Moh Seng Cranes Pte. Ltd. *v* Hup Hin Transport Co Pte Ltd and others
[2012] SGHC 247

Case Number : Suit No 876 of 2010/Y

Decision Date : 11 December 2012

Tribunal/Court : High Court

Coram : Philip Pillai J

Counsel Name(s) : Lye Hoong Yip Raymond and Cheryl-Ann Yeo Wen Si (CitiLegal LLC) for the plaintiff; Yeo Siew Keng Willie and Lim Chee San (Yeo Marini & Partners) for the first defendant; Lynette Chew, Gadriel Tan and Charmelia Sugianto (Inca Law LLC) for the second defendant; David Gan (DG Law LLC) for the third defendant.

Parties : Moh Seng Cranes Pte. Ltd. — Hup Hin Transport Co Pte Ltd and others

Tort – Negligence

11 December 2012 Judgment reserved.

Philip Pillai J:

Introduction

1 The Plaintiff is the owner of the crane which was damaged on a worksite. The owner of the worksite, Crescendas Bionix Pte Ltd ("Crescendas"), contracted with the 2nd Defendant, Jurong Prime Wide Pte Ltd ("JPW"), as the main management contractor to build a 7-storey multi-user business park development at the Biopolis 3 project site (the "Worksite"). Under this main management contract, JPW had effective management and control of the Worksite. JPW in turn had a JPW/MA Subcontract with the 3rd Defendant, MA Builders Pte Ltd ("MA"), under which MA was to carry out structural, architectural and external works on the Worksite. By way of a rental agreement dated 3 March 2010, JPW contracted with the 1st Defendant, Hup Hin Transport Co Pte Ltd ("Hup Hin"), for the supply of cranes to the Worksite on a per call basis (hereafter the "JPW Crane Supply Contract").

2 On 10 June 2010, JPW's construction manager Dominic Lee called Hup Hin's sales and operation manager Albert Neo to order a 50 tonne crane to be delivered to the Worksite the next day. He was informed that Hup Hin did not have a crane available for that day. Albert Neo offered to call another crane company, the Plaintiff, to provide the crane and Dominic Lee agreed. Albert Neo contacted the Plaintiff who agreed to deliver a 50 tonne crane and operator directly to JPW at its Worksite on 11 June 2010. The Plaintiff and Hup Hin had a pre-existing price quotation contract between them which set out the Plaintiff's prices for cranes with operators.

3 The Plaintiff despatched a 50 tonne crane ("the crane") with a crane operator to the Worksite on the morning of 11 June 2010. At the Worksite, the crane was parked and commenced lifting operations as instructed by the Worksite Lifting Supervisor when it was damaged upon its left back outrigger collapsing into a concealed manhole.

4 The Plaintiff brought an action first against Hup Hin, and alternatively against JPW as the effective manager and controller of the Worksite. As JPW sought to shift liability to MA as the main subcontractor, the Plaintiff joined MA as a defendant. The Plaintiff's action against Hup Hin is in

contract, bailment and negligence and its action against JPW and MA is for negligence. The Plaintiff claims $354,652.57 in damages for repair and recovery of the crane, as well as $60,800.00 in damages for loss of use from 11 June 2010 to 13 September 2010 (95 days), costs and interests.

Issues in law

5 All parties agreed that the distilled questions to be decided at this trial are:

(a) whether the Plaintiff has a claim against Hup Hin in contract/ bailment;

(b) whether the Plaintiff has a claim against JPW and/or MA for negligence; and

(c) whether JPW is contractually entitled to be indemnified by Hup Hin and/or MA under their respective contracts with JPW.

Plaintiff's claim against Hup Hin

(i) Contract

6 The Plaintiff's case against Hup Hin is founded on the price quotation contract being the basis for the Plaintiff to have supplied the crane and the crane operator. Hup Hin denies any contractual liability to the Plaintiff on the basis that the Plaintiff supplied the crane with the crane operator to JPW and not to Hup Hin. The legal nature of the relationships at play will depend entirely on the factual matrix and business reality which I will now examine.

