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28. TORT LAW

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I. Introduction

28.1 This review examines significant decisions handed down by the High Court and the Court of Appeal in 2022, covering the areas of breach of confidence, conspiracy, defamation, deceit, negligence and the rule in *Wilkinson v Downton*[1] ("*Wilkinson*").

II. Conspiracy

28.2 The Appellate Division of the High Court ("High Court (Appellate Division)") in *United Overseas Bank Ltd v Lippo Marina Collection Pte Ltd*[2] had to address issues relating to specific elements of the tort of unlawful means conspiracy and deceit. Here, the plaintiff bank, United Overseas Bank Limited, disbursed housing loans to 38 purchasers of condominium units in a project that was developed by Lippo Marina Collection Pte Ltd ("Lippo"). Lippo granted "Furniture Rebates" ("FR") to purchasers referred to by two property agents. The FR was not disclosed by the purchasers to the bank. It transpired that the bank breached the Monetary Authority of Singapore ("MAS") Notice 632[3] which allowed banks to lend up to 80% of the loan-to-value limit. The plaintiff bank sued Lippo and the two property agents in both conspiracy and deceit.

28.3 In the General Division of the High Court,[4] the trial judge upheld the claims in deceit as against the two property agents but dismissed the

1 [1897] 2 QB 57.
2 [2022] SGHC(A) 38.
3 27 August 2013; last revised 5 April 2020.
4 *United Overseas Bank Ltd v Lippo Marina Collection Pte Ltd* [2021] SGHC 283.

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conspiracy claim against the property agents and Lippo.[5] Upon the bank's appeal against the decision, the appeal was allowed with regard to the claim in conspiracy.

28.4 Lippo issued the purchasers the option to purchase ("OTP") with the stated purchase price of the condominium units. Due to the substantial FR granted by Lippo, the purchase price paid by each purchaser was equivalent to the stated purchase price minus the FR (which gave the "adjusted purchase price"). The grant of FR exempted the purchasers from paying the 4% exercise fee and the completion fee for the purchase. All the purchasers (except for one) failed to declare the FR in the loan applications submitted to the plaintiff bank. The latter was therefore unaware of the FR and the adjusted purchase price. Thirty-seven of the 38 purchasers defaulted on their loans. The plaintiff's allegation was that Lippo and the property agents conspired to obtain financing in breach of MAS Notice 632 and in excess of the adjusted purchase price.

28.5 The court disagreed with Lippo's position that the "Furniture Rebate Plan" was a genuine marketing device similar to rebates and discounts used by other developers. First, the court noted the "sheer magnitude" of the FR.[6] Second, the valuations of property were benchmarked against the stated purchase prices which, in this case, did not reflect the true value. The adjusted purchase price was closer to the real purchase price. Seen in this light, the stated purchase price was an inflated price. In tandem with Lippo's role in stating the purchase price in the OTP, this finding was a crucial factor underlying the claim in conspiracy against Lippo. Third, in failing to state the adjusted purchase price in the OTP, Lippo concealed the FR from the plaintiff bank in order to obtain a higher valuation and loan. The court also regarded Lippo's concealment of the FR from the OTP as "deliberate".[7]

28.6 With respect to the elements of conspiracy, Lippo's act in indicating the stated purchase price in the OTP was undertaken in combination with the purchasers to obtain the excess loans and deceive the plaintiff bank. The court also took the view that the plaintiff bank had lent more to the purchasers than what it would have if the true purchase price had been reflected in the OTP. In this regard, as the stated purchase

5 Note that the High Court judgment was reviewed in (2021) 22 SAL Ann Rev 771 at 784–786, paras 28.40–28.45.

6 *United Overseas Bank Ltd v Lippo Marina Collection Pte Ltd* [2022] SGHC(A) 38 at [48]. The court gave the example of the amount of "Furniture Rebates" ("FR") (*ie*, $2.39m) in respect of a sample of three units. This FR amount represented more than 52.6% of the adjusted purchase price (*ie*, $4.541m).

7 *United Overseas Bank Ltd v Lippo Marina Collection Pte Ltd* [2022] SGHC(A) 38 at [90].

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price was inflated, Lippo could not deny that it had, at the very least, intended to injure the plaintiff as a means to an end.[8]

28.7 With respect to the requirement of unlawful means, the court took note of the plaintiff's pleading of the purchase price misrepresentations and the concealment of the FR by Lippo. In addition, the court regarded Lippo's act in issuing the OTP with an inflated purchase price (or OTP misrepresentations) as evidence of unlawful means though this was not specifically pleaded. In so far as the proof of damage was concerned, the plaintiff relied on two case precedents[9] to support the general principle that a "risk of loss" suffices for a claim in conspiracy. In any event, in the present case, the loss had materialised as the purchasers save for one had defaulted on their loans. The claim in unlawful means conspiracy was thus established against Lippo and the two property agents.

28.8 The plaintiffs could not, however, satisfy the elements in deceit. First, the plaintiff did not plead the purchase price misrepresentation against Lippo but only against the two property agents. Further, there were queries concerning the party to whom the representation was made as well as whether the plaintiff acted or relied upon the representation. The pleadings stated that the allegedly false representations were communicated to the solicitors acting for the purchasers rather than to the plaintiff. If the pleadings had not been defective, the court observed that it was plausible that the plaintiff might have relied on the false representations. In the final analysis, as the claim in conspiracy was successful, Lippo was liable to pay damages to the plaintiff for which the quantum would be determined at the assessment of damages.

III. Defamation

28.9 In *Lee Kok Choy v Leong Keng Woo*,[10] the defendant sent two e-mails on 13 and 14 August 2011 to the chief executive officer ("CEO") of the company alleging certain wrongdoings committed by the plaintiff, the executive director of the company. The defendant was the employee of one of the company's subsidiaries. The plaintiff claimed that the e-mails were defamatory and sought damages on the basis that the statements were republished by the CEO to the board of directors and audit committee members.

8 *United Overseas Bank Ltd v Lippo Marina Collection Pte Ltd* [2022] SGHC(A) 38 at [119]–[120].

9 *JTrust Asia Pte Ltd v Group Lease Holdings Pte Ltd* [2020] 2 SLR 1256 at [209]; *Bank Gesellescharft Berlin International SA v Zihnali* [2001] All ER (D) 192 at [31]–[33].

10 [2022] 4 SLR 1253.

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28.10 As a preliminary issue, the defendant pleaded that the plaintiff's suit was time barred by the operation of s 6 of the Limitation Act.[11] Dedar Singh Gill J held that s 24A applied instead to the claim in damages. This was because the phrase "negligence, nuisance and breach of duty" in s 24A encompassed all torts,[12] including defamation. Under s 24A(3)(*a*), however, the action would be time barred as six years had elapsed since the accrual of the cause of action (that is, the publication of the defamatory e-mails in 2011). The writ was filed on 4 July 2019.

28.11 The plaintiff relied on s 24A(3)(*b*) which provides that the time begins to run only from the plaintiff's acquisition of "knowledge required for bringing an action in damages in respect of the relevant damage and the right to bring such an action". The plaintiff argued that he became aware of the e-mails sent to the CEO only on 25 November 2017 through the receipt of hardcopies of the e-mails in the mailbox of his apartment. Prior to the receipt of the hardcopies, he had no knowledge of the two e-mails the defendant had sent to the CEO in 2011. Under the Limitation Act, knowledge of the factual essence of the complaint and the identity of the defendant would suffice,[13] and such knowledge was acquired within three years of the commencement of the lawsuit.

