

IN THE HIGH COURT OF MALAYA AT KUALA LUMPUR

(CIVIL DIVISION)

SUIT NO. S3-23-58-1998

BETWEEN

1. **SAY CHONG SDN. BHD.**
2. **DR. NG SAY HONG**
3. **CHUNG LI KOON (P)** ... **PLAINTIFFS**

AND

1. **CHUAH GUAT KOOI (P)**
2. **CHUA SENG SAM REALTY SDN. BHD.**
3. **PEMBINAAN BSH SDN. BHD.**
4. **SIME AXA ASSURANCE BERHAD**
5. **WAN HUSIN**
(T/A WAN HUSIN & ASSOCIATES)
6. **ABDUL RASHID ABDUL KADER**
(T/A RASHID KADER ARKITEK) ... **DEFENDANTS**

JUDGMENT OF THE COURT

Background

1. The 2nd and 3rd Plaintiffs are the two sole Directors and Shareholders of the 1st Plaintiff company which is the registered proprietor of a piece of land held under lot No. 40536 ("the said land") upon which was erected a double storey bungalow house known as No. 11, Jalan Turi, Bukit Pantai,

59100 Kuala Lumpur. There was also a retaining wall erected on the Plaintiffs' land. The 2nd and 3rd Plaintiffs and family have been living in the said house as a family home since 1980 until the date of incident in December 1993.

2. The 1st Defendant is the registered proprietor of a vacant piece of land at lot No. 40527, which is directly below the Plaintiffs' land.

3. Sometime in early November 1993, the 1st Defendant appointed a contractor (the 3rd Defendant) to excavate and level earthworks on the 1st Defendant's land. The 2nd Plaintiff then spoke to the contractor (3rd Defendant) that the earthwork so close to his retaining wall will cause damage to his property unless protected. The 2nd Plaintiff told the 3rd Defendant that he wanted to see the 1st Defendant on the protection to be taken out. But the 3rd Defendant assured the 2nd Plaintiff not to worry and that he will sought the owner (1st Defendant) to allay the Plaintiff's fear. Despite the 3rd Defendant's assurance, no protection was taken by the 1st Defendant to protect the Plaintiff's property.

4. On 11/12/1993 there was a landslide on the exposed cut slope adjacent to the Plaintiffs' retaining wall causing massive damage to the Plaintiff's property (see photo exhibits P5 – P10). The 1st Defendant failed to rectify and repair the damaged Plaintiffs' property. The Plaintiffs have now claimed damages against the Defendants.

5. The 1st and 2nd Defendants have also each filed a counter-claim against the Plaintiffs for damages, alleging the Plaintiffs' inadequate steps taken to prevent the retaining wall from collapsing thereby causing damage to them.

The Plaintiff's case against the 1st Defendant Chuah Guat Kooi (f)

6. It is not disputed that the 1st Defendant is the registered proprietor of the land at lot No. 40527, and that the 1st Defendant had appointed the contractor (3rd Defendant), the Engineer (5th Defendant) and the Architect (6th Defendant). The 1st Defendant had instructed the 6th Defendant to award the contract to the 3rd Defendant (see exhibit D5(61)(a)). In consideration of the award, the 3rd Defendant paid the 1st Defendant a performance bond of RM42,500.00 i.e. 5% of the contract sum of RM850,000.00. The 1st Defendant also

instructed the 3rd Defendant to take an insurance policy of RM1.5 million for her as the principal (see exhibit P39). The insurer is the 4th Defendant. The learned counsel therefore submitted that the 3rd, 5th and 6th Defendants were servants or agents of the 1st Defendant.

Issue of Liability

7. The learned counsel for the Plaintiff submitted that the 3rd Plaintiff originally bought the said land from the previous owner, Allied Builders in 1979. She then submitted her own Earthworks and Retaining Wall Plan to build a double storey bungalow with a retaining wall. The 3rd Plaintiff's plan was approved by Dewan Bandaraya Kuala Lumpur (DBKL) on 24/06/1980 (Exhibit D5 (43) A, B and C). Based on the said approval, the 3rd Plaintiff erected the double storey bungalow, and retaining wall and carried out the earthworks. According to PW.3 (an engineer from DBKL), he testified that the Plaintiff's earthwork and retaining wall were completed in 1980. He also testified that the Certificate of Fitness (CIF) was issued for the whole house (see Enclosure 19, exhibit D29) after the earthworks were completed on 21/07/1983. It was therefore submitted that the Plaintiff's house, the 24 foot high retaining

wall and the earthwork slopes (see Enclosure 19, exhibits D29; 3 A-E) were all built in accordance with the approval plans (Exhibit D5 (43), A, B and C).

