DALAM MAHKAMAH TINGGI MALAYA DI KUALA LUMPUR
DALAM WILAYAH PERSEKUTUAN, MALAYSIA
[GUAMAN SIVIL NO: WA-22NCVC-384-08/2017]

ANTARA

1. YAP WEE KIAT@JEFF YAP

(NO. K/P: 680601-07-5297)

2. NICOLE TING BIN SHUN

(NO. K/P: 700619-83-5018)

... PLAINTIF-PLAINTIF

DAN

1. AMANAH SCOTTS PROPERTIES (KL) SDN BHD

(NO SYARIKAT: 284005-H)

2. KIRANA MANAGEMENT CORPORATION

(NO PENDAFTARAN: 1746)

... DEFENDAN-DEFENDAN

JUDGMENT

(Enclosure 1)

INTRODUCTION

[1] THE PARTIES:

1.1 The first plaintiff (P1) is the sole registered proprietor of a condominium unit located on the 20th floor, Kirana Condominium (Parcel No:22-21), at No.7-20-1, Condominium Kirana, 7 Jalan Pinang, 50450 Kuala Lumpur (the condo unit), while the second

plaintiff (P2) is his spouse.

1.2 The plaintiffs, collectively referred to as the Ps claimed this condo unit was their residential home.

1.3 The first defendant (D1) was the developer of this low-density mixed development held under Lot No.1271, Seksyen 57, Geran 42678, Bandar Kuala Lumpur, comprising "Menara A: The Arscott's KL" and "Menara B: Kirana Condominium".

1.4 The second defendant (D2) is currently the Management Corporation of the Kirana Condominium, which manages it. The defendants are collectively referred to as the Ds.

THE CLAIM:

1.5 In this suit, the Ps alleged in their Statement of Claim (SoC) that:

(a) The Ds have committed a nuisance by causing persistent and recurring water escape/leakage/seepage into the condo unit, which the Ps allegedly discovered in November 2013.

(b) The alleged escape/leakage/seepage of water continued over time through the reinforced concrete slab, concrete soffit, drains, pipes, and swimming pool area above the condo unit, thereby damaging it.

(c) Testing of the indoor air quality and microbial sampling allegedly determined that bacterial and fungal/mould growth caused by water escape/leakage/seepage posed health risks to the Ps and their children.

(d) The extent of the damage was allegedly discovered after the condo unit was inspected on 07.11.2016, depriving the Ps of the right to a safe, comfortable enjoyment of the condo unit.

1.6 Fixtures, fittings, and clothes were allegedly damaged, and the Ps had to vacate the place in 2014 and seek alternative accommodation.

1.7 The Ds were allegedly negligent and breached their duty of care by not preventing the water escape, leakage, or seepage into the condo unit. Consequently, the Ps had suffered damages. D2, as the Management Corporation, failed in the exercise of its statutory duty to properly maintain and manage the building in breach of sections 59(1) & (2) of the Strata Management Act, 2013 (SMA). The Ds had acted in bad faith in dealing with the Ps.

1.8 The Ps claims against the Ds:

(a) Damage to furniture, fittings, and household and personal items listed in Schedule I to the SoC.

(b) Medical claims set out in Schedule 2 of the SoC.

(c) Alternative accommodations of RM15,000 per month.

(d) Significant loss in the market value of the condo unit.

(e) General damages to be assessed, aggravated damages, exemplary damages, interest, and cost.

[2] The witnesses at the trial are as follows:-

2.1 Ps' witnesses

PW1/P1: Yap Wee Kiat

PW/P2: Nicole Ting Bing Shun

PW3: Rosaling Leong @ Tang You Ping

PW4: Lee Kim Sai (Expert Witness)

PW5: Kuan You Wai (Expert Witness)

2.2 D1 witnesses

DW1: Suleiman Mecja

DW2: Chan Lee Siang (Expert Witness)

DW3: Anselm Tay @ Tay Kheng Ann

2.3 D2 witnesses

DW4: Hafis bin Adnan

DW5: Howard Ong @ Ong Lu Peng

[3] THE SALIENT FACTS.

In a nutshell, as discerned from the cause papers:

3.1 The Ps claimed against the Ds for remedial works to be undertaken by the Ds and damages arising from the alleged leakage into their condo unit due to the alleged escape, leakage or seepage of water from the swimming pool at the 22nd floor, pool pump room at level 21, its piping and drainage system. The Ps had duly notified D2 of the event, but D2 allegedly failed in its statutory duty under s. 59(1) & (2) of the SMA to remedy the default or take the necessary action against D1 to remedy the default.

3.2 In its defence, D1 asserts, amongst others, that:

(a) The Ps had already sued D1 in 2007 via a civil suit, S1-22-668-2007 (Suit 688), for the alleged breach of contract and negligence. It was claimed that the upper-level swimming pool and its piping/drainage system had collapsed, causing water to escape to the Ps condo unit.

The Ps had then claimed costs for renovation, electrical and mechanical work, damage to furniture and fitting, household and personal items, temporary accommodations, packing storage, insurance for furniture and fittings, and household and personal items.

(b) Suit 668 was eventually amicably settled between them with no

admission of liability, where a consent judgment was recorded on 22.09.2011 incorporating a settlement sum of RM490,000.00 and a sum of RM1 million from the Ps insurer.

(c) It was argued that the Ps cannot now bring fresh action in the present suit grounded on the exact cause of action they had resolved with the recording of the Consent Order before the Court.

(d) It was alleged that, the Ps had renovated the condo unit by installing an incorrectly constructed suspended ceiling, causing standard steel brackets, which were installed to reinforce the pipes and prevent damage from the vibration of the said pipes from being displaced.

(e) The Ps renovation affected the condo unit waterproofing system installed in and around the upper-floor swimming pool.

(f) The Ps had abandoned the claim for the repair work when parties recorded the consent order on 29.09.2011 by way of accord and satisfaction and are now precluded from making a new claim on this issue.

(g) The Ps unilaterally carried out the alleged inspection of the indoor air quality, microbial sampling, and identification of health risks, with no definitive determination on the cause of the fault allegedly caused by D1.

(h) D1 states that the pool pump room on the 21st floor is always well-maintained and does not flood. D1 and its employees have exercised reasonable care in the upkeep and maintenance of the swimming pools and their surroundings.

(i) The Ps cancelled the joint inspection of the pool pump room and made no further arrangements. D1 asks that the claim against them be dismissed with costs.

3.3 D2, in its defence, asserts that:

(a) It is the Management Corporation entrusted to manage and oversee the Kirana Condominium.

(b) D2 pleads res judicata on the Ps' claims. Similar issues had been resolved in Suite 668.

(c) In Civil Suit 22-NCVC-540-2011 (Suit 540) at the KL High Court, D2 was suing the Ps for arrears of maintenance charges. The Ps had raised similar issues in their counterclaim against D2. The counterclaim by the Ps was dismissed by the High Court on 21.03.2012 because a consent order had already been recorded in Suit 668.

(d) Similarly, the Ps counterclaim on similar issues was dismissed in the Magistrate Court summons No. A72NCVC-6716-11/2014 (Suit 6176) for arrears in maintenance charges.

(e) D2 does not own the swimming pool atop the condo unit that belongs to D1 and is rented out to D2 for use by the Kirana Condominium community. D2 vehemently denies any negligence, as alleged by the Ps. D2 also vehemently denies any breach of statutory duty in overseeing the impugned swimming pool.

(f) The condo unit issue was handled and resolved between P1 and D1. It had nothing to do with D2. The allegation of water escape/leakage/seepage to the condo unit is within the responsibility of D1 and not D2 at the material time.

(g) D2 prays that the SoC be dismissed with costs.

THE DECISION:

[4] On 12.01.2024**:**

4.1 After perusing all cause papers, the evidence adduced at the trial and

considering the respective arguments of the parties herein, it is my considered judgment that:

(a) On the balance of probabilities, the Ps has failed to prove their case.

