
MAJLIS PERBANDARAN AMPANG JAYA v. STEVEN PHOA CHENG LOON & ORS
FEDERAL COURT, PUTRAJAYA
STEVE SHIM, CJ (SABAH & SARAWAK); ABDUL HAMID MOHAMAD,
FCJ; ARIFFIN ZAKARIA, FCJ
CIVIL APPEAL NO. 01-4-2004 (W)
17 FEBRUARY 2006
[2006] 2 CLJ 1

TORT Damages - Negligence - Immunity under [s. 95\(2\) Street, Drainage and Building Act 1974](#) - Economic loss - Liability of joint tortfeasors - Public law

Blocks 1,2 and 3 of The Highland Towers apartments were situated on Lots 494,495 and 635 in the Mukim of Hulu Klang ("Highland Towers") and were built in front of a steep slope, which said slope was owned by Highland Properties Sdn Bhd who were also the developers for Highland Towers. Highland Properties transferred ownership of the bungalow lots on the hill slope to Arab Malaysian Finance Berhad ("AMFB"). On the hill slope was the East stream which originated from the Metrolux land which was land being developed by Metrolux Sdn Bhd and MBF Property Services Sdn Bhd. On 11 December 1993, a landslide occurred resulting in the collapse of Block 1 and the subsequent evacuation of the respondents from Blocks 2 and 3 of the Highland Towers. The respondents filed a suit in the High Court against various parties including the appellant herein for negligence and nuisance and the trial judge found the appellant to be 15% liable for negligence in respect of the appellant's acts and omissions prior to the collapse of Block 1 of the Highland Towers but held that [s. 95\(2\) of the Street, Drainage and Building Act 1974 \(Act 133\)](#) ("said Act") operated to indemnify the appellant of any pre-collapse liability but afforded no protection to the appellant for post-collapse liability. Both the appellant and respondents appealed to the Court of Appeal which allowed the appellant's appeal on post-collapse liability and the respondents' cross-appeal against the order of the High Court on the issue of indemnity under [s. 95\(2\) of the said Act](#) ("said decision"). The appellant and respondents have lodged their appeal and cross-appeal respectively against the said decision.

The issues that rose for determination *vide* this appeal were: (1) in a situation where a plaintiff sustains damage and alleges negligence against various defendants and the tribunal of fact ascribes negligence to the various defendants and there is a clear finding that the *causa causans* of the plaintiff's damage is the negligence of a particular defendant, can the other defendants who are guilty of certain negligent acts but whose negligent acts are held not to be the *causa causans* be held liable to the plaintiff as well; (2) whether [s. 95\(2\) of the said Act](#) is wide enough to provide immunity to a local authority in approving the diversion of a stream and in failing to detect any damage or defect in the building and drainage plans relating to the development submitted to the local authority by the architect and/or the engineer on behalf of the developer; (3) whether pure economic loss is recoverable under our Malaysian jurisprudence with reference to (a) negligence and (b) nuisance; (4) in a case involving different acts of negligence by multiple defendants committed at different times, whether those defendants are joint tortfeasors; and (5) whether the Court of Appeal erred in providing a distinction between private law and public law when finding that the appellant was not

responsible to the 1st to the 73rd respondents for the appellant's acts and omissions as determined by the High Court following the collapse of Block 1 of the Highland Towers.

Held (allowing the appellant's appeal with costs and dismissing the respondents' cross-appeal, each party to bear their own costs)

Per Abdul Hamid Mohamad FCJ:

(1) While economic loss under limited situations may be allowed, Malaysian courts will have to consider the effects of [s. 3 of the Civil Law Act 1956](#) and considering the "public policy" and the "local circumstances", whether it is fair, just and reasonable to allow it on the facts and in the circumstances of the case. (para 74)

Bahasa Malaysia translation of headnotes

Blok 1, 2 dan 3 pangsapuri Highland Towers yang terletak atas Lot 494, 495 dan 635 dalam Mukim Hulu Klang ("Highland Towers") telah dibina dihadapan suatu tubir curam, yang mana tubir tersebut dimiliki oleh Highland Properties Sdn Bhd yang juga merupakan pemaju bagi Highland Towers. Highland Properties telah memindah milik haknya dalam lot bangalo di atas tubir tersebut kepada Arab Malaysian Finance Berhad ("AMFB"). Diatas tubir tersebut wujudnya anak sungai timur (East stream) yang berpunca daripada tanah Metrolux yang pada masa itu sedang dibangunkan oleh Metrolux Sdn Bhd dan MBF Property Services Sdn Bhd. Pada 11 Disember 1993, suatu tanah runtuh telah berlaku yang telah mengakibatkan Blok 1 Highland Towers runtuh dan/atau tumbang dan yang telah mengakibatkan responden dari Blok 2 & 3 Highland Towers tersebut terpaksa pindah. Responden telah memfailkan tindakan dalam Mahkamah Tinggi terhadap beberapa pihak termasuk perayu untuk kecuaiannya dan kacau-ganggu dan yang arif hakim telah memutuskan bahawa perayu adalah bertanggungjawab untuk kecuaiannya pada kadar 15% berdasarkan tindakannya dan/atau kegagalan mengambil tindakannya sebelum keruntuhan Blok 1 Highland Towers tetapi telah memutuskan bahawa [s. 95\(2\) Akta Jalan, Penyaliran dan Bangunan 1974 \(Akta 133\)](#) ("Akta Tersebut") berfungsi untuk menanggung rugi perayu terhadap sebarang liabiliti pra-runtuh tetapi tidak melindungi atau menanggung rugi perayu terhadap liabiliti post-runtuh. Kedua-dua pihak perayu dan responden telah merayu kepada mahkamah rayuan yang telah membenarkan rayuan perayu atas isu liabiliti post-runtuh dan rayuan responden terhadap keputusan Mahkamah Tinggi atas isu tanggung rugi di bawah [s. 95\(2\) Akta Tersebut \("keputusan tersebut"\)](#). Perayu dan responden kini telah memfailkan rayuan mereka masing-masing terhadap keputusan tersebut.