7 Under the JPW Crane Supply Contract, Hup Hin was to supply JPW with cranes with accompanying crane operators on the Worksite "on a per call basis" at agreed prices. It is noteworthy that Hup Hin did not undertake to guarantee the supply of cranes with crane operators, but only undertook to provide cranes "on a per call basis". There is nothing in the JPW Crane Supply Contract which obliged Hup Hin to procure third party supplies of cranes to JPW whenever Hup Hin was unable to fulfil a call order. Nowhere does the JPW Crane Supply Contract provide or contemplate (as suggested by JPW's counsel) that Hup Hin is further obliged to provide a lifting supervisor on the Worksite for no financial compensation.

8 The Plaintiff and Hup Hin had a bilateral price quotation contract dated 7 August 2008 (the "Moh Seng Quotation") under which the Plaintiff would provide cranes at the prices quoted therein. The Moh Seng Quotation is a simple two page letter which sets out the prices at which the Plaintiff would provide cranes. It does not specify whether the Plaintiff agrees to provide cranes to Hup Hin only or to third parties referred to by Hup Hin. Under the JPW Crane Supply Contract, Hup Hin as JPW's approved crane supplier contracted to provide JPW with cranes with operators at the Worksite on "a per call basis". Whenever Hup Hin did not have cranes available, it was open to Hup Hin with the approval of JPW to arrange for a third party crane company (not a JPW approved crane supplier) to provide the cranes with operators to JPW.

9 In this factual and business matrix, there are three possible legal bases of the relationship between the three parties. The first is that Hup Hin, being unable and not contractually obliged to provide JPW with a crane with operator, was referring JPW to the Plaintiff, who both thereafter contracted directly with each other to the exclusion of Hup Hin. This was not the case on these facts. The second legal basis is that the Plaintiff contracted with Hup Hin to provide the crane with operator to Hup Hin under the Moh Seng Quotation, and that Hup Hin is liable for the damage to the Plaintiff either in contract or bailment. That is not the case here because the arrangement between

the Plaintiff, Hup Hin and JPW was in substance altogether different. The third basis is that JPW, Hup Hin and the Plaintiff all agreed that the Plaintiff would supply the crane with the crane operator directly to JPW, with no further role or involvement of Hup Hin save that Hup Hin would pay the Plaintiff's at the rates provided in the Moh Seng Quotation and Hup Hin would in turn be paid by JPW at the rates provided in the JPW Crane Supply Contract. The Moh Seng Quotation prices to Hup Hin are lower than Hup Hin's contract prices to JPW under the JPW Crane Supply Contract. In such case, Hup Hin would earn a mark-up for this arrangement, whilst JPW by paying Hup Hin would not be obliged to separately contract with the Plaintiff as an approved crane supplier. The business and convenience logic of this arrangement is quite evident.

10 This is a practical business solution known and assented to by all parties. The invoicing arrangements did not change the business substance of the agreement. All parties were aware that the Plaintiff's crane was intended for use by JPW at JPW's Worksite and not by Hup Hin. The Plaintiff did not supply the crane to Hup Hin at Hup Hin's premises but supplied the crane directly to JPW's Worksite. This is not even a case of the Plaintiff providing a crane to Hup Hin and Hup Hin providing a crane operator to proceed to JPW's Worksite. It is significant also that Hup Hin personnel had no involvement or role in the receipt on the Worksite of the Plaintiff's crane with crane operator nor in its deployment and operations.

11 In the light of this factual matrix, I find that there was an oral contract between the three parties for the Plaintiff to provide a crane with crane operator to JPW on 11 June 2010, with payment to be effected through Hup Hin in the manner described in paragraph [9]. This oral agreement was concluded by the conduct of the parties on 11 June 2011 in the act of the Plaintiff sending its crane and JPW receiving it at the Worksite.

12 The Plaintiff's contractual claim against Hup Hin turned on a clause in the Moh Seng Quotation reading: "All our quotations are subject to our General terms & conditions dated 1 Jan 2008, a copy is available on request." The Plaintiff invoked cl 8 of an undated and unsigned set of General terms and conditions which states:

> The Lessee shall provide all types of insurance not limited to all risk insurance on goods being handled, third party and public liability, machinery all risks, workmen compensation etc. The Lessee shall defend and indemnify the Lessor against all liabilities and all claims of damages and losses at consequences whether or not caused directly or indirectly by the negligence of the Lessor employee, servants or agent whatsoever.