28.12 The legal burden is on the plaintiff to show that the claim is not time barred.[14] As the plaintiff had adduced evidence of his receipt of the hardcopies of the e-mails only on 25 November 2017, the evidential burden then shifted to the defendants. In this regard, the defendants could not adduce any evidence that the plaintiff had acquired knowledge of the e-mails before 25 November 2017. As the defendant could not rebut the evidence, the plaintiff would be regarded as having discharged his legal burden of proof that the claim was not time barred.[15] Furthermore, it was only on 25 November 2017 that the plaintiff acquired knowledge of "material facts about the injury or damage which would lead a reasonable person who had suffered such injury or damage to consider it sufficiently serious" to initiate legal action for damages under s 24A(4)(*d*). Hence, the claim was not time barred.

28.13 On the substantive aspects of the claim, it was clear that the e-mails, which alleged that the plaintiff committed criminal offences, were, in their natural and ordinary meaning, defamatory. The defendant, however, argued, relying on the principle in *Jameel (Yousef) v Dow Jones &*

11 2020 Rev Ed.
12 *Yan Jun v Attorney-General* [2015] 1 SLR 752 at [61].
13 *Lian Kok Hong v Ow Wah Foong* [2008] 4 SLR(R) 165 at [36].
14 *IPP Financial Advisers Pte Ltd v Saimee bin Jumaat* [2020] 2 SLR 272 at [37] and [41].
15 *SCT Technologies Pte Ltd v Western Copper Co Ltd* [2016] 1 SLR 1471 at [19].

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Co Inc[16] ("*Jameel*") that there was no real and substantial tort due to the limited publication of the e-mails to the CEO alone. Gill J noted that *Jameel* was not binding in Singapore, and that the Court of Appeal in *Yan Jun v Attorney-General*[17] had indicated that the *Jameel* principle should be treated with some circumspection. Further, Aedit Abdullah J had observed in *Lee Hsien Loong v Leong Sze Hian*[18] that *Jameel* concerned issues of private international law and forum shopping and was borne out of the unique circumstances in the UK, namely, the new Civil Procedure Rules and the Human Rights Act 1998.[19]

28.14 Gill J stated that ultimately, the question of abuse of process should be based on a "cost-benefit calculation" taking into consideration the parties' costs and the impact upon the court's resources, and the benefit to the plaintiff of available remedies.[20] Based on the evidence, the plaintiff's claim should not be struck out under the *Jameel* principle. The e-mails were republished to the members of the board, and the plaintiff was seeking damages for the republication to the board. The e-mails were published by the defendant with malice which would constitute a ground for claiming aggravated damages. There was thus a *prima facie* case of defamation.

28.15 Turning to the defences, Gill J found that the defendant, as an employee of one of the company's subsidiaries, had a "moral duty"[21] to communicate the alleged wrongdoings of the plaintiff to the CEO of the company so that the latter could take steps to investigate the transgressions. Correspondingly, the CEO had an interest to receive the information. As such, the e-mails were published on an occasion of qualified privilege.

28.16 However, the defence was defeated by malice as Gill J found that the defendant did not have an honest belief regarding the truth of the defamatory e-mails. The learned judge did not believe the defendant's evidence that he had personally witnessed the plaintiff's wrongdoings, that he had obtained the information from informants or that the defendant had conducted his own investigations into the matter and possessed evidence of the plaintiff's misconduct prior to sending the defamatory e-mails. There were several inconsistencies in the evidence adduced. Moreover, the defendant failed to explain his omission to mention the plaintiff's wrongdoing to the board at its meeting in

16 [2005] 2 WLR 1614.
17 [2015] 1 SLR 752.
18 [2021] 4 SLR 1128 at [69].
19 c 42.
20 *Lee Kok Choy v Leong Keng Woo* [2022] 4 SLR 1253 at [61].
21 *Lee Kok Choy v Leong Keng Woo* [2022] 4 SLR 1253 at [72].

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November 2011 when the plaintiff was not present and even though the board members had specifically raised questions about the plaintiff. In this connection, the learned judge held that an inference should be drawn about the defendant's lack of honest belief when his allegations were so unfounded.[22]

28.17 As mentioned above, the plaintiff claimed damages for the republication of the e-mails by the CEO to the board and audit committee members. This was based on such republication being foreseeable and intended by the defendant. *The Wellness Group Pte Ltd v OSIM International Ltd*[23] was cited for the proposition that "where the republisher uses language that is his own, the defendant who can be said to have authorised the republication will remain liable so long as the republication adheres to the sense and substance of the statement given by the defendant".[24] On the facts, the learned judge found that the sense and substance of the e-mails were republished to the entire board and three audit committee members.

28.18 It should be noted that the two e-mails were not communicated to the entire board. Instead, the sense and substance of the e-mails were contained in a 4 November report which was communicated to the entire board. The 4 November report conveyed a part of the defamatory sting in the e-mails, and that was sufficient to cause damage to the plaintiff's reputation. *McManus v Beckham*,[25] in which the republication contained the allegation that conveyed a part of the defamatory sting in the original publication, was cited in support. The judge finally awarded to the plaintiff $45,000 in general damages and $5,000 in aggravated damages.

28.19 In the second case on defamation – *Continental Steel Pte Ltd v Nippon Steel & Sumitomo Metal Southeast Asia Pte Ltd*[26] – the plaintiff, a supplier of steel products, sued the defendants for libel, slander and malicious falsehood in respect of statements relating to a new steel column, that is, HISTAR 460 ("the product"). The plaintiff alleged that the defendants' statements imputed that the product did not comply with design standards according to industry guidelines known as "BC1: 2012 'Design Guide on Use of Alternative Steel Materials to BS 5950 and Eurocode 3'" ("the BC1:2012 Guide") which were issued by the Building and Construction Authority of Singapore ("BCA"). Both the plaintiff

22 *Lee Kok Choy v Leong Keng Woo* [2022] 4 SLR 1253 at [128].
23 [2016] 3 SLR 729.
24 *The Wellness Group Pte Ltd v OSIM International Ltd* [2016] 3 SLR 729 at [228]. Note that the cited principle is based on the defendant authorising the republication and not premised on foreseeability and the defendant's intention.
25 [2002] 1 WLR 2982.
26 [2022] SGHC 292.

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and the first defendant were trade rivals and companies incorporated in Singapore. The defendants had been developing a S460M steel product ("Nippon product"). Murahashi, the manager of the first defendant, was alleged to have disseminated the defamatory material. The second defendant, the parent company of the first defendant, was incorporated in Japan.

28.20 The plaintiff claimed that the product that it had been supplying since 2014 was a superior steel grade and met the standards under the "European Technical Approval" ("ETA"), which provides a technical assessment of a product's fitness for an intended use. Moreover, the product had a higher design strength available to the superior steel grade. This was based on the ETA 10-0156 ("the Issued ETA") under which the product had an enhanced design strength (or "Catalogue Design Strength") compared to that of S460M steel. The BC1:2012 Guide did not, however, allow the use of ETAs. The plaintiff alleged that the defendants' statement in the defamatory material that the product must comply with the BC1:2012 Guide was false.