(b) I find no compelling merit in sustaining the present suit against the Ds; fundamentally, it is my judgment that res judicata applies to bar this present suit by the Ps.

(c) In the circumstances, I dismiss the Ps' claim against the Ds with costs of RM50,000.00 payable to the Ds respectively within 30 days from the date hereof.

(d) D2's third-party action against D1 for contribution in the Third-party Notice dated 04.10.2019 and the Statement of Claim by D2 against D1 dated 05.02.2020 are dismissed with no order regarding costs.

4.2 Aggrieved, the Ps collectively appealed my decision, and these are my reasons.

THE PARTIES ARGUMENTS IN A NUTSHELL

[5] I have duly observed and considered all-cause papers, the evidence adduced at the trial and the parties' arguments in canvassing for their positions.

[6] THE PLAINTIFFS (Ps) SUBMISSIONS:

6.1 The Ps claimed the impugned condo unit was their place of residence, which they were forced to vacate in June 2014 due to the alleged water damage, which made the condo allegedly unfit for human occupation.

6.2 It is argued that the present suit is grounded on an alleged water leakage in 2013 that had allegedly damaged the condo unit, though he claims there had been other leakages prior.

It was claimed that:

(a) In **November 2013**, the Ps representative (PW3) supposedly met D2 to discuss the alleged leakages causing corrosion and rust.

(Photographs in BOD (Part B) B3, L.185, pp.654-655; 659-662, 663-664/PDF pp.150-151; pp.155-158, pp.159-160).

(b) Alleging D2's failure to address the complaints, the Ps letter of complaint (30.04.2014) (Bundle B3, L185, pg.665/PDF pg.161) was extended to D1 by D2, taking the position that the swimming pool alleged to be the source of the 2013 leakages was owned by D1 and was not a common property under the care and maintenance of D2 at the time (however evidence showed that the swimming pool was converted as common property in 2012 by D1: Bundle B3, L.185, pg.692/PDF pg.188). Even though being informed by D2 of the allegation of the water leakages, D1 did nothing to address the issue.

(c) The Ps then elected to move out and reside at K Residence @ Jalan Ampang temporarily in 2014 until the alleged issue was resolved but decided for it to be indefinitely in 2016, holding it unfit for habitation due to microbial contamination. It was argued that the Ds failed to address or rectify the alleged leakages from 2013 to 2016.

(d) **Approximately four years** (sometime in 2016) after the allegation of water leakages was made, the Ps engaged the expertise of PW5: Kuan Yu Sai to investigate and identify the source of the alleged water leakages based on the applicable British Standards Documents BS EN 13187 as there is allegedly no Malaysian Standards according to PW5:

(1) PW5 produced two reports: (i) KYW Main Report: Bundle B7, L189, pg.2050/PDF pg.218; and (ii) KYW

Supplementary Report: Bundle 7, L189, pg.212/PDF pg.290 in 2020.

(2) In short, PW5 found various leakages from the swimming pool to the pump room. There was also an active leak in the studio unit on top of the impugned condo unit. The continuous water leakages caused dampness to migrate to the concrete ceiling of the impugned condo unit.

(3) PW5 believed that the waterproofing works on the swimming pool and its pool deck were not by the standards EN1504 products and systems for protecting and repairing concrete structures.

(4) **Approximately four years later, on 07.07.2020**, PW5 carried out a supplemental inspection on the condition of the alleged water leakages. He believed many of the alleged leakages identified in the KYW First Inspection report had dried up, but there were new leaking spots in the living room and bedroom area.

At this juncture, I observe that from the onset of the alleged new water leakage in 2013 to 2020, nothing constructive was done to mitigate it by definitively identifying the root cause, if any, addressing, and rectifying it. It does not augur well for the Ps position herein. It is trite law in Torts that a plaintiff will not be able to claim as damages any loss incurred which could have been avoided by taking reasonable steps in mitigation: *Lee Tai Hoo & Anor v. Lee Swee Keat & Anor* [1987] 1 MLJ 304, HC (affirmed on points of law by the Supreme Court, but award varied). What is reasonable depends on the facts and circumstances in each case.

(5) It was argued that D2 did not produce any rebuttal expert report to challenge the findings of PW5.

(6) It was also argued that D1 failed to call their expert witness on building leakages to challenge the findings of PW5, save for an indoor air quality assessor.

(7) The Ps also engaged PW4: Lee Kim Sai as the indoor air quality assessor, who produced a microbial report dated 07.08.2020: Bundle B7, L.189, pp.1964-2021/PDF pp.132-189. PW4 believed that based on the surface swab test analysis, the impugned condo unit was microbially contaminated and concluded it was unsafe to reside in.

(8) **P2 claimed since 2010**, she and her children suffered allergic reaction issues as a consequence thereof. **The children were diagnosed in 2012** with staphylococcus infection with boils.

(9) PW4 offered evidence that staphylococcus bacteria were present in the condo unit.

6.3 The Ps argued that their enjoyment of the impugned condo unit had been impaired. Consequently, they had to relocate to K's residence in Jalan Ampang and incurred costs there. The water leakage had damaged the impugned condo unit, their personal belongings, furniture, and fittings.

6.4 The Ps believes that Res Judicata does not bar the present proceedings as the suit is dissimilar to Suits 668, 540, and 6176, respectively. Citing *Chua Wee Seng v. Fazal Mohamed* [1971] 1 MLJ 106 and *Arkitek Tenggara Sdn Bhd v. Mid Valley City Sdn Bhd* [2007] 5 MLJ 697, FC. The Ps argued that:

(a) On 14.02.2005, the impugned condo unit was flooded due to a burst elbow pipe at the ceiling level: Bundle B4, L.184, pg.392/PDF 135, Cunningham Lindsey Report 08.09.2005.

(b) The Ps had to vacate the condo unit for seven months to facilitate repair and restoration works.

(c) The Ps subsequently filed Suit 668 in 2007, seeking civil remedies against D1. The parties entered into a Consent Order on 22.09.2011, in which the Ps received RM490k from D1 as compensation with no admission of liability and RM1M from the insurers (MAA): Bundle B5, L187, pg.1230/PDF pg.68.

(d) This present suit is premised on new leakages discovered in November 2016 after the Consent Order was recorded and has nothing to do with the 2005 burst elbow pipe incident.

I observed that this selective assertion contradicts the Ps position that the new water seepage was first discovered in 2013, when nothing constructive was done to mitigate the situation, if any, until 2020 and to date.

(e) D2, in Suit 540, sued the Ps in 2011 to recover arrears in maintenance charges. The Ps counterclaimed that D2 failed to maintain the condo unit properly, causing them to vacate for repair and renovation works from October 2007 to January 2008. The High Court dismissed the Ps counterclaim as it found the issues raised by the Ps had been determined in Suit 668.

(f) D2, in November 2014, sued the Ps in Suit 6176 at the Magistrate's Court to recover maintenance charges and the sinking fund. The Ps counterclaimed that water leakages caused cracks in the wall and flooding of the condo unit. They had to vacate in 2014 and moved to K Residences. The Magistrate struck off the counterclaim with liberty. The Ps argued that the issue then is dissimilar to the present suit. The Federal Court determination in *Kluang Wood Products Sdn Bhd & Anor v. Hong Leong Finance Bhd & Anor* [1999] 1 MLJ 193, FC was cited. It ruled that there must be a final and conclusive determination on the merits of the cause, and the decision upon which the issue of estoppel arises must be final, which puts an

end and concludes that particular action.

(g) Therefore, the Ps submitted that Res Judicata does not apply to bar the present action.

