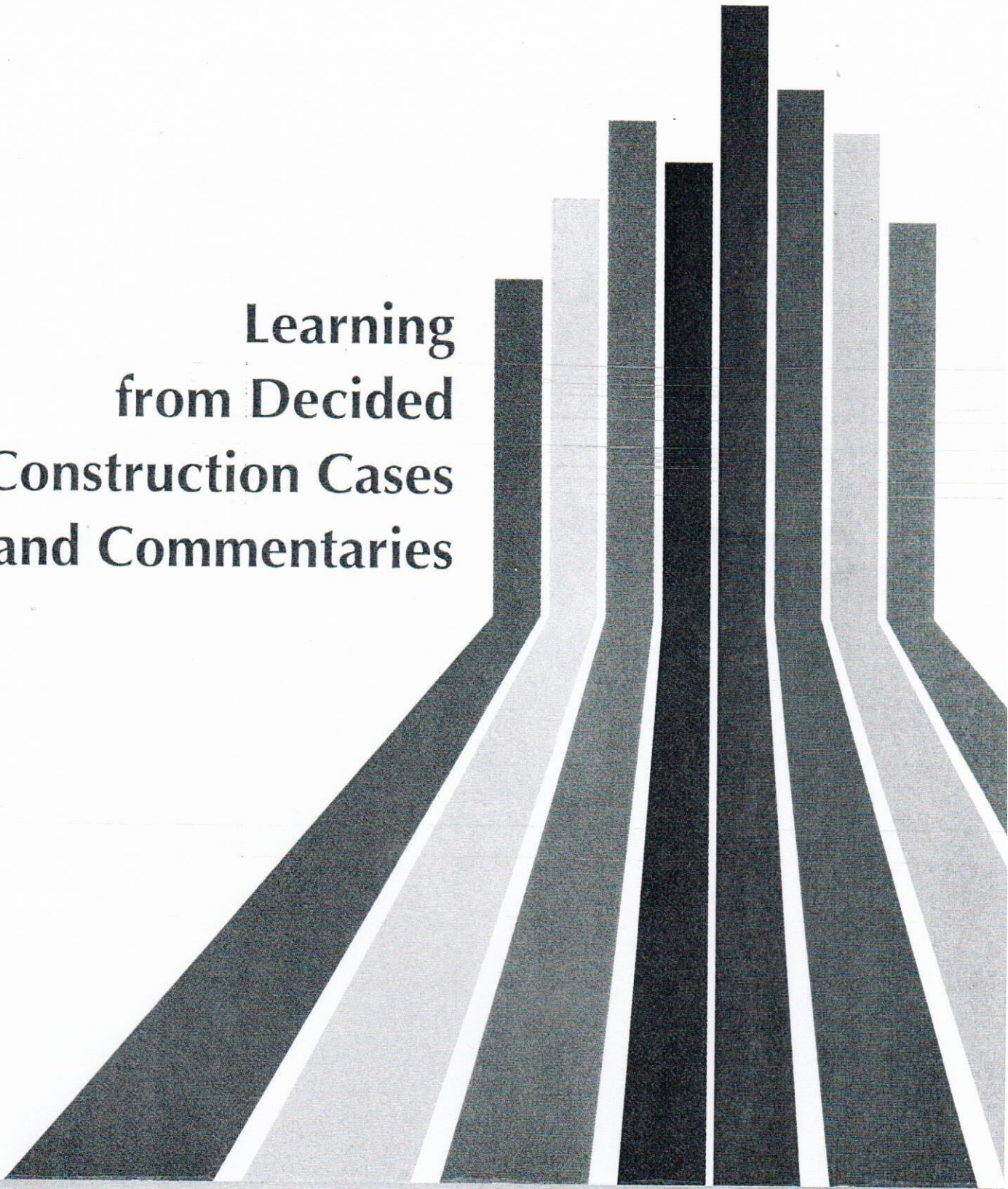


**Learning
from Decided
Construction Cases
and Commentaries**



MLJ Headnotes: Copyright 2015 LexisNexis a division of Reed Elsevier (Singapore) 2008 Pte Ltd; Commentaries, Statistics and Images: Copyright 2015 Construction Industry Development Board Malaysia. All rights reserved.