Isu-isu yang dibangkitkan melalui rayuan ini adalah: (1) dalam keadaan dimana plaintif mengalami kerugian dan mengatakan bahawa kecuaiannya wujud di pihak berbilang defendan dan tribunal fakta mendapati bahawa kecuaiannya tersebut sememangnya disebabkan oleh berbilang defendan dan terdapat keputusan yang jelas bahawa *causa causans* kerugian plaintif adalah disebabkan kecuaiannya di pihak satu defendan, adakah defendan lain yang walaupun juga bertanggungjawab untuk kecuaiannya tetapi bukan penyebab *causa causans*, bertanggungjawab kepada plaintif juga; (2) sama ada [s. 95\(2\) Akta tersebut](#) cukup lebar untuk memberikan perlindungan kepada majlis tempatan dalam tindakannya memberi persetujuan untuk mengubah aliran anak sungai dan dalam kegagalan mereka untuk mengesan kerosakan atau defek dalam bangunan dan pelan penyaliran berhubung dengan pembangunan yang dikemukakan kepada majlis tempatan oleh arkitek dan/atau jurutera bagi pihak pemaju; (3) sama ada kehilangan ekonomi tulen (pure economic loss) boleh dituntut di bawah undang-

undang Malaysia bagi (a) kecuaiian dan (b) kacau-ganggu; (4) sama ada berbilang defendan yang melakukan kecuaiian yang berbeza pada masa yang berbeza boleh dianggap sebagai pelaku tort bersama; dan (5) sama ada Mahkamah Rayuan telah melakukan kesilapan dalam membuat perbezaan antara undang-undang peribadi dan undang-undang awam bila membuat keputusan bahawa perayu tidak bertanggungjawab kepada responden 1 sehingga 73 bagi tindakannya dan/atau kegagalan mengambil tindakan di pihaknya sepertimana diputuskan oleh Mahkamah Tinggi berikutan keruntuhan Blok 1 Highland Towers.

Diputuskan (rayuan perayu dibenarkan dengan kos dan rayuan silang responden ditolak, kos ditanggung oleh kedua pihak)

Oleh Abdul Hamid Mohamad HMP:

(1) Walaupun kehilangan ekonomi tulen dibawah keadaan-keadaan tertentu boleh dibenarkan, mahkamah di Malaysia mesti mengambil kira kesan [s. 3 Akta Undang-undang Sivil 1956](#) dan dalam mengambil kira "kepentingan awam" dan "keadaan-keadaan tempatan", sama ada ianya adil dan munasabah untuk membenarkannya atas fakta dan dalam mengambil kira semua situasi kes.

Case(s) referred to:

Allen v. Gulf Oil Refining Ltd [1981] AC 1004 (refd)

Anns v. Merton London Borough Council [1978] AC 728 (refd)

Bonnington Castings v. Wardlaw [1956] AC 613 (refd)

Boulting v. Association of Cinematograph, Television & Allied Technicians [1963] 2 QB 606 (refd)

Caparo Industries plc v. Dickman & Ors [1990] 1 All ER 568 (refd)

Caparo Industries Plc v. Dickman [1990] 2 AC 605 (refd)

Capital & Counties Plc v. Hampshire County Council [1997] GB 1004 (refd)

Chappel v. Hart [1998] 156 ALR 517 (refd)

[Chung Khiaw Bank Ltd v. Hotel Rasa Sayang \[1990\] 1 CLJ 675; \[1990\] 1 CLJ \(Rep\) 57 SC \(refd\)](#)

David Geddis v. Proprietors of Bana Reservoir [1878] 3 AC 430 (refd)

Davy v. Spelthorne Borough Council (184) A (262) (refd)

Dingle v. Associated Newspapers Ltd & Ors [1961] 2 QB 162 (refd)

Donoghue v. Stevenson [1932] AC 562 (**refd**)

[*Dr Abdul Hamid Abdul Rashid & Anor v. Jurusan Malaysia Consultants & Ors* \[1999\] 8 CLJ 131 HC \(**refd**\)](#)

Environment Agency (Formerly National Rivers Authority) v. Empress Car Co (Abertillery) Ltd [1999] 2 AC 23 (**refd**)

Fairchild (suing on her own behalf) etc v. Glenhaven Funeral Services Ltd & Ors, etc. [2002] 3 WLR 89 (**refd**)

Harris v. Evans [1998] 1 WLR 1285 (**refd**)

Hedley Byrne & Co v. Heller & Partners Ltd [1964] AC 465 (**refd**)

Hedley Byrue & Co Ltd & Partners Ltd [1964] 2 All ER 575 (**refd**)

Invercargill City Council v. Hamlin [1996] 1 All ER 756 (**refd**)

[*Jamal Harun v. Yang Kamsiah & Anor* \[1984\] 1 CLJ 215; \[1984\] 1 CLJ \(Rep\) 11 PC \(**refd**\)](#)

Kane v. New Forest District Council [2001] 3 All ER 914 (**refd**)

Kerajaan Malaysia v. Chuah Fong Shiew [1993] 2 MLJ 439 (**refd**)

[*Liew Choy Hung v. Shah Alam Properties Sdn Bhd* \[1997\] 2 CLJ 601 FC \(**refd**\)](#)

[*Malaysian National Insurance Sdn Bhd v. Lim Tiok* \[1997\] 2 CLJ 351 SC \(**refd**\)](#)

Man B & W Diesel SE Asia Pte Ltd & Anor v. PT Bumi International Tankers & Another Appeal [2004] 2 SLR 300 (**refd**)

March v. E & MH Stramare Pty Ltd & Anor [1991] 99 ALR 423 (**refd**)

Marc Rich & Co. AG v. Bishop Marine Co. Ltd [1996] 1 AC 211 (**refd**)

Murphy v. Brentwood District Council [1990] 2 All ER 908 (**refd**)

Murphy v. Brentwood District Council [1991] 1 AC 398 (**refd**)