28.21 Murahashi had attended a seminar in October 2017 during which he learnt from a representative of the product manufacturer that the BCA did not require compliance with the design parameters set out in the BC1:2012 Guide because the product had already obtained the Issued ETA. The defendants subsequently issued a February 2018 letter stating that they understood why the BC1: 2012 Guide did not apply to the product. Nevertheless, the plaintiff continued to receive queries about the appropriateness of the use of the product in Singapore.

28.22 In the defamation action, Dedar Singh Gill J interpreted the statement, in its natural and ordinary meaning, to be imputing that the product was used in accordance with its Catalogue Design Strength which would be contrary to the BC1:2012 Guide. This was the second meaning pleaded by the plaintiff.[27] The defamatory material stated that the product had to comply with the design strengths prescribed in the BC1: 2012 Guide and could not be used based on its Catalogue Design Strength. This second meaning, according to the learned judge, disparaged the product but not the plaintiff's business. Such meaning would not give rise to any claim in defamation. However, if innuendo were considered, and there were extrinsic facts that the plaintiff was marketing the product in accordance with its Catalogue Design Strength, the statement would be defamatory of the plaintiff. The defamatory sting was that, from the

27 The first meaning pleaded by the plaintiff was that the product should not be used in Singapore. The third meaning was that the product distributed by the plaintiff differed from that sold in Europe.

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perspective of a reasonable person, the plaintiff was dishonest in selling the product.

28.23 Turning to the requirement of reference to plaintiff, this was satisfied as the reasonable person in the construction industry was aware that the plaintiff marketed the product under its Catalogue Design Strength. The defamatory material was published to Fukuda and Kannan from the main contractor and subcontractor of steel works respectively, and Chiew, a consultant to the BC1:2012 Guide. The learned judge also opined that where the defamatory material was communicated to persons who were not aware at the time of the alleged publication that the plaintiff was marketing the product for use in accordance with its Catalogue Design Strength, those persons would not be regarded as publishees.

28.24 Though the words were in the form of slander which ordinarily requires proof of special damage, there was no need for the plaintiff to prove special damage in the present case due to a statutory exception. Section 5 of the Defamation Act[28] exempts the plaintiff from the requirement to prove special damage in respect of words calculated to disparage the plaintiff in any "trade or business" held or carried on by him at the time of the publication.

28.25 Murahashi, an employee of the first defendant, had published the defamatory material directly to Fukuda, Kannan and Chiew, and this act was carried out in the course of employment. The first defendant was thus vicariously liable for defamation. Though the second defendant prepared the publication, it was not responsible for publishing the defamatory material. The plaintiff did not plead any ground for establishing the second defendant as a joint tortfeasor.

28.26 One interesting issue was whether evidence of the truth of the defamatory material may be relied upon in the assessment of damages. The first defendant cited *Burstein v Times Newspapers Ltd*[29] ("*Burstein*") for the proposition that a defendant may adduce evidence of the directly relevant background context of the circumstances in which the publication came to be made. Where a defendant does not plead the defence of justification, O 78 r 7 of the Rules of Court[30] permits evidence as to the circumstances under which a libel or slander was published with a view to mitigation of damages provided the defendant furnishes the *Burstein* particulars in the defence. In this case, the first defendant was

28 Cap 75, 2014 Rev Ed.
29 [2001] 1 WLR 579.
30 2014 Rev Ed.

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not entitled to argue for mitigation of damages as it had not provided the requisite particulars in the defence.

28.27 The republications to three identified parties were a foreseeable consequence[31] of Murahashi's publication of the defamatory material to Chiew. It was foreseeable that Chiew would communicate with the BCA, and that the BCA would in turn communicate the defamatory words to the main contractor and qualified person of a redevelopment project. On this basis, the first defendant would be liable for the republications.

28.28 In addition, the first defendant would be liable for republications via the grapevine effect[32] to unidentified persons within the construction industry. Gill J applied the foreseeability test to the scenario of a corporate defendant which maligns a trade rival in the sale and marketing of a particular product whilst promoting a new product that competes with that of the trade rival, and opined that such statements would be republished within the industry.[33] Of these unidentified persons within the industry, only a proportion of them would have been aware of the extrinsic fact that the plaintiff marketed the product and would therefore appreciate the defamatory innuendo.

28.29 Gill J awarded the plaintiff $25,000 in general damages. The learned judge noted the "moderate gravity" of the defamatory imputation.[34] His Honour also found that Murahashi and the first defendant communicated the defamatory material with malice (that is, reckless disregard as to the truth of the defamatory imputation).[35] In particular, the first defendant was indifferent as to the truth of the defamatory material[36] as it deliberately refrained from inquiring with the BCA as to whether the BC1:2012 Guide applied to the product.[37] The extent of republication, as described above, was also taken into consideration in the quantification of damages. As for the plaintiff's claim for general loss of profits as special

31 *ATU v ATY* [2015] 4 SLR 1159.
32 *Roberts v Prendergast* [2014] 1 Qd R 357; *Dhir v Saddler* [2018] 4 WLR 1.
33 *Continental Steel Pte Ltd v Nippon Steel & Sumitomo Metal Southeast Asia Pte Ltd* [2022] SGHC 292 at [186].
34 *Continental Steel Pte Ltd v Nippon Steel & Sumitomo Metal Southeast Asia Pte Ltd* [2022] SGHC 292 at [230].
35 Note that this is distinct from awarding aggravated damages for injured feelings to a corporate plaintiff which is not allowed but on the ground that "express malice increased the damage done to the corporate plaintiff's reputation": see *Continental Steel Pte Ltd v Nippon Steel & Sumitomo Metal Southeast Asia Pte Ltd* [2022] SGHC 292 at [204].
36 *Macquarie Corporate Telecommunications Pte Ltd v Phoenix Communications Pte Ltd* [2004] 1 SLR(R) 463 at [45].
37 The learned judge cited *Sin Heak Hin Pte Ltd v Yuasa Battery Singapore Co Pte Ltd* [1995] 3 SLR(R) 123.

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damage, the learned judge awarded the plaintiff $50,000 for "probable pecuniary loss"[38] based on a loss period of eight months (October 2017 to June 2018) and the moderate gravity of the defamatory sting.

28.30 The plaintiff had made the same claim for damages with respect to the action in malicious falsehood. As the learned judge had already awarded the plaintiff $50,000 for pecuniary losses in defamation, his Honour did not consider it necessary to discuss the elements in malicious falsehood or award any additional sum in respect of this cause of action due to the rule against double recovery.

IV. Deceit

28.31 *Low Eng Chai v Ishak bin Mohamed Basheere*[39] concerned an action in deceit (including a claim for loss of chance) and the tort of unlawful means conspiracy. The plaintiffs were investors in Asia Strategic Mining Corporation Pte Ltd ("ASMC") whilst the second defendant was the Manager of Public Relations and Customer Services of ASMC. The plaintiffs claimed that the second defendant made fraudulent representations and conspired with the first defendant (the director and shareholder of ASMC) which resulted in the plaintiffs forbearing to commence actions against ASMC, thereby facilitating ASMC to dissipate the money to other parties.[40]

28.32 The first plaintiff had entered into five funding contracts with ASMC for the purchase of steam coal and nickel between November 2016 and June 2017. Under the contracts, ASMC had to pay the first plaintiff a specified monthly sum in accordance with a payment schedule. The contracts stated that the monthly payments would be credited to the second plaintiff's bank account. However, the payments ceased from September 2018. The first plaintiff then obtained a summary judgment of his claim against ASMC for the outstanding payments but had yet to receive any payments.