No copyright is claimed as to any part of the original work prepared by a government officer or employee as part of that person's official duties. No part of this publication may be reproduced or transmitted in any form or by any means, including photocopying and recording, without the written permission of the copyright holders, application for which should be addressed to the Publisher. Such written permission must also be obtained before any part of this publication is stored in a retrieval system of any nature.

Any views or opinions presented in this publication are solely those of the commentators and do not necessarily represent those of the Publisher and CIDB. Commentators were encouraged not to make defamatory statements and not to infringe or authorise any infringement of copyright or any other legal right. The Publisher and CIDB each excludes liability for loss suffered by any person resulting in any way from the use of, or reliance on this publication.

Images appearing within the 'Compilation of Construction Cases and Commentaries' section in this publication have no connection whatsoever with the cases mentioned therein.

†Company No. 76125-H
ISBN No: 978-967-400-345-6 (HC)
ISBN No: 978-967-400-351-7 (SC)

Printed in Malaysia by Vivar Printing Sdn Bhd

CONTENTS

5 FOREWORD

8 ACKNOWLEDGEMENTS

12 LIST OF CASES

13 SUBJECT INDEX

17 STATISTICS ON CONSTRUCTION INDUSTRY

25 STATISTICS ON CONSTRUCTION CASES

31 COMPILATION OF CONSTRUCTION CASES AND COMMENTARIES

COMMENTATORS

Aniz Ahmad Amirudin	Advocate and Solicitor Zul Rafique & Partners
Chan Yew Hoong	Advocate and Solicitor Azman Davidson & Co
Chew Chang Min	Advocate and Solicitor (Malaya and Singapore)
Grace Xavier	Research Fellow Faculty of Law University of Malaya
Ir. Harbans Singh KS	Arbitrator/Adjudicator HSKS Dispute Resolution Chambers
Professor Dr Hunud Abia Kadouf	Dean Ahmad Ibrahim Kulliyah of Laws International Islamic University Malaysia
Karen Ng Gek Suan	Partner Azman Davidson & Co
Ir. Oon Chee Kheng	Advocate and Solicitor CK Oon & Co
Rodney Martin	Managing Director Charlton Martin Consultants Sdn Bhd
Assoc Prof Dr Sharifah Zubaidah Syed Abdul Kader	Ahmad Ibrahim Kulliyah of Laws International Islamic University Malaysia
T Kuhendran	Partner Zul Rafique & Partners

LIST OF CASES

<i>AXA Affin Assurance Bhd v MTD Construction Sdn Bhd</i> [2013] 6 MLJ 323	52
<i>Balbeer Singh a/l Karam Singh & Ors v Sentul Raya Sdn Bhd</i> [2013] 9 MLJ 360	109
<i>Bina Jaya Mantap Sdn Bhd v Institute of Technology Petronas Sdn Bhd</i> [2014] 11 MLJ 352	73
<i>Bumimetro Construction Sdn Bhd v Lee Kok Hwa & Anor and another suit</i> [2015] 7 MLJ 36	123
<i>C S International Design Consortium Sdn Bhd v HSB Development Sdn Bhd</i> [2014] 11 MLJ 751	69
<i>Cobrain Holdings Sdn Bhd v Perwira Bintang Holdings Sdn Bhd</i> [2014] 10 MLJ 496	94
<i>D C Contractor Sdn Bhd v Universiti Pertahanan Nasional Malaysia</i> [2014] 11 MLJ 633	83
<i>Fulloop Sdn Bhd v Crest Builder Sdn Bhd & Anor</i> [2014] 10 MLJ 192	56
<i>Globe Engineering Sdn Bhd v Bina Jati Sdn Bhd</i> [2014] 5 MLJ 145	40
<i>High Century Sdn Bhd v Liew Foot and Sons Construction Sdn Bhd</i> [2014] 11 MLJ 344	98
<i>KC Leong Holdings Sdn Bhd v Datin Moh Bee Ling</i> [2015] 7 MLJ 10	128
<i>Kerajaan Malaysia v Ven-Coal Resources Sdn Bhd</i> [2014] 11 MLJ 218	64
<i>Lembaga Kemajuan Ikan Malaysia v WJ Construction Sdn Bhd</i> [2013] 5 MLJ 98	77
<i>Liang Court Wanisara (Sarawak) Sdn Bhd v Mohamed Shookry Abdul Ghani & Ors</i> [2014] 8 MLJ 157	59
<i>PKNS Engineering & Construction Bhd v Global Inter-Dream (M) Sdn Bhd and another appeal</i> [2014] 5 MLJ 206	48
<i>PWC Corp Sdn Bhd v Teknologi Duta Sdn Bhd</i> [2014] 11 MLJ 682	118
<i>Pembinaan Juta Mekar Sdn Bhd v Sap Holdings Bhd (formerly known as Shah Alam Properties Bhd) & Anor</i> [2014] 11 MLJ 821	107
<i>Pembinaan Perwira Harta Sdn Bhd v Letrikon Jaya Bina Sdn Bhd</i> [2013] 2 MLJ 620	32
<i>Puncak Alam Housing Sdn Bhd (formerly known as Bukit Cerakah Development Sdn Bhd) v Menta Construction Sdn Bhd & Anor</i> [2014] 1 MLJ 287	44
<i>Q2 Engineering Sdn Bhd v PJI-LFGC (Vietnam) Ltd & Ors</i> [2013] 8 MLJ 157	101
<i>Sato Kogyo (M) Sdn Bhd v Salini (M) Sdn Bhd</i> [2014] 10 MLJ 614	89
<i>Tenaga Nasional Bhd v Ahmad Zaki Resources Bhd</i> [2013] 9 MLJ 511	113

