The doctrine of the ultra-hazardous act after *Ng Huat Seng*

I. Introduction

1. In November 2017 the Singapore Court of Appeal narrowed the scope of "ultra-hazardous activity" under Singapore tort law through the case of *Ng Huat Seng v Munib Mohammad Madni,* and clarified (in *obiter*) the scope of activities which may fall within the doctrine of the ultra-hazardous act.[1]

2. An ultra-hazardous act was first defined by the English Court of Appeal as an activity which is "inherently dangerous" even if no harm was likely to follow if proper precautions were taken.[2] The English Court of Appeal decision of *Honeywill and Stein Ltd v Larkin Brothers (London's Commercial Photographers) Ltd* ("*Honeywill*") had imposed a non-delegable duty on the principal where the act done was "ultra-hazardous" in its intrinsic nature.[3] However, the English Court of Appeal reformulated the ambit of an act which was ultra-hazardous in *Biffa Waste Services Ltd v Maschinenfabrik Ernst Hese GmbH* ("*Biffa Waste*")[4] to acts which are "exceptionally dangerous whatever precautions are taken".[5] The Singapore Court of Appeal in *Ng Huat Seng* noted that based on the English Court of Appeal's shift in position from *Honeywill* to *Biffa Waste*, available precautions would be taken into account before a court deems an act "ultra-hazardous".[6]

3. The author believes that the position taken by the Singapore Court of Appeal in *Ng Huat Seng* protects property owners who may engage independent contractors to conduct demolition works from liability for the negligence of the contractor, while unfortunately leaving the victim third-party with no recourse if the contractor does not have the means to compensate the victim. Given the high threshold and the potential for loss suffered by innocent plaintiffs, other safeguards such as mandating insurance

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[1] Ng *Huat Seng v Munib Mohammad Madni* [2017] SGCA 58 ("*Ng Huat Seng*").
[2] *Honeywill and Stein Ltd v Larkin Brothers (London's Commercial Photographers) Ltd* [1934] 1 KB 191 ("*Honeywill*") at p 200.
[3] *Honeywill, supra* n 2 at p 200.
[4] *Ng Huat Seng, supra* n 1 at [94].
[5] *Biffa Waste Services Ltd and another v Maschinenfabrik Ernst Hese GmbH and other* [2008] EWCA Civ 1257 ("*Biffa Waste*") at [78].
[6] *Ng Huat Seng, supra* n 1 at [97].

should be put in place to ensure that victims are not left without recourse for losses suffered.

II. Personal fault, The Independent Contractor Defence and Non-Delegable Duties

4. First, a short explanation on the link between the independent contractor defence and non-delegable duties is helpful to show how the doctrine of the ultra-hazardous act may result in the imposition of a non-delegable duty on the part of a defendant employer.

5. Under the tort of negligence in Singapore, it is settled law that a principal is not vicariously liable for the negligent act of an independent contractor (the "independent contractor defence").[7] As liability in the tort of negligence is contingent on personal fault, a defendant would generally not be personally liable for the act of another.[8] However, a "derogation" from this fault-based principle would be the doctrine of non-delegable duties,[9] where a personal duty would be imposed on the defendant to "[procure] the careful performance of work delegated to others" under certain specific scenarios.[10]

6. The Singapore Court of Appeal had formulated a two-stage test in *MCST 3322 v Tiong Aik Pte Ltd* ("*Tiong Aik*") to determine whether a non-delegable duty would arise on any given set of facts.[11] At the first stage, the claimant would have to satisfy the threshold requirement that either his case fell "within one of the established or recognised categories of non-delegable duties",[12] or his case possessed all five features outlined by Lord Sumption JSC in *Woodland*.[13] It is only after this threshold

