

IMPLICATIONS OF THE HIGHLAND TOWERS JUDGMENT IN RELATION TO THE DUTIES OF BUILDING PROFESSIONALS

Introduction

This landmark case arose out of the 1993 tragedy of the collapse of a tower block in the Highland Towers development in Ampang, just outside the Malaysian capital of Kuala Lumpur leading to loss of life and the loss of use of the Blocks that remained standing.

The event gained widespread publicity at the time, in particular as it was captured by a dramatic sequence of photographs taken by an American visitor to the Towers, and the frantic rescue operations over the next ten days.

The case has several important implications for Building Professionals, in Malaysia and presumably elsewhere, which will be the focus of this discussion, and also led to interesting developments and clarifications in the law of tort.

BRIEF FACTS

Highland Towers consisted of three blocks 12 storey high apartments named simply as Block 1, 2 and 3 respectively. It was constructed sometime between 1975 and 1978.

Directly behind the 3 blocks was a steep hill with a stream flowing west (“the East Stream”), which would have passed harmlessly to the south of the Highland Towers site if it was allowed to follow its natural course.

However, in the course of the application for approval for the Project, the Developer was required by the Local Authority to find a suitable outlet for the East Stream.

This was eventually proposed to be carried out by diverting the East Stream behind the 3 Towers by a grid of roadside drains servicing bungalows proposed to be built on the terraced hillslope behind Highland Towers, and this scheme was approved by the Local Authority.

This approved drainage scheme on the hillslope behind Highland Towers was never completed, as the proposed bungalows were never built.

Some time in the course of the Highland Towers development (as found by the Court) the East Stream was nevertheless diverted by means of a pipe culvert to flow northwards across the hillslope directly behind Highland Towers.

On Saturday, the 11.12.1993, at about 1.30p.m., after 10 days of continuous rainfall, Block 1 collapsed.

The 1st Defendant was the developer of Highland Towers.

The 2nd Defendant, an architectural draughtsman, was the purported architect of Highland Towers.

The 3rd Defendant, was the engineer for Highland Towers.

The 4th Defendant is and was the local authority at the material time that had jurisdiction over the Highland Towers Site, the hillslope directly at the rear of Highland Towers ("Arab Malaysian Land") and the surrounding areas.

The 5th Defendant is and was, at the material time, the registered owner of the Arab Malaysian Land.

The 7th Defendant is the registered owner of a large piece of land (Metrolux Land), which is situated on top of a ridge, commonly known as Bukit Antarabangsa. This land is located just above the Arab Malaysian Land and at the material time was under development.

The 8th Defendant is and, at all material times, the provider of management services to the 7th Defendant to develop the Metrolux Land into a housing estate.

The 9th and 10th Defendants were State Government entities.

Cause

The landslide that brought down Block 1 of Highland Towers was found by the Court to have been a rotational retrogressive slide emanating from a high retaining wall behind the 2nd tier of a 3-tiered car park serving the 3 blocks of the Highland Towers.

Water was found to be one of the principal factors that caused this high wall to fail. This water emanated from poor and non-maintained drainage, as well as a leaking pipe culvert carrying the waters of the diverted East Stream.

LIABILITY

The following were the findings on liability by the Court:

The First Defendant was liable in negligence for

- (i) not engaging a qualified architect,
 - (ii) constructing insufficient and inadequate terraces, retaining walls and drains on the hillslope which could reasonably have been foreseen to have caused the collapse
 - (iii) diverting the East Stream from its natural course and failing to ensure the pipe culvert diversion was adequate,
- and in nuisance for not maintaining drains and retaining walls.

The Second Defendant (Architectural Draughtsman) was liable in negligence for

- (i) not having ensured adequate drainage and retaining walls were built on the hillslope adjacent to the Highland Towers site, which he foresaw or ought to have foreseen would pose a danger to the buildings he was in charge of,
- (ii) in not complying with the requirements of the authorities in respect of drainage, in colluding with the First Defendant and Third Defendant (the Engineer) to obtain CF without fulfilling the conditions imposed by the Fourth Defendant (the Local Authority), in so doing not complying with his duties as Architect, and
- (iii) in not investigating the terracing of the hillslopes and construction of retaining walls even though he was aware they would affect the buildings he was in charge of

and also in nuisance as he was an unreasonable user of land.