SUBJECT INDEX

A

Arbitration

<i>Bina Jaya Mantap Sdn Bhd v Institute of Technology Petronas Sdn Bhd</i> [2014] 11 MLJ 352	73
<i>Lembaga Kemajuan Ikan Malaysia v WJ Construction Sdn Bhd</i> [2013] 5 MLJ 98	77

B

Breach of Contract

<i>Cobrain Holdings Sdn Bhd v Perwira Bintang Holdings Sdn Bhd</i> [2014] 10 MLJ 496	94
<i>PWC Corp Sdn Bhd v Teknologi Duta Sdn Bhd</i> [2014] 11 MLJ 682	118

Building Contract

<i>Pembinaan Perwira Harta Sdn Bhd v Letrikon Jaya Bina Sdn Bhd</i> [2013] 2 MLJ 620	32
--	----

C

Construction of Pay When Paid Clauses

<i>Globe Engineering Sdn Bhd v Bina Jati Sdn Bhd</i> [2014] 5 MLJ 145	40
---	----

Consultancy Contracts: Professional Fees

<i>CS International Design Consortium Sdn Bhd v HSB Development Sdn Bhd</i> [2014] 11 MLJ 751	69
---	----

Contract Obligation

<i>Bumimetro Construction Sdn Bhd v Lee Kok Hwa & Anor and another suit</i> [2015] 7 MLJ 36	123
<i>Q2 Engineering Sdn Bhd v PJI-LFGC (Vietnam) Ltd & Ors</i> [2013] 8 MLJ 157	101

D

Delay and Termination of Contract

<i>PKNS Engineering & Construction Bhd v Global Inter-Dream (M) Sdn Bhd and another appeal</i> [2014] 5 MLJ 206	48
---	----

Direct Payment

<i>Pembinaan Juta Mekar Sdn Bhd v Sap Holdings Bhd (formerly known as Shah Alam Properties Bhd) & Anor</i> [2014] 11 MLJ 821	107
--	-----

Duty of Care

<i>Liang Court Wanisara (Sarawak) Sdn Bhd v Mohamed Shookry Abdul Ghani & Ors</i> [2014] 8 MLJ 157	59
--	----

F**Faulty Design**

<i>AXA Affin Assurance Bhd v MTD Construction Sdn Bhd</i> [2013] 6 MLJ 323	52
--	----

N**Negligence**

<i>Tenaga Nasional Bhd v Ahmad Zaki Resources Bhd</i> [2013] 9 MLJ 511	113
--	-----

