Kris Angsana Sdn Bhd v Eu Sim Chuan @ Eu Sam Yan & Anor [2007] 5 MLJ 13

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COURT OF APPEAL (PUTRAJAYA)

MOKHTAR SIDIN, ZULKEFLI AND SURIYADI JJCA

CIVIL APPEAL NO W–02–48 OF 2006

12 June 2007

Case Summary

Tort — Negligence — Adjoining properties — Construction works caused damage to adjoining property — Whether Acton v Blundell should be applied to absolve defendant from liability for natural and ordinary use of its own land

Tort — Negligence — Duty of care — Construction works caused damage to adjoining property — Whether Acton v Blundell should be applied to absolve defendant from liability for natural and ordinary use of its own land

In or around early March 1997 the defendant ('the appellant'), its staff and or agent commenced construction works extensively on a construction project site. Next door was the plaintiffs' ('the respondents') house. At the relevant time the house was about 30 years old ('the property'), with the first respondent and her family residing in it. She was the wife of the second respondent. Due to the construction work, the respondents' house suffered structural damage, resulting in cracks appearing on the floor, walls, columns and beams of the property. The respondents thereafter filed a negligence suit against the appellant. The learned High Court judge who decided in favour of the respondent, assessed and awarded the sum of RM6,306,242.43 as damages. Being dissatisfied with that decision the appellant filed the present appeal.

The appellant's submission were that; (1) the second respondent had no locus standi as he was not the registered owner nor did he posses the exclusive possession or possessory title to the property; (2) the appellant (as the owner of the project) was under no liability to the respondents, based on the doctrine of *Rylands v Fletcher* [1868] 19 LT 220; LR 3 HL 330 as it had only used the land for the natural, ordinary and normal purpose of building on it; and; (3) the position of the English common law in relation to piling and excavation works on one's own land was enunciated in *Acton v Blundell & Anor* [1843] 152 ER 1223, and as it is part of Malaysian common law, it absolves the appellants from liability for a natural and ordinary use of its own land.

Held, dismissing the appeal with costs:

(1) The second respondent had beneficial interest over the property. He had lived in the property with his wife (the first respondent), two daughters, his son, his daughter-in-law, a grandchild and four servants for a period of no less than 22 years until the property was damaged by the appellant (see para 10). [*14]

(2) The house was badly damaged making it uninhabitable and hence justifying the respondents and his family moving out of the house. There was thus absolutely no error on this finding of fact as regards the extent of the damages by the presiding learned judge (see para 16).

(3) The construction works carried out by the appellant had been the direct cause of the damage on the property. Not only was the construction the cause of the damage to the property but the appellant never took any form of precautionary or preventive steps before commencing the activities (see para 22).

(4) The respondents were the appellant's physical neighbour, and certainly would have been affected by its actions. Further, from the evidence, the damage on the property as a consequence of the acts, in this case, construction activities, without any preventive action undertaken, from a reasonable man's perspective not only was foreseeable but likely to occur. As per the set of facts before the court, only an unreasonable neighbour would care to state that such serious injury to the property was unforeseeable and that it was unlikely to occur (see para 25).

(5) To allow the incoming new house owner or contractor to take away the ground support of adjacent buildings, justifying such acts on natural user of his land, and thereafter blaming gravity and soil subsidence (or dewatering) as an operation of the laws of nature, was not in sync with reality. To deny the rights of neighbours, and allow a wrongdoer to wreak havoc and heartache, would militate against the very fabric of modern life and collective ideology of a multi-faceted society. In a nutshell the case of *Acton v Blundell* would be out of keeping with the current existing law of torts. As it stands, if no reasonable steps were undertaken by the wrongdoer to ensure that no damage would befall the neighbours, and did indeed suffer them, an actionable tort of negligence may await him (see para 35); *Acton v Blundell & Anor* [1843] 152 ER 1223 and *Singapore Finance Ltd v Lim Kah Ngam (Singapore) (Pte) Ltd & Eugene HL Chan Associates (Third Party)* [1984] 2 MLJ 202 not followed.

(6) Having perused the evidence we were satisfied that the respondents had proven their case on a balance of probability. They had established that the appellant owed them a duty of care but had failed to perform it, and damages having ensued resulting from that failure. It must be emphasized that in as much as a land owner is entitled to assert his rights over his land, that right may be interfered with if it necessitates interference. Therefore the court had found no error having been committed by the learned judge on the issue of liability (see para 38).