8. The defence of the 1st Defendant as pleaded, was that she never appointed the contractor (3rd Defendant), the Engineer (5th Defendant) or the Architect (6th Defendant). according to her pleaded defence, she had given a lease of 10 years to the 2nd Defendant to build a bungalow and that it was the 2nd Defendant who had appointed the Contractor, Engineer and Architect.

Court's Findings

9. Although the 1st Defendant had filed her statement of defence, she never even came to court and never gave evidence to contradict or rebut the Plaintiff's claim. In **Ng Ben Thong & Ors v Krishnan a/l Arumugam [1998] 5 MLJ 579** the defendant was absent at the close of the Plaintiff's case. The court held inter alia:-

“Held (1): ... The party has to adduce evidence to substantiate its pleadings. ...”

Therefore the Plaintiffs' evidence against the 1st Defendant remains unchallenged, unrebutted and uncontradicted.

10. Also, looking at the documentary evidence (exhibit D5 (61) a), it was the contract award between the 1st Defendant and the Contractor. The Engineer (4th Defendant) and the Architect also confirmed that it was the 1st Defendant who appointed them and the Contractor (3rd Defendant). Exhibit D57, D58 and D59 confirmed that it was the 1st Defendant who appointed the 5th Defendant. Also the insurance policy (Exhibit D38) states the 1st Defendant as the principal under the policy. Based on the above, I cannot accept the unsubstantiated defence of the 1st Defendant that she never appointed the 3rd, 4th and 5th Defendants. Neither did she plead in her defence that the 3rd, 5th and 6th Defendants were her independent contractors. Therefore the 1st Defendant cannot rely on the defence of independent contractors (see: **Janagi v Ong Boon Kiat [1971] 2 MLJ 196**; and **Ng Ben Thong's** case, supra. The 1st Defendant would therefore be liable for the acts or omissions of each and every other Defendant appointed by her.

11. Neither did the 1st Defendant deny the Plaintiffs' pleading in paragraph 5 of the Amended Statement of Claim where it was alleged that the Defendants were in breach of statutory duties under section 70A (1) and (14) of the Street, Drainage and Building Act and Earthworks By-Laws.

12. Further, Rule 16 (1) of the By-Laws provides:-

“All earthworks exceeding three meters in height and dept shall unless exempted by the Commissioner, be protected by a retaining structure or stabilization of slopes.”

Rule 16 (2) of the By-Laws states:-

“there shall, unless exempted by the Commissioner, be provided temporary retaining structures or stabilization of slopes during the continuance of such earthworks.”

Rule 17 (1) of the By-Laws provides:-

“no earthworks shall commence or continue ... unless the engineer submitting the plans certifies in writing that the earthworks are not likely to cause nuisance or damage to surrounding properties.”

13. In view of the above regulations, and despite the contractor's request (see exhibit P64) to delay the commencement of earthworks and to appoint a specialist contractor until safety assessment precautions were taken out, the 1st Defendant still authorised and permitted the 3rd Defendant who was not a specialist earthwork contractor, to commence work without taking any precautions whatsoever.
14. It must be noted that the Plaintiffs' Retaining Wall had been standing by itself for over 10 years.
15. As a direct result of the 1st Defendant's non-compliance of the statutory requirements mentioned above, the cut and exposed adjacent slopes collapsed, thereby causing massive damage to the Plaintiffs' property. When the whole of the 1st Defendant's land were excavated up to the road level adjacent to the

Plaintiff's Retaining Wall, the then exposed and unprotected slope and retaining wall collapsed.

16. the Plaintiff's engineering consultant (PW.5) testified that the Plaintiff's Retaining Wall had a factor of safety (FOS) as follows:-

(i) against sliding - 2.03 (exhibit P44 pages 4 – 5);

(ii) against overturning - 2.1.

17. This FOS was based on the analysis carried out as in exhibit P44. PW.5 further said that the FOS of 1 is the minimum for a wall to be safe and it was recommended that FOS of 1.2 is the accepted level.

