LEGAL ANALYSIS OF CONSTRUCTION DEFECT CLAIMS WITHIN COMMON LAW JURISDICTIONS FOR MALAYSIA

TENG KAM WAH

THESIS SUBMITTED IN FULFILMENT OF THE REQUIREMENTS FOR THE DEGREE OF DOCTOR OF PHILOSOPHY

FACULTY OF BUILT ENVIRONMENT
UNIVERSITY OF MALAYA
KUALA LUMPUR

2018

UNIVERSITY OF MALAYA

ORIGINAL LITERARY WORK DECLARATION

Name of Candidate: TENG KAM WAH

Matric No: BHA100010

Name of Degree: DOCTOR OF PHILOSOPHY

Title of Project Paper/Research Report/Dissertation/Thesis ("this Work"):

LEGAL ANALYSIS OF CONSTRUCTION DEFECT CLAIMS WITHIN COMMON LAW JURISDICTIONS FOR MALAYSIA

Field of Study: LAWS IN BUILT ENVIRONMENT

I do solemnly and sincerely declare that:

(1) I am the sole author/writer of this Work;
(2) This Work is original;
(3) Any use of any work in which copyright exists was done by way of fair dealing and for permitted purposes and any excerpt or extract from, or reference to or reproduction of any copyright work has been disclosed expressly and sufficiently and the title of the Work and its authorship have been acknowledged in this Work;
(4) I do not have any actual knowledge nor do I ought reasonably to know that the making of this work constitutes an infringement of any copyright work;
(5) I hereby assign all and every rights in the copyright to this Work to the University of Malaya ("UM"), who henceforth shall be owner of the copyright in this Work and that any reproduction or use in any form or by any means whatsoever is prohibited without the written consent of UM having been first had and obtained;
(6) I am fully aware that if in the course of making this Work I have infringed any copyright whether intentionally or otherwise, I may be subject to legal action or any other action as may be determined by UM.

Candidate's Signature Date:

Subscribed and solemnly declared before,

Witness's Signature Date:

Name:

Designation:

LEGAL ANALYSIS OF CONSTRUCTION DEFECT CLAIMS WITHIN COMMON LAW JURISDICTIONS FOR MALAYSIA

ABSTRACT

This research focuses on the legal perspectives of some selected issues of construction defect claims in three areas: causes of action, remedies and limitation periods. There are certain issues pertaining to construction defect claims in Malaysia where the law is unsettled, or where application of the law leads to unfairness or injustice, or where the applicable legal principles do not fit neatly into the broader conceptual framework of the law. This study aims to propose the most appropriate judicial and legislative responses to the law on construction defect claims in Malaysia with particular focus on areas which are still mired in controversy or are still developing. The research methodology is doctrinal research. Doctrinal legal research is an endeavour predominantly concerned with the analysis of legal principles and the manner in which they have been developed and applied. The primary sources of information are court decisions, statutes and standard forms of construction contract. The secondary sources are journal articles, books, conference and seminar papers, theses, dissertations and online resources. The significance and contribution of the research include providing recommendations on the proper approaches to take to resolve controversial or difficult issues in construction defect claims and thus reducing disputes in the construction industry and promoting greater harmony amongst all the various parties and consequently, at the macro level, contributing to the healthy and orderly growth of the construction industry. The research also provides some recommendations on whether there is a need for legislative intervention in the interest of social justice for construction defect claims. This research recommends that where loss is suffered by the owner who

is not the employer in a construction contract, the law should prevent the situation where neither the owner nor the employer can recover damages for the loss from the contractor. Where the parties involved in a construction project like the employer, main contractor, sub-contractors and architect have structured their respective liabilities by contract, the court should be slow to superimpose a duty of care which goes beyond the contemplation of the parties at the time of the making of the contracts. There should be no policy bar to claims for pure economic loss for defective buildings. There should be legislative intervention to impose on builders and others involved in the provision of houses the obligations of a transmissible warranty of the quality of their work and the fitness for occupation of the completed houses. Under certain circumstances, it may be appropriate to assess damages to the aggrieved employer on the basis of the savings made by the contractor in the misperformance of his work. Damages for non-financial loss to the employer like loss of amenity, distress and inconvenience should be more readily available and should not invariably be modest in quantum. An order for specific performance to rectify construction defects ought to be granted by the court in appropriate circumstances. The law on the limitation period for latent defect claims in negligence should be amended to allow for limitation to run from the date when the fault is discovered, or at least discoverable.