[*Nepline Sdn Bhd v. Jones Lang Wootton* \[1995\] 1 CLJ 865 HC \(**refd**\)](#)

Nicholsons & Ors v. Atlas Steel Foundary & Engineering Co Ltd [1957] 1 WLR 631 (**refd**)

[*Oli Mohamed v. Keith Murphy & Anor* \[1969\] 1 LNS 122; \[1969\] 2 MLJ 244 \(**refd**\)](#)

Perre & Ors v. Apand Pty Ltd [1999] 164 ALR 606 (**refd**)

Phelps v. Hillingdon London Borough Council [2001] 2 AC 6019 (**refd**)

[*Pilba Trading & Agency v. South East Asia Insurance Bhd & Anor* \[1999\] 8 CLJ 403 HC \(refd\)](#)

RSP Architects Planners & Engineers (Reglan Squire & Partners FE) v. Management Corporation Strata Title No. 1075 [1999] 2 SLR 449 (refd)

RSP Architects Planners & Engineers v. Ocean Front Pte Ltd & Anor Appeal [1996] 1 SLR 113 (refd)

Roy v. Kensington & Chelsea and Westminster Family Practitioner Committee [1992] 1 All ER 705 (refd)

Smith, Hogg & Company Ltd v. Black Sea & Baltic General Insurance Co Ltd [1940] AC 997 (refd)

South Pacific Manufacturing Co Ltd v. New Zealand Security Consultants & Investigations Ltd [1992] 2 NZLR 282 (refd)

Spring v. Guardian Assurance Plc [1985] 2 AC 295 (refd)

Sutherland Shire Council v. Heyman & Anor [1985] 157 CLR 424 (refd)

[*Syarikat Batu Sinar Sdn Bhd & Ors v. UMBC Finance Bhd & Ors* \[1990\] 2 CLJ 691; \[1990\] 3 CLJ \(Rep\) 140 HC \(refd\)](#)

[*Teh Khem On & Anor v. Yeoh & Wu Development Sdn Bhd & Ors* \[1996\] 2 CLJ 1105 HC \(refd\)](#)

White v. Jones [1995] 2 AC 207 (refd)

Winnipeg Condominium Corp No. 36 v. Bird Construction Co Ltd & Ors [1995] 121 DLR (4th edn) 193 (refd)

Legislation referred to:

[Civil Law Act 1956, s. 3\(1\)](#)

[Rules of the High Court 1980, O. 18 r. 19, O. 53](#)

[Street, Drainage & Building Act 1974, ss. 54, 55, 95\(2\)](#)

Other source(s) referred to:

LC Green, *Filling Lacunae in the Law* [1963] MLJ xxviii

Counsel:

For the appellant - VS Viswanathan; M/s VS Viswa & Co.

For the respondents no 1-73 - Rajendra Navaratnam (Yatiswara Ramachandran, Marion Qua Li Lian & Toh Chia Hua with him); M/s Azman Davidson & Co.

For the respondent no 74 - Shamsudin Abdullah.

For the respondent no 77 - D Bhaskaran (David Soosay with him); M/s Shearn Delamore & Co.

Reported by Sharmini Pillai

JUDGMENT**Abdul Hamid Mohamad FCJ:**

[26] I have the advantage of reading the judgment of the learned Chief Judge (Sabah & Sarawak). It saves me from having to narrate the background facts as well as having to deal with all the issues raised in the appeal. As I agree with the learned Chief Judge (Sabah & Sarawak) on other issues, I shall only deal with the issue of "post collapse" liability of the appellant ("MPAJ").

[27] However, before going any further there is one point that I would like to make and, that is, regarding the provision of [s. 3\(1\) of the Civil Law Act 1956](#) which provides:

3. (1) Save so far as other provision has been made or may hereafter be made by any written law in force in Malaysia, the Court shall:

(a) in West Malaysia or any part thereof, apply the common law of England and the rules of equity as administered in England on the 7th day of April 1956;

(b) in Sabah, apply the common law of England and the rules of equity, together with statutes of general application, as administered or in force in England on the 1st day of December 1951;

(c) in Sarawak, apply the common law of England and the rules of equity, together with statutes of general application, as administered or in force in England on the 12th day of December 1949, subject however to subsection (3)(ii): Provided always that the said common law, rules of equity and statutes of general application shall be applied so far only as the circumstances of the States of Malaysia and their respective inhabitants permit and subject to such qualifications as local circumstances render necessary.

[28] That provision was legislated, if I may so, by the British one year before the then Malaya obtained her independence and remains the law of this country for half a century now. Whatever our personal views about it, it is the law and no court can ignore it.

[29] That provision says (I am only referring to common law) that the court shall apply the common law of England as administered of England on the given dates provided that no provision has been made or may hereafter be made by any written law in force in Malaysia. Even then, it is further qualified that it is only applicable so far only as the circumstances of the States of Malaysia and their respective inhabitants permit and subject to such qualifications as local circumstances render necessary.

[30] Strictly speaking, when faced with the situation whether a particular principle of common law of England is applicable, first, the court has to determine whether there is any written law in force in Malaysia. If there is, the court does not have to look anywhere else. If there is none, then the court should determine what is the common law as administered in England on 7 April 1956, in the case of West Malaysia. Having done that the court should consider whether "local circumstances" and "local inhabitants" permit its application, as such. If it is "permissible" the court should apply it. If not, in my view, the court is free to reject it totally or adopt any part which is "permissible", with or without qualification. Where the court rejects it totally or in part, then the court is free to formulate Malaysia's own common law. In so doing, the court is at liberty to look at other sources, local or otherwise, including the common law of England after 7 April 1956 and principles of common law in other countries.