38 The court cited *Integrated Information Pte Ltd v CD-Biz Directories Pte Ltd* [1999] 2 SLR(R) 301.

39 [2022] SGHC 207.

40 As the plaintiffs had already entered judgment against the first defendant on the ground that the latter had failed to file his affidavit of evidence-in-chief within the stipulated court timelines, the judgment focused primarily on the claim against the second defendant.

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28.33 With respect to the claim in deceit based on the elements in *Panatron Pte Ltd v Lee Cheow Lee*,[41] the plaintiffs alleged four representations made by the second defendant:[42]

> (a) Banking issues had resulted in payment delays (the 'first representation').
>
> (b) All outstanding payments would be made from 9 November 2018 (the 'second representation').
>
> (c) ASMC is in good overall financial health (the 'third representation').
>
> (d) ASMC is in possession of the requisite funds and is ready and willing to make all payments (the 'fourth representation').

The second and fourth representations were statements of future intention. Nevertheless, S Mohan J considered such statements as actionable if the statement implied that the maker of the statement in fact (a) honestly believed that the event would happen in the future; or (b) had reasonable grounds for making such an assertion.[43] On the facts, they were held to be implied representations and hence actionable representations.

28.34 The plaintiffs could not, however, prove that any of the four representations made by the second defendant were false. The fact that there was movement of funds in and out of a particular bank account alone did not prove that the first representation was false. The second representation, being an implied representation, was not false as the second defendant had a reasonable basis for making the representation. The fourth representation was held not to be false based on similar reasoning. The plaintiffs conceded that the third representation and part of the fourth representation (that is, that ASMC possessed the requisite funds) were true. Thus, the requirement to prove the falsity of the representations had not been satisfied and the claim was dismissed.

28.35 The learned judge proceeded nonetheless to analyse the other elements of the tort of deceit. His Honour found that there was no proof of reliance by the plaintiffs on the above representations. The plaintiffs' pleadings, affidavits of evidence-in-chief or closing submissions did not disclose any particulars of the legal action or investigations that the plaintiffs forbore from commencing. Furthermore, the plaintiffs had commenced legal proceedings against ASMC in 2019 which indicated they were not relying on the representations during this period. In fact,

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41 [2001] 2 SLR(R) 435 at [14].

42 *Low Eng Chai v Ishak bin Mohamed Basheere* [2022] SGHC 207 at [27].

43 *Deutsche Bank AG v Chang Tse Wen* [2013] 1 SLR 1310 at [96], followed in *KLW Holdings Ltd v Straitsworld Advisory Ltd* [2017] 5 SLR 184 at [31].

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the present suit based on unlawful means conspiracy was commenced on 30 May 2019.

28.36 With respect to the alleged losses, the plaintiffs had pleaded and argued in written submissions that the loss was the sum of $616,700 owed to the first plaintiff under the contracts. During closing submissions, however, the plaintiffs reframed the claim for damages as one for the loss of a chance to commence legal proceedings expeditiously against ASMC based on the principles in the English decision in *Allied Maples Group Ltd v Simmons & Simmons*.[44] According to Mohan J, for the claim based on loss of chance to succeed, the plaintiffs would have to prove that: (a) on a balance of probabilities, but for the representations, the plaintiffs would have commenced legal action against ASMC in October 2018; (b) there was a real or substantial chance that the court hearing the proceedings would have allowed the plaintiffs to recover money due under the contracts; (c) on a balance of probabilities, the plaintiffs would have enforced any judgment granted against ASMC; and (d) there was a substantial chance that the plaintiffs would successfully enforce such judgment.[45]

28.37 The claim for loss of chance failed as there was no evidence of the plaintiffs' readiness to commence legal proceedings in October 2018 or any real or substantial chance that they would have been granted judgment if such proceedings had been commenced. In addition, though the first plaintiff obtained summary judgment against ASMC on 6 December 2019, he had not enforced the judgment.

28.38 Similarly, the claim in unlawful means conspiracy was not established. There was no evidence that the moneys were dissipated in the sense of being applied for an improper purpose (or, for that matter, that the money was in fact received by the second defendant improperly). The plaintiffs could not prove that the second defendant had combined or reached an agreement with the first defendant to cause the money to be dissipated from ASMC. There was no intention on the part of the second defendant to cause harm to the plaintiffs; neither had the plaintiffs suffered loss as a result of the alleged conspiracy.

44 [1995] 1 WLR 1602, followed in *Asia Hotel Investments Ltd v Starwood Asia Pacific Management Pte Ltd* [2005] 1 SLR(R) 661.
45 *Low Eng Chai v Ishak bin Mohamed Basheere* [2022] SGHC 207 at [76].

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V. Negligence

A. Medical negligence

28.39 *Chia Soo Kiang v Tan Tock Seng Hospital Pte Ltd*[46] was a medical negligence claim arising out of the death in hospital of a 74-year-old woman. The deceased was first admitted to Tan Tock Seng Hospital ("TTSH") in 2018 for an acute myocardial injury and, following her discharge, was managed as an outpatient by the cardiology clinic. Some months after her discharge, the deceased returned to TTSH with a persistent fever. She was diagnosed as suffering from sepsis and given antibiotics. She was subsequently seen by a doctor in the ward who noted that the deceased was on chronic medications for her heart and for her hypertension. The doctor stopped those medicines while treating the deceased's sepsis as she was concerned that the medicines could interfere with the deceased's blood clotting capability and kidney functions.

28.40 A few days later, the deceased had a shower, assisted by an intern. She collapsed soon after the shower and did not regain consciousness, passing away three weeks later. Actions were brought against the hospital and the doctors alleging that the doctors were negligent in failing to diagnose the deceased correctly in the emergency department, in taking her for a shower, and for not resuscitating her promptly. Further, it was alleged that the doctor had failed to obtain consent from the deceased before stopping her chronic medication. The plaintiff argued that the deceased should have been diagnosed as suffering from a type 1 myocardial injury rather than a type 2 myocardial injury, the former being more serious. Choo Han Teck J disagreed, holding that the expert opinion and evidence suggested that she was suffering from a type 2 myocardial injury.

28.41 On the shower incident, Choo J found that there was no evidence to show that the cardiac arrest she suffered was due to a myocardial infarction, holding that it was equally likely that the cause of the cardiac arrest was a pulmonary embolism. The expert evidence also supported the management of the deceased following her admission; thus, the doctors could not be found negligent. No reference was made in the judgment to the jurisprudence, but it was evident that Choo J had decided the case applying the *Bolam*/*Bolitho*/*Gunapathy* peer professional standard. On stopping the chronic medication, Choo J found that the decision was clinically supported.

46 [2022] SGHC 259.