Pada atau sekitar awal Mac 1997, defendan ('perayu'), kakitangan dan/atau ejennya telah memulakan kerja-kerja yang meluas di lapangan projek pembinaan. Bersebelahan adalah rumah plaintif ('responden'). Pada masa yang releven rumah tersebut adalah berusia kira-kira 30 tahun ('harta tanah'), dengan responden pertama dan keluarganya yang tinggal di situ. Beliau adalah isteri kepada responden kedua. Disebabkan kerja pembinaan, rumah responden mengalami kerosakan struktur yang menyebabkan rekahan muncul di lantai, dinding, tiang dan rasuk harta tanah [*15]
tersebut. Hakim mahkamah tinggi yang bijaksana yang memutuskan memihak kepada responden juga menaksirkan kerugian dan telah mengawardkan gantirugi yang sesuai sebanyak RM6,306,242.43. Tidak puas hati dengan keputusan tersebut perayu memfailkan rayuan ini.

Hujahan perayu adalah; (1) responden kedua tidak mempunyai locus standi kerana beliau bukannya pemilik berdaftar atau memiliki milikan eksklusif atau pemilikan hakmilik atas harta tanah; (2) perayu (sebagai pemilik projek) adalah tidak berliabiliti kepada responden berdasarkan kepada doktrin *Rylands v Fletcher* [1868] 19 LT 220; LR 3 HL 330 yang mana ianya hanya menggunakan tanah untuk semula jadi, kebiasaan dan normal bagi pembinaan atasnya; dan (3) kedudukan undang-undang common Inggeris berkenaan dengan kerja-kerja memantakkan tiang dan penggalian ke atas satu-satu tanah persendirian adalah dijelaskan di dalam *Acton v Blundell & Anor* [1843] 152 ER 1223 dan adalah sebahagian daripada undang-undang common Malaysia, yang mana melepaskan perayu daripada liabiliti untuk kegunaan semulajadi dan kebiasaan tanah miliknya.

Diputuskan, menolak rayuan dengan kos:

(1) Responden kedua mempunyai kepentingan benefisial ke atas harta tanah. Beliau telah tinggal di harta tanah tersebut dengan isterinya (responden pertama), dua orang anak perempuan, anak lelakinya, menantu perempuannya, cucu dan empat orang gaji untuk tempoh tidak kurang 22 tahun sehinggalah harta tanah tersebut telah dirosakkan oleh perayu (lihat perenggan 10).

(2) Rumah tersebut telah rosak teruk menyebabkannya tidak boleh dihuni dan oleh itu adalah berasas responden-responden dan keluarganya pindah keluar daripada rumah. Adalah tiada kesilapan langsung

atas dapatan fakta berkenaan dengan takat kerosakan oleh hakim bijaksana yang bersidang (lihat perenggan 16).

(3) Kerja-kerja pembinaan yang dilakukan oleh perayu adalah penyebab langsung kepada kerosakan yang berlaku pada harta tanah tersebut. Bukan hanya pembinaan yang menyebabkan kerosakan harta tanah tersebut tetapi perayu langsung tidak mengambil langkah-langkah berjaga-jaga atau pencegahan sebelum memulakan aktiviti-aktiviti (lihat perenggan 22).

(4) Responden adalah jiran fizikal perayu, dan sudah tentu akan memberikan kesan atas tindakannya. Selanjutnya, daripada keterangan, kerosakan yang berlaku ke atas harta tanah adalah disebabkan tindakan-tindakan tersebut, dalam kes ini, aktiviti-aktiviti pembinaan, tanpa apa-apa tindakan pencegahan diambil, daripada perspektif sesesorang yang munasabah bukan hanya dapat diramalkan tetapi berkemungkinan untuk berlaku. Berdasarkan set fakta di hadapan mahkamah, hanya jiran yang tidak munasabah akan menyatakan bahawa kecederaan serius harta tanah tersebut tidak dapat diramalkan dan ianya tidak mungkin akan berlaku (lihat perenggan 25).

(5) Untuk membenarkan kemasukan pemilik rumah baru atau kontraktor mengambil pergi sokongan tanak bangunan bersebelahan, menjustifikasikan tindakan tersebut atas penggunaan kebiasaan tanahnya, dan kemudiannya [*16]

menyalahkan graviti dan penenggelaman tanah (atau penyahairan) sebagai proses perundangan semula jadi, adalah tidak sama dengan realiti. Untuk menafikan hak jiran, dan membenarkan pesalah laku untuk menyebabkan kemusnahan dan seksaan jiwa, akan menghalang terhadap struktur kehidupan moden dan ideologi bersama kepelbagaian masyarakat. Pendek kata kes *Acton v Blundell* adalah terkeluar daripada mengikut dengan kewujudan undang-undang tort terkini. Seperti mana ianya berdiri, jika tiada langkah yang munasabah diambil oleh pesalah laku untuk memastikan bahawa tiada kerosakan akan berlaku kepada jiran-jiran, dan melakukannya sudah tentu menjejaskan mereka, tindakan yang boleh diambil kelalaian secara tort mungkin menantinya (lihat perenggan 35); *Acton v Blundell & Anor* [1843] 152 ER 1223 and *Singapore Finance Ltd v Lim Kah Ngam (Singapore) (Pte) Ltd & Eugene HL Chan Associates (Third Party)* [1984] 2 MLJ 202 tidak diikut.

