transportation. Abdul Ghani's 24 Sep AEIC states that Grassland sold seats to passengers "on buses *owned and operated* by Zenwan" [emphasis added].[175] The drivers of Zenwan's buses were employed by Zenwan, as well as "[a]ll personnel [like] managers, [and] coordinators".[176] The LTA licence defining the approved pick-up and set-down points in Singapore and Malaysia is also conferred on Zenwan.[177] This *could* be a factor weighing against the conclusion that Grassland undertook to provide the transportation service itself.

203 However, I decline to admit the foregoing evidence under s 94(*f*) for two reasons. First, the second pleading requirement formulated in *Sembcorp* requires that "the factual circumstances in which the [facts sought to be relied on] were known to *both or all* the relevant parties must also be pleaded with

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175 Abdul Ghani's Sep 2019 AEIC (1044) at para 6 (3DBAEIC 1044 at p 15); Abdul Ghani's Sep 2019 AEIC (1307) at para 6 (3DBAEIC 1307 at p 15).

176 Abdul Ghani's Sep 2019 AEIC (1044) at para 7 (3DBAEIC 1044 at p 16); Abdul Ghani's Sep 2019 AEIC (1307) at para 7 (3DBAEIC 1307 at p 15).

177 Abdul Ghani's Sep 2019 AEIC (1044) at p 51 (3DBAEIC 1044 at p 64); Abdul Ghani's Sep 2019 AEIC (1307) at p 58 (3DBAEIC 1307 at p 71).

sufficient particularity" [emphasis added] (*Sembcorp* at [73(b)]). While Grassland's Defence in both actions does allege that the Bus and Chuah were owned and employed respectively by Zenwan, there is no evidence that the Plaintiffs knew this at the time the Contracts were formed. Neither did Grassland plead that this was so. Second, Grassland has not, in its Defence, specified the effect which such facts have on its contended construction of the Contracts. Grassland's control (or lack thereof) over Zenwan is hence inadmissible for the purpose of construing the Contracts.

(B) INTERPRETATION IN LIGHT OF THE ADMISSIBLE EXTRINSIC EVIDENCE

204 I now commence the task of interpretation itself. Given my conclusions in the preceding sub-section, I am unassisted by any admissible extrinsic evidence, subject to one observation I make at [218] below.

205 First, since cl 19 is unenforceable, there is no express statement in the Contracts that Grassland was acting as a mere agent for the Plaintiffs. I note, however, that cl 18(i), states that the Company shall not be liable for "[a]ny cause beyond the reasonable control of [Grassland], the Travel Services and/or its principal(s)". Clause 18(j) also states that Grassland shall not be liable for "[a]ny cancellation or alteration of the tour itinerary, hotel accommodation or tour services as a result of any of the aforementioned event or as a result of any decision, act or omission of the Company principal(s), their agents and servants or any of them." However, I do not regard cll 18(i) and 18(j) as an undertaking by Grassland to act merely as an agent for the Plaintiffs or third-party suppliers. In fact, cl 18(i) specifically contemplates Grassland contracting as a principal, while recognising that it may act for a third-party principal in certain transactions. In this vein, the natural reading of cl 18(j) is that it simply elaborates on Grassland's exclusion of liability in the situation where Grassland

is not itself the principal to the contract with its customer. However, none of this amounts to an undertaking that Grassland acts purely in the capacity of an agent in all of its dealings.

206 Immediately, this distinguishes the Contracts from those in *Craven* and *Bridges*. The contractual documents in those cases had express language which confined the defendant's role to *arranging* for transportation by independent suppliers or that excluded the defendant's responsibility for the conduct of its suppliers. In contrast, there is no similar language in the Contracts which precludes Grassland from undertaking to supply the transportation service itself.

207 Second, from the front page of the Booking Forms, a reasonable reader would obtain the impression that Grassland was supplying the coach transportation itself. My reasons are as follows.

208 For one, the visual impact of the front page of the Booking Form is that there are no third parties involved in providing the bus transportation under the Contracts. In the header of the Manokarans' Booking Form, only GET's name and Grassland's logo (*ie*, an image of a running horse) are featured.[178] GET's contact details, including the address of the Boon Lay Branch and Grassland's website, are provided. Similarly, in the header of the Wees' Booking Form, only GE's name and Grassland's logo are printed. Contact details like the address of the Golden Mile Office and Grassland's website are also stated.[179] There is, conspicuously, no mention of third-party bus companies like Zenwan in the header, and, for that matter, any other part of the Booking Forms.