Keywords: construction defect claims, law, causes of action, remedies, limitation periods

LEGAL ANALYSIS OF CONSTRUCTION DEFECT CLAIMS WITHIN COMMON LAW JURISDICTIONS FOR MALAYSIA

ABSTRAK

Penyelidikan ini tertumpu kepada perspektif undang-undang untuk beberapa isu terpilih ke atas tuntutan kecacatan pembinaan dalam tiga bidang: kausa tindakan, remedi dan had masa. Terdapat isu-isu tertentu berkenaan dengan tuntutan kecacatan pembinaan di Malaysia kerana ketidakpastian undang-undang, atau penggunaan undang-undang yang mengakibatkan ketidakadilan, atau prinsip yang terpakai adalah tidak selaras dengan rangka kerja konseptual undang-undang yang lebih luas. Kajian ini bertujuan untuk mencadangkan tindakbalas kehakiman dan legislatif yang paling sesuai terhadap undang-undang tuntutan kecacatan pembinaan di Malaysia dengan fokus khusus terhadap aspek yang masih menimbulkan kontroversi atau yang masih berkembang. Metodologi penyelidikan ialah penyelidikan secara doktrin. Penyelidikan secara doktrin adalah suatu usaha yang melibatkan terutamanya analisis prinsip undang-undang dan cara yang mana ianya telah diperkembangkan dan digunakan. Maklumat bagi sumber-sumber primer adalah keputusan mahkamah, statut dan kontrak pembinaan bentuk piawai. Sumber-sumber sekunder adalah artikel jurnal, buku, kertas persidangan dan seminar, tesis, disertasi dan sumber atas talian. Kepentingan dan sumbangan penyelidikan ini termasuklah memberi cadangan yang berkenaan berserta dengan pendekatan yang sesuai diambil untuk penyelesaian isu yang menimbulkan kontroversi atau sukar dalam tuntutan kecacatan pembinaan serta mengurangkan pertikaian dalam industri pembinaan di samping menggalakkan keharmonian di antara pihak-pihak yang berkenaan dan seterusnya, secara am, menyumbang kepada perkembangan industri pembinaan yang sihat dan teratur. Penyelidikan ini juga memberi beberapa cadangan

sama ada campur tangan legislatif diperlukan untuk keadilan sosial dalam tuntutan kecacatan pembinaan. Penyelidikan ini mencadangkan agar dalam keadaan di mana kerugian dialami oleh pemilik yang bukan majikan dalam suatu kontrak pembinaan, undang-undang sepatutnya menghindar keadaan di mana pemilik dan majikan tidak boleh memperolehi ganti rugi untuk kerugian daripada kontraktor tersebut. Dalam keadaan di mana pihak-pihak yang terlibat dalam suatu projek pembinaan seperti majikan, kontraktor utama, sub-kontraktor dan arkitek telah menstruktur liabiliti mereka secara kontrak, mahkamah tidak seharusnya mengenakan suatu kewajipan berjaga-jaga yang melebihi pertimbangan pihak-pihak pada masa kontrak-kontrak itu dibuat. Sepatutnya tiada halangan secara dasar terhadap tuntutan untuk kerugian ekonomi tulen untuk kecacatan bangunan. Sepatutnya terdapat campur tangan legislatif untuk dikenakan ke atas pembina dan pihak-pihak lain yang terlibat dalam pembekalan rumah obligasi secara waranti boleh dipindah berkenaan dengan kualiti kerja mereka dan kesesuaian untuk mendiami rumah siap dibina. Dalam keadaan tertentu, adalah lebih sesuai bagi menaksir ganti rugi untuk majikan yang terkilan atas dasar penjimatan yang diperolehi oleh kontraktor kerana kemungkiran dalam kerjanya. Ganti rugi untuk kerugian bukan kewangan kepada majikan seperti kehilangan ameniti, kesusahan dan kesulitan sepatutnya lebih tersedia dan tidak semestinya sederhana dalam kuantum. Perintah untuk pelaksanaan spesifik untuk membetulkan kecacatan pembinaan sepatutnya dibenarkan oleh mahkamah dalam keadaan tertentu. Undang-undang had masa untuk tuntutan kecacatan laten kerana kecuaian sepatutnya dipinda untuk membenarkan had masa bermula daripada tarikh kesalahan itu telah diketahui, atau sekurang-kurangnya boleh ditemui.

Kata kunci: tuntutan kecacatan pembinaan, undang-undang, kausa tindakan, remedi, had masa

ACKNOWLEDGEMENTS

To my supervisors, Dr Sr Rosli Said and Dr Sr Mohd Suhaimi Bin Mohd Danuri,

for having taken the time and effort to guide me through this journey

To Dr Sr Hasniyati Hamzah

for having gone beyond her call of duty to assist me

To my family

for their love and care.