The Plaintiff also averred that Hup Hin had breached cl 10 of the General terms and conditions, which states that "[t]he Lessee shall ensure that there are suitable accesses and work areas at all times in accordance to the requirement of the Lessor. All obstacles shall be removed at the Lessee costs."

13 As explained earlier, the oral contract was between the Plaintiff, Hup Hin and JPW. At the outset, it is clear that JPW is not a party to the Moh Seng Quotation and as such the terms were not incorporated as terms of the oral contract. In any event, it makes no sense for Hup Hin to have to additionally bear the insurance cost of the crane and operator for an operation in which it had no role. The Plaintiff was not supplying a crane to Hup Hin for Hup Hin's use and deployment. It was supplying a crane to JPW. The terms relied on by the Plaintiff expressly contemplate an end user/lessee of the crane. The end user/lessee in this arrangement assented to by all parties was JPW and not Hup Hin. To expect Hup Hin under these circumstances to additionally insure against the operation of the Plaintiff's crane at JPW's worksite would be to defy business efficacy.

14 The Plaintiff next claimed that it is an implied term of its contract with Hup Hin that Hup Hin

would take good care of the crane and use the crane safely in a way that would not expose it to damage. The Plaintiff says that the implied term applies to Hup Hin's servants, agents, representatives and/or sub-hirers acting on its behalf or authorised by it to have use of the crane. The Plaintiff's claim would require Hup Hin to either supervise the use of the crane or to indemnify the Plaintiff for damage caused by the end user. I do not accept the Plaintiff's argument in the light of the factual and business matrix present here and known to all parties.

15 The Plaintiff next claimed that a contract of bailment for valuable consideration existed between the Plaintiff and Hup Hin under which Hup Hin was under a duty to take reasonable care of the Plaintiff's crane and would be liable for any negligence of third parties. N E Palmer, *Bailment*, (The Law Book Company Limited, 1991), lists some factors relevant in determining the existence of a bailment. These include, *inter alia*, whether the hirer is empowered to direct the external movements of the machine, whether the plant was allowed to be used for the benefit and on the instructions of other users, whether the hirer owns or occupies the land on which the work is performed and so on. The author emphasised (at p 943) that "a true bailment imputes an exclusive possession. The result may be that many contracts traditionally described as hirings may not produce this relationship at all." The facts in the present case do not point to the existence of a bailor-bailee relationship between Hup Hin and the Plaintiff at all. Hup Hin never received possession of the crane, which was delivered directly by the Plaintiff to JPW at the Worksite. The Plaintiff's contention that Hup Hin received constructive possession or control of the crane and then "sub-hired" it to JPW is untenable in the light of the factual business matrix.

16 For the above reasons, the Plaintiff's claim against Hup Hin in contract and for bailment fails.

(ii) Negligence

17 The Plaintiff's claim against Hup Hin for negligence is again flawed. Hup Hin could not have been said to owe any duty of care to the Plaintiff with regard to the crane operator or the crane on JPW's Worksite. All parties were aware that the Plaintiff's crane and the crane operator were to be deployed for lifting work under the supervision and direction of JPW. There was nothing on the facts in this case which required Hup Hin to supervise the deployment or lifting works on JPW's Worksite. Thus, there is no basis for any duty of care, let alone any failure to exercise reasonable care, to have arisen on the part of Hup Hin with respect to the deployment and operation of the Plaintiff's crane with operator at JPW's Worksite.

Claim against JPW

(i) Negligence

18 The Plaintiff then claimed that JPW had effective control and management of the Worksite, and that its negligence resulted in the damage to the crane. It is beyond debate and confirmed by the subpoenaed Ministry of Manpower officer Koh Chin Chin that JPW had principal responsibility for the Worksite under the Workplace and Safety Health Act (Cap 354A, 2009 Rev Ed), and that JPW had appointed the requisite officers to discharge such responsibility. JPW's Principal for Quality, Environment, Health and Safety Joseph Chua gave evidence that he was responsible for the implementation and management of safety and compliance by JPW. It is not disputed that JPW's Worksite representatives included: Senior Project Manager Teo Boon Thong ("Senior Project Manager") whose duties included ensuring overall site safety; Safety Officer Kuah Teck Heng ("Safety Officer") who was in charge of the safety for the Project; and Lifting Supervisor Kolanjiapan Sunder ("Lifting Supervisor") who supervised the parking and lifting operations of the Plaintiff's crane at the Worksite on 11 June 2010.