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[7] *Management Corporation Strata Title Plan No 3322 v Tiong Aik Construction Pte Ltd and* another [2016] SGCA 40 ("*Tiong Aik*") at [20].
[8] *Ng Huat Seng and another v Munib Mohammad Madni and another* [2016] 4 SLR 373 ("*Ng Huat Seng HC*") at [57].
[9] *Ng Huat Seng, supra* n 1 at [80].
[10] *Woodland v Swimming Teachers Association* [2014] AC 537 ("*Woodland*") at [5], cited with approval in *Tiong Aik, supra* n 7 at [22].
[11] *Tiong Aik, supra* n 7.
[12] *Tiong Aik, supra* n 7; it was stated at [47] that examples of such established categories where a non-delegable duty would arise may be between schools and school authorities to their students, hospitals and health authorities to their patients as well as cases involving ultra-hazardous operations.
[13] *Woodland v Swimming Teachers Association* [2014] AC 537 ("*Woodland*") at [23]; where the features were (a) The claimant is a patient or child, or for some reason is especially vulnerable or dependant on the protection of the defendant against risk of injury; (b) There is an antecedent relationship between claimant and defendant independent of the negligent act which places the claimant in the actual custody, charge or care of the defendant and from which it is possible to impute to the defendant the assumption of a positive duty to protect the claimant

requirement is satisfied that the court would take into account the "fairness and reasonableness" of imposing a non-delegable duty of care on the defendant in the particular circumstances of the case, as well as the "relevant policy considerations in our local context".[14]

7. In *Ng Huat Seng*, the court held that demolition works did not fall within the definition of ultra-hazardous operations.[15] As such, the Singapore Court of Appeal declined to come to a firm conclusion as to whether the doctrine of the ultra-hazardous act was to be recognised as a part of Singapore law as one of the "established or recognised categories of non-delegable duties" under the first stage of the test in *Tiong Aik*.[16]

III. The Doctrine of the Ultra-Hazardous Act

8. The *locus classicus* of the doctrine of the ultra-hazardous act is the English Court of Appeal decision of *Honeywill*.[17] In *Honeywill*, the plaintiffs had hired the defendants to take photographs inside a cinema where they had completed acoustic works.[18] The photography works entailed the use of a chemical flashlight to illuminate the interior of the cinema by igniting the magnesium powder in a tray held above the lens.[19] The employee had set up his camera too close to a curtain which caught fire when the magnesium powder was ignited, causing considerable damage to the cinema.[20] The plaintiff had acted on advice and had paid the cinema owners before suing the defendant for an indemnity.[21] The English Court of Appeal held that while the general rule was that an employer is not liable for the acts of an independent contractor,[22] an exception to the independent contractor defence would be where the act done was "ultra-

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from harm. Such relationships normally involve an element of control over the claimant; (c) The claimant has no control over how the defendant chooses to perform those obligations owed to the claimant; (d) The defendant has delegated to a third party some function which is an integral part of the positive duty which he has assumed toward the claimant; and the third party is exercising for the purpose of the function delegated to him the defendant's custody or care of the claimant and the element of control that goes with it; and (e) The third party had been negligent not in some collateral respect but in the performance of the very function assumed by the defendant and delegated to him.

[14] *Tiong Aik, supra* n 7 at [62].
[15] *Ng Huat Seng, supra* n 1 at [89].
[16] *Ibid.*
[17] *Honeywill, supra* n 2.
[18] *Honeywill, supra* n 2 at p 195.
[19] *Ibid*.
[20] *Id*.
[21] *Honeywill, supra* n 2 at p 196.
[22] *Ibid*.

hazardous" and "[contained] a dangerous operation in its intrinsic nature, involving the creation of fire and explosion on the premises".[23] This would give rise to a non-delegable duty on the principal's part to ensure that the act was carried out safely.[24]

9. However, this decision has been the subject of "trenchant criticism" due to the difficulty of identifying which activities are "ultra-hazardous", and therefore give rise to a non-delegable duty, and those merely "hazardous", which do not.[25]