TABLE OF CONTENTS

LIST OF TABLES

LIST OF ABBREVIATIONS

AC	:	Law Reports Appeal Cases
AIR	:	All India Reporter
AJR	:	Australian Jurist Reports
ALJR	:	Australian Law Journal Reports
All ER	:	All England Law Reports
ALR	:	Australian Law Reports
AMR	:	All Malaysia Reports
App Cas	:	Law Reports, Appeal Cases
BLR	:	Building Law Reports
Bus LR	:	Business Law Review
Ch	:	Law Reports Chancery Division
Ch D	:	Law Reports Chancery Division
CJ	:	Chief Justice
CJSS	:	Chief Judge Sabah and Sarawak
CLJ	:	Current Law Journal
CLR	:	Commonwealth Law Reports
EWHC (Ch)	:	High Court of England and Wales (Chancery Division)
EWCA Civ	:	Court of Appeal of England and Wales Civil Division
EWHC (Comm)	:	High Court of England and Wales (Commercial Division)
EWHC (QB)	:	High Court of England and Wales (Queen's Bench Division)
EWHC (TCC)	:	High Court of England and Wales (Technology & Construction Court)
FC	:	Federal Court
FCJ	:	Judge of the Federal Court
HC	:	High Court
HL	:	House of Lords
J	:	Judge
JCA	:	Judge of the Court of Appeal
KB	:	Law Reports King's Bench
Lloyd's Rep	:	Lloyd's Law Reports
LQR	:	Law Quarterly Review

LR	:	Law Review
MLJ	:	Malayan Law Journal
MLJU	:	Malayan Law Journal Unreported
NZLR	:	New Zealand Law Reports
QB	:	Law Reports Queen's Bench
SC	:	Supreme Court
SCJ	:	Judge of the Supreme Court
SGCA	:	Singapore Court of Appeal
SGHC	:	Singapore High Court
SLR	:	Singapore Law Reports
WLR	:	Weekly Law Reports

LIST OF CASES

Acsim (Southern) Ltd v Dancon Danish Contracting and Development Co Ltd (1989) 19 ConLR 1 (CA)

Addis v Gramophone Co Ltd [1909] AC 488 (HL)

Aectra Refining and Manufacturing Inc v Exmar NV [1994] 1 WLR 1634 (CA)

Albacruz (Cargo Owners) v Albazero (Owners), The Albazero [1977] AC 774 (HL)

Alfred McAlpine Construction Ltd v Forum Architects [2002] EWHC 1152 (TCC), [2002] BLR 378

Alfred McAlpine Construction Ltd v Panatown Ltd [2001] 1 AC 518 (HL)

Alfred Templeton & Ors v Low Yat Holdings Sdn Bhd & Anor [1989] 2 MLJ 202 (HC)

Alliance (Malaya) Engineering Co Sdn Bhd v San Development Sdn Bhd [1974] 2 MLJ 94 (FC)

Aloe Coal Co v Clark Equipment Co (1987) 816 F 2d 110

AmBank (M) Bhd v Abdul Aziz bin Hassan & Ors [2010] 3 MLJ 784 (CA)

AmBank (M) Bhd v Kamariyah bt Hamdan & Anor [2013] 5 MLJ 448 (CA)

Anns v Merton London BC [1978] AC 728 (HL)

Arenson v Casson Beckman Rutley & Co [1977] AC 405 (HL)

Ariston SRL v Charly Records Ltd (1990) Independent, 13 April (CA)

Askin v Knox [1989] 1 NZLR 248 (Court of Appeal, New Zealand)

Attorney General v Blake [2001] 1 AC 268 (HL)

Attorney-General for Newfoundland v Newfoundland Railway Co (1888) 13 App Cas 199 (PC)

Axel Johnson Petroleum AB v MG Mineral Group AG [1992] 1 WLR 270 (CA)

Bacom Enterprises Sdn Bhd v Jong Chuk & Ors [2011] 5 MLJ 820 (CA)

Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd [1998] 1 MLJ 393 (FC)

Baker v Ollard and Bentley (1982) 126 Sol Jo 593 (CA)

Baltic Shipping Co v Dillon [1993] HCA 4, 176 CLR 344 (High Court, Australia)

Bank of Boston Connecticut v European Grain and Shipping Ltd, The Domique [1989] AC 1056 (HL)