19 As required by s 20(3)(c) of the Factories (Operation of Cranes) Regulations (the "Regulations"), the Lifting Supervisor was responsible for ensuring that the ground conditions were safe for any lifting operation to be performed by any mobile crane on the Worksite on that day. The Lifting Supervisor had directed the crane operator, Lian Lam Hoe ("Crane Operator"), to park the crane over the former washing bay and to undertake the actual lifting works to lift reinforced steel bars from a trailer on One North Link Road onto a designated area on the Worksite. Section 16(c) of the Regulations imposes a duty on the crane operator to ascertain whether the ground conditions, in particular the ground surface on which a mobile crane is to be operated, are safe for travel or any lifting operation, and to report to the lifting supervisor if he is of the opinion that they are not safe for travel or any lifting operation. It is undisputed that the Crane Operator conducted a visual inspection of the ground conditions of this area. He then reported first to the Lifting Supervisor and then to the Safety Officer that he was of the opinion that the soft, muddy ground conditions were "not very good" for lifting.

20 It is in evidence that the Crane Operator spoke Mandarin and the Hokkien dialect and had limited understanding of English. The Lifting Supervisor spoke English and Tamil. Upon being told of the Crane Operator's concerns, the Lifting Supervisor told the Crane Operator to proceed as instructed as the ground was safe. The Crane Operator then expressed in Mandarin/Hokkien his opinion to the Worksite Safety Officer. The Safety Officer conveyed, in English, the Crane Operator's opinion to the Lifting Supervisor. The Lifting Supervisor told the Safety Officer that the ground was safe for lifting operations as the washing bay had been backfilled. The Safety Officer conveyed this information to the Crane Operator. It was the Safety Officer's evidence that he did not personally think the location to be suitable because of the presence of the former washing bay, and that he had told the Lifting Supervisor that he did not know anything about any backfilling. The Safety Officer left the scene immediately thereafter. It was the Safety Officer's evidence that before he left the scene, he had instructed that the crane be removed from the washing bay. This is disputed by the Plaintiff, which alleged that the Safety Officer walked away without giving any such instruction. The Crane Operator thereafter proceeded to park the crane and prepare it for lifting operations as instructed by the Lifting Supervisor. As a safety precaution, the Crane Operator added wooden beams and placed an additional steel plate under the left rear outrigger which was over the area he thought to be "not very good".

21 On the instructions of the Lifting Supervisor, the Crane Operator conducted testing before commencing lifting works. He then lifted a load from the trailer parked on One North Link Road. Just as he was about to bring the load down to the designated Worksite loading area, the left back outrigger of the crane collapsed into a concealed hole in the ground and the crane toppled. Fortunately, only the Plaintiff's crane was damaged and neither the Crane Operator nor anyone nearby suffered any physical injury.

22 It was then discovered that the crane's left back outrigger had broken through the concrete slabs covering a concealed manhole on which the outrigger had been resting. It is critical to keep in mind that the concealed manhole was near the former washing bay area but that the washing bay was not the proximate cause of the collapsing of the crane's left back outrigger. In other words, the collapse of the crane was not caused by it being parked or lifting operations being conducted over the washing bay. It was caused by the crane's left back outrigger being placed over the concealed manhole, not visible to the Crane Operator, the Lifting Supervisor or the Safety Officer. Further there is no evidence to show that either the Lifting Supervisor or the Safety Officer, let alone the Crane Operator, had any knowledge or reason to know of the existence of the manhole, concealed or otherwise.

23 JPW ran several defences. First, it denied that it had any duty of care to the Crane Operator or

crane. Second, it averred that it complied with and procured compliance with its statutory safety processes. Third it averred contributory negligence on the part of the Crane Operator. Fourth it averred contributory negligence on the part of MA.