(6) Setelah meneliti keterangan, kami berpuas hati bahawa responden telah membuktikan kes mereka atas imbangan kebarangkalian. Mereka telah membuktikan bahawa perayu terhutang kepada mereka kewajipan berjaga-jaga tetapi telah gagal melaksanakannya, dan kerosakan seterusnya disebabkan daripada kegagalan tersebut. Ianya mestilah ditegaskan bahawa sebanyak mana pemilik tanah berhak untuk memperlihatkan haknya ke atas tanahnya, hak tersebut mungkin terganggu jika kepentingannya masuk campur. Oleh itu mahkamah mendapati tiada kesilapan dilakukan oleh hakim yang bijaksana dalam isu liabiliti (lihat perenggan 38).

Notes

For cases on adjoining properties, see 12 *Mallal's Digest* (4th Ed, 2002 Reissue) paras 655–669.

For cases on duty of care, see 12 *Mallal's Digest* (4th Ed, 2002 Reissue) paras 813–829.

Cases referred to

Acton v Blundell and another [1843] 152 ER 1223 (not folld)

Dodd Properties (Kent) Ltd & Anor v Canterbury City Council & Ors [1980] 1 All ER 928 (refd)

Donoghue v Stevenson [1932] AC 562 (refd)

Liew Choy Hung v Shah Alam Properties Sdn Bhd [1997] 2 MLJ 309 (refd)

Loh Siew Keng v Seng Huat Construction Pte Ltd [1998] SGHC 197 (refd)

Mayor, Councillors and Citizens of Perth, The v Halle [1911] 13 CLR 393 (refd)

Pugliese v National Capital Commission [1977] 79 DLR(3d) 592 (refd)

Rylands v Fletcher [1868] 19 LT 220 (refd)

Singapore Finance Ltd v Lim Kah Ngam (Singapore) (Pte) Ltd And Eugene HL Chan Associates (Third Party) [1984] 2 MLJ 202 (not folld)

BS Sidhu (Sharon Sidhu with him) (BS Sidhu & Co) for the appellant.
David Lingam (HW Yip with him) (David Lingam & Co) for the respondent.
[*17]

Suriyadi JCA (delivering judgment of the court):

[1]The 13 pages statement of claim, reduced to the following, had stated inter alia, that in or around early March 1997 the defendant ('appellant'), its staff and or agent had commenced construction works extensively on a project site. Amongst the construction works carried out on the said site were piling works. Next door was the plaintiffs' ('respondents') house. Due to that negligent construction work, the respondents' house suffered structural damage, resulting in cracks appearing on the floor, walls, columns and beams of the property. All these damages had threatened the respondents' safety and the occupants of the said house ('property').

[2]The particulars of negligence were, amongst others, failure to make any or any sufficient inspection of the land before commencing the construction work including the piling works, failure to take any sufficient steps to ensure the safety of the occupants or property bordering the construction area, failure to stop and or postpone the piling works or construction even though they had knowledge regarding the damage inflicted upon the said property, and the danger to life and safety of the respondents and occupants of the said property, failure to apply good engineering standards properly in the said construction project, failure to give any attention or sufficient attention to the warnings given by the respondents, failure to give importance to the condition of the said property and occupants residing in houses bordering the said project site, carrying out the piling works or construction works in an unprofessional manner, unreasonably without care, attention and skill and without considering at all the interest of other people, especially the respondents.

[3]The respondents alleged that the cracks had widened in the course of time due to the continuous piling works carried out by the appellant and or its agent on the said property. This had also caused the property to subside, sink or move.

[4]The agreed facts are as follows: The first respondent is the registered owner of the property which is a piece of land held under HS(M) 03600, HS(M) 03602, Geran Mukim, Lot No 54, Seksyen 88, Geran Mukim Lot No 47, Seksyen 88 together with a double-storey bungalow house built thereon known as No 290A Lorong Palas, Off Jalan Ampang, Kuala Lumpur. At the relevant time the property was about 30 years old, with the first respondent and her family residing in it. She is the wife of the second respondent.