Bankes v Jarvis [1903] 1 KB 549 (DC)

Barrett v Enfield London BC [2001] 2 AC 550 (HL)

Bellefield Computer Services Ltd v E Turner & Sons Ltd [2000] EWHC Admin 284, [2000] BLR 97

Bellgrove v Eldridge [1954] HCA 36, 90 CLR 613 (High Court, Australia)

Berent v Family Mosaic Housing [2012] EWCA Civ 961

Berjaya Times Squares Sdn Bhd v M Concept Sdn Bhd [2010] 1 MLJ 597 (FC)

Beswick v Beswick [1968] AC 58 (HL)

BICC plc v Burndy Corpn [1985] Ch 232 (CA)

Biggin & Co Ltd v Permanite Ltd [1951] 2 KB 314 (CA)

Bim Kemi AB v Blackburn Chemicals Ltd [2003] EWCA Civ 889, [2004] 2 Costs LR 201

Birmingham Corpn v West Midland Baptist (Trust) Association (Inc) [1970] AC 874 (HL)

Birse Construction Ltd v Eastern Telegraph Co Ltd [2004] EWHC 2512 (TCC), [2004] 47 EG 164 (CS)

BOC Group plc v Centeon LLC [1999] 1 All ER (Comm) 970 (CA)

Bolam v Friern Hospital Management Committee [1957] 2 All ER 118 (QBD)

Bolitho v City and Hackney Health Authority [1998] AC 232 (HL)

Boustead Naval Shipyard Sdn Bhd v Dynaforce Corp Sdn Bhd [2015] 1 MLJ 284 (CA)

Bovis Lend Lease Ltd v RD Fire Protection Ltd [2003] EWHC 939 (TCC), 89 ConLR 169

Bowen v Paramount Builders (Hamilton) Ltd [1977] 1 NZLR 394 (Court of Appeal, New Zealand)

Bridge v Campbell Discount Co Ltd [1962] AC 600 (HL)

Bryan v Maloney [1995] HCA 17, 182 CLR 609 (High Court, Australia)

Bukit Cerakah Development Sdn Bhd v L'Grande Development Sdn Bhd [2008] 3 MLJ 547 (CA)

CA Duquemin Ltd v Slater (1993) 37 ConLR 147 (QBD)

Caparo Industries plc v Dickman [1990] 2 AC 605 (HL)

Cartledge v E Jopling & Sons Ltd [1963] AC 758 (HL)

Cassidy v Ministry of Health [1951] 2 KB 343 (CA)

Central Electricity Generating Board v Halifax Corpn [1963] AC 785 (HL)

Central Trust Co v Rafuse [1986] 2 SCR 147

CH Giles & Co Ltd v Morris [1972] 1 WLR 307 (Ch D)

Chesham Properties Ltd v Bucknall Austin Project Management Services Ltd (1996) CILL 1189

Chevron International Oil Co Ltd v A/S Sea Team, The Havprins [1983] 2 Lloyd's Rep 356 (QBD)

Chew Hon Keong v Betterproducts Industries Sdn Bhd & Ors [2013] 7 MLJ 196 (HC)

China-Pacific SA v Food Corpn of India, The Winson [1982] AC 939 (HL)

City Investment Sdn Bhd v Koperasi Serbaguna Cuepacs Tanggungan Bhd [1988] 1 MLJ 69 (PC)

City of Kamloops v Nielsen (1984) 10 DLR (4th) 641 (Supreme Court, Canada)

City of Westminster v Jarvis & Sons Ltd (1970) 7 BLR 64 (HL)

Clay v AJ Crump & Sons Ltd [1964] 1 QB 533 (CA)

Co-operative Insurance Society Ltd v Argyll Stores (Holdings) Ltd [1998] AC 1 (HL)

Costigan v Ruzicka (1984) 13 DLR (4th) 368 (Alberta Court of Appeal, Canada)

Coulls v Bagot's Executor & Trustee Co Ltd [1967] HCA 3, 119 CLR 460 (High Court, Australia)

Credit Corp (M) Bhd v Fong Tak Sin [1991] 1 MLJ 409 (SC)

Credit Guarantee Corp Malaysia Bhd v SSN Medical Products Sdn Bhd [2017] 2 MLJ 629 (CA)

Cristel v Cristel [1951] 2 KB 725 (CA)

Crocker v British Coal Corpn (1995) 29 BMLR 159 (QBD)

Curran v Newpark Cinemas Ltd [1951] 1 All ER 295 (CA)

Curran v Northern Ireland Co-ownership Housing Association Ltd [1987] AC 718 (HL)