10. The English Court of Appeal acknowledged that it was not open to them to overrule the decision in *Honeywill*,[26] but sought to narrow the ambit of this doctrine in *Biffa Waste*.[27] *Biffa Waste* concerned a fire in the ball mill of a recycling plant that was under construction. The main contractor had been engaged to undertake some works at the plant, and had subcontracted certain welding works to third-party contractors.[28] The third party negligently carried out the welding works, which resulted in a fire and damage to the plant.[29] The plant owner sought to hold the main contractor liable despite the main contractor having delegated the work to a subcontractor by applying the doctrine of the ultra-hazardous act as the subcontractors had gone insolvent.[30] The court held that welding works were not ultra-hazardous in nature and the availability of precautionary measures to ameliorate the potential risks of the act in question had to be considered when determining whether an act was "ultra-hazardous".[31] This limits the doctrine to acts which were "exceptionally dangerous [despite] whatever precautions were taken".[32]

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[23] *Honeywill, supra* n 2 at p 199.
[24] *Ibid*.
[25] *Ng Huat Seng, supra* n 1 at [92]; see also P S Atiyah, *Vicarious Liability in the Law of Torts* (Butterworths, 1967) at p 371 where it was noted that the definition laid down in *Honeywill* resulted in difficulty determining what an inherently dangerous operation was.
[26] *Biffa Waste, supra* n 5 at [78].
[27] *Biffa Waste, supra* n 5.
[28] *Biffa Waste, supra* n 5 at [9].
[29] *Biffa Waste, supra* n 5 at [41].
[30] *Biffa Waste, supra* n 5 at [13].
[31] *Biffa Waste, supra* n 5 at [75].
[32] *Biffa Waste, supra* n 5 at [78]. Even where the act in itself is inherently ultra-hazardous but there are precautionary measures available to mitigate the risk, the act would, by virtue of the existence of said precautions, no longer fall within the ambit of the ultra-hazardous doctrine although the tortfeasor chose not to take the precautions.

11. The key differences between the approaches in *Honeywill* and that of *Biffa Waste* are that the former looks at the relevant activity without taking into account precautionary measures,[33] while the latter refers to possible means of mitigating the risk of the activity *per se* before determining whether it is ultra-hazardous.[34] Prior to *Ng Huat Seng*, it was unclear whether the Singapore Court of Appeal would apply the wider approach in *Honeywill* or the narrowed exception in *Biffa Waste*.

IV. Facts and holding of *Ng Huat Seng*

12. *Ng Huat Seng* involved pair of neighbours, Mr Ng Huat Seng ("Ng") and Mr Munib Mohammad Madni ("Munib"). Munib had tasked hired Esthetix Design Pte Ltd ("Esthetix") to carry out demolition works on their house.[35] Ng resided in a house two metres below that of Munib.[36] Munib had appointed Esthetix as a contractor to demolish and rebuild their property on a "turnkey" basis, meaning that all arrangements were left to Esthetix.[37] During demolition works conducted by Esthetix, some debris fell on and damaged Ng's property.[38]

13. The lower court held that only Esthetix (and not Munib) was liable for the damage under the principle of *res ipsa loquitur*.[39] This was since the damage would not have occurred had Esthetix taken the necessary precautionary steps when carrying out demolition works.[40]

14. However, Esthetix was without financial means to pay damages.[41] As such, Ng sought to recover from Munib via the doctrine of the ultra-hazardous act, pleading that:[42]
    a. Munib did not exercise due care in the selection and appointment of the Esthetix as their builder and;

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[33] *Ng Huat Seng HC, supra* n 8 at [75].
[34] *Ibid.*
[35] *Ng Huat Seng HC, supra* n 8 at [4].
[36] *Ibid.*
[37] *Ng Huat Seng, supra* n 1 at [4].
[38] *Ng Huat Seng, supra* n 1 at [5].
[39] *Ng Huat Seng and Kho Sung Chin v Munib Mohammad Madni, Zahrah Ayub and Esthetix Design Pte Ltd* [2015] SGDC 315("*Ng Huat Seng DC*") at [64].
[40] *Ng Huat Seng DC, supra* n 39 at [64].
[41] *Ng Huat Seng, supra* n 1 at [14].
[42] *Ng Huat Seng, supra* n 1 at [1].