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178 PBD 1044 (Grassland) at p 4.

179 PBD 1307 (Grassland) at p 3.

209 Next, the language on the front page of the Booking Form is consistent with Grassland being the transport supplier. This is because Grassland is objectively seen to have a high degree of control over the deployment of buses and passengers' seating on the buses. Under "Remark:" at the top half of the front page, it is stated:

> 1) There are no Toilet [*sic*] in 35 seater Super-VIP coach.
>
> 2) Super-VIP can either be a Single Decker 26 seater Or a Double Deck 35 seater coach.
>
> 3) If change to Double Decker coach, Seat No. subject to change without prior notice.

These "remarks" suggest that Grassland could determine the type of bus which the Plaintiffs would be carried on (*ie*, single decker or double decker) and passengers' seat numbers thereon. Absent the mention of third-party suppliers, the likely impression is that Grassland operated these buses.

210 The information provided on the front of the Booking Form also suggests that it was a bus ticket issued by Grassland. The Booking Form is described as a "Two Way Tkt". The seat numbers, type of bus on each leg of the two-way trip (*eg*, Super VIP-D/366)[180] and relevant dates, times, pickup and alighting points pertaining to the journey are also stipulated. What is of particular significance is that the prescribed pickup location for the Manokarans and Wees on their Booking Forms was the Boon Lay Office and the Golden Mile Office respectively. Put another way, a reasonable reader would infer that he is reporting *to Grassland* on the departure date to board the bus bound for Genting Highlands. There is also a confirmation of "FULL PAYMENT" on the Booking Form to reflect, I presume, that Manokaran and Wee had handed

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180 PBD 1307 (Grassland) at p 3.

Grassland's representatives the necessary payment. Allied to this last-mentioned point is cl 16 of the Booking Form Terms and Conditions, which states that the "price paid to [Grassland] is solely for the *ticket* and does not include any other costs"[181] [emphasis added]. Viewing this information in the round, a reasonable reader would understand Grassland to be issuing a ticket for bus transportation which it is providing.

211 Third, the Booking Form Terms and Conditions fortify, from an objective standpoint, the sense that Grassland is the bus transport supplier. These terms are consistent with Grassland having undertaken to provide the transportation itself.

212 To begin with, I agree with the Plaintiffs that the following terms are inconsistent with Grassland being a mere booking agent. Clauses 7 and 11 state that "two-way coach tickets" and "[a]ll tickets / receipts / vouchers" will become invalid if the passenger is deported or refused entry by immigration or if the passenger fails to check in half an hour before departure respectively. However, if Grassland was *not* the carrier, but a true agent for the Plaintiffs (or Zenwan), the contract of carriage would exist between the Plaintiffs and Zenwan. In this counterfactual, I fail to see how Grassland would have a right to declare the tickets issued by Zenwan invalid. That the Booking Form Terms and Conditions set out rules of invalidity adds to the objective impression that the Booking Form is a ticket issued by Grassland.

213 Clause 6, however, does not objectively point to Grassland being the carrier. Limb (b) states that no *refund* shall be provided if a passenger is refused entry into Malaysia or Singapore. Even if it was a mere booking agent, it is

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181 PBD 1044 (Grassland) at p 5; PBD 1307 (Grassland) at p 4.

understandable if Grassland had inserted this term out of the abundance of caution to pre-empt claims by dissatisfied customers.

214 I am also careful not to place too much weight on cl 12, which allows Grassland to replace the "Super-VIP Coach" with other types of coaches in the event of a breakdown. The PC in *Wong Mee Wan* appears to have suggested that the first defendant (*ie*, the tour operator) having the right to "change the means of transport provided for in the itinerary" was a factor weighing in favour of the first defendant undertaking to provide transportation services (at 754). However, Andrew Phang (as he then was before his elevation to the bench) in "On the Liability of Travel Agents: Construction, Implied Terms and Vicarious Performance" (1996) 11(1) Denning L.J. 91 ("Phang's Article") at 94–95 opined that this last-mentioned factor in *Wong Mee Wan* "does not … necessarily entail the full assumption of responsibility the Board attributed to the first defendant". I agree. Even if Grassland was a mere booking agent, it would be in its commercial interests to take steps to ensure that its customers are not stranded *en route* to their final destination, or denied transportation *in toto* on account of a faulty bus.