D & F Estates Ltd v Church Comrs for England [1989] AC 177 (HL)

Damodaran v Vesudevan [1975] 2 MLJ 231 (FC)

Darlington BC v Wiltshier Northern Ltd [1995] 3 All ER 895 (CA)

Dataran Rentas Sdn Bhd v BMC Constructions Sdn Bhd [2008] 2 MLJ 856 (CA)

Datuk Bandar Dewan Bandaraya Kuala Lumpur v Ong Kok Peng & Anor [1993] 2 MLJ 234 (SC)

Davis Contractors Ltd v Fareham UDC [1956] AC 696 (HL)

Dawnays Ltd v FG Minter Ltd [1971] 1 WLR 1205 (CA)

Debnarayan Dutt v Chunilal Ghose [1914] 41 Cal 137

Dennis v Charnwood BC [1983] QB 409 (CA)

Devenish Nutrition Ltd v Sanofi-Aventis SA (France) [2008] EWCA Civ 1086, [2009] Ch 390

Dole Dried Fruit and Nut Co v Trustin Kerwood Ltd [1990] 2 Lloyd's Rep 309 (CA)

Donoghue v Stevenson [1932] AC 562 (HL)

Dr Abdul Hamid Abdul Rashid & Anor v Jurusan Malaysia Consultants (sued as a Firm) & Ors [1997] 3 MLJ 546 (HC)

DRC Distributions Ltd v Ulva Ltd [2007] EWHC 1716 (QB)

Drive Yourself Hire Co (London) Ltd v Strutt [1954] 1 QB 250 (CA)

DSL Group Ltd v Unisys International Services Ltd (1994) 41 ConLR 33 (QBD)

Dunlop Pneumatic Tyre Co Ltd v Selfridge & Co Ltd [1915] AC 847 (HL)

Dunlop v Lambert (1839) 6 Cl & Fin 600 (HL)

Dutton v Bognor Regis UDC [1972] 1 QB 373 (CA)

East Ham Corpn v Bernard Sunley & Sons Ltd [1966] AC 406 (HL)

East River Steamship Corp v Transamerica Delaval Inc (1986) 476 US 858 (United States Supreme Court)

Ebrahim Dawood Ltd v Heath (Est 1927) Ltd [1961] 2 Lloyd's Rep 512 (QBD)

Eckersley v Binnie & Partners (1988) 18 ConLR 1 (CA)

Eiles v London Borough of Southwark [2006] EWHC 1411 (TCC)

ELBA SpA v Fiamma Sdn Bhd [2008] 3 MLJ 713 (HC)

Esso Petroleum Co Ltd v Mardon [1976] QB 801 (CA)

Esso Petroleum Co Ltd v Milton [1997] 2 All ER 593 (CA)

Experience Hendrix LLC v PPX Enterprises Inc [2003] EWCA Civ 323, [2003] 1 All ER (Comm) 830

Expo Holdings Sdn Bhd v Saujana Triangle Sdn Bhd [2009] MLJU 1600 (HC)

Fairweather Ltd v Asden Securities Ltd (1979) 12 BLR 40 (QBD)

Farley v Skinner [2001] UKHL 49, [2002] 2 AC 732

FC Seck Trading As Oversea Structural Company v Wong And Lee [1940] MLJ 182

Fearns v Anglo-Dutch Paint & Chemical Co Ltd [2010] EWHC 2366 (Ch)

Federal Commerce & Navigation Co Ltd v Molena Alpha Inc, The Nanfri [1978] QB 927 (CA)

Ferguson v Sohl (1992) 62 BLR 95 (CA)

Fong Wan Realty Sdn Bhd v PJ Condominium Sdn Bhd [2009] MLJU 1428 (HC)

Foo Fio Na v Dr Soo Fook Mun & Anor [2007] 1 MLJ 593 (FC)

Forster v Outred & Co [1982] 2 All ER 753 (CA)

Foster Wheeler Group Engineering Ltd v Chevron UK Ltd (29 February 1996) QBD

Fuller v Happy Shopper Markets Ltd [2001] 1 WLR 1681 (Ch D)

Ganapathy Chettiar v Lum Kum Chum & Ors [1981] 2 MLJ 145 (FC)

Geldof Metaalconstructie NV v Simon Carves Ltd [2010] EWCA Civ 667, [2010] 4 All ER 847

General Feeds Inc Panama v Slobodna Plovidba Yugoslavia [1999] 1 Lloyd's Rep 688 (QBD)

