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Exploring boundaries of non-delegable duty of care in routine residential construction

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Introduction

In the Federal Court case of *Hemraj & Co Sdn Bhd v Tenaga Nasional Berhad*, the crux of the appeal concerned the imposition of non-delegable duty of care (ie, that third-party contractors ought to take reasonable care when doing a homeowner's excavation works).

Leave was granted by the Court on the following questions (hereafter collectively referred to as "leave questions"):

- Is routine residential construction work carried out by a homeowner through its independent contractors so extraordinarily hazardous as to impose a non-delegable duty of care on the homeowner to a public utilities company, namely Tenaga Nasional Berhad (TNB) for the negligence of those independent contractors?
- If not, is there a special relationship between the homeowner and TNB that satisfies the criteria of the "second category" described in *Woodland v Essex County Council [2014]*⁽¹⁾ to impose a non-delegable duty of care on the homeowner regarding the negligence of its independent contractors?
- Is non-delegable duty of care a cause of action that must be expressly pleaded particularising the basis on which the duty is said to arise? Or is it a matter of law that may be raised during submissions?

Facts

The appellant, Hemraj & Co Sdn Bhd (Hemraj), appointed the third parties as consultants and contractors to carry out excavation works in front of a house belonging to both Hemraj and the director of Hemraj (the defendant). The purpose of the excavation works was to connect the septic tank of the house to the main public sewerage system. During the excavation works, the 132KV underground cable had been damaged. The respondent, TNB, then claimed for emergency repairs and replacement of the cable from the appellant and the defendant who, in turn, sought indemnity against the consultants and contractors.

In essence, TNB contended that Hemraj owed a non-delegable duty of care to TNB, a personal duty to ensure that reasonable care was taken by third-party contractors in doing the excavation works.

High Court

The High Court found that Hemraj owed a non-delegable duty of care to TNB and was, therefore, liable for TNB's loss and expenses, notwithstanding the fact that the third-party contractor, the immediate tortfeasor, was blatantly negligent. As an exception to the general rule, the High Court ordered that the third-party contractors be jointly and severally liable to indemnify Hemraj for the total amount of damages awarded against Hemraj.

Dissatisfied, Hemraj appealed against the High Court's decision.

Court of Appeal

In affirming the High Court's decision, the Court of Appeal found that:

- Hemraj had a positive duty to protect TNB's underground cables and, subsequently, to the public who use the electricity distributed or transmitted via the underground cables; and
- this case fell under the first category of the doctrine of non-delegable duty of care in relation to highway and hazard cases.

Hemraj appealed against the decision of the Court of Appeal.

Federal Court

Zabariah Mohd Yusof FCJ, in delivering the unanimous decision, established the approach in determining the imposition of non-delegable duty of care.

First, the Court had to determine whether a case falls under either category established in *Woodland* as set out below:

- If the defendant employs an independent contractor to perform work that is inherently hazardous, extraordinarily hazardous or liable to become so in the course of the work, the duty of care cannot be delegated to the independent contractor and the principal will remain liable throughout (first category).

- If a special relationship exists between the principal and the victim, the principal is not permitted to delegate their tortious liability to an independent contractor (second category).

According to *Biffa Waste Services Ltd v Maschinenfabrik Ernst Hese GmbH*,⁽²⁾ it is only acts that are "exceptionally dangerous whatever precautions are taken" that fall within the first category.

In establishing an act to fall within the second category, it must possess all five defining features outlined by Lord Sumption in *Woodland*.

Once the category of case has been established, the court would have to further consider whether the imposition of such a duty were fair, just and reasonable as a matter of judicial policy in the local context.⁽³⁾

In applying the approach above, the Federal Court answered no to the first leave question. This was because the excavation works in question were not extraordinarily hazardous and thus did not fall within the first category for the following reasons:

- All licences were issued or required to be issued to the consultants and contractors, not the homeowners, and section 37(12)(a) of the Electricity Supply Act 1990 did not impose a non-delegable duty of care on homeowners or require them to obtain approval from TNB.
- The excavations works were routine residential construction works.
- The fact that the excavation works were carried out near a highway was irrelevant.
- There was no evidence that there was a particular risk from the renovation works that remained substantial, even if the renovation works were done properly.
- From a risk allocation point of view, it would not be fair, just and reasonable to expose homeowners to an indeterminate liability for the tortious acts of their independent contractors, whose manner of work are beyond their control.

Regarding the second and third leave questions, the Court declined to answer.

Comment

The Federal Court's decision in this case provided a clear approach in determining the imposition of non-delegable duty of care. While the Court's application of the established legal principle in this case was facts sensitive, this decision shed light on the court's general reluctance to impose high standard of care on routine residential construction works. As apparent from the judgment, the Federal Court gave correct recognition of the limited control that homeowners have over the actions of their independent contractors. Overall, the Court's decision provides clarity on the application of the doctrine of non-delegable duty of care.

Further, this decision may serve as an alert to companies that engage contractors and/or consultants for extraordinarily hazardous works. While the court shows reluctance to impose non-delegable duty of care on routine residential construction works, it is yet to be tested on work of an industrial and non-routine residential nature.

For further information on this topic please contact Pang Wilson or Low Ley Yeow at Gan Partnership by telephone (+603 7931 7060) or email (wilson@ganlaw.my or leyyeow@ganlaw.my). The Gan Partnership website can be accessed at www.ganlaw.my.

Endnotes

(1) 1 All ER 482.

(2) [2009] 3 WLR 3242.

(3) See *Dr Kok Choong Seng & Anor v Soo Cheng Lin and Anor Appeal* [2018] 1 MLJ 685.