6.5 The Ps argued that the Ds owed a duty of care to take reasonable care, which they breached, resulting in the Ps suffering damages that were not too remote: *Arab Malaysian Finance Bhd v. Steven Phoa Cheng Loon & Co* [2003] 1 CLJ 585, CA*; Lord Bridge in Caparo Industries Plc v. Dickman* [1990] 2 AC 605 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 court considers it fair, just, and reasonable that the law should impose a duty of a given scope upon the one party for the benefit of the other."

As the developer of Kirana Condominium, D1 had a close proximate relationship with the Ps, the owner of the impugned condo unit. D2 contracted them to maintain the swimming pool and the pump room. They must ensure that it is properly maintained. They did nothing to address the issue of the allegation of water leakages, even though they were duly informed by D2 in 2014. It is the Ps case that the water leakages were caused by the failure in the waterproofing works concerning the swimming pool and the pump room: Bundle B7, L189, pp.1933-1935/PDF pp.101-103, Survey report of Gen Superseal (15.08.2019). In this report by D1's specialist contractor, it was recommended that D1 apply a new waterproofing membrane to stop water leakage from the swimming pool to the pump room. During a joint inspection (27.08.2020) between D2 and D1, it was found that D1 did not properly maintain the pump room: Bundle B3, L185, pg.721/PDF pg.217, pp.722A-&22G/PDF pp.219-225. It was

argued that leakage in the pump room escalated to the condo unit below, impairing and damaging the impugned condo unit. D1 must be held liable for nuisance.

6.6 D2 has breached its statutory duty under the Strata Management Act 2013 and its duty of care to the Ps in failing to maintain the property. The Swimming pool and the pump room are common properties within their jurisdiction and care. That duty is non-delegable: *AUMK Capital Sdn Bhd v. Menara UOA Bangsar Management Corporation* [2022] MLJU 2149, HC*; CAN Infra Sdn Bhd v. Perbadanan Pengurusan & Anor* [2019] MLJU 1849, HC**.** D2 did nothing to address the allegation of water leakages save for forwarding the Ps letter of complaint to D1. Consequently, D2 has breached its statutory duty.

In the circumstances, the Ps pray that the Ds be found liable.

THE FIRST (D1) SUBMISSIONS:

[7] Canvassing for their defence in denying the Ps claim, in a nutshell, D1 argued that:

7.1 The Ps had failed to disclose all pertinent facts and circumstances frankly and fully in arguing for their claim. As the plaintiffs, they are duty-bound by law (sections 101-103 Evidence Act 1950) to establish their claim by adducing compelling evidence:

The Fordeco Nos.12 & 17: The Owners of and all other persons interested in the ships Fordeco Nos. 12 and Fordeco No.17 v. Shanghai Hai Xing Shipping Co Ltd, the owners of the ship MV Xin Hua 10 [2000] 1 MLJ 449, FC*; Aneka Melor Sdn Bhd v. Seri Sabko (M) Sdn Bhd* [2016] 2 CLJ 563**.**

Parties are bound by the pleadings that they have filed and can only confine their arguments within it. The Court is duty-bound to give effect to the context of the pleaded case and not otherwise: *Samuel Naik Siang Ting v. Public Bank* [2015] 8 CLJ 944, FC:

"[29] It is a cardinal rule in civil litigation that parties are bound by their pleadings and are not allowed to adduce facts and issues which they have not pleaded (State Government of Perak v. Muniandy [1985] CLJU 117; [1985] 1 LNS 117; [1986] 1 MLJ 490 *and Anuar Mat Amin v. Abdullah Mohd Zain* [1989] CLJU 74; [1989] 1 LNS 74; [1989] 3 MLJ 313). *In Blay v. Pollard & Morris* [1930] 1 KB 628, *Scrutton LJ ruled that: "Cases must be decided on the issues on the record, and if it is desired to raise other issues, there must be pleaded on the record by amendment."*

[30] The Supreme Court in Lee Ah Chor v. Southern Bank Bhd [1991] 1 CLJ 667; [1991] 1 CLJ (Rep) 239; [1991] 1 MLJ 428, *had also emphasised the importance of pleadings and ruled that where a vital issue was not raised in the pleadings it could not be allowed to be argued and to succeed on appeal (see also Ambank (M) Bhd v. Luqman Kamil Mohammed Don* [2012] 3 CLJ 551; [2012] MLJU 56 FC).

[31] On the same issue, HRH Raja Azlan Shah FJ (as HRH then was) in The Chartered Bank v. Yong Chan [1974] CLJU 178;[1974] 1 LNS 178; [1974] 1 MLJ 157, *had also pointed out that "as the trial judge had decided on an issue which was not raised in the pleadings, the judgment must be set aside and new trial ordered" (see also: Haji Mohamed Dom v. Sakiman* [1955] CLJU 26;[1955] 1 LNS 26; [1956] MLJ 45 *and Kiaw Aik Hang Co Ltd v. Tan Tien Choy* [1963] CLJU 59;[1963] 1 LNS 59; [1964] MLJ 99)."

7.2 Res Judicata must bar the present suit by the Ps as similar facts had been ventilated in Court by the parties in:

(a) KL HC Civil Suit No. S1-22-888-2007 (Suit 668) by the Ps against D1.

(b) In an action by D2 against the Ps for arrears for maintenance

charges in KL HC Civil Suit No.22-NCVC-540-2011 (Suit 540), the Ps pleaded similar facts in their counterclaim and was dismissed for res judicata.

(c) Both suits pertain to similar facts and subject matter, and the cause of actions pleaded are closely related.

(d) In 2016, in a civil action at the KL Magistrate Court Civil Suit: A72NCVC-6716-11/2016 (Suit 6716) by D2 for recovery of maintenance and sinking fund against the Ps for the impugned condo unit, the Ps counterclaimed on similar grounds concerning water leakages originating from the upper floor swimming pool. The counterclaim was dismissed:

(1) The Ps claimed about allegedly new water leakages in 2013 but did not raise this issue in the counterclaim in Suit 6176 in 2016.

(2) Similar issues should not be allowed to be re-litigated in the present suit.

D1 cited the Federal Court in *Asia Commercial Finance (M) Sdn Bhd v. Kawal Teliti Sdn Bhd* [1995] 3 MLJ 189, FC, which ruled that when a matter between two parties has been adjudicated and determined by a court of competent jurisdiction, either party is not permitted to litigate the matter again as the determination or judgment has become the truth between such parties. Also cited was *Seruan Gemilang Makmur Sdn Bhd v. Badan Perhubungan UMNO Negeri Pahang Darul Makmur (via its secretary Dato' Ahmad Tajudin bin Sulaiman)* [2010] 8 MLJ 575 that observed that the fact remains. Admittedly, the relief claimed is the same concerning the same subject matter and is consequent to the same agreement. Therefore, it would be most unjust to permit the plaintiff to make a double claim arising out of the same transaction, and this would amount to abusing the court process, frivolous and

scandalous, as the claim of relief is wholly unnecessary. The plaintiff cannot divide their case into separate compartments and proceed by way of instalments to suit their convenience where the relief applied in this civil suit has been included and claimed in the first civil suit where judgment had already been granted in favour of the plaintiff.

7.3 Counsel for D1 drew up a comparative table to highlight the similarities in the present suit and Suits 668, 540, and 6176. The present suit is evidently founded on the same water leakage issues as in Suit 668. The pictures of the defects impacting the impugned condo unit (Bundle B3, L185, PDF pp.147-160) are the same pictures of the damage in 2006 in the same bundle at pp.154-160. For ease of reference, I reproduced below:

"The particulars of the negligence pleaded in Suit 668 and present suit are as produced as follows:-

(a) Suit 668 (Paragraph 16 (a) of SOC, at pdf page 105 Bundle B4/E. 197
Using or permitting for the usage of the swimming pool when the 1st Defendant knew or had reasonably known that the swimming pool, or the drainage system and/or its piping system is inadequate and defective.
Present Suit (Paragraph 15.2 of the SOC, at pdf page 27 of Bundle A1/E.160
Using or permitting to be used the swimming pool located above the Property although the Defendant or any one of them knew or ought to have known that the swimming pool, its drainage system and/or piping is inadequate and defective.