George Fischer Holding Ltd v Multi Design Consultants Ltd (1998) 61 ConLR 85 (QBD)

George Hawkins v Chrysler (UK) Ltd & Burne Associates (1986) 38 BLR 36 (CA)

Gibbs v Guild (1881) 8 QBD 296 (QBD)

Giedo Van Der Garde BV v Force India Formula One Team Ltd [2010] EWHC 2373 (QB)

Gilbert-Ash (Northern) Ltd v Modern Engineering (Bristol) Ltd [1974] AC 689 (HL)

Global Upline Sdn Bhd v Kerajaan Malaysia [2016] 8 MLJ 441 (HC)

Goh Kiang Heng v Hj Mohd Ali Bin Hj Abd Majid [1998] 1 MLJ 615 (HC)

Gold v Patman and Fotheringham Ltd [1958] 1 WLR 697 (CA)

Goldberg v Housing Authority of the City of Newark (1962) 186 A 2d 291

Goss v Chilcott [1996] AC 788 (PC)

Government of the State of Sabah v Suwiri Sdn Bhd [2006] 1 MLJ 359 (CA)

Governors of the Peabody Donation Fund v Sir Lindsay Parkinson & Co Ltd [1985] AC 210 (HL)

Grand Junction Canal v Dimes (1852) 3 HL Cas 759

Grant v Australian Knitting Mills Ltd [1936] AC 85 (PC)

Greater Nottingham Co-operative Society Ltd v Cementation Piling and Foundations Ltd [1989] QB 71 (CA)

Greaves & Co (Contractors) Ltd v Baynham Meikle & Partners [1975] 3 All ER 99 (CA)

Groom v Crocker [1939] 1 KB 194 (CA)

GUS Property Management Ltd v Littlewoods Mail Order Stores Ltd 1982 SC (HL) 157

GW Atkins Ltd v Scott (1980) 46 ConLR 14 (CA)

H Dakin & Co Ltd v Lee [1916] 1 KB 566 (CA)

Hanafiah, Raslan, Mohamed & Partners v Weng Lok Mining Co Ltd [1977] 1 MLJ 248 (HC)

Hanak v Green [1958] 2 QB 9 (CA)

Harrison v Shepherd Homes Ltd [2011] EWHC 1811 (TCC), (2011) 27 Const LJ 709

Hedley Byrne & Co Ltd v Heller & Partners Ltd [1964] AC 465 (HL)

Hemp v Garland (1843) 4 QB 519

Henderson v Merrett Syndicates Ltd [1995] 2 AC 145 (HL)

Henriksens Rederi A/S v PHZ Rolimpex, The Brede [1974] QB 233 (CA)

Her Majesty's Commissioners of Customs and Excise v Barclays Bank plc [2006] UKHL 28, [2007] 1 AC 181

Hiap Tian Soon Construction Pte Ltd and another v Hola Development Pte Ltd and another [2002] SGHC 258, [2003] 1 SLR 667

Hill v Chief Constable of West Yorkshire [1989] AC 53 (HL)

Hobbs v London and South Western Railway Co (1875) LR 10 QB 111

Hock Hua Bank Bhd v Sahari Bin Murid [1981] 1 MLJ 143 (FC)

Home Office v Dorset Yacht Co Ltd [1970] AC 1004 (HL)

Hospitals for Sick Children Board of Governors v McLaughlin & Harvey plc (1987) 19 ConLR 25 (QBD)

Hughes v Percival (1883) 8 App Cas 443 (HL)

Hutchinson v Harris (1978) 10 BLR 19 (CA)

HW Nevill (Sunblest) Ltd v William Press & Son Ltd (1981) 20 BLR 78 (QBD)

Invercargill City Council v Hamlin [1996] AC 624 (PC)

IRC v Dowdall O'Mahoney & Co Ltd [1952] AC 401 (HL)

Isenberg v East India House Estate Co Ltd (1863) 3 De GJ & S 263

Jackson v Horizon Holidays Ltd [1975] 3 All ER 92 (CA)

Jacob's & Youngs Inc v Kent (1921) 129 NE 889

Jaggard v Sawyer [1995] 2 All ER 189 (CA)

Jamil bin Harun v Yang Kamsiah & Anor [1984] 1 MLJ 217 (PC)

Jarvis v Swans Tours Ltd [1973] QB 233 (CA)

JC Williamson Ltd v Lukey & Mulholland [1931] HCA 15, 45 CLR 282 (High Court, Australia)

Jegon v Vivian (1871) LR 6 Ch App 742

Jeune v Queens Cross Properties Ltd [1974] Ch 97 (Ch D)