18. In fact even the 5th Defendant (the Architect) testified that FOS means the equilibrium. Therefore, the higher figure (of 2.03 and 2.1) would mean it was twice the minimum safety standard against sliding and overturning. (See DW.5's testimony at page 189 notes of proceedings).

19. On the 11/12/1993, the overall slope stability check showed that the FOS were reduced to 0.952 (see page 6 of Exhibit P44). This happened during the 1st Defendant's unprotected excavation of the adjacent slopes for a close distance of almost only 16 feet away from the Plaintiff's Retaining Wall and from the height of 6 to 3 meters high to the road level (see exhibit P4 and P7).

20. The 1st Defendant's denial of liability was based on the fact that she had leased her land to the 2nd Defendant, thereby her counsel submitted that she no longer was responsible for what had transpired on the land thereafter.

21. Although the 1st Defendant had leased her land for a period of 10 years with an option to purchase, the fact remains that it was the 1st Defendant who first appointed the Contractor (3rd Defendant), the Engineer (5th Defendant) and the Architect (6th Defendant). When the 2nd Defendant leased the land from the 1st Defendant, it was aware of this and just carried on with the employment of 3rd, 5th and 6th Defendants in the land excavation of the 1st Defendant's land. It must be remembered that the 10 years lease was with an option to purchase by 2nd

Defendant. The 2nd Defendant was a company formed from family investment and the only two shareholders of 2nd Defendant company were DW.1 and his wife. DW.1 and the 1st Defendant's husband (Mr. Beh) have been colleagues since 1987. 1st Defendant is a remiesier and DW1 was also her client. Therefore there was a close relationship between the shareholders of the 2nd Defendant company and the 1st Defendant. It can only be concluded that both the 1st and 2nd Defendant had acquiesced in the appointment of the 3rd, 5th and 6th Defendants in the building of a bungalow on the 1st Defendant's land which entailed the excavation works of the said land.

22. Likewise the 2nd Defendant's counsel submitted that the 2nd Defendant was absolved from any liability because it had engaged a professional and competent contractor, engineer and architect to do the earthworks towards the building of a double storey bungalow on the 1st Defendant's land and that it had left it entirely to them for that purpose. His argument was based on the general rule that an employer is not responsible for the negligence and other wrong doings of his independent contractor. Reliance was placed on the case of **Riverstone**

Meat Co. Pty. Ltd. v Lancashire Shipping Co. Ltd. [1960] 1

QB 536, 580 – 582 where it was held that if the act or process

in question is one which involves technical skill or knowledge,

then the ordinary man will discharge his duty by entrusting it to

an apparently competent contractor, he is not liable.

23. In the instant case it was submitted that the 2nd Defendant had engaged a competent professional architect (the 6th Defendant). The 6th Defendant in turn had engaged the engineer (the 5th Defendant). The contractor (3rd Defendant) was engaged pursuant to the recommendation of the 5th Defendant.

Plaintiff's case against the 5th and 6th Defendants

24. Learned counsel for the 5th and 6th Defendants submitted that if there was any breach of statutory duty, the action is sui generis i.e. independent from an action in negligence, and would normally entail criminal or quasi criminal action for such breach and/or offence by the relevant authority enforced under the same legislation. In the case of **Phillips v Britannia Hygenic Laundry Company, Ltd. [1923] 2 KB 833** it was held:-

“that it was not intended by the Act or the Order that everyone injured through a breach of the Order should have the right of action for damages; but that the duty imposed by the Order was a public duty only to be enforced by the penalty for a breach of it, and not otherwise.”

25. It was therefore submitted that the Plaintiff’s contentions on the breach of section 70A of the Street Drainage and Building Act 1974 would only lie to the local authority punishable pursuant to Section 71 of the same Act and not otherwise.
26. Even if there was a breach of statutory duty which is denied by the 5th and 6th Defendants it was submitted that the Plaintiff’s action lies solely on the law of negligence, which requires the Plaintiff to prove on a balance of probabilities that negligence existed.
27. Both the Plaintiffs and Defendants had called expert evidence to substantiate each other’s case. But expert evidence is only persuasive on the court which has to finally determine the liability. Having considered the expert testimony of both sides I