(b) Suit 668 (Paragraph 16 (b) of SOC, at pdf page 106 Bundle B4/E.197
Failing to inspect, maintain and/or repair the swimming pool, its drainage system and/or piping system adequately or at all
Present Suit (Paragraph 15.3 of the SOC, at pdf page 27 of Bundle A1/E.160
Failing to inspect, maintain and/or repair the swimming pool, its drainage system and/or piping system adequately or at all

(c) Suit 668 (Paragraph 16 (c) of SOC, at pdf page 106 Bundle B4/E. 197
Failing to improve the swimming pool, its drainage system and/or its piping despite complaints from the Plaintiffs on the leakage from the swimming pool
Present Suit (Paragraph 15.4 of the SOC, at pdf page 27 of Bundle A1/E.160
Failing to improve the swimming pool, its drainage system and/or its piping despite complaints from the Plaintiffs.

(d) Suit 668 (Paragraph 16 (d) of SOC, at pdf page 106 Bundle B4/E. 197
Failing to install proper or adequate water proofing system to prevent to escape, leakage and/or seepage of water from the Swimming Pool.
Present Suit (Paragraph 15.5 of the SOC, at pdf page 27 of Bundle A1/E.160

Failing to install proper or adequate water proofing system to prevent to escape, leakage and/or seepage of water into the Property.

Among the reliefs sought by the Plaintiffs in the previous suits were damages for the goods in the condominium unit and an order for the 1st Defendant to carry out repair and maintenance work for the swimming pool and its drainage system together with its piping system to prevent further escape or leakage of water.

Present Suit	*Suit 668*	*Suit 6716*
Paragraph 25 at pdf page 30 of Bundle A1/E.160	***Paragraph 21 at pdf page 108 Bundle B4/E.197***	***Paragraph 20 at pdf page 237 Bundle B5/E.187***
(a) An order that the ***Defendants or either one of them do within 14 days carry out such necessary repair and/or maintenance to prevent further escape and/or leakage and /or seepage of water into the Property.***	*(e) An order that the* ***Defendant do within 14 days carry out such necessary repair and/or maintenance of the swimming pool, its drainage system and/or its piping to prevent any further escape of water or leakage to the Plaintiff's property.***	*(a) A declaration that D2 is not entitled to charge maintenance and administrative charges until the leakage issue has been finally resolved by D2.*
(b), (c), (e), (f), (g)	*(a) Special damages for* ***renovation of property, electrical and***	*(b) Special damages for packaging, storage and removing personal*

Special damages for ***damage to furniture and fittings*** *(€851,376.00),* ***damage to Plaintiffs' personal items*** *(USD259,810.46) + (SBG8197.80) + (RM865,981.63 including medical claims),* ***alternative accommodation***	***mechanical works, damage to furniture, fittings, household and personal items, temporary accommodation,*** *packaging storage and insurance for insurance, fittings,* ***household and personal items*** *amounting to RM2,564,3999.29*	*items,* ***alternative accommodation*** *and cleaning costs.*
(h) ***General damages to be assessed.***	*(b)* ***General damages to be assessed.***	
(i) ***Aggravated damages.***	*(c)* ***Aggravated damages.***	
(j) ***Exemplary damages***	*(d)* ***Exemplary damages.***	

I have observed and considered the arguments in those paragraphs and agree they are similar. It compellingly supports the position taken by D1 and D2 on the issue of res judicata.

7.4 From the alleged discovery of new leakages in 2013, it was only in 2016 that the Ps requested a joint inspection of the condo unit and the pump room:

(a) The agreed joint inspection was called off at the last minute when PW3: Roslind Leong, the personal representative of the Ps, informed the Ds that the Ps were unavailable.

(b) There is no impartial and definitive evidence that the alleged leakage originated from the swimming pool on level 22 or the pump room on level 21. Any such allegations are purely

speculative.

(c) The Ps should not be allowed to pursue a similar claim as in Suit 668, as parties had entered into a Consent Order for a full settlement of disputes with no admission of liability. A compensation of RM1.490m has been paid. D1 had conducted repair works to the swimming pool and piping to mitigate and prevent water leakage. PW2/P2, in her evidence, confirmed that the damages that came from the previous suit had been rectified, but leakages continue, and the condo unit continues to suffer damage. In the premise it was not new and related to Suit 668 that had been settled*: Earning Century Sdn Bhd v. Aw Khoon Hwee Dennis & Ors* [2017] CLJU; [2017] 1 LNS:

"Since the 2011 suit was struck out by the High Court pursuant to a Consent Order, the plaintiff is barred by the doctrine of estoppel or res judicata in the wider sense, to file this present suit against the defendants. If an action is struck out by consent, the effect is not only to put an end to that action but also precludes the plaintiff from bringing fresh proceedings based on the same, or substantially the same, cause of action. Thus the plaintiff should not be allowed to proceed with the present suit, as it would be tantamount to an abuse of the process of the court.'

The Court held *in Mayban Allied Bhd v. Kenneth Godfrey Gomes & Anor and Another Appeal* [2010] 9 CLJ 702 that it must give full recognition to the consent order. Allowing the appellant to proceed with the second suit is an abuse of the court process.

7.5 It was further argued by D1 that:

(a) The Ps claim does not disclose a reasonable cause of action as it failed to disclose the actual cause and precise location of the alleged leakage in the pleadings. What was asserted were

random allegations without the required particulars. It is an abuse of process and a malicious action against the Ds. D1 cited *Lim Chee Kuo v. The Pacific Bank Berhad* [2011] 5 MLJ 230 that had ruled it was an abuse of process when the plaintiff knew that he never had a cause of action, proceeded with the action to extort relief that he was not entitled to.

(b) It is malicious as the Ps made selective disclosures of pertinent information to the Court admonishing the Ds.

(c) The Ps failed to provide compelling evidence to establish their case for negligence, nuisance, and breach of statutory duty. What has been argued and presented are speculative assertions to support their claim. They could not establish the alleged losses they had suffered. It is a trite law that they must prove it. D1 cited Lord Goddard CJ in *Bonham-Carter v. Hyde Park Hotel* [1948] 64 TLR 177, referred to and followed by the Federal Court in *Tan Sri Khoo Tech Puat & Anor v. Plenitude Holdings Sdn Bhd* [1995] 1 CLJ 15, FC; and *Datuk Mohd Ali Hj Abdul Majid & Anor v. Public Bank Berhad* [2014] 6 CLJ 269, FC:

"The plaintiff must understand that if they bring actions for damages, it is for them to prove their damage; it is not enough to write down the particulars. So to speak, throw them at the head of the court, saying: This is what I have lost. I ask you to give these damages. They have to prove it."

There is simply no compelling and definitive evidence to establish the cause of the leakage, as the PS alleged, rendering their claim untenable. The Court of Appeal made it clear in *Lee Kim Noor & Anor v. Julian Chong Sook Keong & Anor* [2021] 8 CLJ 852, CA when it observed:

(1) That a cause of action in tort arose when the plaintiffs suffered damage. It is necessary to prove actual damage

to constitute a cause of action in negligence and that, on the pleaded facts, the plaintiff had suffered actual damage through the defendant's negligence.

(2) Time runs from the date the cause of action accrues and not when the plaintiffs discovered the damage: *Ambank (M) Bhd v. Abdul Aziz bin Hassan & Ors* [2010] 3 MLJ 784, CA.

7.6 D1 further argued that:

(a) The Ps argued that although they discovered the alleged leakage in 2013, it has continued to this day.