b. that the demolition works were "ultra-hazardous" and gave rise to a non-delegable duty of care under the approach in *Honeywill*.[43]

15. The lower court held that Munib had exercised due care in appointing Esthetix to carry out the demolition work as Esthetix was licenced by the Building and Construction Authority.[44] The judge also held that while the ultra-hazardous exception did apply in Singapore,[45] the scope of the exception should be "kept as narrow as possible and [should] be applied only to activities that are exceptionally dangerous whatever precautions are taken".[46] The court further held that whether an activity was ultra-hazardous was a question of degree.[47] The court held that as demolition works were routinely conducted and there is no proof that explosives or other inherent dangerous procedures were used as part of the woks, it is therefore not an activity that "remained dangerous even when proper precautions were undertaken".[48] Hence, such works were not ultra-hazardous *per se* as they would not be a hazard if done with "ordinary caution by skilled men".[49]

16. On appeal, the High Court considered the implications of both *Honeywill* and *Biffa Waste*. Ultimately, the court found that the "best solution" was that which was adopted in *Biffa Waste*, i.e. "in order for an act to be considered ultra-hazardous, it must be 'exceptionally dangerous whatever precautions are taken' while disregarding the context in which the act is done".[50] The court thus held that the demolition did not fall within the ultra-hazardous act doctrine as it was not proven to be a "dangerous operation in its intrinsic nature".[51]

17. On appeal by Ng raising the same arguments,[52] the Court of Appeal dismissed the appeal. The Court of Appeal also agreed with the High Court that the approach in *Biffa Waste* was to be preferred, and that demolition works did not fall within the meaning

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[43] *Ng Huat Seng, supra* n 1 at [31].
[44] *Ng Huat Seng, supra* n 1 at [76].
[45] *Ng Huat Seng DC, supra* n 39 at [45].
[46] *Ng Huat Seng DC, supra* n 39 at [51].
[47] *Ng Huat Seng DC, supra* n 39 at [50].
[48] *Ng Huat Seng, supra* n 1 at [97].
[49] *Ng Huat Seng DC, supra* n 39 at [57].
[50] *Ng Huat Seng HC, supra* n 8 at [77].
[51] *Ng Huat Seng HC, supra* n 8 at [78].
[52] *Ng Huat Seng, supra* n 1 at [1].

of "ultra-hazardous".[53] As it was found that demolition works were not ultra-hazardous, the court declined to make a firm decision as to whether this doctrine applied in Singapore.[54] The court (in *obiter*) went on to consider how the doctrine, if recognised in Singapore, should be applied.[55]

V. The ambit and impact on the doctrine of the ultra-hazardous act

18. The Singapore Court of Appeal stated that given the "extremely stringent duty" imposed on the duty-bearer, the doctrine should only be applied in "very limited circumstances" where an activity poses a "material risk of causing exceptionally serious harm to others even if it is carried out with reasonable care".[56] More importantly, it was the persistence of risk that would make it "fair, just and reasonable" to find that the principal had a duty to take reasonable care to prevent the negligence of an independent contractor.[57]

19. The approach in *Honeywill* was criticised for the uncertain nature of the principle due to the broad definition afforded by the term "inherently dangerous".[58] Thus, the court decided to adopt the more restrictive approach laid down in *Biffa Waste*.[59]

20. While *Biffa Waste* narrowed the ambit of the doctrine's applicability, the Court of Appeal went a step further by laying down three considerations when determining the acts which were "ultra-hazardous",[60] namely:
    a. the persistence of a material risk of exceptionally serious harm to others arising from the activity in question;
    b. the potential extent of harm if the risk materialises; and
    c. the limited ability to exclude this risk despite exercising reasonable care.[61]