[5]The appellant is the owner of lots 45, 46, 50,51, 52, 53, 57 and 58 seksyen 88, Lorong Palas, off Jalan Ampang, Kuala Lumpur. These lots are adjacent to the property belonging to the respondent. The appellant is developing the said Lots into a project known as 'Cadangan Membina 2 Blok 20 Tingkat Bangunan dengan Tingkat Basement Untuk Tempat Letak Kereta' ('the project'). After obtaining on or about March 1997 the requisite government approvals, and after having carried out a soil test investigation, the appellant commenced construction works at the project site. After the appellant had commenced sheet piling works cracks began to appear on the property. The respondents thereafter informed the appellant of the cracks and [*18]
they thereafter carried out a joint inspection of the property. Pursuant to the inspection, the appellant vide letter dated 24 June 1997, had agreed to affix glass plates on the cracked areas and to monitor the movements of the glass-plates. The appellant also agreed to provide props for the beam at the front portion of the main garage. By a letter dated 10 September 1997, the appellant's former solicitors had informed the respondents' solicitors that it had referred the matter to its insurers and would revert to the respondents' solicitors accordingly.

[6]The following facts have not been agreed upon by the contending parties. According to the appellant it had offered to repair and rectify the damages but without admission of liability. This offer however was refused. Further to that, the respondents themselves had refused to take any steps to repair or minimize the damages to the property. A letter dated 21 September 1998 from the respondents' solicitors, which recorded the unwillingness of the appellant to assume liability, was asserted to be the real reason for the lack of cooperation on the part of the respondents. And this was despite the appellant's own consultants reporting on the status and uninhabitable

condition of the property. The appellant had alleged that the property still remained in a state of disrepair even though the respondents were financially well endowed to carry out the necessary repair works.

[7]The respondents had thereafter filed a negligence suit against the appellant. The learned High Court Judge who decided in favour of the respondent had also ordered that damages be assessed by the Senior Assistant Registrar. Despite that specific assessment order, the learned judge had eventually assessed the damages himself and had awarded damages to the tune of RM6,306,242.43. He had awarded interest at the rate of 8% per annum on the amount awarded, from the date of filing of the suit, to the date of realization. Costs were also ordered against the appellant.

[8]Being dissatisfied with that decision the appellant filed the present appeal and this panel heard the appeal. We had unanimously dismissed the appeal with costs.

[9]The appellant's submission before us had rested on the premise that:

(a) the second respondent had no locus standi as he was not the registered owner nor did he posses the exclusive possession or possessory title to the property;

(b) the respondents had failed to prove negligence on the part of the appellant;

(c) the appellant (as the owner of the project) was under no liability to the respondents, based on the doctrine of *Rylands v Fletcher* [1868] 19 LT 220; LR 3 HL 330 as it had only used the land for the natural, ordinary and normal purpose of building on it; and

(d) the position of the English common law in relation to piling and excavation works on one's own land was enunciated in *Acton v Blundell and Another* [1843] 152 ER 1223 and is part of Malaysian common law, and absolves the appellants from liability for a natural and ordinary use of its own land.

[10]As regards the first premise ie the issue of locus standi of the second respondent to proceed with the suit, we were satisfied that he had beneficial interest [*19]
over it. He had lived in that house with his wife (the first respondent), two daughters, his son, his daughter-in-law, a grandchild and four servants until the property was damaged by the appellant for a period of no less than 22 years. The High Court had correctly found that the second respondent had financed the building of the property. In brief, the first respondent and the second respondent not only had possession over the property but had a right to it, to the exclusion of others. This portion of the appellant's submission thus was a non-issue before us.

[11]Having scrutinized the evidence, we found the letter of 14 April 1997 from the appellant very revealing, as it not only recognized the second respondent's beneficial rights, it being addressed to him, but a willingness by the appellant to undertake certain remedial measures. In it the appellant had agreed to replace the entire floor and wall tiles on the ground floor of the property apart from other works to the entire satisfaction of the respondents. Later, a letter dated 24 June 1997, was also sent by the appellant to the second respondent, agreeing to place glass plates on cracks immediately. It also agreed to jointly monitor the crack situation. The appellant also had agreed to provide props for the beam at the front portion of the main garage immediately. To assist it in the performance of those remedial acts the appellant had requested structural and architectural drawings to be studied by its consultants. This was the degree of its sense of responsibility despite the refusal to admit liability openly.

[12]Exchanges of letters had ensued thereafter between the parties, whereupon the appellant was allowed access to the property, primarily to assess the loss and damages sustained to it. On 10 April 1998, through a letter from Angkasa Reka Sdn Bhd (a company comprising civil and structural engineering experts), the appellant had admitted finding the following:

(1) Defects located at the external area of the premises have deteriorated further, visible through the widening of cracks and settlement of ground slab sections.

(2) The settlement of the ground slab has affected the delamination of external brick columns and architectural elements at the front perimeter of the building.

(3) A majority of the defects internally, mainly brickwalls and brick columns, have not shown significant signs of further deterioration.