24 It is undisputed that the proximate cause of the damage to the crane was the manhole which was concealed at the time of the lifting operations on 11 June 2010. It is in evidence that JPW had known of the existence of the manhole since 12 August 2008. JPW's photographs taken on this date were produced in evidence which showed MA's equipment and some workers in the vicinity of the same but then exposed manhole. JPW's Senior Project Manager testified that he had then known of the existence of the manhole but could not remember telling anyone or any of the subcontractors about it. It would have been common knowledge to all that heavy vehicles would be passing through the area and also that heavy crane lifting operations would be carried out on the Worksite including the area around the washing bay and concealed manhole. In the light of this, once JPW came to have knowledge of the manhole no later than 12 August 2008, it had a duty to take reasonable care towards all persons, operators and equipment that would forseeably operate in the vicinity of the manhole.

25 I have no difficulty holding that the two-stage test in establishing a duty of care set out in *Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency* [2007] 4 SLR(R) 100 is satisfied. With respect to factual foreseeability, it was clearly foreseeable that the failure to take precautions with respect to a known unconcealed manhole at least by 12 August 2008 could result in damage to persons or vehicles in the vicinity of the manhole. The test of legal proximity is also satisfied by the fact that JPW had ordered the crane for lifting works on the Worksite. Finally, there are no policy reasons weighing against imposing such a duty of care on JPW. The imposition of a duty of care on JPW as the occupier and main management contractor of the Worksite is entirely consistent with the policy reasons underlying the applicable statutory regime under the Workplace Safety and Health Act (Cap 345A, 2007 Rev Ed), which prescribes responsibilities on occupiers regarding the safe condition of their worksites. I therefore find that JPW owed a duty to take reasonable care to the Plaintiff's crane operator and crane.

26 What then would be the standard of reasonable care that JPW had to meet failing which it would be liable in negligence? Some industry standard guidance is provided by the Singapore Standard SS 536 2008 Code of Practice ("Code") for the safe use of mobile cranes:

> **Sec. 9.3.1.2 (c)** the authorised crane operator "shall ascertain whether the ground conditions, in particular the ground surface on which a mobile crane is to be operated, are safe for travel or any lifting operation, and if he is of the opinion that it is not safe for travel or any lifting operation, he shall report this to the lifting supervisor."
>
> **Sec. 9.3.3 (c)** the appointed lifting supervisor shall be responsible to "ensure that the ground conditions are safe for any lifting operation to be performed by any mobile crane."
>
> **Sec. 10.1** "In order to ensure that the ground can safely support a mobile crane, it will be necessary to obtain information about ground conditions on site. The important items to check are:
>
> Ground character
>
> Water condition; and
>
> Location of any underground hazards."

Sec. 10.2 (e) on Ground classification for urban sites:

"Potential underground hazards e.g. basements, sewers, tunnels, water pipes, poorly backfilled trenches, manholes, inspection chambers etc."

Sec. 10.4 ground bearing capacity: "On large construction sites where mobile cranes are expected to be in common use over long periods, a site survey should be undertaken to identify soil types and underground hazards. Further ground improvements may then be required and can take many forms. When all surveys are completed, any hazards identified and soil improvements completed, a site layout plan can be produced to show the location or danger areas, access routes, and safe working areas for the types of mobile cranes to be used."

Sec. 10.6 (e) Underground hazards include "covered shafts and manholes."

27 Knowledge of the ground conditions to support mobile cranes is the responsibility of the principal occupier. JPW was therefore responsible for determining the ground conditions of areas from which lifting operations could be conducted. The Code prescribes that for large construction sites a site survey should be undertaken to identify soil types and underground hazards, which the Code defines as including manholes. All this points to the primary responsibility being imposed on JPW as the effective controller and manager of the Worksite. JPW's Senior Project Manager's evidence is that he was aware by 12 August 2008 of the existence of this particular manhole but had done nothing about it. No written notifications were issued to all subcontractors nor were any signs, markers or barriers erected to draw attention to the existence of the manhole and to prevent heavy vehicles from parking or operating in the immediate vicinity.

28 The fact that there was a former washing bay close to the manhole would also have meant that quite apart from mobile cranes, laden and unladen lorries would regularly be in the vicinity of the washing bay and the manhole. It is quite clear that the washing bay for laden and unladen lorries would not have been constructed by MA at this location if it were known to MA that the manhole was nearby. It was in evidence that MA had previously built and subsequently removed a guardhouse over the former washing bay, which confirms that the existence of the manhole was then and subsequently unknown to MA.