[31] In practice, lawyers and judges do not usually approach the matter that way. One of the reasons, I believe, is the difficulty in determining the common law of England as administered in England on that date. Another reason which may even be more dominant, is that both lawyers and judges alike do not see the rational of Malaysian courts applying "archaic" common law of England which reason, in law, is difficult to justify. As a result, quite often, most recent developments in the common law of England are followed without any reference to the said provision. However, this is not to say that judges are not aware or, generally speaking, choose to disregard the provision. Some do state clearly in their judgments the effects of that provision. For example, in [Syarikat Batu Sinar Sdn. Bhd. & 2 Ors. v. UMBC Finance Bhd. & 2 Ors. \[1990\] 2 CLJ 691; \[1990\] 3 CLJ \(Rep\) 140](#) Peh Swee Chin J (as he then was) referring to the proviso to [s. 3\(i\)](#) said: We have to develop our own Common law just like what Australia has been doing, by directing our mind to the "local circumstances" or "local inhabitants".

[32] In [Chung Khiaw Bank Ltd. v. Hotel Rasa Sayang \[1990\] 1 CLJ 675; \[1990\] 1 CLJ \(Rep\) 57](#) the Supreme Court, *inter alia*, held: (4) Because the principle of common law has been incorporated into statutory law as contained in [s. 24 of the Contracts Act 1950](#), the trend on any change in the common law elsewhere is not relevant. Any change in the common law after 7 April 1956 shall be made by our own courts.

[33] In the judgment of the court in that case, delivered by Hashim Yeop A. Sani CJ (Malaya), the learned Chief Justice (Malaya), said: [Section 3 of the Civil Law Act 1956](#) directs the courts to apply the common law of England only in so far as the circumstances permit and save where no provision has been made by statute law. The development of the common law after 7 April 1956 (for the States of Malaya) is entirely in the hands of the courts of this country. We cannot just accept the development of the common law in England. See also the majority judgments in [Government of Malaysia v. Lim Kit Siang \(\[1988\] 1 CLJ 63 \(Rep\); \[1988\] 1 CLJ 219; \[1988\] 2 MLJ 12 - added\)](#).

[34] That case is an example where our statute has made specific provisions incorporating the

principles of common law of England. However, it shows the effect on the application of the common law in England. In the instant appeal, we are dealing with a situation where no statutory provisions have been made.

[35] In [*Jamal bin Harun v. Yang Kamsiah & Anor \[1984\] 1 CLJ 215; \[1984\] 1 CLJ \(Rep\) 11*](#) (PC) a "running down" case in which the issue of itemization of damages was in question, Lord Scarman, delivering the judgment of the Board, *inter alia*, said: Their Lordships do not doubt that it is for the courts of Malaysia to decide, subject always to the statute law of the Federation, whether to follow English case law. Modern English authorities may be persuasive, but are not binding. In determining whether to accept their guidance the courts will have regard to the circumstances of the states of Malaysia and will be careful to apply them only to the extent that the written law permits and no further than in their view it is just to do so.

[36] As early as 1963, this provision had been criticised. Professor L.C. Green, in an article "*Filling Lacunae in the Law*" [1963] MLJ xxviii, commented: Apart from any problem that might arise from the fact that this legislation attempts, to some extent at least, to introduce a supplementary English common law or equity which may have become out of date and which may no longer be applicable in England, the situation in Malaysia and Singapore is today different from what it was at the time of the enactment of the Ordinances. In view of the increased political stature of the two territories, an in anticipation of further changes likely to be effected with the establishment of Malaysia, it is now perhaps evidence of an out of date attitude as well as contrary to national prestige to make provisions for the supplementation of the local law in the event of lacunae by means of reference to any "alien" system, whether it be that of the former imperial power or not.

[37] It is not the function of the court to enter into arguments regarding the desirability or otherwise of the provision. That is a matter for Parliament to decide. As far as the court is concerned, until now, that is the law and the court is duty bound to apply it. In so doing, the provision is clear that even the application of common law of England as administered in England on 7 April 1956 is subject to the conditions that no provision has been made by statute law and that it is "permissible" considering the "circumstances of the States of Malaysia" and their "respective inhabitants". That is not to say that post_7 April 1956 developments are totally irrelevant and must be ignored altogether. If the court finds that the common law of England as at 7 April 1956, is not "permissible", it is open to the court to consider post-7 April 1956 developments or even the law in other jurisdictions or sources.

[38] The point I am making, if I may borrow the words of Hashim Yeop A. Sani, Chief Justice (Malaya) in *Chung Khiaw Bank Ltd. (supra)* is that "We cannot just accept the development of the common law of England". We have to "direct our mind to the "local circumstances" or "local inhabitants", " to quote the words of Peh Swee Chin J in *Syarikat Batu Sinar Sdn. Bhd. & 2 Ors (supra)*)

Claim For Post-collapse Economic Loss

[39] As I agree with the Chief Judge (Sabah & Sarawak) that [s. 95\(2\)](#) protects MPAJ from claims for pre-collapse period, it is not necessary for me to discuss the issue. So, I shall confine myself to the post-collapse period.

[40] The High Court had found MPAJ liable for the post-collapse period and that [s. 95\(2\) of](#)

[the Street, Drainage & Building Act 1974 \("S, D & B Act 1974"\)](#) does not cover MPAJ. The Court of Appeal reversed that finding purely on the ground that it is a matter under public law and not private law. The learned Chief Judge (Sabah & Sarawak) disagreed with the Court of Appeal and held that the claim could be made under private law as well. While I agree with his finding of law, in my view, since the Court of Appeal merely "assumes" that MPAJ was liable for post-collapse period, this Court should go one step further and decide whether on the facts, MPAJ should be held liable for the pure economic loss suffered by the respondents/plaintiffs. In this respect, I shall confine my discussions to the liability of MPAJ, a local authority, for economic loss suffered by the respondents for its failure to take remedial actions after the collapse of Block 1.