(4) …

[13]I now touch on the evidence as described by the second respondent as regards the damages. It reads, inter alia:

Q 11: What happened when the defendant commenced work on the site? Please elaborate in detail.

A 11.1.1: When the defendant and/or their agents, employees and/or representatives commenced construction works on the site, cracks started to appear at various places of the property. In particular, on the driveway of the property, the garden floors as well as the floors, ceilings and walls of our house.

[*20]

A 11.1.2: The ground in the garden area was substantially damaged and there was a gap left on different levels as the ground had subsided. It looked like the kind of damage an earthquake would cause.

A 11.1.3: The concrete wall surrounding and fencing the house on the property was cracked in numerous places and was also tilting leaving many openings in the same.

A 11.1.4: There were also shifts, sinking and subsiding in various areas of the property leaving large cracks and gaps in and around the property and the house on the property.

A 11.1.5: The columns supporting the house also started to crack and tilt.

A 11.1.6: The alignment of the doors and windows of the house became warped and could not be properly shut and opened.

A 11.1.7: The sewerage system in the house also started to give problems. The sewerage system was not effective and we could not utilize the flush of the wash closet properly.

A 11.1 8: Moreover, there were pipes leaking on the property.

A11.1.9: …

A 11.1.10: I am not confident that the damage to the house has stopped just because the construction have halted. I believe that the construction works of the defendant and/or their agents, employees and/or representatives on the site would most likely have cause latent damage to the property which will eventually cause the property to deteriorate at a greater rate.

A. 11.2.1: My family and I were extremely worried and concerned of our safety as the cracks in the walls, columns, floors and ceilings were getting larger from day to day. We were always afraid of the house collapsing due to the damage to the house.

Q 21: Was the property fit to be resided in?

A 21.1: Initially, when the defendant commenced their construction, there was only minor damage caused to the house by the construction works of the defendant on the site. However, in a matter of months, our house became totally uninhabitable due to the widening of the wall and floor cracks, the cracking and damage to the columns supporting the house, the non-functioning sewerage system, the fear of the electrical system short circuiting, the problems of opening and closing doors and windows in the house and above all other factors, the fear for our safety due to the threat of the house collapsing.

Q22: Did you vacate the property? If yes, when?

A 22.1: Despite the house and the property holding great sentimental value as well as a good location, we had no choice but to move out of the house for fear of our safety.

A 22.2: We shifted out sometime in September 1997.

[*21]

[14]Taking a sample of the second respondent testimony, he had testified that the property was uninhabitable due to the acts of the appellant, and was in a state that would endanger his life, the first respondent and the other occupants. It was thus necessary to move out of that home.

[15]From documentary evidence, these damages were also confirmed by the Dewan Bandaraya Kuala Lumpur ('DBKL'), which had made its own investigation after having received complaints from the respondents of the repercussion of the appellant's construction activities. The appellant had replied to the DBKL reiterating that any reasonable claims would be resolved by its insurance. In a gist there was no doubt that the house had been badly damaged. This predicament was in stark contrast prior to it being damaged when it was 'sturdy and safe' and reasonable for the respondents' station in life.

[16]We were thus satisfied that the house was badly damaged making it uninhabitable and hence justifying the respondents and his family moving out of the house. There was thus absolutely no error on this finding of fact as regards the extent of the damages by the presiding learned judge.

[17]The following questions to be answered will be what were the causes of the substantive damages and who the wrongdoer was. The appellant in its submission ventilated that the damage to the respondents property was due to the differential settlement caused by the forces of nature and had highlighted PW4's evidence which stated that 'the damage was due to ground movements caused by subsidence which resulted from movement of the water table'. Having gone through the latter's evidence, it must be emphasized that one cannot be partisan to words, which may taken out of context, whether from oral testimonies or reports, merely to suit the purpose of a particular submission. PW4 did admit that the cracks were due to settlement and draw down of the water table and had observed that the building was not fit for habitation and was beyond repair. He did admit that the damage was caused by ground movement subsidence, but what counsel for the appellant failed to supply were the words, 'subsidence which was caused by the movement of water table *due to the construction activities nearby*'.

[18]PW5, an experienced engineer by profession who had carried out a visual survey of the damages had also concluded that 'the damage to the property in question ('the property') was related to the ongoing construction in the adjacent property', activities carried out by the appellant.