The Third Defendant (Engineer) was liable in negligence for

- (i) not having taken into account the hill or slope behind the Towers,
 - (ii) not having designed and constructed a foundation to accommodate the lateral loads of a landslide or alternatively to have ensured that the adjacent hillslope was stable,
 - (iii) for not having implemented that approved drainage scheme,
 - (iv) for colluding with the First and Second Defendants to obtain CF without fulfilling the conditions imposed by the Fourth Defendant
- and also in nuisance as he was an unreasonable user of land.

The Fourth Defendant (Local Authority) although negligent in respect of its duties associated with building. i.e. in respect of approval of building plans, to ensure implementation of the approved drainage system during construction, and in the

issue of the CF, was nonetheless conferred immunity by reason of s95(2) of the Street, Drainage and Building Act by the High Court. This was subsequently reversed by the Court of Appeal, in that no immunity attached where the danger was created by the Local Authority.

(The High Court's finding that the Fourth Defendant was however not immune in respect of its negligence in carrying out its post building functions of maintaining the East Stream which also attracted liability in nuisance was reversed by the Court of Appeal which found no such duty, stating the remedy for this lay in the realm of public law.)

The Fifth Defendant (Arab-Malaysian Finance Bhd) was liable in negligence in failing to maintain the drains on its land, and in taking measures to restore stability on its land after the collapse.

The Seventh Defendant (Metrolux Properties) and its Project Manager, the Eighth Defendant, who were liable in negligence and nuisance for preventing water from flowing downhill (into their site) and instead directing water into the East Stream, when they knew or ought to have known that this would increase the volume of water and inject silt, especially where there was extensive clearing on their land, into the East Stream where it would be deposited, which would in turn (as proved) cause or contribute to the failure of the drainage system and collapse of Block 1.

The Ninth and Tenth Defendants (essentially the State Government) were not found liable due to a technical issue in respect of the particular party sued.

The Sixth Defendant (an abortive purchaser of the Arab-Malaysian Land who carried out site clearing works) was not found liable on the evidence.

IMPACT ON DUTIES OF BUILDING PROFESSIONALS

A. The Architect

- (i) *No Defence That Engagement Was A Limited One, At The Very Least Must Ensure The Other Aspects Of The Works By Others Was Done Competently*

The Architect's defence that he was only retained to design and supervise the 3 apartment blocks, and denied that his scope extended to the drainage, earthworks and retaining walls.

This was rejected by the Court.

The Court held that the Architect must take into account the condition of the vicinity of the land upon which the building is built, as well as the land itself, must be evaluated when assessing the safety of the building.

Also, as a matter of fact the Court found that the Architect was concerned with the vicinity as well as the building itself when he submitted the layout plan to the authorities as it included terracing and drainage of the hillslope behind Highland Towers. He must therefore ensure that this work, although carried out by others, is carried out in a competent and workmanlike manner.

(ii) *No Difference In Standard Of Care For Unqualified Practitioner*

Even though the Architect was in reality only an Architectural draughtsman, the Court measured his conduct against the standard of a reasonably competent Architect, holding that if a man is unqualified but holds himself out to be possessing a skill, he would be judged by the standard of a reasonably competent qualified person.

(i) *No Excuse To Say That Employer Forced Non-Compliance With Laws*

Finally, the Court appears to have emphatically rejected the excuse of the Architect that he could not stop his employer from doing anything illegal (in the context of colluding with the engineer in obtaining CFs for the three apartment blocks without fulfilling the conditions imposed by the Local Authority and not ensuring the terracing and retaining wall were properly designed, provided for and sufficient to withstand slope failure) even though he was aware it would affect the buildings he was in charge of – the Court has clearly stated that when the law is broken, the Architect must report to the authorities – the architect must ensure that the law is followed even at the risk of being discharged by his employer.

B. The Engineer

The Engineer's defence that he was only retained to design and supervise the structural aspects of the 3 apartment blocks, two retaining walls within the Highland Towers compound and submit plans for the drainage and two and denied that his scope extended to the drainage, earthworks.