[41] The judgment of the High Court on this point is rather brief. This is what the learned judge said: To consider whether the 4th (MPAJ - added) defendant is liable for the acts and/or omissions committed post-collapse, it is necessary to disclose some events that transpired after the collapse of Block 1. After the Highland Towers calamity there were efforts by the 4th defendant to stabilize the hill slope on Arab Malaysian Land to ensure that no accident of the kind that caused the collapse of Block 1 would occur (*sic*) to Block 2 & 3. In January 1995, there was a briefing called by the 4th defendant which was attended by the 5th defendant and some others. They were told by the 4th defendant that a master drainage plan for the entire area to accommodate all landowners in the vicinity of Highland Towers would be prepared. It was announced that the consultant engaged by the 4th defendant, M/s EEC would be ready with the master drainage plan within 3 months from date of the briefing. It was obvious that any master drainage plan for the area must cater for the East Stream. It was substantially due to this East Stream not properly attended to that Block 1 collapsed. In fact this concern of the East Stream, from the chronology of events as set out, was highlighted by JPS from the very beginning of the development of the Highland Towers Project. Thus the task to incorporate the East Stream into the comprehensive master drainage plan falls upon the 4th defendant who is the body in charge of this watercourse. But after a period of 1 year there was no sight or news of this plan. After numerous reminders by the 5th defendant of such a plan, the 4th defendant on the 29.3.1996 held another briefing. This time, the 4th defendant informed the attendees that a new firm of consultant, by the name of K.N. Associates, was engaged to replace the previous. Again the 4th defendant gave an assurance that a comprehensive drainage plan of the area would be forth coming with this replacement of consultant. Sad to say, until the time when all evidence for this case was recorded by this Court, no comprehensive master drainage plan for the Highland Towers and its surrounding area was adduced by the 4th defendant. In fact this defendant offered no explanation as to why its promise was not met. These delays had affected the 5th defendant who insists that without a master drainage plan of the area approved and implemented by the 4th defendant, and the retaining walls on their land as well as those on Highland Towers Site are corrected or rectified, then very little can be done by anyone to secure the stability of the slope behind Block 2 & 3. Despite this pressing need and the obvious knowledge of the urgent requirement for a master drainage plan (for otherwise the 4th defendant would not have initiated steps to appoint consultants for this work soon after the collapse of Block 1) to secure the stability of the slope so as to ensure the safety of the 2 apartment blocks, the 4th defendant did nothing after the respective consultants were unable to meet their commitments. The plaintiffs and all other relevant parties are kept waiting because of the 4th defendant. This is certainly inexcusable and definitely a breach of the duty of care owed by the 4th defendant to the plaintiffs for not even fulfilling its obligation towards maintenance of the East Stream. For this I find the 4th defendant liable to the plaintiffs for negligence. Lastly, the plaintiffs have also alleged that the 4th defendant failed to take any action against the Tropic in clearing the

5th defendant's land. I shall be elaborating in detail the acts of Tropic when I analyze the position of the 5th defendant and Tropic. For the present moment, suffice me to say that I do not consider the 4th defendant liable to the plaintiffs in respect of the action committed by Tropic. As for the claim of the plaintiffs on the 4th defendant for failing to prevent vandalism and theft to Block 2 & 3, I allow it and my reasons will be intimated in the later part of this judgment.

Analysis - Nuisance

By the acts and/or omissions of the 4th defendant elaborated above, I also find that the 4th defendant is an unreasonable user of its land in failing to maintain the East Stream post collapse which is under its care. Its acts and or omissions are foreseeable to cause a damage to the plaintiffs - its neighbour. For this, I find the 4th defendant is also liable to the plaintiffs for nuisance.

[42] The sum total of it all is the failure of MPAJ to fulfill its promise to come up with and implement the master drainage plan. As found by the learned judge, there were efforts made by MPAJ to stabilize the hill slope on Arab Malaysian Land to ensure that no accident of the kind that caused the collapse of Block 1 would occur to Blocks 2 & 3. A consultant was engaged to prepare a master drainage plan. After a year and no such plan was produced, a new consultant was appointed to prepare the same. Yet it never materialized. It is for this reason that the learned Judge found MPAJ liable for negligence to the plaintiffs.

[43] It must be clarified that here I am only concerned with the failure or delay on the part of MPAJ to come up with and to implement a master drainage plan in an effort to stabilize the hill slope on the Arab Malaysian Land.

[44] The question is, does this failure or delay amount to actionable negligence against a public authority, the MPAJ, for pure economic loss?

[45] Let us now look at cases decided by Malaysian courts on pure economic loss. First the case of *Kerajaan Malaysia v. Chuah Fong Shiew* [1993] 2 MLJ 439. In that case, the plaintiff claimed damages resulting from the negligence of the defendants in superintending and supervising buildings constructed for the plaintiff by Sri Kinabalu Sdn. Bhd. All the defendants were employees or agents of the consultant firm, Sigoh Din Sdn. Bhd., which was responsible for superintending and supervising the construction. The plaintiff alleged that all the three defendants had failed to carry out their duties to superintend and supervise the construction, causing the plaintiff to suffer substantial losses in repairing the buildings in order to make them safe for occupation. The third defendant applied to strike out the plaintiff's action under [O. 18 r. 19 of the Rules of the High Court 1980](#) ("RHC 1980"). The senior assistant registrar struck out the action against the third defendant. The plaintiff appealed to the judge-in-chambers. The learned judge dismissed the appeal.

[46] Very interesting arguments were forwarded by learned counsel for both parties including the effect of [s. 3 of the Civil Law Act 1956](#), the issue of public policy and exception to *Hedley Byrue & Co. Ltd. & Partners Ltd.* [1964] 2 All ER 575.