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28.42 The argument that the doctor should have obtained the patient's consent to stop the medication was rejected by Choo J. While this is correct, this should not be taken as permission for doctors to stop chronic medication without informing the patient or caregivers. It is crucial that the patient or caregivers are informed about any changes to the medication regime to avoid an adverse event. There is one observation of Choo J that should be read with caution: "It is entirely within the responsibility and competence of doctors to act in the patient's best interests when prescribing and withholding medications according to their professional judgment."[47] This conflation of professional judgment and best interests should be avoided as best interest has to be decided from the patient's perspective and not the doctor's.[48]

B. Medical negligence and the rule in Wilkinson v Downton

28.43 *Tiong Sze Yin Serene v Chan Herng Nieng*[49] arose out of an intimate relationship turned sour. The male defendant was a psychiatrist who was in an intimate relationship with the female plaintiff despite being married. At some point during the relationship, the plaintiff discovered that the defendant was having a relationship with another woman. The plaintiff, who had taken their relationship to be exclusive and for the long term, made complaints against the defendant to the Singapore Medical Council ("SMC") alleging that the defendant had negligently prescribed her Xanax and was colluding with another doctor to manipulate vulnerable female patients into sexual relationships. The two actions that the plaintiff brought in this case were in negligence with respect to the prescription of Xanax and under the rule in *Wilkinson*[50] for causing harm by inducing her to enter into an intimate relationship. Tan Siong Thye J found against the plaintiff on both actions.

28.44 On the negligence claim, the issues to be determined were whether the defendant had acted negligently and whether the defendant's negligence had caused the plaintiff damage. The defendant conceded that he owed the plaintiff a duty of care as a medical professional. This concession was rightly made as even though the plaintiff was not registered as his patient, he was treating her in his capacity as a medical professional. The plaintiff particularised the defendant's negligence as prescribing Xanax without (a) "ascertaining the suitability of Xanax for her"; (b) ensuring that "she would not become addicted to Xanax";

47 *Chia Soo Kiang v Tan Tock Seng Hospital Pte Ltd* [2022] SGHC 259 at [32].
48 *Aintree University Hospitals NHS Foundation Trust v James* [2013] UKSC 67; [2014] 1 AC 591; [2013] 3 WLR 1299.
49 [2022] SGHC 170.
50 See para 28.1 above.

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(c) cautioning "her against drug dependency"; and (d) keeping clinical notes.[51]

28.45 Tan J, citing *Hii Chii Kok v Ooi Peng Jin London Lucien*[52] ("*Hii Chii Kok*"), noted that the standard of care for diagnosis and treatment was that based on the *Bolam/Bolitho* test,[53] namely the peer professional standard. Thus, as long as the defendant's practice is accepted as proper by a responsible body of professional opinion and that opinion is logically defensible, the defendant may not be found negligent. On the facts and evidence, Tan J disbelieved the plaintiff's claims as to the number of tablets prescribed and the frequency of prescription and preferred the evidence of the defendant. Nonetheless, even based on the higher amounts alleged by the plaintiff, Tan J found that the defendant would not have acted negligently as the expert gave an opinion that the dosage was still below the recommended maximum.

28.46 Having decided the negligence issue, Tan J went on to consider the plaintiff's arguments relying on the SMC Ethical Code and Ethical Guidelines[54] ("ECEG"). The judgment contains some clear statements about the relevance of ethical guidelines on the legal standard of care. This conflation of legal and ethical standards has been an unfortunate aspect of medical law in Singapore, following *Hii Chii Kok* and *Singapore Medical Council v Lim Lian Arn*[55] ("*Lim Lian Arn*"). *Lim Lian Arn* involved a doctor who faced disciplinary sanction for allegedly failing to obtain informed consent from a patient for a routine medical procedure. Although the doctor was cleared by the Court of Three Judges, the two cases decided so close to each other gave rise to confusion about the appropriate tests for informed consent under the common law and under the ECEG, leaving medical practitioners concerned as to how they should act.

28.47 Tan J clarified that the ECEG functioned as a guide for doctors and was not prescriptive; doctors could exercise clinical judgment and disregard the guidelines if the circumstances so demanded. This passage is worth quoting in full:[56]

> In my view, as I have reiterated above, the central issue is not whether Dr Chan had breached the professional standard as prescribed by the ECEG. Instead,

51 *Tiong Sze Yin Serene v Chan Herng Nieng* [2022] SGHC 170 at [24].
52 [2017] 2 SLR 492.
53 *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582; *Bolitho v City & Hackney Health Authority* [1998] AC 232.
54 2016 Ed.
55 [2019] 5 SLR 739.
56 *Tiong Sze Yin Serene v Chan Herng Nieng* [2022] SGHC 170 at [53].

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> the issue is whether Dr Chan was negligent when he gave Ms Tiong Xanax. Turning to this inquiry, there can be a situation in which Dr Chan could have complied with the ECEG to the very letter and therefore did not breach any professional standard, but could still be negligent in giving Ms Tiong Xanax. Conversely, there can be a situation in which Dr Chan could have breached the ECEG and yet not be negligent in giving Ms Tiong Xanax. In addition, there can be a situation in which Dr Chan could have breached the professional standard and also be negligent in giving Xanax to Ms Tiong. This third scenario is Ms Tiong's allegation. In this situation, the court should not be concerned about whether Dr Chan breached his professional standard but should focus on whether Dr Chan was negligent when he gave Ms Tiong Xanax.

This clarification should be welcomed by the medical profession. Clinical judgment will not be found negligent merely because the doctor does not follow published guidelines. Ultimately, whether a doctor is negligent depends on whether the doctor's practice is accepted as proper by a responsible body of peers. Having found the defendant not negligent, Tan J nonetheless went on to consider whether the plaintiff had suffered harm, concluding on the evidence that she had not suffered psychiatric harm.

C. *Breach of confidence*

28.48 *Writers Studio Pte Ltd v Chin Kwok Yung*[57] arose from disputes within a company that culminated in tortious actions for breach of duty of care and breach of confidentiality (in addition to breaches of implied contractual duties and a non-confidentiality agreement). The plaintiff provided education support services to students in primary schools. The defendant was engaged by the plaintiff as a tutor.

28.49 Lee Seiu Kin J found that an express oral contract existed between the parties. Lee J held that the defendant was engaged as an independent contractor under an employment *for* service.[58] The defendant did not receive a fixed salary (but a percentage of the tuition fees of the students he taught) and paid rent for the rooms he used to teach the students. The plaintiff had no right to terminate the defendant's engagement. Teaching materials prepared by the defendant were considered his property, and the defendant did not receive any benefits (for example, leave or medical benefits) from the plaintiff and could stipulate his own teaching schedule. Moreover, the parties understood that there was no requirement to contribute to the defendant's Central Provident Fund.

57 [2022] SGHC 205.

58 See *Kureoka Enterprise Pte Ltd v Central Provident Fund Board* [1992] SGHC 113 and *BNM v National University of Singapore* [2014] 4 SLR 931.

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28.50 In respect of the alleged breach of duty of care under the tort of negligence, the plaintiff pleaded that the defendant was obliged to conduct himself in a manner which could be expected of a "reasonable tutor to young children",[59] and that the defendant had breached his duty through the latter's misconduct and inappropriate behaviour.