This was rejected by the Court.

The Court held that the Engineer must take into account the condition of the vicinity of the land upon which the building is built, as well as the land itself, must be evaluated when assessing the safety of the building.

He should have ensured the stability of the hillslope behind Highland Towers. His duty was not discharged by a mere belief that the terracing of the hillslopes and the retaining walls built on them were carried out by an engineer or other consultant.

He ought to have inquired as to

- (i) whether this professional was qualified, and
- (ii) whether what he was doing affected the safety of the Tower Blocks.

[Other Aspects of the Engineer's negligence – gross violation of his duty of care to the purchasers in the issue of a notification to the Authorities that the approved drainage was built when only 10% was built]

SUMMARY

- (i) Building Professionals require to consider the vicinity of the site as well as the site itself in assessing safety-particularly in regard to adjacent hillslopes.
- (ii) Building Professionals cannot hide behind limited scopes of engagement-these are a matter between themselves and their employer, but the scope of their duty owed to persons likely to be affected by their services is not so limited.
- (iii) Building Professionals require to ensure that others engaged to do work likely to affect the structures they have been engaged to design/supervise are competent and will carry out their work in a workmanlike manner.
- (iv) If Building Professionals hold themselves out to have expertise in a particular area when they are unqualified, their conduct will be measured against the ordinarily competent qualified practitioner of such expertise.
- (v) Building Professionals must ensure the law is followed, reporting to the authorities if necessary if their clients break the law, even at the risk of being discharged by their client.

IMPACT ON TORT LAW

Negligence

In the High Court, the decision adopted the approach taken by other Commonwealth jurisdictions in allowing the recovery of “pure economic loss”, especially where sufficient proximity can be demonstrated between the negligent act and the loss, in preference to the strict English position on this point.

The Court of Appeal reversed this part of the decision, holding that this was a policy matter for the legislature or the Federal Court.

However, the Court of Appeal, whilst declining to deviate from the strict rules precluding recovery of pure economic loss in tort, held (relying on a passage of the judgment of Lord Oliver in *Murphy v Brentwood*[1991] 1 AC 398 that

- (i) it was not the nature of the damage itself, whether financial or physical which was determinative of remoteness, and
- (ii) the critical question was whether the scope of the duty of care in the circumstances of the case was such as to embrace damage of the kind that the Plaintiff claimed to have sustained.

It then proceeded to hold that the facts as found by the trial judge was sufficient to show that economic loss by the Plaintiffs was a type of loss within the reasonable foresight of the defendants in the event a landslide occurred, and was able to find that it was recoverable on the particular facts.

What then is the impact of this decision on the question of recovery of pure economic loss?

Although the Court of Appeal stated it was not establishing any new principles of law, the decision seemed to be consistent with the current judicial thinking in this fast developing area of law as it

- (i) did not adopt an exclusionary approach to the recovery of economic loss
- (ii) was primarily based on the particular facts of the case
- (iii) did not appear to be based on any set of rules for recovery of this kind of loss, and
- (iv) alluded to factors which are treated in other cases under the label of proximity

see for example: *RSP Architects Planners & Architects v Ocean Front*[1996] 1SLR 113 (Court of Appeal Singapore)

RSP Architects Planners & Architects v Management Corporation[1999] 2SLR 449 (Court of Appeal Singapore)

Perre v Apand[1999] 198 CLR 180(High Court of Australia)

Nuisance

The Highland Towers decision confirms that

- (i) pure economic loss in the form of a diminution in the value of land is recoverable in nuisance
- (ii) the damage recoverable in nuisance must be of the type that the Defendant could reasonably foresee, adopting a principle from an English case, *Cambridge Water Co. Ltd v Eastern Countries Leather plc* [1994] 1All ER 53 at 70.

Conclusion

In conclusion, the Highland Towers decision clarifies the extent and nature of the professional duties and responsibilities of Building Professionals demanded by the law, and contains important developments in tort law in Malaysia which mirror that in other jurisdictions to a large extent

It remains to be seen if the Federal Court in Malaysia will endorse these principles.

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