[47] Unfortunately, the judgment proper is rather brief. On economic loss, the learned judge merely said: (3) Kerugian yang dialami oleh plaintiff adalah kerugian atau kehilangan ekonomi tulen (pure economic losses), dan defendan ketiga tidak boleh dikenakan

tanggung (liability) di bawah tort di atas kerugian yang dialami oleh plaintif dalam kes ini oleh kerana tiada siapapun yang cedera atau tiada harta kepunyaan orang lain rosak akibat daripada perbuatan atau salah laku oleh defendan ketiga. Keputusan yang dibuat oleh Dewan Pertuanan (House of Lords) dalam kes *Murphy v. Brentwood DC* dan lain-lain kes lagi yang membuat keputusan yang sama, adalah sangat munasabah, berpatutan dan sepatutnya diterima sehingga bila-bila masapun. Mahkamah di negara ini menerima keputusan dan pendapat itu dan tiada kemungkinan membuat pendapat yang berlainan, walaupun apa yang dikatakan oleh peguam pihak plaintif bahawa keadaan di Malaysia berlainan dengan keadaan di United Kingdom. Hakim dalam kamar ini juga berpendapat bahawa adalah tidak berpatutan dan tidak munasabah jika pekerja-pekerja, termasuk juga pekerja-pekerja mahir yang bekerja di bawah seseorang atau syarikat pemborong binaan, bertanggung (liable) kepada tuan ampunya bangunan yang berkenaan di atas kecuaiannya yang membawa kepada ketidaksempurnaan bangunan yang berkenaan asalkan ianya tidak menyebabkan kecederaan kepada diri seseorang atau harta benda orang lain.

[48] Two years later, as a High Court Judge, I had occasion to decide the case of [Nepline Sdn. Bhd. v. Jones Lang Wootton \[1995\] 1 CLJ 865](#). In that case, a firm of registered real estate agents and chartered valuer was sued for damages for failure to disclose the fact to the appellant (tenant) that the premises was subject to "a foreclosure proceeding then pending in court". The court made an order for sale of the said premises and the appellant demanded the return of the deposit. The respondent contended that it was a case of mere omission and not a positive statement made by the respondent and that the claim was for pure economic loss. It is in that case that I took the approach mentioned earlier in this judgment. I then tried to determine the common law of England on the subject as on 7 April 1956, and then considered the provision to [s. 3\(1\) of the Civil Law Act 1956](#). This is what I had said then: I therefore ask the question whether local circumstances would require the respondent, an estate agent, a professional who advertised premises for rent, who knew that the premises was a subject matter of a pending foreclosure action, to owe a duty of care to the appellant, who answered to the advertisement and subsequently entered into a tenancy agreement for a period of two years, to disclose the fact that the premises was subject to a pending foreclosure action?

I do not have the slightest doubt that the answer should be in the affirmative.

This is not a case of a friend telling another friend that there is a house for rent. This is a case of a professional firm, holding out to be a professional with expertise in its field, earning its income as such professional. They know that people like the appellant would act on their advice. Indeed, I have no doubt that they would hold out to be experts in the field and are reliable. It would be a sad day if the law of this country recognises that such a firm, in that kind of relationship, owes no duty of care to its client yet may charge fees for their expert services.

In the circumstances, I think I am fully justified in taking the view that the defendant in this case owed a duty to the plaintiff to disclose that there was a foreclosure proceeding pending. I think the provision of [s. 3 of the Civil Law Act 1956](#), especially the proviso thereto, allows me to do so.

Learned Counsel for the respondent, referring to numerous texts and authorities, stressed the need for some control mechanism narrower than the concept of reasonable foreseeability to limit a person's liability for pure economic loss. He argued, correctly I must say, that subsequent to Anns's case there are a number of cases, including Caparo which steered clear

of it and were termed as the "retreat from *Anns*'s cases."

First, I must say that I agree with him that the claim in the present case (for the refund of the deposit paid) is for pure economic loss. It is not for an injury to person or property.

Secondly, generally speaking, I also agree that there is a need to limit recoverability of damages for pure economic loss.

The reasons for judicial reluctance to impose liability in such cases are conveniently listed by R.P. Balkin and J.L.R. Davis in the *Law of Torts* from pp. 421 to 424. These are:

- (i) the fear of indeterminate liability;
- (ii) disproportion between defendant's blameworthiness and the extent of his liability;
- (iii) interrelationship between liability in tort and contract;
- (iv) the need for certainty; and
- (v) the effect of insurance.

Considering these factors, it is a wise policy to limit liability in pure economic loss cases, generally speaking.

However, I am of the view that such fears do not arise in this case. Here the amount claimed is definite. It is a definite amount which had been paid by the appellant. It is that amount only which the appellant now seeks to recover. So, even using the two tests which learned counsel for the respondent urged me to apply, I think, on the facts of this case, the respondent is liable.

[49] My record shows that appeal to the Court of Appeal (Court of Appeal Civil Appeal No. 4-90-95) was dismissed on 6 January 1997. Unfortunately there is no written judgment of the Court of Appeal.

[50] In the same year [*Teh Khem On & Anor v. Yeoh & Wu Development Sdn. Bhd. & Ors.* \[1996\] 2 CLJ 1105](#) was decided by Peh Swee Chin J (as he then was). In that case, the plaintiffs claimed against the first defendant ("the builder") in contract for defective works in the construction of the house purchased by the plaintiffs. They also claimed against the second defendant ("the architect") and the third defendant ("the engineer") for damages in negligence. The learned judge found the builder liable for breach of contract but dismissed the claim against the architect and the engineer with whom the plaintiffs had no contractual relationship, the claim being for pure economic loss. The learned judge discussed at length the development in England (and mentioning also the attitude of the courts in Australia and New Zealand) up to *Murphy v. Brentwood District Council* [1990] 2 All ER 908.

[51] In [*Pilba Trading & Agency v. South East Asia Insurance Bhd & Anor* \[1999\] 8 CLJ 403](#), the appellant ("the insured") sent a damaged car for repair at a workshop appointed by the respondent ("the insurer"). There was a long delay at the workshop. As a result, the insured incurred expenses in hiring an alternative vehicle for which the insured claimed in tort of negligence. Muhammad Kamil J dismissed the claim on the ground, inter alia, that "the

alleged loss was pure economic loss. It was a financial or pecuniary loss and did not involve any physical damage or danger of physical damage to the property of the appellant. It was quite distinct from cases of economic loss involving physical damage. The established legal position in regard to this is to preclude such claims even where foreseeable. The courts have always been reluctant to extend the law of negligence to claim of foreseeable economic loss."