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[53] *Ng Huat Seng, supra* n 1 at [94].
[54] *Ng Huat Seng, supra* n 1 at [89].
[55] *Ng Huat Seng, supra* n 1 at [106].
[56] *Ng Huat Seng, supra* n 1 at [96].
[57] *Ibid.*
[58] P. S. Atiyah, *Vicarious Liability in the Law of Torts* (Butterworths 1967) at p 371.
[59] *Biffa Waste, supra* n 5 at [76].
[60] *Ng Huat Seng, supra* n 1 at [95].
[61] *Ibid.*

VI. The way forward: mandating construction insurance the way to go?

21. In concluding, the Court of Appeal had noted that whether the doctrine should be recognised as part of the law in Singapore had yet to be formally considered.[62] Even though *Biffa Waste* narrowed the ambit of the doctrine considerably, the Court of Appeal had noted that there is potential utility in the doctrine still, especially in exceptional circumstances where such a far-reaching remedy is necessitated.[63] For instance, it recognized that the duty to ensure that reasonable care was taken could be imposed on a principal where there might be "exceptionally serious harm to innocent parties" due to the acts of an independent contractor.[64]

22. What would this development mean for landed homeowners? It seems unfair to require homeowners living adjacent to properties undergoing demolition works to insure themselves against the possibility of extensive property damaged caused by a negligent contractor who later becomes insolvent. The present outcome is unsatisfactory as there is no recourse available for homeowners who fall within this category.

23. A better option may be to mandate public liability insurance where an act has the potential to harm an innocent third party. To draw a parallel, the Court of Appeal had recognised driving as an activity which may be "catastrophic" if reasonable care is not exercised.[65] Despite driving being regarded as "tolerably safe" due to the availability of precautions,[66] the automotive industry requires vehicle owners to be insured against third party risks.[67] However, there is no such requirement in the construction industry even though it is commonplace in the building and construction contracts.[68] The Building Control Regulations 2003 also require builders who engage in building or

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[62] *Ng Huat Seng, supra* n 1 at [106].
[63] *Ng Huat Seng, supra* n 1 at [108]. However, the court did not elaborate on what amounts to "exceptional circumstances".
[64] *Ibid.*
[65] *Ng Huat Seng, supra* n 1 at [94].
[66] *Ibid.*
[67] Motor Vehicles (Third-Party Risks and Compensation) Act (Cap 189, 2000 Rev Ed) s 3.
[68] Public Sector Standard Conditions of Contracts 2014 (PSSCOC), (7 Ed. July 2014) s 27.1(1)(a). It is noted that while public liability insurance is not mandated by law, the Singapore Building and Construction Authority had drafted the PSSCOC to enable a common contract form for public sector construction contracts <https://www.bca.gov.sg/PSSCOC/psscoc_construction_works.html> (Accessed 26 December 2017).

demolition works to erect protective hoardings of "solid and robust construction" prior to the commencement of works to separate the site from "a street, footway or any adjoining or adjacent property",[69] impliedly recognising the danger in construction works.

VII. Conclusion

24. *Ng Huat Seng* provides a glimpse into how cases seeking to argue the doctrine of the ultra-hazardous act will be treated in the future if the doctrine is recognised in Singapore. Having acknowledged the potential utility of this doctrine in exceptional cases,[70] it seems more likely than not that the doctrine will be recognised in Singapore when a case which falls within the guide set out by the Court of Appeal is heard before the court.

25. In densely populated Singapore where building rejuvenation works constantly take place, mandating insurance coverage against damage caused to third parties may prevent a repeat of the plight of the innocent plaintiffs in *Ng Huat Seng* who would likely have to bear the cost of damage to their property.

[69] Building Control Regulations 2003 (s 666/2003) s 30.
[70] *Ng Huat Seng*, *supra* n 1 at [108].