(b) This is untenable, and D1 cited in support the UK Court of Appeal ruling in *Jalla & Ors v. Shell International Trading and Shipping Co & Anor* [2021] EWCA Civ 63, CA England that a cause of action in tort is usually a single, self-contained package of rights, relating to an act or omission which has caused damage and is actionable in law. Thus, any claim of negligence in this case arising out of the event when oil leaked into the sea on 20th December 2011 gives rise to a single cause of action, which, as a matter of law, was completed when the damage occurred.

(c) The Ps attempted to steer away from this reality in law by producing self-serving reports unilaterally prepared by their experts before filing the present action and not when they first discovered the alleged leakage in 2013. The law is trite that expert reports do not decide the matter. It is merely persuasive. It is the presiding judge that eventually determines the matter:

(1) The Non-Destructive Inspection (01.07.2017 by PW5) is in Bundle B7, L.189, PDF pp.218-246, and the Supplementary report (22.07.2020) is in the same bundle at pp.290-302.

(2) The Microbial Contamination Assessment (7.8.2020 by PW4) in Bundle B7, L.189, PDF/pp.132-207.

D1 argued that the self-serving findings in the reports above are hardly definitive of the impugned issues in this present suit and must be taken cautiously. They consist substantially of speculations, and it is trite that speculation is not accepted evidence in our judicial system. The documentary evidence produced by the Ps failed to provide persuasive evidence on their allegations of nuisance, negligence, and breach of statutory duty. Consequently, the burden does not shift to the Ds to establish their defence.

7.7 D1 also argued that on 01.02.2010, D1 officially handed over ownership, management, and maintenance of Kirana Condominiums (Menara B) to D2. D1 initially owned the swimming pool on level 22, but vide a mutual agreement by letter (25.11.2009) in Bundle B2, L.184, pg.184, D2 agreed to accept all common properties, including the swimming pool on level 22:

(a) In May 2010, D1 surrendered a parcel unit together with several accessory parcels to be part of the common property vested in D2

(b) The Ds mutually arranged for D1 to continue maintaining Ascott's KL (Menara A), including the common properties.

(c) The Ds also entered into a services arrangement enabling D1 to operate and maintain several common properties (including the swimming pool on level 22 and the pump room on level 21 of Menara B/Kirana) under the purview of D2 as the Management Corporation of the condominium.

(d) D1 argued that their duty, if any, is limited to D2 and does not extend to the Ps.

(e) Charges expended by D1 to D2 are mainly for the maintenance,

operations, and facilities of the swimming pool and the pump room for the residents of Kirana Condominium.

(f) D2, as the MC, is duty-bound to address and rectify all leakages and seepage. All common property, including the swimming pool and the pump room, is within the jurisdiction of the MC and not D1: *3 Two Square Sdn Bhd v. Perbadanan Pengurusan 3 Two Square & Ors; Yong Shang Ming (3rd party)* [2018] 4 CLJ 458, HC.

7.8 D1 asserted that the present claim by the Ps had been rendered academic as the leakage issue had been resolved, and the claim on it has ceased to exist:

(a) Upon the conclusion of the joint inspection, the Ps did not furnish a further report to substantiate the allegations of continuous leakage.

(b) PW5, the Ps expert, confirmed in his evidence that no leakages were found during the joint inspection, and the moisture meter reading showed zero. The Court should not decide on a matter when there is no dispute to be resolved: *Low Keang Guan v. Sin Heap Lee-Marubeni Sdn Bhd* [2005] 7 MLJ 216. *In Tan Sri Musa bin Hj Aman v. Tun Datuk Seri Panglima Hj Juhar Hj Mahiruddin & Anor and another appeal* [2020] 3 MLJ 46, CA, the Court of Appeal observed the court ought not to be required to answer academic issues which are no longer live issues.

(c) D1 argued that they do not owe any duty towards the Ps and are not liable for any alleged negligence as they had always exercised due care in discharging their duties as required.

(d) The alleged damage sustained by the Ps was caused or contributed by the P's conduct and negligence.

(e) There is no compelling evidence that the swimming pool and the pump room caused leakage, so the allegation remains

unproven. The materials adduced by the Ps are self-serving and purely speculative. In *OG Heights Management Corp v. One Aug Land Sdn Bhd & Ors* [2013] 3 MLJ 665, HC held that the creators of nuisance, namely the owner of the adjacent land and the developer of the adjacent land, would be liable for nuisance. The Federal Court in *Pushpaleela a/p R Selvarajah & Anor v. Rajamani d/o Meyappa Chettiar and other appeals* [2019] 2 MLJ 553, FC observed that for the establishment of a duty of care in Malaysia, the preferred test is foreseeability, proximity, and policy considerations: The Three-fold test.

(f) The following facts are to be considered:

(1) The tort of negligence, nuisance and breach of statutory duty has ended as the Ps had prevented the Ds from entering the condo unit for a joint inspection on 10.11.2016 to assess and determine the cause and source of the alleged water leakage.

(2) The Ps cancelled the agreed joint inspection, with no new date appointed.

(3) The cause of action accrued in November 2013 with the alleged new water leakage. This goes against the Ps position of a continuing or repeated fresh cause of action every time. Beyond bare assertions, no cogent evidence was adduced to support such a position.

(4) The burden lies on the Ps to establish negligence, nuisance, and breach of statutory duty on the part of the Ds. What has been argued are fundamentally suggestive postulations. That will not be sufficient in law.

(5) The Ps are guilty of contributory negligence to the alleged injury or damage that they have suffered. After discovering the new water leakage in November 2013,

they failed to mitigate the alleged losses timeously. They abandon the condo unit without proper care and ventilation. They failed to conduct a fumigation exercise to decontaminate the condo unit when they had the chance.

In the circumstances, D1 prays that the Ps claim be dismissed with costs.

THE SECOND DEFENDANT (D2) SUBMISSIONS:

[8] Canvassing for their defence in denying the Ps claim, in a nutshell, D2 argued that:

8.1 D2, as the MC of the Kirana Condominium, took the position that other than conjectures, there is no compelling evidence of the 2013 water leakages as alleged by the Ps:

(a) The Ps abandoned the condo unit, uncleaned and unattended, deteriorating it to the point that it is uninhabitable with mould growth.

(b) Substantially similar issues in the present suit should be barred by res judicata (Suits 668, 540, and 1676).

(c) The swimming pool and the pump room did not form part of the common property for the Kirana Condominium at the time, as they were in possession and registered under D1. Notwithstanding that the swimming pool and the pump room were eventually transferred as common property sometime in November 2012 (unknown to D2), D2 never had control of possession thereof, as they were under the care and control of D1. It was rented out (RM3,500-3580: 2013-2019) to D2 for use by the Kirana community. D2 cited *Newfield Peninsula Malaysia Inc v. The Owners of the Ship or Vessel Tanjung Pinang* 1 [2013] 10 MLJ 650, FC that ruled a party with the actual de facto possession is as good as ownership, to whom any tort action shall be brought to. In the circumstances, D2

had forwarded the Ps letter of complaint on the alleged water leakages to D1 for their action to address it.

(d) D2 diligently carried out its statutory duties for the Kirana Condominium. Allegations of breach of duty in such circumstances are untenable. If there is any finding of liability on claims of breach of statutory duty (Strata Management Act), nuisance, and negligence by the Ps, it is caused by D1, which must indemnify D2. For this purpose, D2 took a third-party action against D1 for contribution.

8.2 D2 stood by its position that the present action by the Ps is barred by res judicata:

(a) From the SPA (10.06.2002), Deed of Assignment (23.08.2002):

(1) P1 is at all material times the sole purchaser and registered proprietor of the impugned condo unit: Bundle B1, L183, pp.227-238; 239-234.

(2) Contrary to the bare assertion of P1, there is no legal document or instrument produced by P1 to show that P2 has legal or beneficial interests in the impugned condo unit to support her position or locus as a plaintiff in the present suit.