Non-Completion: Consequences

<i>Balbeer Singh a/l Karam Singh & Ors v Sentul Raya Sdn Bhd</i> [2013] 9 MLJ 360	109
---	-----

Non-payment

<i>KC Leong Holdings Sdn Bhd v Datin Moh Bee Ling</i> [2015] 7 MLJ 10	128
---	-----

P**Performance Bond, Injunctive Relief**

<i>Fulloop Sdn Bhd v Crest Builder Sdn Bhd & Anor</i> [2014] 10 MLJ 192	56
---	----

Performance Guarantee

<i>Sato Kogyo (M) Sdn Bhd v Salini (M) Sdn Bhd</i> [2014] 10 MLJ 614	89
--	----

S**Settlement Agreement - The Legal Implications**

<i>Puncak Alam Housing Sdn Bhd (formerly known as Bukit Cerakah Development Sdn Bhd) v Menta Construction Sdn Bhd & Anor</i> [2014] 1 MLJ 287	44
---	----

Summary Judgment, Unpaid Party's Remedies

High Century Sdn Bhd v Liew Foot and Sons Construction Sdn Bhd [2014] 11 MLJ 344 98

W

Wrongful Termination

D C Contractor Sdn Bhd v Universiti Pertahanan Nasional Malaysia [2014] 11 MLJ 633..... 83

Kerajaan Malaysia v Ven-Coal Resources Sdn Bhd [2014] 11 MLJ 218 64

COMMENTARY

by Assoc Prof Dr Sharifah Zubaidah Syed Abdul Kader
Ahmad Ibrahim Kulliyah of Laws
International Islamic University Malaysia

Negligence

Introduction

The defendant was appointed by the Government of Malaysia to construct works on a highway project ('the project'). Prior to commencement of the project, several meetings were held concerning the location of 33kV cables owned by the plaintiff located underground at the project site. The location of the cable was not marked in the plan given to the defendant. The plaintiff claimed that during several meetings, the plaintiff had verbally informed the defendant through its employees or representatives the location of the cable. The plaintiff's cable was damaged while the piling of sheet piles was being carried out by the defendant's subcontractor, Giga Engineering S/B ('Giga'). The plaintiff thus claimed for the losses it had suffered as a result of the damage to the cable. The defendant alleged that TN Distribution, the plaintiff's subsidiary, was in charge of the project and at all material times the defendant was dealing with TN Distribution. TN Distribution had returned the duly approved plan which was marked with the route of the 33kV cable but did not indicate on the approved plan the presence of any 33kV cable at the point of damage. Apart from the tort of negligence, the plaintiff also relied on s 41 of the Electricity Supply Act 1990 ('the Act'). The plaintiff also pleaded and relied on the maxim of *res ipsa loquitur* on the grounds that the defendant had control over the location of the site at the material time and therefore had the burden to show that the defendant was not negligent in carrying out the sheet piling work. The

defendant denied any negligence on its part for the damage caused to the cable. The issue arising for determination was whether the defendant had knowledge of the presence or existence of the cable at the damage point. The defendant claimed that the plaintiff did not have the right to bring the suit (*locus standi*) against the defendant because TN Distribution was a separate entity from the plaintiff and the damage to the cable was caused by Giga. The plaintiff however submitted that the issue of *locus standi* was not pleaded by the defendant in its defence.

What we should learn from the case

1. *Rule of evidence on production of documentary support when such document was referred to in an allegation*

The plaintiff's case was that they had given notice to the defendant of existence of 33kV cable at the point of damage during a site visit done in 2004, and that the route of the 33kV cables were shown to the defendant. The plaintiff also alleged that they had given verbal notice to the defendant of the existence of the 33kV cables and had warned the defendant's representative, his agent or his subcontractor numerous times that there is a 33kV cable at the construction site within a radius of less than 50 meters. The defendant on the other hand denied that they had knowledge of the presence or existence of the 33kV cables at the damage point. The defendant said the plaintiff or its subsidiary had not marked or indicated the location of any 33kV cable at coordinates N:10105.856 E:-12179.02 CH2135.783 (the damage point).

