

March 2011

## NEGLIGENCE

Where a site supervisor failed to ensure that the backfill material used by the contractor complied with contract specifications and was safe for use as backfill, held that he owed and breached his duty of care to the client for this failure:

-- *Animal Concerns Research & Education Society v Tan Boon Kwee* [2011] SGCA 2 (Singapore, Court of Appeal, 24 January 2011)

### Facts

The appellant in this case was the Animal Concerns Research & Education Society (“**Appellant**”). It had engaged a contractor, A.n.A Contractor Pte Ltd (“**Contractor**”), to build a shelter for animals on a plot of land leased from the Singapore Land Authority (“**SLA**”). The respondent (“**Respondent**”) was a director of the Contractor, and also the site supervisor appointed to the construction project.

The construction of the shelter required that the site be levelled. It transpired that, in the course of levelling the site, wood chips had been used as landfill. The wood chips caused a foul smell, and a blackish effluence oozed from the site. This came to the attention of the SLA and the National Environment Agency, who then required the Appellant to remedy the problem.

The Appellant sued the Contractor, and also sued the Respondent in his capacity as clerk of works of the project, alleging that he had negligently failed to supervise the levelling of the site and, in particular, failed to ensure that wood chips were suitable landfill material. The Respondent countered that his duty to the Appellant was set out in the Building Control Act. This did not include imposing liability for the backfilling. The statutory duty was a complete exposition of his duties and there was no room to impose an additional common law duty on him.

### Legal Background

Section 10(5) of the Building Control Act sets out the duties of a site supervisor as follows:

“Every site supervisor appointed under this section in respect of any building works shall take all reasonable steps and exercise due diligence in giving:

To discuss the possible implications of this for your business, please contact:



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(a) in the case of large building works — full-time supervision to the carrying out of the structural elements of the building works; and

(b) in the case of small-scale building works — immediate supervision to the carrying out of the critical structural elements of the building works,

to ensure that the structural elements or critical structural elements, as the case may be, of the building works in question are carried out in accordance with the plans of the building works supplied to him in accordance with section 9(1)(c) by a qualified person, and with any terms and conditions imposed by the Commissioner of Building Control.”

Over and above any duty arising under section 10(5), a duty might arise under the common law tort of negligence. This requires that there be a duty of care between the site supervisor and the client. In Singapore, the Court of Appeal held in *Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency* (2007) that to determine whether there is a duty of care, the court has to consider:

- Whether there was sufficient legal proximity between the Appellant and the Respondent for a duty of care to arise; and
- Whether any policy considerations negated this duty.

#### *Decision*

The Court applied the first part of the test in *Spandeck* and held that there was sufficient legal proximity between the Appellant and Respondent:

- As a matter of industry practice, by virtue of his functions and responsibilities at the building site, a site supervisor is regarded as being in fairly close proximity to the client. This is the case even if they are not in a formal employer-employee relationship. He protects the interests of the client against the builder by inspecting and supervising the works to ensure that they conform to the client’s budget, standards and specifications, and that the client is getting value for money and proper workmanship.
- Where a contractual nexus exists between these two parties, there will be contractual liability. There could also be a concurrent liability for negligence in tort as well.
- Where a contractual nexus does not exist between these two parties, whether or not a duty of care exists would depend on the precise facts in question—in particular, whether there had been an assumption of

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responsibility by the site supervisor *vis-à-vis* the client (and a corresponding reliance by the latter on the former).

In this case, the Respondent was the main director of the Contractor and he procured the Contractor to appoint him as the site supervisor. In such circumstances, the Respondent was voluntarily assuming the various responsibilities the role carried and holding himself out as possessing the relevant qualifications and skills necessary to discharge that role. As for whether there was reliance by the Appellant on care being taken by the Respondent in circumstances where the latter knew or ought to have known of such reliance, it must have been obvious to the Respondent that the Appellant was relying on him as a site supervisor.

The Court then considered the second part of the *Spandeck* test. It held that there were policy considerations here in favour of imposing a duty:

- The Legislature had not intended, when stipulating only criminal penalties for breach of section 10 of the Building Control Act, to preclude common law civil remedies against negligent site supervisors.
- The question of what common law duties a site supervisor owes is one of public safety, especially in the local context where construction takes place on an ongoing basis. In the field of public and workplace safety, there was no reason why the courts should not be astute to introduce minimum standards of skill and care via the tort of negligence.

The Court also noted the conflict of interests on the specific facts of this case where the backfill material had not only been provided by a third party company to the Contractor for free, the third party had paid the Contractor S\$40,000 to remove the material for it. Furthermore, the contract and regulatory permit contemplated that the land would be filled with soil obtained from levelling of the site and not from off-site material. Given these circumstances, a reasonably competent and prudent site supervisor, knowing of all these matters, would have taken special care and redoubled his efforts in supervising the backfilling and checking that the backfill material used was suitable. At the very least, he would have informed the qualified persons (and, more importantly, the Appellant) that the Contractor was backfilling the site in a manner not contemplated by the contract.

The Court therefore held that the Respondent was liable for the damage suffered by the Appellant, with damages to be assessed at a later stage.

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