[19]Credit however must be given to counsel for the appellant as regards the evidence of DW1, which was not censored unnecessarily. The admission of DW1 that the damages were due to 'the settlement of subsoil strata due to lateral movements of earth during the construction of the deep basement adjacent to the building and settlement due to lowering of the ground water table during the construction of the deep basement' was divulged. DW2, the architect of the appellant for the adjacent project had also unreservedly admitted, '*I agree that the damage to the plaintiffs' property (respondents') was as a result of the piling works done conducted by the defendant*'. He had further testified, '… I confirm that the defects to the plaintiffs' [*22]
property had deteriorated from 1997 to 1998'. Apart from the instructive respondents' witnesses' testimony, what with DW1's admission compounded by DW2's corroboration, the defences of the appellant were now in shambles.

[20]As observed above, the factual findings of the learned judge here, as to the cause of the damages, likewise was impeccable. The judge had immaculately stated the following:

> Such activities had caused movement and settlement of the underground soil which in turn caused damages to the plaintiffs' bungalow house which developed cracks in various parts of the building including the compound of the said bungalow.

[21]Despite the complaints by the respondents, and despite the obvious damages befalling the property, the appellant had continued with its activities. Even a neighbour had a taste of the appellant's nonchalance. As early as 17 January 1997 DBKL had occasion to order the appellant to cease all construction activities due to the damages suffered by that neighbour (a bungalow owned by the Government of Sabah). Again on 14 August 1997 the DBKL had informed the appellant of complaints having been received and had requested the appellant to cooperate by sending to it a report of the latest development. The cavalier attitude of the appellant again met the wrath of DBKL when in April 1998, it was ordered to stop that impugned construction activities, based on similar grounds. By then it was too late.

[22]Needless to say, we were satisfied that the construction works carried out by the appellant had been the direct cause of the damages befalling the property. It was also our finding that not only was the construction the cause of

the damage to the property but that the appellant never took any form of precautionary or preventive steps before commencing the activities. The High Court judge in same vein had succinctly authored that:

> Hence in the light of the clear cause of action alleged by the plaintiff against the defendant for negligent acts particulars of which had been enumerated in para 7 of the statement of claim the *defendant should prove to the satisfaction of the court that it had taken all the necessary steps and measures to prevent possible damages to said bungalow adjacent to the defendant's construction site. No such evidence had been adduced by any of the defence 4 witnesses*. (Emphasis added.)

[23]We were satisfied that the respondents had established negligence on the part of the appellant, and due to that negligence, the respondents' property had suffered irreparable damages and hence beyond habitation. The appellant had omitted to do something which any reasonable man in that situation would have done to avoid the respondents' sufferings. But the law is such that mere negligence by itself, regardless of the losses suffered by an aggrieved party, will not suffice to pin down a wrongdoer. A wrongdoer is only liable in negligence if he is under a legal duty to take care. That injury to the aggrieved party, or time immemorial referred to as the neighbour, must be foreseeable, and likely to happen.

[24]Who then is the neighbour? Lord Atkin in *Donoghue v Stevenson* [1932] AC 562/580 had said the following:

[*23]

> The rule that you are to love your neighbour becomes, in law, you must not injure your neighbour; and the lawyer's question, Who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? *The answer seems to be — persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question*. (Emphasis added.)

[25]Needless to say from the set of facts, the respondents were the appellant's physical neighbour, and certainly would have been affected by its actions. Further, from the evidence, the damages befalling the property as a consequence of the acts, in this case, construction activities, without any preventive actions undertaken, from a reasonable man's perspective not only was foreseeable but likely to occur. As per the set of facts before us, only an unreasonable neighbour would care to state that such serious injury to the property was unforeseeable and that it was unlikely to occur.

Rylands v Fletcher, for some unknown reason was submitted by counsel for the appellant, in support of its case, an approach which had baffled us. The principle in that case merely states that if a person brings or accumulates on his land anything, which if it should escape may cause damage to his neighbour he does so at his peril. If it does escape and cause damage, he is responsible, however careful he may have been, and whatever precautions he may have taken to prevent the damage. This cause of action therefore imposes an absolute liability on that wrongdoer. To be liable, the wrongdoer must have brought something on to his land likely to cause mischief if it escapes, and which has in fact escaped, and those things happened in the course of some use of the land.

[26]In the circumstances of this case we were unable to agree with the submission of the appellant that the principles enunciated in *Rylands v Fletcher* were relevant. Nothing was brought onto the appellant's land, which later escaped, in line with the requirements of the latter case, to warrant its advertence, let alone the defence.

[27]The last legal issue canvassed by the appellant was the position of the English common law in relation to piling and excavation works on its own land as enunciated in *Acton v Blundell* and another. The appellant had submitted that it was part of Malaysian common law, and that being so it had absolved the appellants from liability for a natural and ordinary use of its own land. In brief the appellant had submitted that the principle that emanated from the above case was an absolute defence.