As the plaintiff's witness testified that he had marked the route of the cable 33kV at the

damage point on the plan, the plaintiff had to prove this fact by producing a copy of the said plan at the trial. Since the plaintiff failed to do this, the court referred to s 114(g) of the Evidence Act 1950 which raised adverse inference against the plaintiff. The court also concluded that the plaintiff had to prove that they had given notice to the defendant of the existence of the 33kv cables at the damage point.

2. *The concept of res ipsa loquitur and its relation to law on negligence*

The plaintiff relied on the maxim *res ipsa loquitur*, a rebuttable presumption that where an accident or damage occurred at a place within the sole control of a defendant, the accident or damage would not have ordinarily occurred in the absence of the defendant's negligence. The defendant had to prove that it was not in sole control and negligent in carrying out work over the project area.

The court concluded there was no evidence to show that the defendant had sole control over the site as evidence showed that the defendant's subcontractor, Giga Engineering Sdn Bhd also had control of the site. The defendant showed how the damage occurred and also proved that the damage was from sheet piling works undertaken by Giga Engineering Sdn Bhd and not the defendant. This meant that *res ipsa loquitur* cannot be relied upon by the plaintiff against the defendant.

3. *Locus standi and its relation to cause of action in commencing legal proceeding*

There are four main stakeholders involved in this case — Tenaga Nasional Bhd ('plaintiff'), Tenaga Nasional Distribution Sdn Bhd ('TN Distribution' — the plaintiff's subsidiary which the defendant was dealing with in the project), Ahmad Zaki Resources Bhd ('defendant') and Giga Engineering Sdn Bhd ('Giga' — the defendant's subcontractor). The suit was initiated by Tenaga Nasional Bhd as plaintiff against the defendant. The defendant contended that TN Distribution was a separate legal entity from the plaintiff; hence the plaintiff did not have the locus standi (the legal right or capacity to bring an action or to appear in court) to commence the suit against the defendant.

The plaintiff countered that defence of locus standi (<http://www.oxforddictionaries.com/definition/english/locus-standi>) must be specifically pleaded by the defendant as the parties in court are bound by their pleadings. The court concluded the plaintiff had the responsibility of determining who the opponent party is in his action. The rationale for this is because unless his opponent can be determined by the plaintiff, he would not be able to have a valid cause of action which forms the basis of lawsuits.

Based on this reasoning, the court decided that despite the plaintiff's contention that locus standi was not pleaded; it was relevant to the case as the plaintiff had wrongly sued

the defendant. The court thus disregarded the plaintiff's objection on reliance of locus standi by the defendant to defeat the plaintiff's claim.

4. *Vicarious liability*

The plaintiff relied on s 41 of the Electricity Supply Act 1990 which provides for strict liability on a party who caused damage to the plaintiff's asset, in this case the 33kV cable. The plaintiff had actual knowledge that the sheet piling work was undertaken by Giga Engineering Sdn Bhd (the defendant's subcontractor) and not the defendant. The plaintiff however failed to plead that the defendant was vicariously liable for the act or omission of its subcontractor.

Therefore, the court decided that the plaintiff was not entitled to claim for compensation against the defendant.

This case demonstrates that evidence relied upon by a party should demonstrate the actual point of damage that has been incurred. Failure to provide such evidence will raise an adverse inference against the party making the allegation that the production of such evidence will adversely affect the alleging party's case.

Suggested best practices to be adopted

In this case, the court also was of the view that in order for the invocation of the maxim *res ipsa loquitur*, the plaintiff must satisfy the court that the defendant had sole and exclusive control over the ecosystem where the damage or accident has occurred. If this cannot be proven satisfactorily by the plaintiff, then the presumption that the damage or accident has occurred due to the negligence of the defendant cannot be sustained.

It is also interesting to note that parties wishing to commence legal proceedings must ascertain that the correct party is named as defendant. The court concluded that the failure of naming the correct party in a legal suit would mean that the cause of action would fail which would impact the root of the legal proceeding.

Lastly, vicarious liability has to be pleaded in order for it to be relied upon. In the absence of such pleading, a defendant in a civil action cannot be held liable for damage caused by the act or omission of the defendant's subcontractor.



Menara Ibu Perjabat Polis Bukit Aman