29 In the course of giving evidence MA's project manager Roger Kung revealed that he had received a site utility plan in around 2009 which showed a sewage line of which the manhole was a part. He gave evidence that he had at around the same time observed other subcontractors constructing the basement of a building nearby and had then assumed (but was unsure) that the sewage line and manhole were known to or would be removed by such contractors. Who prepared this site utility plan and what instructions were given to which if any of the subcontractors with respect to the sewage line was not adduced in evidence before this court. The assignment of responsibilities between MA and the subcontractors constructing the basement observed by Roger Kung was also not in evidence before this court. I am accordingly unable to make findings or draw inferences from this site utility plan.

30 From the evidence given by the witnesses however, it is clear that JPW's Senior Project Manager came to know no later than 12 August 2008 of the existence of the then exposed manhole. No evidence was adduced in court to explain how it came about that the exposed manhole was not then visibly marked or cordoned off on the ground. There is no evidence that from this critical date JPW took any action to ensure that the manhole was properly marked and cordoned off or indeed that no heavy vehicles or cranes would be parked or any lifting operations undertaken in the vicinity of the manhole. There was no evidence adduced of any assignment of responsibility or instruction to any

subcontractor to take any action with respect to the exposed manhole.

31 In the light of this, I find that JPW did not take reasonable care, once the exposed manhole had been discovered on 12 August 2008, to properly mark and cordon off the manhole until it was removed, to direct that appropriate action be taken by the subcontractors, or to ensure that no heavy vehicles would be parked or undertake lifting operations in the vicinity of the manhole. The Lifting Supervisor proceeded with the lifting operation which resulted in the damage of the crane as he could not be expected to know and indeed did not know of the existence of the manhole. Neither did the Safety Officer.

32 JPW next submitted that its Safety Officer had not approved the crane to be parked over the washing bay and had instructed the crane to be removed. The Crane Operator testified that he had, as instructed by the Lifting Supervisor, parked the crane over the washing bay to conduct a lifting operation to lift reinforced steel bars from the trailer parked on One North Link Road to the Worksite. The Safety Officer himself was obliged to concede that this actual lifting operation could only be physically undertaken from the washing bay area and no other area on the Worksite. The Safety Officer next gave evidence that he had given instructions to the Lifting Supervisor to remove the crane from the washing bay area. I do not accept his evidence that he did so. First he admits that the Lifting Supervisor had told him that the washing bay had been backfilled. Had he instructed the crane to be removed (because he nevertheless did not think it safe to park or operate there) it is puzzling that he would immediately walk away from the scene without ensuring that his instructions were promptly implemented. Further the Safety Officer was accompanied by an assistant who similarly immediately walked away and was not instructed to remain to ensure removal of the crane.

33 JPW next sought to rely on its safety processes in place at the Worksite, including carrying out safety meetings and ensuring that a permit-to-work system was implemented for high-risk construction work like lifting operations. These processes have no bearing *per se* on the damage that was caused by the concealed manhole the existence of which was known to JPW no later than 12 August 2008 if not earlier.

34 In the light of the above, I find that JPW was in breach of its duty of care in respect of the Plaintiff's Crane Operator and crane. The first mention in court by MA's Roger Kung that he had in hand in 2009 a site utility map indicating the existence of sewage lines and this particular manhole raises the question as to who was assigned direct responsibility for the marking or removal of the same and who was to monitor and ensure performance of the appropriate actions. There was no evidence adduced in this court as to the assignment of responsibility to any subcontractor. I accordingly am unable to make any finding or inference from this site utility map.

(ii) JPW's claim for contributory negligence against the Crane Operator and MA

35 JPW next averred contributory negligence first by the Plaintiff's Crane Operator and second by MA.

36 Both the Safety Officer and the Lifting Supervisor confirmed that the Crane Operator had raised his concerns that the ground was "not too good" for lifting operations to them. Notwithstanding this, the Lifting Supervisor instructed him to park the crane over the washing bay, which he did. It was the Crane Operator's first time at the Worksite, and it is difficult to see what else he could have done other than take the instructions of the Lifting Supervisor, absent any contrary instruction from the Safety Officer to whom he had repeated his concerns. The Crane Operator took the step of placing an additional steel plate under the left back outrigger over the area which he thought to be "not too good." What the Crane Operator did was entirely reasonable and evidenced no lack of reasonable

care. I find that the Crane Operator fully discharged his responsibility as prescribed by s 16 of the Regulations. In these circumstances I find that the Crane Operator did not in any way contribute to the damage to the crane.