28.51 First, the defendant did owe a legal duty of care based on the *Spandeck* framework.[60] It was factually foreseeable that the plaintiff would suffer from the defendant's carelessness given the physical relationship between the parties. With respect to the proximity requirement, the learned judge cited *Go Dante Yap v Bank Austria Creditanstalt AG*,[61] stating that there was an implied term in the contract that the defendant would exercise reasonable skill and care in rendering services to the plaintiff. In addition, the defendant had, as a tutor, voluntarily assumed a responsibility to exercise reasonable skill and care to the tuition centre and the latter had relied on his expertise. Thus, there was a *prima facie* duty of care owed by the defendant to the plaintiff. At the second stage of policy considerations, since the contract between the parties did not specify the delivery of lessons and conduct expected of the defendant, the contractual relationship did not negate the *prima facie* duty.

28.52 Second, the learned judge held that the defendant did not breach his duty. Due to the continuing late payment of his fees by the plaintiff, it was not unreasonable for the defendant to end his class early and cancel two classes on short notice. When asked by the students, his act of informing the students he was resigning because he had not received his remuneration from the plaintiff was similarly not unreasonable. The evidence that the defendant behaved inappropriately in class was dependent on the evidence of the students' statements which, according to Lee J, did not go towards showing the truth of those statements.

28.53 The discussion now turns to the plaintiff's allegations of breach of a non-disclosure agreement ("NDA") and/or confidentiality. The defendant signed an NDA on 25 April 2020. The plaintiff claimed that confidential information included its clients' contact information and teaching materials. Lee J eventually dismissed the plaintiff's claim for breach of confidentiality.

59 *Writers Studio Pte Ltd v Chin Kwok Yung* [2022] SGHC 205 at [40].
60 *Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency* [2007] 4 SLR(R) 100.
61 [2011] 4 SLR 559.

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28.54 The learned judge first highlighted that the duty of confidentiality is an equitable obligation based on the following elements in *Coco v AN Clark (Engineers) Ltd*[62] ("*Coco*"):[63]

> (a) That the information in question has the necessary quality of confidence about it.
>
> (b) The information must have been imparted in circumstances importing an obligation of confidence.
>
> (c) There must be an unauthorised use of the information, and in appropriate cases, this use must be to the detriment of the party who originally communicated it.

Subsequently, the Court of Appeal in *I-Admin (Singapore) Pte Ltd v Hong Ying Ting*[64] ("*I-Admin*") had adopted a "modified approach" to *Coco*:[65]

> [I]f the relevant information had the necessary quality of confidence about it and if it was imparted in circumstances importing an obligation of confidence, an action for the breach of confidence would be presumed. This presumption could be rebutted if the defendant could adduce proof that his/her conscience was not affected in the circumstances in which the plaintiff's wrongful loss interest had been harmed or undermined.

28.55 Lee J observed, with reference to the more recent case of *Lim Oon Kuin v Rajah & Tann Singapore LLP*,[66] that *I-Admin* did not seek to change completely the law as embodied in *Coco* but to "specifically fill the lacuna in the law in so far as the legitimate objective of protecting the wrongful loss interest".[67] The plaintiff's wrongful loss interest would be protected unless the defendant could discharge its legal burden to show that his conscience was unaffected.

28.56 Thus, the traditional approach in *Coco* remains with its focus on wrongful gain interest where the defendant has made an unauthorised use or disclosure of the confidential information and obtained a benefit. To protect wrongful gain interest, the plaintiff will continue to bear the legal burden of proving there has been unauthorised use of confidential information to the detriment of the plaintiff.

28.57 In the present case, the plaintiff had framed the pleadings based on the law prior to *I-Admin* (that is, only the requirements in *Coco*). The

62 [1969] RPC 41; see also *X Pte Ltd v CDE* [1992] 2 SLR(R) 575.
63 *Writers Studio Pte Ltd v Chin Kwok Yung* [2022] SGHC 205 at [124].
64 [2020] 1 SLR 1130 at [64].
65 *Writers Studio Pte Ltd v Chin Kwok Yung* [2022] SGHC 205 at [129].
66 [2022] 2 SLR 280.
67 *Writers Studio Pte Ltd v Chin Kwok Yung* [2022] SGHC 205 at [130]; *Lim Oon Kuin v Rajah & Tann Singapore LLP* [2022] 2 SLR 280 at [39].

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plaintiff did not specify whether the claim was premised on wrongful gain interest or wrongful loss interest. As such, the plaintiff was not entitled to argue in court that the defendant ought to shoulder the legal burden to show its conscience was unaffected. Moreover, the defendant in this case did not take or acquire the confidential information. Instead, the confidential information was passed to him from the plaintiff company.

28.58 Hence, the present case should be analysed with reference to the protection of wrongful gain interest under *Coco*. Based on the factual findings, the learned judge held that the plaintiff had not discharged its legal burden on a balance of probabilities that it had suffered any loss or detriment from the alleged breaches of confidential information, whether in respect of client contacts or teaching materials.

D. Public duties

28.59 The litigation in *How Weng Fan v Sengkang Town Council*[68] arose out of the change in management of town councils following a series of elections. Town councils are responsible for the management of the common property in public housing estates. They are incorporated under the Town Councils Act[69] ("TCA") and regulated under various subsidiary legislation. The relevant regulation for this action was the Town Councils Financial Rules[70] ("TCFR"). The TCA and the TCFR provide the legislative framework for the financial management of town councils.

28.60 Prior to the 2011 General Elections, the People's Action Party ("PAP") managed the Aljunied Town Council and the Workers' Party managed the Hougang Town Council. Following the 2011 elections when the Workers' Party won the Aljunied Group Representative Constituency ("GRC"), the Aljunied-Hougang Town Council ("AHTC") was constituted. In 2013, the Workers' Party won the election in the Punggol East Single Member Constituency ("SMC") and the AHTC was reconstituted as the Aljunied-Hougang-Punggol East Town Council ("AHPETC"). In 2015, the PAP won the Punggol East SMC election, which then came under the Pasir Ris-Punggol Town Council ("PRPTC"). The AHPETC was reconstituted, reverting to the AHTC. In 2020, all the assets and liabilities of PRPTC were transferred to Sengkang Town Council, which was the plaintiff in the litigation.

28.61 The plaintiffs were the various town councils, who brought actions against individual members of AHTC as it existed before 2013 and

68 [2022] SGCA 72.
69 Cap 329A, 2000 Rev Ed.
70 Cap 329A, R1, 1998 Rev Ed.

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again after it was reconstituted in 2015. The seven individual defendants included three elected members, Lim, Low and Singh; two appointed members, Chua and Foo; and two senior employees, How, the General Manager, and Loh, the Secretary and sole proprietor of FM Solutions & Integrated Services ("FMSI"). The eighth defendant was FM Solutions & Services Pte Ltd ("FMSS"), of which Loh and How were majority shareholders. The claims centred on three allegations of wrongdoing pertaining to (a) the award of four contracts for managing agent ("MA") and Essential Maintenance Service Unit ("EMSU") services to FMSS; (b) the process by which payments were approved and made to FMSS and Loh; and (c) the award of contracts to third-party contractors. The plaintiffs pleaded that the individuals owed various statutory, fiduciary and common law duties to the respective town councils.