John F Hunt Demolition Ltd v ASME Engineering Ltd [2007] EWHC 1507 (TCC), [2008] 1 All ER 180

Jones v IOS (RUK) Ltd [2012] EWHC 348 (Ch)

Junior Books Ltd v Veitchi Co Ltd [1983] 1 AC 520 (HL)

Kane v New Forest District Council [2001] EWCA Civ 878, [2001] 3 All ER 914

KC Chan Brothers Development Sdn Bhd v Tan Kon Seng & Ors [2001] 6 MLJ 636 (HC)

Keighley, Maxsted & Co v Durant [1901] AC 240 (HL)

Kepong Prospecting Ltd & Ors v Schmidt [1968] 1 MLJ 170 (PC)

Kerajaan Malaysia lwn Cheah Foong Chiew dan Lain-Lain [1993] 2 MLJ 439 (HC)

Ketteman v Hansel Properties Ltd [1987] AC 189 (HL)

KGV & Associates Sdn Bhd v The Co-Operative Central Bank Ltd [2006] 5 MLJ 513 (CA)

Khoo Cheng Tat v Lim Soon Teik & Anor [1982] 1 MLJ 289 (HC)

Krishna Lal Sadhu v Pramila Bala Dasi [1928] 55 Cal 1315

Kuala Lumpur Finance Bhd v KGV & Associates Sdn Bhd [1995] 1 MLJ 504 (HC)

L/M International Construction Inc v The Circle Ltd Partnership (1995) 49 ConLR 12 (CA)

Law Kam Loy & Anor v Boltex Sdn Bhd & 5 Ors [2005] 4 AMR 525 (CA)

Law Society v Sephton & Co [2006] UKHL 22, [2006] 2 AC 543

Leigh and Sillavan Ltd v Aliakmon Shipping Co Ltd, The Aliakmon [1986] 1 AC 785 (HL)

Leon Corpn v Atlantic Lines and Navigation Co Inc, The Leon [1985] 2 Lloyd's Rep 470 (QBD)

Leong Ah Weng v Neoh Thean Soo & Anor [1983] 2 MLJ 119 (FC)

Liang Court Wanisara (Sarawak) Sdn Bhd v Mohamed Shookry Abdul Ghani & Ors [2014] 8 MLJ 157 (HC)

Lim Chon Jet & Ors v Yusen Jaya Sdn Bhd [2011] 8 CLJ 598 (HC)

Lim Teck Kong v Dr Abdul Hamid Abdul Rashid & Anor [2006] 3 MLJ 213 (CA)

Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd [1993] 3 All ER 417 (HL)

Livingstone v Rawyards Coal Co (1880) 5 App Cas 25 (HL)

Loh & Loh Constructions Sdn Bhd v Quota Innovations Sdn Bhd and Others [2005] MLJU 552 (HC)

Loh Chiak Eong & Anor v Lok Kok Beng & Ors [2013] 1 MLJ 27 (CA)

Lok Kok Beng & 49 Ors v Loh Chiak Eong & Anor [2015] 4 MLJ 734 (FC)

London Congregational Union Inc v Harriss & Harriss [1988] 1 All ER 15 (CA)

Majlis Perbandaran Ampang Jaya v Steven Phoa Cheng Loon & Ors [2006] 2 MLJ 389 (FC)

Man B&W Diesel S E Asia Pte Ltd and another v PT Bumi International Tankers and another appeal [2004] SGCA 8, [2004] 2 SLR 300 (Court of Appeal, Singapore)

Manufacturers' Mutual Insurance Ltd v Queensland Government Railways [1968] HCA 52, 118 CLR 314 (High Court, Australia)

Martin v Porter (1839) 5 M & W 351

Mayor and Burgess of the London Borough of Waltham Forest v Oakmesh Ltd [2009] EWHC 1688 (Ch)

Mayor, Aldermen, and Burgesses of Wolverhampton v Emmons [1901] 1 QB 515 (CA)

McCreagh v Judd [1923] WN 174 (KBD)

McGlinn v Waltham Contractors Ltd [2007] EWHC 149 (TCC), [2008] Bus LR 233

Melham Ltd v Burton (Collector of Taxes) [2006] UKHL 6, [2006] 1 WLR 2820

Mellowes Archital Ltd v Bell Projects Ltd (1997) 58 ConLR 22 (CA)

Merrett v Babb [2001] EWCA Civ 214, [2001] QB 1174

Michael Salliss & Co Ltd v Calil and William F Newman & Associates (1987) 13 ConLR 68 (QBD)