215 Nonetheless, in addition to cll 7 and 11, the Booking Form Terms and Conditions depict Grassland as exercising control over the operation of the buses and the use of tickets. For instance, Grassland prohibits the transferability of tickets (cl 2) and re-arranging of seats (cl 13), limits each passenger to 10 kg of carry-on luggage (cl 10), requires passengers to fasten their safety belts once on the highway (cl 1) and confines the use of the bus toilet (if any) to urinating only (cl 14). In my judgment, these are operational decisions connected to the journey on the bus which a reasonable reader would expect the party providing the transportation service to determine, rather than a booking agent.

216 Further, the following clauses suggest that Grassland is assuming responsibility for the provision of the transportation service. Clause 9(a), for instance, states that Grassland "shall not be liable for any loss or damage to the passenger's personal belongings and luggage (kept in the luggage compartment of the coach) *during the entire journey*" [emphasis added]. Clause 18(d) excludes liability for "[t]raffic congestion, vehicle breakdown, obstruction of any public / private road or highway". I accept, however, that when these clauses are read in isolation, they are not unambiguous assumptions of responsibility to provide a transport service. Even a booking agent may contract on the basis of such clauses out of caution. As Lord Hoffman noted in *Beaufort Developments (N.I.) Ltd v Gilbert-Ash N.I. Ltd* [1999] 1 AC 266 at 274, "[t]he fact is that even in legal documents (or, some might say, especially in legal documents) people often use superfluous words. Sometimes the draftsmanship is clumsy; more often the cause is a lawyer's desire to be certain that every conceivable point has been covered." However, when cll 9(a) and 18(d) are read in the context of the *entire* Booking Form, I am satisfied they reinforce a reasonable reader's understanding that Grassland undertook responsibility to provide transportation and was simply attempting to exclude its liability in certain respects through, among other clauses, cll 9(a) and 18(d).

217 As such, while cll 18(i) and (j) show that Grassland does not always act as a principal, the information provided on the front of the Booking Form, and the clauses which portray Grassland as exercising close control over the operation of the bus (see [215] above) weigh more strongly in favour of showing that Grassland undertook to provide the bus transportation itself under these specific Contracts.

218 In sum, on an objective reading of the Contracts, Grassland undertook to transport the Plaintiffs from Singapore to Genting Highlands, and back, by

bus. As intimated at [204] above, there is a final piece of extrinsic evidence, whose admissibility I have not yet determined. The Plaintiffs rely on this evidence to show that they were not informed by Xing Lina or Lye that they would be travelling on a bus that was not owned by Grassland at the time they had entered into the Contracts.[182] Part of this evidence is Xing Lina's testimony that she would not tell passengers that they would be travelling on Zenwan buses unless she was asked.[183] The remainder of the evidence is the Plaintiffs' affidavit evidence. However, insofar as all of this is evidence of pre-contractual negotiations, whether it is admissible remains an open question: *Xia Zhengyan v Geng Changqing v Geng Changqing* [2015] 3 SLR 732 at [62]; *Sembcorp* at [75]. In the absence of full submissions, I do not consider this to be the appropriate occasion to grapple with this difficult question. In any case, even if the foregoing evidence is admissible, it will reinforce, and not change, my decision.

Whether there was a breach of the Contracts

Implied term in fact or law?

219 There is no express term in the Contracts obliging Grassland to exercise reasonable care in the provision of the transportation service. The Plaintiffs submit that it should be an implied term that they would be ferried to and from Genting with "due care and skill and in a reasonably safe manner".[184] For reference, the Plaintiffs pleaded this implied term (without specifying whether it is an implied term in fact or law) as follows: "That [Grassland] including its agents, servants and/or employees would use reasonable care and skill in

182 PCS (Grassland) at para 151(d).

183 NE, 11 December 2019, p 57: 19–23.

184 PCS (Grassland) at para 121.

planning, managing and/or carrying out the transport services provided to the Plaintiffs, throughout the Journey, to ensure a safe Journey for the Plaintiffs."[185] They submit that this term should be implied in *fact* under the three-step process laid down in *Sembcorp* at [101]:[186]