28.62 The trial judge found against the town council members, holding that they owed fiduciary duties to AHTC as they "were vested with a high degree of trust, confidence and autonomy".[71] On the particular allegations, the judge found that the waiver of tender and subsequent appointment of FMSS was not justified and was a preconceived plan to replace staff loyal to the PAP with staff loyal to the Workers' Party.[72] On the improper payments, the judge found that the parties approving the payments were conflicted and that there was an inherent risk of overpaying as there was inadequate independent verification of work done. On the award of contracts to third parties, the judge found that there were breaches of equitable duties as existing contracts could have been extended. The judge interpreted s 52 of the TCA as providing immunity only against claims by third parties and not by the town council itself.

28.63 The Court of Appeal's decision is significant for its analysis of potential private law liabilities for public law functions, as well as the scope of s 52 of the TCA which provides immunity to town council members against claims brought by third parties as well as the town council itself. Sundaresh Menon CJ, who gave the court's judgment, noted that legal duties could be divided into three conceptual categories: the tort of negligence; the tort of breach of statutory duty; and the tort of misfeasance in public office. Referring to *Tan Juay Pah v Kimly Construction Pte Ltd*[73] ("*Tan Juay Pah*"), Menon CJ noted that statutory duties could give rise to common law duties so long as the test in *Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency*[74] ("*Spandeck*") was satisfied

71 *How Weng Fan v Sengkang Town Council* [2022] SGCA 72 at [100].
72 *How Weng Fan v Sengkang Town Council* [2022] SGCA 72 at [101].
73 [2012] 2 SLR 549.
74 [2007] 4 SLR(R) 100.

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and the statutory framework was not inconsistent with the imposition of a duty of care.

28.64 Menon CJ went on to address the key question, namely whether "Town Councillors and Employees can be made liable … in a private law action for what, in essence, are alleged breaches of public law duties",[75] setting out the key principles from *Swain v The Law Society*:[76]

> (a) A public body may act in both a private capacity and a public capacity. It is important to be mindful of the capacity in which it is acting because the consequences of its actions may be quite different.
>
> (b) Whether a public body is acting in a private or public capacity is to be determined by scrutinising the entire circumstances and the source of the power being exercised by the public body. To put it simply, the question is whether the public body is exercising a power that is rooted in public law (as where it arises from a statute and is for a public purpose) or private law (as where it arises out of a private contract and does not entail the exercise of a statutory power for a public purpose).
>
> (c) If the public body is acting in a private capacity, private law governs the relationship between that body and those persons who stood to be affected by its actions in that capacity, and private law remedies may be sought. Equally, public law remedies may not typically be available.
>
> (d) If the public body is acting in a public capacity, public law governs the relationship between that body and those persons who stood to be affected by its actions in that capacity, and public law remedies can be sought, but typically not private law remedies.

28.65 The distinction between acting in public or private capacity is crucial. When a public body or its officials act in a private capacity, they could be liable under private law, but if they are performing public functions, then the proper remedy law lies in public law and not private law.[77] Menon CJ held that the trial judge had failed to distinguish between public and private law in determining the scope of the private law duties of the council members and employees (the defendants). The trial judge held that because town councils may be incorporated, that subjected them to private law obligations and remedies. Menon CJ disagreed, observing that incorporation was to give town councils legal personality, but it did not necessarily expose them to liability under private law for all of their actions. The trial judge also drew comparisons between council members and directors, arguing that as the latter owed fiduciary duties to their companies, so too should council members owe fiduciary duties to the

75 *How Weng Fan v Sengkang Town Council* [2022] SGCA 72 at [137].
76 [1983] AC 598. See *How Weng Fan v Sengkang Town Council* [2022] SGCA 72 at [140].
77 *Public Service Commission v Law Swee Lin Linda* [2001] 1 SLR(R) 133.

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town council. Menon CJ rejected this view, holding that companies are quintessentially private entities exercising private functions and are not comparable with town councils which mainly exercise public functions.

28.66 Fiduciary duties thus should generally not be imposed on council members and employees as "there is no beneficiary in the equitable sense".[78] Fiduciary duties demand undivided loyalty and must be voluntarily undertaken. In this case, the defendants were not acting as fiduciaries but were executing statutory duties under public law. Another reason not to find council members and employees as fiduciaries lies in the separation of powers. Fiduciaries must act in the best interest of the beneficiaries, but what is in the best interest of the town council is essentially a political matter that should be determined through the democratic process and not by way of judicial review as the Executive should have discretion in making decisions.[79] Menon CJ further observed that there is no need for fiduciary duties to enforce the town council's duties under the TCA and the TCFR as the TCA itself provides for an enforcement mechanism.

28.67 Having found that the defendants were not under a fiduciary duty, Menon CJ went on to hold that they could not be subject to any equitable duty as the latter was contingent on there being a fiduciary relationship. Consequently, the parties agreed that as the defendants were not under any fiduciary or equitable duty, any claim against FMSS for knowing receipt and dishonest assistance would fail as such a claim was predicated on there being breaches of fiduciary duties. Menon CJ then focused the remainder of the judgment on whether the defendants owed any common law duties under the *Spandeck* test.

28.68 The threshold question of factual foreseeability was easily satisfied, and on the facts a relationship of proximity could be found as the defendants had assumed responsibility for their acts and the town council relied on them. The crux of the question was whether there were any policy considerations that negated or restricted any potential duty. In cases involving public bodies where the common law duty arises in part out of statutory duties, it is important to ensure that any common law duty does not conflict with the statutory duties. Two considerations are significant: s 52 of the TCA and the doctrine of separation of powers.

28.69 Section 52 provides as follows:

> No suit or other legal proceedings shall lie personally against any member, officer or employee of a Town Council or other person acting under the direction of a

78 *How Weng Fan v Sengkang Town Council* [2022] SGCA 72 at [170].
79 *How Weng Fan v Sengkang Town Council* [2022] SGCA 72 at [189].

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> Town Council for anything which is in good faith done or intended to be done in the execution or purported execution of this Act or any other Act.

Section 52 thus does not provide blanket immunity but merely restricts the scope of duty to acts that were not done in good faith. Thus, a duty of care could coexist with s 52. On the separation of powers, Menon CJ noted that, unlike fiduciary duties which generally involve policy or political decisions and hence should be protected from judicial review except in limited circumstances, a common law duty is not always related to policy questions, and often involves operational matters. This is an area where judicial review would not be inappropriate.

28.70 There were three key issues in determining the scope of s 52, namely, whether it applied to claims by a town council; what the test was for good faith; and which party bore the burden of proof. Menon CJ rejected the trial judge's conclusion, holding that s 52 applied to the town council and therefore afforded protection to the defendants. This was so as council members and employees exercise discretionary powers that involve the delicate balancing of various matters, and it would not be appropriate for a judge to second-guess these decisions. Good faith would be satisfied when the council member or employee acted honestly and for a proper purpose "with a basic degree of competence and diligence".[80] The good faith test would not be met only when "no reasonable person in that position could honestly believe it was an appropriate course of action".[81] The burden of proof lay on the defendant.