[52] The learned judge also reviewed judgments of the courts in England right up to *Caparo Industries plc v. Dickman & Ors.* [1990] 1 All ER 568

[53] In 1996, James Foong J (as he then was) decided the case of [Dr. Abdul Hamid Abdul Rashid & Anor v. Jurusan Malaysia Consultants \(sued as a firm\) & Ors.](#) [1999] 8 CLJ 131. In that case, the plaintiff had hired the first defendant, an engineering firm, to construct a double storey house. The plans were signed by the fourth defendant, the proprietor of the first defendant who was a registered engineer. The building plans were approved by the second defendant, the local council. About three and a half years after the handing over of the house to the plaintiff the house began to collapse due to landslide and the plaintiff had to evacuate the house. The plaintiffs claims against the first, fourth and fifth defendants were founded on contract and tort. Their claim against the second defendant (the local council) was based on negligence and breach of statutory duties. The cause of action against the third defendant was based on negligence, nuisance and the rule of *Rylands v. Flether*.

[54] The court allowed the plaintiffs' claim against the first, third and fourth defendants but dismissed the claim against the second and fifth defendants. The learned judge, *inter alia*, held: (3) A claim for pure economic loss can be entertained in an action for negligence. Non-allowance of such claim would leave the entire group of subsequent purchasers in this country without relief against errant builders, architects, engineers and related personnel who are found to have erred. If there is any fear that this approach may encumber the local authorities to pay out substantial claims due to their negligence in granting approvals or inspecting building works, there is [s 95 of the Street, Drainage and Building Act 1974](#) which prohibits such authorities to be sued.

[55] The learned judge, in his judgment, reviewed judgments of the courts in England, Australia, New Zealand, Canada and Singapore besides the judgment of Peh Swee Chin J mentioned earlier. The learned judge distinguished *Murphy (supra)*, followed the Canadian case of *Winnipeg Condominium Corp. No. 36 v. Bird Construction Co. Ltd. & Ors* [1995] 121 DLR (4th edn.) 193, the Australian case *Sutherland Shire Council v. Heyman & Anor* [1985] 157 CLR 424; 60 ALR 1, the Singapore case of *RSP Architects Planners & Engineers v. Ocean Front Pte Ltd. & Anor Appeal* [1996] 1 SLR 113, but did not follow Peh Swee Chin's judgment in *Teh Khew On & Anor (supra)*.

[56] However, this case (*Dr. Abdul Hamid Abdul Rashid, supra*) was overruled by the Court of Appeal in the instant case.

[57] So, we see that, so far, there had only been a few judgments of Malaysian courts and all are at High Court level. In three of the cases, *Kerajaan Malaysia (supra)*, *Teh Khew On (supra)* and *Pilba Trading (supra)*, the learned judges appear to have dismissed the claims for pure economic loss because there were no injuries to person or property. Of the two that allowed the claim, I had in *Nepline Sdn. Bhd. (supra)* allowed it after resorting to the proviso to [s. 3\(1\) of the Civil Law Act 1959](#), following and indeed extended *Hedley Byrue (supra)* on the basis that there was fiduciary relationship between the parties. James Foong J, in *Dr.*

Abdul Hamid Abdul Rashid (supra), appears to base his decision to allow economic loss on his concern that otherwise "the entire group of subsequent purchases in this country (would be left) without relief against errant builders, architects, engineers and related personnel who are found to have erred." However, this case was overruled by the Court of Appeal in the instant case.

[58] So, it appears that until today *Nepline Sdn. Bhd. (supra)* is the only case in which the Court of Appeal has confirmed the judgment of the High Court in a claim for economic loss, though without a written judgment.

[59] Now, reflecting on my own judgment in *Nepline Sdn. Bhd. (supra)* delivered ten years ago, I am afraid I am still of the same view regarding the approach that the court has to take in view of [s. 3\(1\) of the Civil Law Act 1956](#), the effect of the provision and the proviso thereto and the decision to accept claims for pure economic loss in negligence in limited cases, considering the local circumstances. However, I shall not venture to say where the line should be drawn. It may be said that this will lead to uncertainty in the law. The answer to that is that this whole area of common law itself is fraught with uncertainty.

[60] I shall now return to the issue under discussion in the instant appeal: whether MPAJ is liable for the economic loss suffered by the plaintiffs for failure (so far) to do what it had promised to do to alleviate the loss suffered by the respondents after the collapse of Block 1 and evacuation of Blocks 2 and 3. We are actually dealing with the failure on the part of MPAJ to promptly and effectively carry out the drainage master plan that it promised to do. And, we are dealing with a local authority. I am confining my judgment to that factual situation alone.

[61] Even the Privy Council, sitting in England hearing an appeal from New Zealand had in mind the "local policy considerations" in applying the common law of England. This can be seen in *Invercargill City Council v. Hamlin* [1996] 1 All ER 756, a case concerning the duty of care of the local authority in New Zealand over the negligence of its Inspector in approving defective foundations causing damage to the house in question. The headnote summarises the views of the Privy Council as follows:

Held - The appeal would be dismissed for the following reasons:

(1) The New Zealand Court of Appeal was entitled to develop the common law of New Zealand according to local policy considerations in areas of the common law which were developing, not settled. The law of negligence in relation to a local authority's liability for the negligence of a building inspector was particularly unsuited to a single solution applicable in all common law jurisdictions regardless of differing local circumstances. The perception in New Zealand was that community standards and expectations demanded the imposition of a duty of care on local authorities and builders alike to ensure compliance with local byelaws and the Court of Appeal had, in common with other common law jurisdictions, built up a line of authority based on the linked concepts of control by the local authority of building works through the enforcement of its byelaws and reliance on that control by purchasers. The present case had been decided in accordance with that line of authority and therefore on the duty of care issue the Board would indorse in relation to New Zealand the approach taken by the New Zealand courts, notwithstanding House of Lords authority to the contrary (see p 764 h to p 765 a, p 766 j to p 767 c f g, p 768 c and p 773 c, post); dictum of Lord Diplock in *Cassell & Co. Ltd. v. Broome* [1972] 1 All ER 801 at 871 applied; *Bowen v. Paramount*

Builders (Hamilton) Ltd [1977] 1 NZLR 394 and *Kamloops (City) v. Nielsen* [1984] 10 DLR (4th) 641 followed; *D & F Estates Ltd v. Church Comrs for England* [1988] 2 All ER 992 and *Murphy v. Brentwood DC* [1990] 2 All ER 908 not followed.