[28]The facts in the above case were that the plaintiff had sunk a well in his property for raising water for the working of his mill. The defendant had later sunk two coal pits on its land adjacent to that of the plaintiff's land. Due to that two coal pits the water supply to the plaintiff's mill was affected causing losses to the latter. The plaintiff sued the defendant for interfering with his rights of enjoyment over the water flowing under his land. The court had found for the defendant. It was held that an owner of land through which water flows in a subterraneous course, has no right [*24]

or interest in it which will enable him to maintain an action against a landowner, who, in carrying on mining operations in his own land in the usual manner, drains away the water from him.

[29]Come *Singapore Finance Ltd v Lim Kah Ngam (Singapore) (Pte) Ltd And Eugene HL Chan Associates (Third Party)* [1984] 2 MLJ 202 the principle of the above case of *Acton v Blundell* was adapted. The facts are as follows:

[30]In mid-January 1974 the defendants were excavating their site enclosed with a cofferdam for three basement floors. They were in the course of erecting a 13-storeybuilding. During this period, the owners of buildings in the neighbourhood complained that cracks had appeared in their buildings. The plaintiffs whose building suffered extensive cracks claimed damages for loss of support, nuisance as well as negligence against the defendants. The plaintiffs alleged that by reason of the excavations, the bottom of the hole, thereby formed, heaved upwards and the ground upon the sides of the cofferdam moved downwards and laterally towards the excavation hold, having passed underneath the sheet piles surrounding the defendants land, with the consequence that the surface ground in the immediate vicinity subsided and the buildings standing on them thereafter suffering cracks.

[31]Throughout the trial, the defendants contended and admitted that ground de-watering of the plaintiffs' soil had been caused by the excavation works. But the defendants and the third party maintained that such de-watering, that is the flow of water from the plaintiffs' soil into the excavation hole through indeterminate or undefined channels, was due to the forces of nature and the forces of gravity, and was neither avoidable, given the state of engineering at all material times, nor was it due to any positive acts done by the defendants, their servants or agents. The defendants contended that the damage to the plaintiffs' building was *damnum sine injuria.*

[32]It was held on dismissing the plaintiffs' claim, that the English Common Law, which was first declared in *Acton v Blundell*, was received into and had become part of the law of Singapore.

[33]To summarise, in *Acton v Blundell* it was a deliberate case of the plaintiff being cut off from water, albeit under ground, caused by the action of the defendant, whilst in *Singapore Finance Ltd v Lim Kah Ngam (Singapore) (Pte) Ltd And Eugene HL Chan Associates (Third Party)*, the damage to the plaintiff's building was caused by differential consolidation settlement brought about by de-watering, and accentuated by other factors. Simply put, the de-watering and act of the defendant had caused the surface ground in the immediate vicinity to subside, resulting in the plaintiff's property, which stood on the subsided land, to suffer cracks.

[34]With respect to the archaic view of *Acton v Blundell* the realities of modern life must not be discounted. High density of population in popular residential areas in Malaysia is now the norm. Houses may have to be built very close to each other, at times on hilltops, or even hugging those slopes. To allow the incoming new house owner or contractor to take away the ground support of adjacent buildings, justifying such acts on natural user of his land, and thereafter blaming gravity and soil [*25]
subsidence (or de-watering) as an operation of the laws of nature, is not in sync with reality. We are no more a society that lives miles apart like the olden days, but in one where a sneeze is never out of the neighbour's earshot; and where likewise unreasonable activities may touch the life of a neighbour. To deny the rights of neighbours, and allow a wrongdoer to wreak havoc and heartache, would militate against the very fabric of modern life and collective ideology of a multifaceted society. In a nutshell the case of *Acton v Blundell* would be out of keeping with the current existing law of torts. As it stands, if no reasonable steps were undertaken by the wrongdoer to ensure that no damages would befall the neighbours, and did indeed suffer them, an actionable tort of negligence may await him.

[35]To wind up the issue of liability we therefore reject the rule propounded in *Acton v Blundell*. On that premise, we also reject the stance of *Singapore Finance Ltd v Lim Kah Ngam (Singapore) (Pte) Ltd and Eugene HL Chan Associates (Third Party)*, which had adapted *Acton v Blundell*. The rejection of the latter case is not without precedent. In *Pugliese v National Capital Commission* [1977] 79 DLR(3d) 592, it was resolved that:

> The rule of English common law that ownership of land carries the absolute right to abstract or interfere with the flow of underground water, whatever the effect on the owner's neighbour, ought not to be applied without reference to the modern law of negligence and nuisance. While the plaintiffs did not have an absolute right to the support of subsurface water, they did have a right not to be subjected to interference with the support of such water where such interference amounted to negligence or nuisance.