28.71 Applying the principles to the facts, Menon CJ found that s 52 afforded immunity for the decision to award the first MA contract and the EMSU contract to FMSS. The trial judge had made wrong inferences about the intentions of the defendants. Menon CJ found that the defendants had acted in good faith as they had to replace the MA and EMSU urgently, and the existing company had abruptly refused to continue providing its services. On the payments processes, Menon CJ found that the defendants had failed to act in good faith and were thus not protected by s 52. They had put in place a system that was inadequate to detect fraud or to ensure that work for which payments were claimed had been satisfactorily completed, hence breaching their common law duty to take reasonable care.

28.72 Having found the defendants negligent, Menon CJ observed that the plaintiffs had not provided any evidence to show that the defendants' negligence had caused them any damage. There was no evidence that

80 *How Weng Fan v Sengkang Town Council* [2022] SGCA 72 at [279].
81 *How Weng Fan v Sengkang Town Council* [2022] SGCA 72 at [279].

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improper payments had actually been made and the burden of proof lay on the plaintiffs. That matter would have to be resolved at the trial for assessment of damages. Finally, on the awarding of contracts to third parties, Menon CJ found that there was only (one) instance of breach of duty in the awarding of one of the contracts without renewing the existing contract at a lower rate.

E. Road traffic accidents

28.73 *CXN v CXO*[82] involved a motor accident that highlighted an important social issue. The second defendant was the driver of a car that hit a van driven by the first defendant. The plaintiff was a child who was travelling in the rear cargo compartment of the van which was not equipped with seats or seatbelts. The first defendant was executing a U-turn when the van was hit by the second defendant's car which was travelling at very high speed. The collision caused severe damage and resulted in the plaintiff being thrown out of the van and suffering serious injuries. Both parties accepted that they were negligent and neither argued that the plaintiff had been contributorily negligent. The issue was the apportionment of responsibility between the two defendants.

28.74 Both defendants pleaded guilty to offences under the Road Traffic Act,[83] the first defendant for failing to keep a proper lookout while performing an authorised U-turn and the second defendant for speeding, travelling at 124km/h on a road where the speed limit was 70km/h. Teh Hwee Hwee JC observed that the driver of a right-turning vehicle had to give way to oncoming traffic, and as a general rule would be treated as the more blameworthy party if an oncoming vehicle on the straight road collided into the right-turning vehicle.[84] The judge also noted that, pursuant to ss 45A(1) and 45A(5) of the Evidence Act 1893,[85] any conviction, including statements of facts in a criminal proceeding by the parties, may be admitted into evidence. This proved to be fatal to the arguments of both defendants. The first defendant argued that he had kept a proper lookout, but in the criminal proceeding had admitted that he had not kept a proper lookout. Similarly, the second defendant argued that he was not speeding, but in the criminal proceeding had admitted to driving at 124km/h. A forensic expert estimated that the second defendant was travelling at up to 140km/h just before the accident.

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82 [2022] SGHC 311.
83 Cap 276, 2004 Rev Ed.
84 *Chai Yew Cian v Yeoh Yeow Yee* [2015] SGHC 124.
85 2020 Rev Ed.

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28.75 In determining apportionment, Teh JC, noting that the court had to evaluate the comparative moral blameworthiness and causative potency of each defendant, found that the first defendant bore 65% of the responsibility as the accident could have been avoided had he kept a proper lookout. Significantly, Teh JC also took into consideration the first defendant's moral blameworthiness in allowing a child to travel in the rear cargo compartment of the van without being secured, describing the first defendant as "irresponsible and reckless to place an 8-year-old child in the rear cargo compartment of his van that was meant to carry goods, and not passengers".[86] Yet, it is not an uncommon sight in Singapore to see cargo vehicles transporting workers in the rear compartment without seats, let alone seatbelts.[87] The fact that the workers are adults is irrelevant as the risk of injury remains the same. Employers continuing this practice should take note, as should insurance companies.

F. Workplace injury

28.76 *The Subsidiary Management Corporation No 01 – Strata Title Plan No 4355 v Janaed*[88] was a judgment of the High Court (Appellate Division) involving a claim following a workplace injury. The plaintiff was deployed to the mechanical and electrical room at Westgate Tower to check and replace some flow switches in one of the chillers. Climbing to the top of the chiller, the plaintiff used his mobile phone to take photos of the switches while using his other hand to zoom in for close-up shots. There were no guard rails installed at the top of the chiller, and the plaintiff did not use any safety harness or belt. He lost his balance and fell 3.7m, suffering serious injuries that left him paralysed.

28.77 The plaintiff brought actions against the Subsidiary Management Corporation No 01 – Strata Title Plan No 4355 ("MCST"); Zoe International Pte Ltd ("Zoe"), which was engaged by the MCST to carry out the works; Zoe's sub-contractor, Felizardo Paras Jose t/a STA Rota Engineering Services ("STA"); and his employer, Newtec Engineering Pte Ltd ("Newtec"). The trial judge found STA and the MCST jointly liable, Zoe not liable, and the plaintiff 30% contributorily negligent. Newtec did not enter an appearance, but no interlocutory injunction was granted as it was open to the plaintiff to enter default judgment against Newtec, which he subsequently did.

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86 *CXN v CXO* [2022] SGHC 311 at [78].

87 This is an issue that is being reviewed by the Government: Ang Hwee Min, "Transport ministry Reviewing Safety Measures for Lorries Ferrying Workers: Amy Khor" *Channel NewsAsia* (10 May 2021).

88 [2022] 2 SLR 743.

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28.78 On appeal, the MCST argued that it did not owe a duty of care to the plaintiff as by virtue of its status of occupier its duty only extended to the static condition of the property and did not include activities conducted by others on the property. Citing *See Toh Siew Kee v Ho Ah Lam Ferrocement (Pte) Ltd*,[89] Chua Lee Ming J, giving the judgment of the court, held that the distinction between static and dynamic conditions of the property is no longer determinative of the occupiers' duty as the special rules have been subsumed into the general principles of negligence. Applying *Spandeck*,[90] Chua J found that the threshold requirement was easily satisfied as it was foreseeable that a person could fall from height if there were no guard rails or harnesses.

28.79 On proximity, Chua J noted that the plaintiff was a lawful visitor who was escorted to the premises by the MCST's executive officer. The existence of a duty is bolstered by the statutory framework of the Workplace Safety and Health Act[91] ("WSHA") and the Workplace Safety and Health (Work at Heights) Regulations 2013 ("WSHR"), which place statutory duties on the MCST. Such statutory duties may give rise to common law duties, as held by the Court of Appeal in *Tan Juay Pah*.[92] The WSHA specifically imposes duties on occupiers and the WSHR provides that occupiers are obliged to provide guard-rails or barriers, or in the alternative a travel restraint system or fall restraint system (harness or belt) where there is a risk of falling from a height above 2m. The MCST had clearly breached its duty by failing to provide any safeguards. Chua J noted that industry standards and statutory duties could inform the content of common law duties.

28.80 On Zoe, Chua J found that Zoe owed the plaintiff a duty but was not liable as there was no evidence of breach of duty. Reviewing precedents on contributory negligence, Chua J was satisfied that the trial judge's findings on proximity was not against the weight of evidence and should be left undisturbed.

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89 [2013] 3 SLR 284.
90 See para 28.63 above.
91 Cap354A, 2009 Rev Ed.
92 See para 28.63 above.

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