(b) Notwithstanding the Court of Appeal's overturning the High Court's decision to strike out the present suit on res judicata and remitting the case for trial to ventilate on all issues, including res judicata, which is still a live issue for determination. D2 still maintain the argument that the present suit is substantially similar (alleged water leakages) to Suits 668, 540, and 6176: *Asia Commercial Finance (M) Berhad v. Kawal Teliti Sdn Bhd* [1995] 3 CLJ 782, FC; *Lin Wen-Chih & Anor v. pacific Forest Industries Sdn Bhd & Anor* [2023] 8 CLJ, FC.

(c) The Ps took the position:

(1) It does not concern the water leakage incident in 2006 but the discovery of a new leakage in 2013 after the Consent order was recorded in Suit 668 with D1.

(2) However, if this is true, this alleged new water leakage was never raised in Suit 6176 in 2014 at the Magistrate's Court in P1 defence and counterclaim when D2 sued for maintenance charges and the sinking fund. In the proceeding at the Magistrate's Court, the merits of P1/PW1's counterclaim were not decided because the Court at the time had determined and ruled that the merits and/or subject matter of the P1/PW1's counterclaim had already been dealt in Suit 668, whereby a Consent Order had been recorded. As such, whether or not the Court had decided on the merits of P1/PW1's counterclaim has no bearing on the applicability of the principle of res judicata to estop the present claim.

(3) The Ps' reliance on alleged water leakage in their defence and counterclaim was struck off.

(d) In the circumstances, res judicata must step in to arrest the present suit from proceeding.

8.3 That said, D2 argued that, in any event, the Ps had failed to meet its burden to establish the present suit against D2 for nuisance, negligence, and breach of statutory duty:

(a) The impugned condo unit is on level 20th, the swimming pool is on the 22nd floor, and the pump room is on the 21st floor. If the alleged water leakage is from the swimming pool and/or the pump room, it must pass through a condo unit (21-01) on the 21st floor before hitting the impugned condo unit. There is no indication that it was so.

(b) The Ps did not particularise the area in the condo unit impacted by the alleged new water leakage save for a general sweeping statement. An inspection in 20121 showed that it was dry andstuffy with no signs of water leakages, rendering their allegation of new water leakages in 2013 suspect.

(c) The Ps relied heavily on a set of photographs attached to their letter of complaint (30.04.2014) to D2: Bundle B3, L.185, pp.651-664. The photographs relied upon by the Ps:

(1) Photos of the impugned condo unit are not verified.

(2) They were not taken indoors where the damage is said to occur.

(3) The date the photos were taken was not verified, except for a few, which were dated in 2012, contrary to the Ps' pleadings that the alleged water leakage was discovered in November 2013.

This fact raises questions about the veracity of the Ps claim. Even PW3, the personal representative for the Ps who prepared the letter of complaint, admitted in her evidence that the leakages complained of were connected to the same leakages in 2006.

The Ps expert reports (the Non-Destructive Report and the Supplementary Report) unilaterally prepared by PW5 are self-serving. The findings are speculative, and the cause of the alleged 2013 water leakage cannot be said with certainty. Meanwhile, the Microbial Contamination Assessment Report prepared by PW4 was proven unreliable at the trial.

8.4 D2 argued that:

(a) The Ps could not prove that the alleged microbial

contamination in the condo unit could be faulted on D2. Ps expert PW4 showed that several factors, including lifestyle, activities, and ventilation conditions in the condo unit, could cause it.

(b) In the circumstances, D2 argued that the fact that the Ps had abandoned the condo unit and left it in an uninhabitable state contributed to microbial growth.

(c) The Ps did not provide compelling evidence of the health risks they experienced while occupying the condo unit. PW1/P1, save for a bare assertion in his evidence, could not provide the evidence required to establish the health hazard the family experienced while staying in the condo unit. The Ps could not prove the allegation of unlawful interference.

8.5 The facts showed clearly:

(a) That the Ps are guilty of contributory negligence.

(b) Ps never took any active and constructive steps to mitigate the alleged damage and merely expected the Ds to do it for them.

(c) The Ps carried out improper rectification works following the 2006 burst pipe incident and improper storage and safekeeping of the movable properties, which the Ps claims were damaged.

(d) The Ps must ensure that renovation/rectification work is done correctly so as not to affect the property's standard steel brackets and waterproofing system of the condo unit.

(e) Rectify, repair and/or make good any damage to the condo unit arising from the alleged escape and/or leakage and/or water seepage present as of 22.09.2011 after the Consent Judgment was entered between the P1 and D1 (with compensation of RM1.490m paid).

(f) Treat and decontaminate bacteria and fungi in the condo unit, which could have been done at any time, but no action was taken.

(g) The facts showed that from the initial discovery of the alleged new water leakages in 2013 to 2020, and to date, the Ps never took active steps to mitigate the damage or losses. They abandoned the condo unit to its current state. The water leakage issue could have been addressed sooner, but they cancelled the appointed joint inspection date on 10.11.2016 with no urgency to set a new one as quickly as possible. They merely sat on it.

8.6 Due to the circumstances in which the swimming pool and the pump room are under D1's control, care, and maintenance, D1 must be held accountable if liability is determined. D2 was made to rent the swimming pool from D1 for use by the Kirana community from 2013 to 2019. D2 has no control over the swimming pool and the pump room at all material times, and it has not breached its statutory duty under SMA at any time, as alleged by the Ps. If D2 is found liable, they seek a contribution from D1 under the third-party proceedings herein.

8.7 D2 argued that the Ps claim for damages was left unproven after the trial. The Ps merely listed the alleged losses (Schedule 1 and Schedule 1A) and threw them to the court for compensation. The law is trite that all claims of damages need to be proved before they can even be considered for assessment. No compelling evidence was adduced to corroborate and establish the Ps' claim for damages.

In the circumstances, D2 pray that the Ps claim be dismissed with costs.

THE LAW

[9] Res Judicata in brief:

9.1 Section 25(2) of the Court of Judicature Act 1964, read with the

Schedule, empowers the Court to dismiss proceedings where the matter in question is res judicata between the parties.

9.2 *Asia Commercial Finance (M) Bhd v. Kawal Teliti Sdn Bhd* [1995] 3 MLJ 189, FC:

(a) When a matter between two parties has been adjudicated by a court of competent jurisdiction, they and their privies are not permitted to litigate once more the res judicata, as the Judgment becomes the truth between such parties.

(b) As a result, an estoppel per rem judicatum has been created.

(c) Issue estoppel prevents the correctness of a final judgment by the same parties in a subsequent proceeding from being contradicted.

(d) The court has an inherent jurisdiction to dismiss an action by applying the doctrine of res judicata, which is estoppel based on public policy, even if it has not been pleaded, as public policy requires that there should be finality in litigation.

9.3 *Hartecon JV Sdn Bhd v. Hartela Contractors Ltd* [1996] 2 MLJ 57, CA:

(a) A failure to adhere to the principle of res judicata may lead to chaos in the conduct of civil proceedings.

(b) It would be a circular tail-chasing exercise with no forward movement, proving to the man on the street that the maxim 'the law is an ass' is not without content.

(c) To extend the scope of that principle would be to effectively demolish the requirements of certainty and finality, which are the two pillars on which the judicial process rests.

9.4 *Seruan Gemilang Makmur Sdn Bhd v. Badan Perhubungan UMNO Negeri Pahang Darul Makmur (via its secretary Dato' Ahmad*

Tajudin bin Sulaiman) [2010] 8 MLJ 575:

(a) It would be most unjust to permit the plaintiff to make a double claim arising from the same transaction. This would amount to abusing the court process, frivolous and scandalous, as the claim of relief is wholly unnecessary.

(b) The plaintiff cannot divide their case into separate compartments and proceed by way of instalments to suit their convenience where the relief applied in this civil suit has been included and claimed in the first civil suit where judgment had already been granted in favour of the plaintiff.