> (a) The first step is to ascertain how the gap in the contract arises. Implication will be considered only if the court discerns that the gap arose because the parties ***did not contemplate*** the gap.
>
> (b) At the second step, the court considers whether it is necessary in the business or commercial sense to imply a term in order to give the contract efficacy.
>
> (c) Finally, the court considers the specific term to be implied. This must be one which the parties, having regard to the need for business efficacy, would have responded "Oh, of course!" had the proposed term been put to them at time of the contract. If it is not possible to find such a clear response, then, the gap persists and the consequences of that gap ensue.
>
> [emphasis added in bold italics]

220 Under step (a), the Court of Appeal in *Sembcorp* at [94] clarified that if the gap arose in other ways, it would not be appropriate for the court to consider if it will imply a term. These "other ways" include where the parties contemplated the issue but chose not to: (a) provide a term for it because they mistakenly thought that the express terms of the contract had adequately addressed it; or (b) provide any term for it because they could not agree on a solution.

221 In the present case, the Plaintiffs submit that there is a gap in the Contracts insofar as they do not deal with "the liability and compensation of

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185 SOC 1044 at para 28(b) (PSDB 1044 (Grassland) at p 12; SOC 1307 at para 28(b) (PSDB 1307 (Grassland) at p 12).

186 PCS (Grassland) at paras 122–128.

damages" in the event an accident occurs and the Plaintiffs sustain personal injuries, as in the present case.[187]

222 However, I am not prepared to find that both parties failed to contemplate the issue of Grassland's liability for failure to provide the transportation service with reasonable care. In their submissions, the Plaintiffs have not directed me to evidence that *Grassland* failed to contemplate this issue. In fact, in my judgment, cl 19, while unenforceable for the purpose of demonstrating that Grassland was merely an agent, prevents a true gap from arising. It is likely that Grassland contemplated (albeit erroneously) that cl 19 would prevent it from assuming any duty to provide the transportation service, including to provide such service with reasonable care. I regard this as an instance where the drafter of the contract mistakenly thought that the express terms of the contract adequately addressed the issue. My finding in this regard is reinforced by cl 18, which attempts to exclude Grassland's liability for, among other things, "accidents". Although, whether cl 18 is enforceable for the purpose of excluding liability for negligence is a matter I return to later at [234] below.

223 As I am unable to imply a term in fact, although the following was not argued by the Plaintiffs, I now consider whether it is appropriate to imply the following term in law: if a tour operator or an entity selling tours and/or tickets ("Retailer") undertakes to supply a service, it is contractually obliged to provide such service with reasonable care ("the Implied Term in Law").

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187 PCS (Grassland) at para 127(a).

224 The Court of Appeal in *Chua Choon Cheng and Others v Allgreen Properties Ltd and another appeal* [2009] 3 SLR(R) 724 ("*Chua Choon Cheng*") summarised the principles on implied terms in law as follows:

> 68 The 'implied term in law' is a peculiar feature of contract law, in that the law is concerned with considerations of *fairness and policy* rather than the intentions of the parties *per se*: see *Halsbury's Laws of England*, vol 9(1) (Butterworths, 4th Ed Reissue, 1998) ('*Halsbury's Laws of England*') at para 778; [*Chitty on Contracts*, vol 1 (Beale gen ed) (Sweet & Maxwell, 30th Ed, 2008) ('*Chitty on Contracts*')] at para 13-003. In *Scally v Southern Health and Social Services Board* [1992] 1 AC 294, Lord Bridge drew the distinction between an implied term in fact and in law in the following manner (at 307):
>
> > A clear distinction is drawn … between the search for an implied term necessary to give business efficacy to a particular contract and the search, *based on wider considerations*, for a term which the law will imply as a necessary incident of a definable category of contractual relationship. [emphasis added]
>
> 69 By implying a term in law, the court is laying down a general rule in law that certain terms will be implied in all contracts of a defined type, unless it is contrary to the express words of the agreement: *Chitty on Contracts* at para 13-003. Indeed, some of the rules which the courts had previously implied have later become codified in statutory form: see for example, ss 10–15A of the Sale of Goods Act (Cap 393, 1999 Rev Ed). In short, the court is really "deciding what should be the content of a paradigm contract … [and] is in effect imposing on the parties a term which is most reasonable in the circumstances": Andrew Phang Boon Leong, *Cheshire, Fifoot and Furmston's Law of Contract* (Butterworths Asia, 2nd Ed, 2001) at pp 263–264. However, this does not mean that any reasonable term will be implied in a contract: see *Liverpool City Council v Irwin* [1977] AC 239 at 262 (*per* Lord Salmon). Indeed, a court should ordinarily exercise considerable restraint in implying a term in law, given that such a term extends and applies to all future like cases, rather than to the particular contract at hand and the immediate parties only as in the case of terms implied in fact: see [*Forefront Medical*