[36]In *Loh Siew Keng v Seng Huat Construction Pte Ltd* [1998] SGHC 197, the Singapore High Court had occasion to opine:

> The result then is that I have to consider whether the Singapore Courts should adapt the rule in *Acton v Blundell* as a matter of choice.On careful consideration, I came to the conclusion that it should not be the law of Singapore
>
> I do not think that the rule in *Acton v Blunder* can be justified today.

[37]Having perused the evidence we were satisfied that the respondents had proven their case on a balance of probability. They had established that the appellant owed them a duty of care but had failed to perform it, and damages having ensued resulting from that failure. It must be emphasized that in as much as a land owner is entitled to assert his rights over his land, that right may be interfered with if it necessitates interference (see *The Mayor, Councillors and Citizens of Perth v Halle* [1911] 13 CLR 393). We therefore had found no error having been committed by the learned judge here on the issue of liability.

[38]What was left for consideration was the issue of damages and the quantum (the issues under Rayuan Sivil No 02–616 of 2006). The injury suffered by the respondents here was certainly not remote as it was of a kind any reasonable man could have foreseen. Guided by that principle the learned judge had accordingly [*26] ordered damages in the sum of RM6,306,242.43 against the appellant, with interest at the rate of 8% pa, on the amount awarded from the date of filing the suit to the date of realization.

[39]Witnesses had been called by the appellant, and in the course of which, the respondents had adduced evidence pertaining to the losses and eventual quantum. The claimed sum of RM43,828.85 for the total fees of the engineers, valuers and the quantity surveyors was quite reasonable. And so were the legitimate rental claims of RM12,000 per month when the respondents moved to a new location. There was thus no mathematical error when the claimed rentals totalled RM1,230,246.58. Likewise the wages of a watchman totaling RM88,000 was not an unreasonable claim.

[40]Before proceeding further, it is necessary to state that the underlying object for the assessment of damages is to put an aggrieved party in the same position as he had occupied, prior to the time when the wrong was done on him (see *Dodd Properties (Kent) Ltd & Anor v Canterbury City Council & Ors* [1980] 1 All ER 928; *Liew Choy Hung v Shah Alam Properties Sdn Bhd* [1997] 2 MLJ 309). For special damages, losses which are actual, and unavoidable, invariably monetary awards too will be ordered so as to compensate him.

[41]Here, as the property had become uninhabitable, and to stay in it would endanger the respondents' lives, let alone repairing of it would not be feasible, the sum claimed for the demolition and rebuilding amounting to RM3,393,167, which had been established, was reasonable. And of course the cost of moving back into the property in the sum of RM50,000 was a fair and acceptable sum.

[42]We found no error in the findings of the learned judge when he had ordered RM1,000,000 also as part of the general damages. Practitioners are well aware that general damages represent losses which are not easily quantifiable, with losses in the like of mental stress, hardship etc. as suffered by the respondents, also falling under the heading. There was ample evidence to show that the health of the second respondent indeed had taken a dive, due to the continuous and persistent mental distress of seeing their home slowly disintegrating, followed by further hardship when moving house.

[43]Finally we were unable to default the learned judge for ordering RM500,000 for a claim of aggravated and/or exemplary damages which is part of general damages. The respondents had given the appellant very early warnings as regards the extent of the damages pursuant to its activities but to no avail. No serious preventive measures were undertaken and the sufferings of the respondents merely multiplied. Not only was the property disintegrating before their very eyes but their injured feelings were heightened by the lackadaisical and obnoxious attitude of the appellant. If not for this suit the appellant would have been quite content to remain continuously nonchalant about the whole episode.

[44]The behaviour of the latter not only had affected the respondents but had also attracted the attention and wrath of the authorities (DBKL). Whether such [*27] reprehensible behaviour of the appellant, could have attracted aggravated damages, *Mc Gregor on Damages* (16th Ed, 1997) p 287 had occasion to state:

> The primary object of an award of damages is to compensate the plaintiff for the harm done to him; a possible secondary object is to punish the defendant for his conduct in inflicting that harm. Such a secondary object can be achieved by awarding, in addition to the normal compensatory damages, damages which are variously called exemplary damages,

punitive damages, vindictive damages or even retributory damages, and comes into play whenever the defendant's conduct is sufficiently outrageous to merit punishment as where it discloses malice, fraud, *cruelty, insolence or the like* (Emphasis added.)

[45]When ordering any award under the heading of exemplary damages the resources of the appellant would be a relevant consideration. For a company that was about to build a 20 storied two block-building, the above sum of RM500,000 was quite modest, and would make no impact on its means.

[46]Founded on the above reasons this panel had dismissed the appeal with costs and had affirmed the decision of the learned High Court judge.

[47]My learned brother Zulkefli JCA has seen this judgment in draft and has expressed his agreement with it.

Appeal dismissed with costs.

Reported by Loo Lai Mee