9.5 The Federal Court in *Syarikat Sebati Sdn Bhd v. Pengarah Jabatan Perhutanan & Anor* [2019] 3 CLJ 157, FC, ruled that:

"[34] Firstly, on the issue of res judicata, it is necessary to reiterate the elements which constitute res judicata. For this purpose, we find the book Spencer Bower and Turner, Res Judicata, 3rd edn. (1996) particularly useful. There the learned authors set out on p. 10, para 19 what is involved in the burden of showing res judicata, which consists of six matters:

(i) The decision was judicial in the relevant sense.

(ii) It was, in fact, pronounced.

(iii) the tribunal had jurisdiction over the parties and the subject matter.

(iv) The decision was - (a) final and (b) on the merits.

(v) It determined the same questions as that raised in the latter question.

(vi) The parties to the latter litigation were either parties to the earlier litigation or their privies, or the earlier decision was in rem. "

[10] Breach of statutory duty in brief:

There are four elements required to establish civil liability for the breach of a statutory duty:

(1) The injury suffered is within the ambit of the statute,

(2) The statutory duty imposes a liability to a civil action,

(3) The statutory duty was not fulfilled, and

(4) The breach has caused the injury.

[11] Negligence in brief:

11.1 The tort of negligence requires proof of specific elements before it is established, despite carelessness on the part of the defendant and injury or damage sustained by the plaintiff. In *Blyth v. Birmingham Waterworks Co* [1856] 11 Ex 781, Alderson B said:

"...that negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do; or doing something which a prudent and reasonable man would not do."

11.2 Essentially, to establish negligence, **three elements must be fulfilled**.

(a) There is a **duty of care** on the defendant's part.

(b) The defendant **breaches this duty** and

(c) The breach **causes damage that is not too remote** to the plaintiff, although these elements are not necessarily exclusive of the other at all times.

See *Arab-Malaysian Finance Bhd v. Steven Phoa Cheng Loon & Ors and Other Appeals* [2003] 1 MLJ 567, CA.

11.3 The cause of action for negligence arises on the date the plaintiff suffers the loss: *Bank Bumiputra Malaysia Berhad v. Messrs Wan Merican Hamzah & Shaik and Ors* [1994] 1 MLJ 124, HC.

11.4 **Duty of care on the part of the defendant.**

(a) The objective test used in determining the existence of a duty of care is the neighbour principle advocated 38 years before 1970.

(b) This principle was cited with approval in *Home Office v. Dorset Yacht Co Ltd* [1970] AC 1004, where **Lord Reid** said it should apply unless there is some valid justification for its exclusion.

(c) The neighbour principle was propounded by *Lord Atkins in Donoghue v. Stevenson* [1932] AC 562, HL in short:

(1) The rule that you are to love your neighbour becomes in law; you must not injure your neighbour.

(2) You must take reasonable care to avoid acts or omissions you can reasonably foresee would likely injure your neighbour.

(3) A neighbour-in-law seems to be a person who is so closely and directly affected by my act or omission that I ought reasonably to contemplate them as being so affected when I am directing my mind to the acts or omissions that are called in question.

11.5 Breach of this duty of care:

(a) As said by Alderson B in **Blyth Birmingham Waterworks Co. [1856] 11 Ex 781:**

(1) Negligence is the omission of doing something which a reasonable man would do or doing something which a

reasonable man would not do.

(2) A breach of duty is determinable through the reasonable man test. The question is: Would a reasonable man have acted as the defendant had done if the reasonable man faced the same circumstances as the defendant?

(3) The standard of care required is not that of the defendant himself but of this 'reasonable man'.

(b) In the *Government of Malaysia & Ors v. Jumat bin Mahmud & Anor* [1977] 2 MLJ 103, FC, held that in considering whether or not the defendants were in breach of their duty of care, it was necessary to consider whether the risks of injury to the plaintiff were reasonably foreseeable. Assuming it was, the next question was whether the defendants had taken reasonable steps to protect the plaintiff against those risks.

(c) In *Mohamed Raihan bin Ibrahim & Anor v. Government of Malaysia & Ors* [1981] 2 MLJ 27, FC, the Federal Court distinguished this case from *Jumat's* case, supra. It held the defendants negligent as they had failed to take reasonable steps to prevent injury to the plaintiff under their care.

(d) The factors the Court considers in determining the required standard of care are varied. It is up to the trial judge. **The standard of care is a question of law, but a finding that the defendant has met or has not met that standard is a matter of fact**.

See *Arab-Malaysian Finance Bhd v. Steven Phoa Cheng Loon & Ors and Other Appeals* [2003] 1 MLJ 567, CA.

11.6 **The breach causes damage to the plaintiff:**

(a) The evidence adduced at trial on the defendant's conduct must satisfactorily establish that it had occasioned the alleged

damage/injury to the plaintiff. **"But for"** the defendant's breach of duty, would the plaintiff, on a balance of probability, suffer the injury or harm claimed?

The "but for" test of causation produces an all-or-nothing result. The defendant is liable if the plaintiff did not suffer injury but for the defendant's negligence. The neglect of the defendant must have been a necessary condition to occasion the injury or harm: *Dr Guan Suk Chyn v. Kartar Kaur a/p Jageer Singh* [2014] 1 AMR 200, CA; *Ngan Siong Hing v. RHB Bank* [2014] 2 MLJ 449, CA:

(1) The first step in establishing causation (but for) is to eliminate irrelevant causes.

(2) The Court is not concerned with identifying all the possible causes of the incident.

(3) Only the effective cause of the damage caused is of concern.

(4) Would the damage have occurred but for the defendant's negligence?

See:*Dr Noor Aini binti Haji Sa'ari v. Sa-Art Sae Lee & Anor* [2016] AMR 309, CA, *Elizabeth Chin Yew Kim & Anor v. Dato' Ong Gim Huat* [2017] 1 MLJ 328, CA.

11.7 The Court of Appeal ruled in *Chua Seng Sam Reality Sdn Bhd v. Say Chong Sdn Bhd* [2013] 2 MLJ 29, CA that in an action for negligence, the plaintiff must establish:

(1) The defendant's action was the effective cause of the injury suffered by the plaintiff.

(2) There must be a causative link between the wrongdoing and the damage/injury caused, and

(3) The plaintiff's claim must fail without a causative link.

11.8 The Federal Court in *Guan Soon Tin Mining Co v. Wong Fook Kum* [1969] 1 MLJ 99, FC ruled that the plaintiff's claim for negligence could not succeed for failing to establish the "cause and effect" of the death of the fish in the river. There was no positive proof that the discharge from the defendant's mine had anything to do with the death of the fish. **There was only a possibility**.

Findings

[12] In determining the present suit:

12.1 I have examined all-cause papers, the evidence at the trial, and the parties' respective submissions in canvassing for their position in the present suit.

12.2 Considering my observation in the totality of the evidence and the parties' respective arguments in paragraphs **[6]** 6.1-6.6, [7] 7.1-7.8, and **[8]** 8.1-8.7 hereof, in addition to, it is my considered determination that the Ps failed to meet their burden to establish their claim in the present suit.

12.3 Fundamentally, I find that the Ps' claim herein is arrested by res judicata, as the Ds convincingly argued in their respective arguments. It would effectively stop this claim from proceeding further. Allowing the Ps to prosecute this claim against the Ds would be an abuse of process.

See:

Asia Commercial Finance (M) Bhd v. Kawal Teliti Sdn Bhd [1995] 3 MLJ 189, FC; *Hartecon JV Sdn Bhd v. Hartela Contractors Ltd* [1996] 2 MLJ 57, CA; *Seruan Gemilang Makmur Sdn Bhd v. Badan Perhubungan UMNO Negeri Pahang Darul Makmur (via its secretary Dato' Ahmad Tajudin bin Sulaiman)* [2010] 8 MLJ 575; *Syarikat Sebati Sdn Bhd v. Pengarah Jabatan Perhutanan & Anor*

[2019] 3 CLJ 157, FC.