> *Technology (Pte) Ltd v Modern-Pak Pte Ltd* [2006] 1 SLR(R) 927] at [44].

225 The test for whether a term should be implied in law is whether it is a necessary incident of a definable category of contractual relationship: *Scally and others v Southern Health and Social Services Board and another* [1992] 1 AC 294 ("*Scally*") at 306–307. The test of necessity in this situation is based on "wider considerations" than those for implied terms in fact (*Scally* at 307).

226 It is apposite to refer to the House of Lord's decision in *Liverpool City Council v Irwin and another* [1977] AC 239 ("*Liverpool*"). In that case, the defendants were the tenants of a maisonette on the ninth floor of a 15-floor tower block owned by the plaintiff. There was no formal tenancy agreement. However, in a list of tenants' obligations prepared by the landlord and signed by the tenant, there were no express undertakings by the plaintiff (at 252–253). The lifts of the building were out of order, staircases unlit and the general conditions were appalling as a result of, among other reasons, vandalism. The defendants withheld payment of rent, alleging that the plaintiff had breached certain implied terms of the tenancy agreement. The plaintiff disputed the existence of such implied terms, but the House of Lords rejected the plaintiff's arguments.

227 Of particular interest is the court's implication in law of a contractual duty on the part of landlords to take reasonable care to maintain the stairs, lifts and rubbish chutes, referred to as the "common parts" the building (at 254–256).

228 Lord Wilberforce found that it was necessary to imply a duty on the landlord to maintain the common parts of the building because these were (at 256):

> … an ***essential means of access***, retained in the landlord's occupation, to units in a building of multi-occupation, for unless the obligation to maintain is, in a defined manner, placed upon the tenants, individually or collectively, the nature of the contract, and the circumstances, ***require*** that it be placed on the landlord.
>
> [emphasis added]

229 Lord Wilberforce added that to leave the landlord "free of contractual obligation … and subject only to administrative or political pressure, is, …, inconsistent totally with the nature of [a landlord-tenant] relationship" (at 254). In a similar vein, Lord Salmon reasoned that if the landlord did not have a duty to at least use reasonable care to keep the lifts working properly and the staircase lit, the whole transaction becomes "inefficacious, futile and absurd" (at 262).

230 As regards the standard of this duty of maintenance, Lord Wilberforce went on to clarify that the test of necessity only required the landlord to take reasonable care to keep the common parts in reasonable repair and usability. He explained as follows (at 256):

> … the test of the existence of the term is ***necessity*** the standard must surely not exceed what is necessary having regard to the circumstances. To imply an absolute obligation to repair would go beyond what is a necessary legal incident and would indeed be unreasonable. An obligation to take reasonable care to keep in reasonable repair and usability is what fits the requirements of the case. Such a definition involves - and I think rightly - recognition that the tenants themselves have their responsibilities. What it is reasonable to expect of a landlord has a clear relation to what a reasonable set of tenants should do for themselves.
>
> [emphasis added]

231 In my view, if a tour operator or Retailer contractually undertakes to provide a particular service to its customers, it is indeed a necessary incident of this relationship that the former parties are required to take reasonable care in the provision of the service. It is wholly inconsistent with such a relationship,

where customers place a degree of trust in the tour operator or Retailer to provide a service safely, often in a foreign land, that the tour operator or Retailer is completely free from obligation to exercise at least reasonable care.