[62] In that case, the court in New Zealand went even further than the courts in England on the issue of duty of care of a local council. Yet, the Privy Council declined to interfere considering the "local policy consideration" and "differing local circumstances" in New Zealand.

[63] We will also remember the views expressed by the Privy Council in relation to Malaysia quoted earlier.

[64] So, it is in this light that I shall consider the issue now under discussion.

[65] I shall not enter into the discussion whether the "categorization approach" or the "open-ended approach" should be accepted by the courts in this country. That has been sufficiently dealt with by the learned Chief Judge (Sabah & Sarawak). After all, as correctly stated by learned Chief Judge (Sabah & Sarawak), the two approaches do not exist in strict water tight compartments. It is possible for them to overlap.

[66] Even if we accept that the question is not the nature of the damage itself, whether physical or pecuniary, but whether the scope of the duty of care in the circumstances of the case is such as to embrace damage of the kind suffered by the plaintiffs, there is the additional factor to be considered ie, whether it is fair, just and reasonable to impose such a duty. This is where public policy and local circumstances come into consideration: In *Caparo Industries plc v. Dickman* [1990] 1 All ER 568 (HL) at p. 573 to 574, Lord Bridge said: What emerges is that, in addition to the foreseeability of damage, necessary ingredients in any situation giving rise to a duty of care are that there should exist between the party owing the duty and the party to whom it is owed a relationship characterised by the law as one of 'proximity' or 'neighbourhood' and that the situation should be one *in which the council considers it fair, just and reasonable that the law should impose a duty of a given scope on the party for the benefit of the other.* (emphasis added).

[67] The question then is, considering the public policy and local circumstances, is it fair, just and reasonable to impose a liability on MPAJ, a local authority, for pure economic loss to the plaintiffs for its failure (so far) to come up with and implement the promised drainage master plan or to stabilize the hill slope on Arab Malaysian Land to ensure that no accident of the kind that caused the collapse of Block 1 would occur to Blocks 2 and 3?

[68] A local council is established with a host of duties to perform, from providing and maintaining recreational areas and collecting garbage to providing public transport, homes for the squatters, temporary homes in case of disasters, natural or otherwise, and so on. Indeed, the list is endless. The expectations of residents are even more. These are public duties to all residents or ratepayers within the council's geographical limit. To finance all their activities, local authorities depend mainly on assessment rates and fees for licences. In a democracy as in Malaysia and the kind of attitude of the people, we know too well how difficult it is to increase the rates or the fees even by a few percent. With limited resources and manpower, even if it tries its best (and generally speaking, I say they do) to provide the infrastructure and services, it will not satisfy everybody. People's demands far outweigh their contributions. When services are provided or as a result of infrastructural improvements, the value of their

properties goes up, as usually happen, it is taken for granted, as their rights, their good fortune or business acumen. Then there is the attitude of the public from littering and vandalism to resorting to irresponsible means in order to maximise profits, as we see in the facts of this case as narrated by the learned High Court Judge.

[69] With limited resources and manpower local councils would have to have their priorities. In my view, the provision of basic necessities for the general public has priority over compensation for pure economic loss of some individuals who are clearly better off than the majority of the residents in the local council area. Indeed, the large sum required to pay for the economic loss, even if a local council has the means to pay, will certainly deplete whatever resources a local council has for the provision of basic services and infrastructure. Projects will stall. More claims for economic loss will follow. There may be situations where a local council, which may only be minimally negligent, may be held to be a joint tortfeasor with other tortfeasors, which may include irresponsible developers, contractors and professionals. There is no way to execute the judgments against them. Out of necessity or for convenience, the judgment for the full amount may be enforced against the local council. The local council may go bust. Even if it does not, is it fair, just and reasonable that the taxpayers' money be utilised to pay for the "debts" of such people? In my view, the answer is "No".

[70] I do not think that we can compare the "local circumstances" in New Zealand, for example, with the "local circumstances" in Malaysia now, be it in terms of development (many Malaysian, though it may not in the MPAJ locality, are still without water supply and electricity), civic mindedness of, and compliance with laws and bylaws by the general public or, as we see in this case, even by developers, and others. I do not think that, in the present circumstances, on the facts and in the circumstances of this case, it is fair, just and reasonable to impose such a burden on MPAJ or other local councils in this country in similar situations.

[71] For the same reasons too, the claim for loss due to vandalism and theft by the respondents which was allowed by the learned trial judge should not be allowed. Vandalism follows every disaster, natural or otherwise, in undeveloped, developing or most developed countries. Recent event shows that even the most powerful military and the best equipped police force in the richest and most developed country in the world were also unable to prevent it. Even we ourselves cannot ensure that our own houses will not be broken into. I do not think it is fair, just and reasonable to hold MPAJ liable for it.

[72] The discussion in this judgment covers nuisance as well.

[73] So, while I agree with the answers given by the learned Chief Judge (Sabah & Sarawak) on other questions, on pure economic loss, my answer to question No. 3 is as follows:

[74] While economic loss under limited situations may be allowed, Malaysian courts will have to consider the effects of [s. 3 of the Civil Law Act 1956](#) and, considering the "public policy" and the "local circumstances", whether it is fair, just and reasonable to allow it on the facts and in the circumstances of the case.

[75] I would therefore allow MPAJ's appeal with costs here and in the courts below and order that the deposit be refunded. Regarding the cross-appeal by the respondents, even though, as a matter of law, I agree with the learned Chief Judge (Sabah & Sarawak) who disagrees with the Court of Appeal on the question of the dichotomy between public law and private law, in the light of my judgment on the pure economic loss issue, I would dismiss it. However, on

the cross-appeal, I would order that each party pays its own costs and that the deposit be refunded to the respondents.