The circumstances of the present suit read against Suits 668, 540 and 6176 fall within the observation of the Federal Court in Syarikat Sebati (supra):

"[34] ... what is involved in the burden of showing res judicata, which consists of six matters:

(i) The decision was judicial in the relevant sense.

(ii) It was, in fact, pronounced.

(iii) the tribunal had jurisdiction over the parties and the subject matter.

(iv) The decision was - (a) final and (b) on the merits.

(v) It determined the same questions as that raised in the latter question.

(vi) The parties to the latter litigation were either parties to the earlier litigation or their privies, or the earlier decision was in rem. "

That said, for completeness, I had also considered the merits of the Ps' claim on the totality of the evidence at the trial against the Ds in this suit, and I find that the Ps failed to discharge their burden as required under ss. 101-103 Evidence Act 1950:

12.4 The Ps failed to produce compelling or persuasive evidence to tilt the evidential scale in their favour, and I am unpersuaded with their arguments. It is trite in law that establishing the case is on the Ps. It is not the Ds' duty to disprove it. The evidentiary burden is that those who allege a fact are duty-bound to prove it (see **s.101, 102, and 103 of the Evidence Act 1950**).

Selvaduray v. Chinniah [1939] 1 MLJ 253, 254, CA held:

"The burden of proof under section 102 of the Evidence Enactment is upon the person who would fail if no evidence at all were given on either side and accordingly, the plaintiff must establish his case. If he fails to do so, it will not avail him to turn around and say that the defendant has not established his. The defendant can say it is wholly immaterial whether I prove my case or not. You have not proved yours".

Johara Bi bt. Abdul Kadir Marican v. Lawrence Lam Kwok Fou & Anor [1981] 1 MLJ 139, FC held:

"It was all a matter of proof, and until and unless the plaintiff has discharged the onus on her to prove her case on a balance of probabilities, the burden did not shift to the defendant. Even if the defendant's case was completely unbelievable, the claim against him must, in these circumstances, be dismissed. With respect, we agree with this judicial approach."

[13] Consequently:

13.1 After examining the totality of the evidence before me, I can't find the necessary compelling evidence to attach liability on the Ds. The claim and the plaintiffs' evidence in canvassing this suit contain fundamental holes. Their evidence does not fit the claim.

13.2 What is before me from the Ps side are speculative materials leading to a suggestion that it was possible. Among the evidence at the trial, I considered:

(a) The Non-Destructive Expert Report and the Supplementary Expert Report by PW5 are highly speculative. It could not definitively pinpoint the cause of the alleged water leakages 2013. It is trite that the Court shall not act on speculation but only deal with proven facts.

(b) The Microbial Assessment Report by PW4 has undoubtedly been rendered unreliable and could not with certainty address

the issue to fault its existence on the alleged negligence of the Ds.

I take cognisance that the Ps Letter of Complaint (30.04.2014) to D2 for the alleged discovery of the 2013 water leakage relied heavily on a set of photographs to prove their allegations: Bundle B3, L185, pp.651-664. However, it has been established that at the trial:

(1) The photographs of the impugned condo unit are not verified.

(2) They were not taken indoors where the damage is said to occur.

(3) The date the photos were taken was not verified, except for a few, which were dated in 2012, contrary to the Ps' pleadings that the alleged water leakage was discovered in November 2013.

The circumstances raise issues regarding the veracity of the Ps claim. PW3, the personal representative for the PS who prepared the letter of complaint, admitted in her evidence that the leakages complained of were connected to the same leakages in 2006 that had been addressed and resolved in the Consent Order of Suit 668.

(c) It is not refuted that the Ps prevented the Ds from entering the condo unit for a joint inspection on 10.11.2016 to assess and determine the cause and source of the alleged water leakage that the relevant party could have addressed promptly. The Ps cancelled the agreed-upon joint inspection, and no new date was appointed. This manner of conduct raises questions about the integrity of the Ps claim.

(d) Save for the Ps' bare assertion, no compelling evidence was adduced to support the Ps' position that the water leakages in

2013 are new and detached from the issue in Suit 668.

(e) As I observed earlier, the Ps are accountable for contributory negligence to the alleged injury or damage that they have suffered. After discovering the alleged new water leakage in November 2013, they failed to mitigate the supposed losses timeously. They abandoned the condo unit without proper care and ventilation. They failed to conduct a fumigation exercise to decontaminate the condo unit when they had the chance.

When the Ps witnesses, including the experts in their respective fields, could not satisfactorily nail the issue to establish guilt on the Ds' part, it opened the door for more speculations about what had happened. Speculative evidence to suggest fault is never good evidence in law, so I cannot rest a definitive finding. In the circumstances, I find the Ps story is not probable. It was observed by the Federal Court in *Guan Soon Tin Mining Co v. Wong Fook Kum* [1969] 1 MLJ 99, FC that the plaintiff's claim for negligence could not succeed. There was no definitive proof that the discharge from the defendant's mine had anything to do with the death of the fish. **There was only a possibility**. It was insufficient to attach liability to the defendant.

13.3 In arguing for their case, I find the arguments by the Ps unconvincing for want of compelling evidence. As ruled by the Court of Appeal in *Chua Seng Sam Reality Sdn Bhd v. Say Chong Sdn Bhd* [2013] 2 MLJ 29, CA in an action for negligence, the plaintiff must establish (1) the Ds action was the effective cause of the injury suffered by the Ps, (2) there must be a causative link between the wrongdoing and the damage/injury caused, and **(3) the Ps claim must fail without a causative link**. In the circumstances, I cannot extricate the find from the Ps facts to attach the Ds with fault and liability appropriately.

[14] Definitive proof of fault and liability on a mere possibility is

insufficient in law.

14.1 The standard of care is a question of law, but a finding that the defendant has met or has not met that standard is a matter of fact (*Arab-Malaysian Finance Bhd v. Steven Phoa Cheng Loon & Ors and Other Appeals* [2003] 1 MLJ 567, CA). The Privy Council further observed in *Rowling v. Takasro Properties Ltd* [1988] 1 All ER 163, PC all the relevant circumstances must be considered. The evidence adduced at trial on D's conduct must satisfactorily establish that it had occasioned the alleged damage/injury to the Ps. The Court of Appeal observed in *Dr Guan Suk Chyn v. Kartar Kaur a/p Jageer Singh* [2014] 1 AMR 200, CA; *Ngan Siong Hing v. RHB Bank* [2014] 2 MLJ 449, CA: "*Only the effective cause of the damage caused is of concern. Would the damage have occurred but for the defendant's negligence?*"

14.2 In light of the foregoing, taking the facts of the case as a whole, I find no compelling evidence to hold the Ds liable for negligence, nuisance and breach of statutory duty.

Conclusions

[15] All things considered:

15.1 It is trite in law that all cases are decided on the legal burden of proof being discharged. The acid test applies to any particular case. The Federal Court in *Johara Bi bt. Abdul Kadir Marican v. Lawrence Lam Kwok Fou & Anor* [1981] 1 MLJ 139, FC ruled that it was all a matter of proof and that until and unless the plaintiff has discharged the onus on her to prove her case on a balance of probabilities, the burden did not shift to the defendant. No matter if the defendant's case was completely unbelievable, the claim against him must, in these circumstances, be dismissed.

15.2 After considering the facts, all evidence adduced at the trial, and the parties' respective arguments, on the balance of probabilities I find

no merits in P's suit against Ds and I dismissed it with costs of RM50,000.00 (each) payable within thirty (30) days from the date hereof.

15.3 By the same reasonings D2's third party claim for indemnity from D1 is no longer an issue and is therefore dismissed.

Dated: 20 MARCH 2024

(HAYATUL AKMAL ABDUL AZIZ)
JUDGE
HIGH COURT OF MALAYA
KUALA LUMPUR

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