232 I, like the House of Lords in *Liverpool*, also do not go so far as to require the tour operator or Retailer to, in absolute terms, provide the service safely. This would exceed what is necessary in the relationship. However, I consider it absurd if the service provider is not subject to an implied duty to at least take reasonable care in the performance of the service. That would allow the tour operator or Retailer *who has contractually undertaken* to provide the service to do so with wanton disregard for its customers' safety.

233 As such, I am satisfied that Grassland, having undertaken to provide the bus transportation service under the Contracts, is subject to an implied term in law to provide such service with reasonable care. I also find support for such an implied term in law in the following commentaries. Phang, for instance, argued that there is no real obstacle in recognising such an implied term in law if one accepts the distinction between merely "arranging" and "wholly undertaking" to provide a service. The distinction, I surmise, is that the Implied Term in Law will only feature in the former type of undertaking: Phang's Article at 98–99. He notes, further, that *Wong Mee Wan* likely involved an implied term in fact (and is therefore of little assistance here) (at 98). Jack Beatson, Andrew Burrows & John Cartwright in *Anson's Law of Contract* (Oxford University Press, 29th Ed, 2010) at 154–155 also recognise the existence of such an implied term in law.

234 I make three additional observations to place beyond doubt the appropriateness of recognising the Implied Term in Law. First, in my view, the Implied Term in Law does not contradict any of the express provisions of the

Contract. This is significant because an implied term in law applies to all contracts of a defined type *unless* the implication of such a term would be contrary to the express words of the agreement: *Chua Choon Cheng* at [69]. Clause 19, being unenforceable by virtue of s 3(2)(*b*)(i) of the UCTA for the purpose of establishing that Grassland's contractual undertaking was merely to act as an agent for the Plaintiffs (*ie*, not to provide the transportation service itself), does not prevent the Implied Term in Law from arising. Clause 18 is similarly unenforceable by virtue of s 2(1) of the UCTA for the purpose of excluding Grassland's liability for "death or personal injury resulting from negligence". As such, cll 18 and 19 do not bar the implication of the Implied Term in Law in the Contracts. This outcome must be correct since I loathe to think that a party is able to avoid liability for breach of terms implied in law by the simple expedient of planting unenforceable clauses in the contract.

235 Second, while the Plaintiffs did not specifically plead an implied term in *law*, this does not prevent me from recognising one: *Jet Holding Ltd and others v Cooper Cameron (Singapore) Pte Ltd and another and other appeals* [2006] 3 SLR(R) 769 at [93].

236 Finally, as explained at [90] above, the fact that Grassland sub-contracted the transportation service to Zenwan does not absolve Grassland from its contractual undertakings to the Plaintiffs. Therefore, even though it was Chuah who drove the Bus negligently, Grassland still breached the Implied Term in Law.

Whether the plaintiffs, other than Wee and Manokaran, were privy to the Contracts?

237 Grassland finally submits that the Plaintiffs who did not sign the Contracts are not privy to the Contracts and therefore have no legal basis to recover damages under the Contracts.[188]

238 In response, the Plaintiffs submit that Grassland is precluded from running this defence.[189] They argue that the first time that Grassland raised this issue was in its Joint Opening Statement dated 3 December 2019.[190] They claim to have suffered irreparable prejudice as they were not given the opportunity to plead matters relating to the Contracts (Rights of Third Parties) Act (Cap 53B, 2002 Rev Ed) in their Replies or to adduce evidence on this issue.[191]

239 The Court of Appeal in *V Nithia (co-administratrix of the estate of Ponnusamy Sivapakiam, deceased) v Buthmanaban s/o Vaithilingam and another* [2015] 5 SLR 1422 ("*V Nithia*") at [38] set out the general rule that "parties are bound by their pleadings and the court is precluded from deciding on a matter that the parties themselves have decided not to put into issue." However, it also noted that procedure is not an end in itself, but a means to the end of attaining a fair trial (at [39]). In this light, the court recognised that the general rule may be departed from in *limited* circumstances where "no prejudice is caused to the other party in the trial or where it would be clearly unjust for

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188 3DCS 1044 at paras 51–52; 3DCS 1307 at paras 50–51.

189 Plaintiffs' in HC/S 1044/2018 & HC/S 1307/2018 Joint Reply Submissions in respect of the Trial on Liability against the 3rd Defendants in HC/S 1044/2018 & HC/S 1307/2018 dated 3 February 2021 ("PRS (Grassland)") at paras 4 and 6.