am however inclined to say that whatever the technical opinions given, the fact remains that even though the Plaintiff's Retaining Wall was built on a land filled slope, it had remained intact for over 10 years since it was built. I do not think one can be wrong to assume that over the 10 years there must have been a lot of inclement weather which could have caused the said wall to collapse at one point or other if it was technically faulty. But it only collapsed after the earthwork was undertaken by the Defendants when the landslide occurred, thereby causing the Plaintiff's Retaining Wall to collapse. This resulted in the 2nd and 3rd Plaintiffs to move out of their house in fear of further damage and threat to their safety. In my opinion, the Retaining Wall would still be standing if not for the human interference caused by the 3rd Defendant's earthworks. In fact it did not break immediately after the earthwork commenced. It only collapsed about one month later after from the site possession on 25/10/1993. On the evidence adduced (Exhibit P4 – P7) when the whole of the 1st Defendant's land was excavated up to the road level adjacent to the Plaintiff's Retaining Wall, the then exposed and unprotected slope and the Retaining Wall collapsed.

28. In fact the 1st Defendant knew that earthwork on her land at the adjacent Plaintiff's slope involved special risks. That was why the 1st Defendant required the contractor (3rd Defendant) to take up an "All Contractors Risks Insurance Policy" on damage caused ... landslide RM850,000 and against third party liability against property RM1.5 million." (See exhibit P39). It was also a fact that the 3rd Defendant had informed that a specialist earthwork contractor was required to carry out the works. Yet the 1st Defendant did not appoint such a specialist and failed to take the necessary precaution as was required by Rule 16 (1) of the Earthworks (Federal Territory of Kuala Lumpur By-Laws 1988) which provides:-

"All earthworks exceeding three meters in height or depth shall unless exempted by the Commissioner be protected by a retaining structure or stabilisation of slopes."

Rule 16 (2) of the same By-Laws further provides:-

"there shall unless exempted by the Commissioner, be provided temporary retaining structures or stabilisation of slopes during the continuance of such earthworks."

29. The 1st Defendant despite being notified by the Contractor (3rd Defendant) of the risks and danger to the Plaintiffs' Retaining Wall, still authorised and permitted the 3rd Defendant who was not a Specialist Earthwork Contractor to commence work without taking any precautions whatsoever.
30. It is my finding of fact that on a balance of probabilities it was a direct result of the 1st and 3rd Defendant's negligence and failure to provide the necessary precaution by having temporary retaining structures or stabilisation of slopes during the excavation of the 1st Defendant's land that led to the landslide and the collapse of the Plaintiffs' Retaining Wall.

Conclusion

31. For the above reasons I would allow paragraph 21 of the Plaintiffs' claim with costs. I find that the 1st Defendant as the registered owner of the land and the 2nd Defendant as the lessee of the said land are liable to the Plaintiffs for the damage caused to their property. Likewise the Contractor (3rd Defendant) was also liable for carrying out the unapproved earthworks knowing fully well of the risks involved by not taking any precautionary measure to prevent the foreseeable disaster

that could have happened as it did. Similarly the 5th Defendant and the 6th Defendant are also liable for giving the Contractor to work on the tender documents and plans given by them on behalf of the 1st Defendant knowing that the earthwork plans were not approved by the local authority. I would hold them all to be equally liable to the Plaintiffs. The 4th Defendant's liability is to the extent of their insurance coverage. As for the damages, they are to be assessed by the Senior Assistant Registrar of the Court.

32. In view of my findings that it was the negligence of the Defendants that caused the Plaintiff's Retaining Wall to collapse and that the said wall had withstood itself for more than 10 years without collapsing and the fact that no evidence was adduced to show that the earth on the Plaintiffs' garden was a natural non-user or that it escaped by itself onto the 1st Defendant's land, I therefore dismiss their counter-claims with costs.

Signed.
(DATO' HASHIM BIN DATO' HJ. YUSOFF)
Judge

Date: 10th July 2009

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Cases referred to:

Ng Ben Thong & Ors v Krishnan a/l Arumugam [1998] 5 MLJ 579;

Janagi v Ong Boon Kiat [1971] 2 MLJ 196;

Riverstone Meat Co. Pty. Ltd. v Lancashire Shipping Co. Ltd. [1960] 1
QB 536, 580 – 582;

Phillips v Britannia Hygenic Laundry Company, Ltd. [1923] 2 KB 833.