37 JPW next averred that MA contributed to the damage to the crane by reason of MA's nearby excavation works. MA was constructing an external drain close to the concealed manhole. Prior to removal, the excavated soil was temporarily piled up adjacent to the washing bay and the concealed manhole. Rain had caused the excavated soil to run off and cover the manhole. The 11 June 2010 photographs taken after the accident show that the area over the washing bay and the manhole was concealed by a muddy layer of soil. Thus, JPW argued that MA's excavation works contributed to the accident.

38 What has not been established in evidence is whether the existence of the manhole would have been visible quite apart from the excavated soil run-off. From the evidence that the washing bay had been constructed and operated near the manhole, it would be a reasonable inference that a washing bay for loaded and unloaded lorries would not have been built near a visible manhole or a concealed manhole known to be in the vicinity. This means that the manhole remained concealed even before the excavated soil run-off. The photographs of 2008 reveal the presence of workers over the exposed manhole and it was confirmed in evidence that MA's project manager had then been present also. No evidence has been adduced that MA was specifically assigned responsibility to take appropriate action with respect to the sewage utilities and the manhole. The presence of MA's project manager is alone insufficient evidence to establish that MA contributed to the accident if the manhole had thereafter become concealed by normal operations on the Worksite unconnected with the excavation works. I am therefore unable to find that MA contributed to the accident by reason of conducting the excavation works nearby, when on the evidence this excavation work was carried out without knowledge of the existence of the manhole.

(iii) JPW's indemnity claims against Hup Hin and MA

39 I will next consider JPW's indemnity claims against Hup Hin and MA.

40 The JPW Crane Supply Contract with Hup Hin contains Condition 11 which reads:

> You [Hup Hin] shall indemnify us [JPW] against all liabilities, claims and damages arising out of, inter-alias, any negligence, breach of contract, statutory defaults or defaults of whatsoever nature caused by you in executing this Sub-Contract, which indemnify [*sic*] shall be on the same terms, applied mutatis mutandis, as those which we as Contractor, is [*sic*] required to indemnify the Employer.

JPW next invoked Condition 4 of the Supplementary Conditions which reads:

> All Sub-Contract Works, materials, goods, plant, equipment or other property executed by, belonging to or provided by the Sub-Contractor, his servants or agents, shall be the sole responsibility of the Sub-Contractor who shall indemnify the Contractor against any loss, claims or proceedings in respect thereof. Any insurance against such loss or claim, including any stipulated excess thereof, shall be the sole concern of the Sub-Contractor.

41 I have already found that the arrangement on 11 June 2010 was carried out pursuant to an oral contract between the Plaintiff, Hup Hin and JPW (at [11] above). The JPW Crane Supply Contract, which is a bilateral contract between JPW and Hup Hin, was not incorporated expressly or impliedly in the oral contract between the three parties and consequently has no application to the oral contract.

In any event, since the Plaintiff provided the crane with crane operator directly to JPW, the Plaintiff is not a "servant or agent" of Hup Hin and accordingly Condition 4 has no operation. Similarly, Condition 11 obliges Hup Hin to indemnify JPW only when JPW is in turn liable to indemnify its employer. Crescendas bears no such counter liability for the damage to the crane and accordingly Condition 11 also has no operation. I find that the JPW Crane Supply Contract terms were not terms of the oral contract between the Plaintiff, Hup Hin and JPW. For these reasons, JPW's claim for contractual indemnity against Hup Hin must fail.

42 JPW next sought damages from Hup Hin for breach of the JPW Crane Supply Contract, including, *inter alia*, Hup Hin's alleged failure to ensure that it had taken out adequate insurance, failure to provide a site representative and lifting supervisor, failure to take reasonable steps to comply with applicable work safety and health requirements and failure to perform the requisite risk assessments. I have already found that the JPW Crane Supply Contract was not operative on 11 June 2010, the events of which were instead governed by an oral agreement between all three parties. Hup Hin's contractual obligation pursuant to this oral agreement was simply to make the requisite payment to the Plaintiff under the parties' agreed invoicing arrangements and nothing more. For this reason, JPW's claim against Hup Hin for breach of the JPW Crane Supply Contract must fail.