190 Joint Opening Statement by 3rd Defendant for HC/S 1044/2018 and HC/S 1307/2018 dated 3 December 2019 at paras 5, 7, 10, 19, 21, 23 and 25.

191 PRS (Grassland) at para 6.

the court not to do so" (at [40]). The court also added that "cases where it is clear that no prejudice will be caused by the reliance on an unpleaded cause of action or issue that has not been examined at the trial are *likely to be uncommon*" [emphasis added] (at [41]).

240 In light of the guidance in *V Nithia*, I agree with the Plaintiffs that Grassland is precluded from advancing the defence relating to privity.

241 I accept that the Plaintiffs are prejudiced by their lack of reasonable opportunity to plead matters and lead evidence to counter the allegation that the non-signatory Plaintiffs were not privy to the Contracts. Importantly, neither Booking Form names the Plaintiffs other than Wee or Manokaran. The circumstances surrounding the signing of the Booking Forms would have been significant in determining who Grassland had an intention to enter into legal relations with.

242 However, the Plaintiffs did not have a proper opportunity to lead evidence in this regard. For instance, in respect of Xie, it is argued that her involvement in the transaction is evidenced by the fact that Wee handed her passport to Grassland's staff.[192] Fuller details on what was communicated to Grassland's representatives in the course of that exchange is lacking. The same can be said about the Manokarans' case. While they state in their AEICs, in general terms, that Manokaran had spoken "to a member of [Grassland's] staff … about booking bus tickets for [his] Family",[193] evidence on what exactly was said by both Manokaran and Grassland's staff in response is not before me.

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192 PRS (Grassland) at para 29; NE, 11 December 2019, p 14:27–31.

193 Manokaran's Sep 2019 AEIC at para 17 (PBAEIC 1044 (Grassland at p 7); Barvathi's Sep 2019 at para 18 (PBAEIC 1044 (Grassland) at p 73); Priyatharsini's Sep 2019 AEIC at para 18 (PBAEIC 1044 (Grassland) at p 129).

243 For these reasons, this is not one of the rare cases in which the court is entitled to venture beyond the parties' pleadings. It cannot be said that both sides have come to court ready to deal with the issue of privity despite its omission from the pleadings.

244 In any event, notwithstanding the paucity of evidence, I find it absurd that Xing Lina and Lye were not alive to Wee and Manokaran's respective intention to purchase tickets *on behalf* of other persons. The fact that more than one ticket was purchased should have alerted them to the fact that there were other persons who would be party to the Contracts. Even further still, Manokaran was accompanied by Barvathi and Priyatharsini when he signed the Booking Form at the Boon Lay Office. He also gave evidence that he informed Grassland's staff that "[his] Family and [himself] were agreeable to purchase the bus tickets".[194] Wee similarly states that he informed Grassland's staff that "[his] wife and [himself] wanted to" book a trip.[195] Therefore, I am not prepared to find that the Plaintiffs, other than Wee and Manokaran, were not privy to the Contracts.

Conclusion

245 In light of the foregoing, I give interlocutory judgment in favour of the Plaintiffs, with damages to be assessed in relation to: (a) Zenwan's vicarious liability for Chuah's tortious negligence; and (b) Grassland's contractual liability to all the Plaintiffs under the Contracts for failing to provide the bus

194 Manokaran's Sep 2019 AEIC at para 20 (PBAEIC 1044 (Grassland) at p 8).

195 Wee's Sep 2019 AEIC at para 17 (PBAEIC 1307 (Grassland) at p 7).

transportation service with reasonable care. I will hear parties on costs for the trial on liability separately.

Dedar Singh Gill
Judge of the High Court

Palaniappan Sundararaj and Ranita Yogeeswaran
(K&L Gates Straits Law LLC) for the plaintiffs in Suit 1044 of 2018 and Suit 1307 of 2018;
Gan Chern Ning David (DG Law LLC) and Teo Kim Soon Danny
(Advance Law LLC) for the second defendant in Suit 1044 of 2018 and Suit 1307 of 2018;
Pillai Subbiah (Tan & Pillai) for the third defendant in Suit 1044 of 2018 and Suit 1307 of 2018;
The first defendant absent and unrepresented in Suit 1044 of 2018 and Suit 1307 of 2018.