43 JPW next claimed damages against MA for breach of the JPW/MA Subcontract, first for breach of contract in failing to comply with all workplace safety requirements and alternatively for a contractual indemnity by reason of cl 12.3.4 of the JPW/MA Subcontract.

44 JPW averred that MA failed to comply with applicable workplace safety and health requirements by commencing lifting operations without a valid permit-to-work and failing to comply with the Safety Officer's express instructions to remove the crane from the washing bay. Much was made of the mysteriously missing and incomplete permit(s) to work for lifting operations on 11 June 2010. Much time was expended on how and by whom the incomplete permit-to-work in evidence was partially completed, as well as on a second mysteriously missing permit-to-work which purportedly existed with respect to another lifting operation on 11 June 2010. I have rejected JPW's Safety Officer's evidence that he instructed the crane to be removed from the washing bay area. I have also found that the Lifting Supervisor had directed the parking and lifting operations from the washing bay area. In the light of this, it is not necessary for me to make any factual findings as to the particulars of the relevant permit(s)-to-work or to make inferences from the mysteriously missing permit-to-work. In the light of the above, JPW has not been able to establish any breach of the workplace safety and health requirements by MA such as might constitute a breach of the JPW/MA Subcontract.

45 Moving on to JPW's indemnity claim, cl 12.3.4 of the JPW/MA Subcontract provides that:

> The ***Subcontractor shall be liable for, and shall indemnify JURONG against any expense, liability, loss, claim or proceedings*** in respect of any injury or damage whatsoever to any property real or personal belonging to any third party, in so far as such injury or damage arises out of or in the course of or by reason of the carrying out of such works under the Subcontract (whether by any act or omission), ***except to the extent that the same is wholly due to any wilful default or neglect of JURONG*** or any person for whom JURONG is responsible.
>
> [emphasis added]

46 In *Re Young and Harston's Contract* (1886) 31 Ch D 168, Bowen LJ considered the meaning of the phrase "wilful default" (whilst concurrently warning against viewing the term as a "term of art"). He construed the word "default" to imply "nothing more, nothing less, than not doing what is reasonable under the circumstances" or "not doing something which you ought to do". The term

"wilful" was interpreted to mean "nothing blameable", but merely that "the person ... is a free agent, and that what has been done arises from the spontaneous action of his will". Clause 12.3.4 further provides that MA is not required to indemnify JPW where the damage is wholly due to JPW's "neglect" which all counsel read to mean negligence. JPW's counsel's submission that MA is required to indemnify JPW in spite of the latter's negligence, so long as it falls short of "gross negligence", is untenable. In its totality cl 12.3.4 is to be construed to refer to JPW's failure to do what is reasonable under the circumstances and this would extend to failure to take reasonable care in the circumstances. I have also found that MA did not contribute to the concealed manhole which caused the damage to the crane. As I have earlier found JPW to have had a duty to take reasonable care and to have failed to take such reasonable care, the exception in cl 12.3.4 is operative in this case and JPW has no case to be indemnified by MA for the damage to the crane.

Conclusion

47 From 12 August 2008 when the exposed manhole came to be known by JPW's Senior Project Manager, there being no evidence that JPW itself took or assigned any responsibility or any action to mark or cordon off the manhole, JPW failed to take reasonable care thereby causing damage to the Plaintiff's crane. Neither the Crane Operator nor MA contributed to the proximate cause of the damage which was the concealed manhole. JPW is liable for negligence to the Plaintiff for damage to the Plaintiff's crane. JPW has no indemnity claim against MA under the JPW/MA Subcontract for its liability to the Plaintiff for damage to the Plaintiff's crane.

48 The Plaintiff's costs shall be agreed or taxed and borne by the 2nd Defendant. The 1st Defendant's costs on an indemnity basis are to be agreed or taxed and borne by 2nd Defendant. The 3rd Defendant's costs are to be agreed or taxed and borne by 2nd Defendant.