Midland Bank Trust Co Ltd v Hett, Stubbs & Kemp [1979] Ch 384 (Ch D)

Ministry of Defence v Ashman [1993] 2 EGLR 102 (CA)

Ministry of Sound (Ireland) Ltd v World Online Ltd [2003] EWHC 2178 (Ch), [2003] 2 All ER (Comm) 823

Mirant Asia-Pacific Construction (Hong Kong) Ltd v Ove Arup Partners International Ltd [2007] EWHC 918 (TCC), [2008] Bus LR D1

Mondel v Steel (1841) 8 M & W 858

Morrison Steamship Co Ltd v Greystoke Castle (Owners of Cargo lately laden on) [1947] AC 265 (HL)

Mottram Consultants Ltd v Bernard Sunley & Sons Ltd [1975] 2 Lloyd's Rep 197 (HL)

Mount Albert Borough Council v Johnson [1979] 2 NZLR 234 (Court of Appeal, New Zealand)

Muirhead v Industrial Tank Specialities Ltd [1986] QB 507 (CA)

Multiplex Constructions (UK) Ltd v Cleveland Bridge UK Ltd [2006] EWHC 1341 (TCC), 107 ConLR 1

Murphy v Brentwood District Council [1991] 1 AC 398 (HL)

Mutual Shipping Corpn v Bayshore Shipping Co, The Montan [1985] 1 WLR 625 (CA)

Nasri v Mesah [1971] 1 MLJ 32 (FC)

National Petroleum Co Ltd v Popatlal AIR 1936 Bom 344

Nepline Sdn Bhd v Jones Lang Wootton [1995] 1 CLJ 865 (HC)

Ngan & Ngan Holdings & Anor v Central Mercantile Corp (M) Sdn Bhd [2010] 1 MLJ 822 (CA)

Nicholson v Nicholson [1974] 4 ALR 212 (Supreme Court, New South Wales)

Nitrigin Eireann Teoranta v Inco Alloys Ltd [1992] 1 All ER 854 (QBD)

Nocton v Lord Ashburton [1914] AC 932 (HL)

North East Lincolnshire BC v Millennium Park (Grimsby) Ltd [2002] EWCA Civ 1719

Nykredit Mortgage Bank plc v Edward Erdman Group Ltd (No 2) [1997] 1 WLR 1627 (HL)

Offer-Hoar v Larkshore Ltd [2006] EWCA Civ 1079, [2007] 1 All ER (Comm) 104

Oriental Bank Bhd v Syarikat Zahidi Sdn Bhd [1998] 7 MLJ 81 (HC)

Oversea Chinese Banking Corporation Ltd v Woo Hing Brothers (M) Sdn Bhd [1992] 2 MLJ 86 (HC)

Overseas Tankship (UK) Ltd v Morts Dock and Engineering Co Ltd, The Wagon Mound [1961] AC 388 (PC)

P & M Kaye Ltd v Hosier & Dickinson Ltd [1972] 1 All ER 121 (HL)

P & O Developments Ltd v Guy's and St Thomas' NHS Trust (1998) 62 ConLR 38 (TCC)

Pacific Associates Inc v Baxter [1990] 1 QB 993 (CA)

Pacific Rim Investments Pte Ltd v Lam Seng Tiong & Anor [1995] 3 SLR 1 (Court of Appeal, Singapore)

Pahang South Union Omnibus Co Bhd v Ministry of Labour and Manpower & Anor [1981] 2 MLJ 199 (FC)

PB Malaysia Sdn Bhd v Samudra (M) Sdn Bhd [2009] 7 MLJ 681 (HC)

Pell Frischmann Engineering Ltd v Bow Valley Iran Ltd [2009] UKPC 45, [2011] 1 WLR 2370

Pembenaan Leow Tuck Chui & Sons Sdn Bhd v Dr Leela's Medical Centre Sdn Bhd [1995] 2 MLJ 57 (SC)

Penarth Dock Engineering Co Ltd v Pounds [1963] 1 Lloyd's Rep 359 (QBD)

Permodalan Plantations Sdn Bhd v Rachuta Sdn Bhd [1985] 1 MLJ 157 (FC)

Perre v Apand Pty Ltd [1999] HCA 36, 198 CLR 180 (High Court, Australia)

Perry v Sidney Phillips & Son [1982] 1 WLR 1297 (CA)

Phelps v Hillingdon London BC Anderton [2001] 2 AC 619 (HL)

Phillips v Homfray (1871) LR 6 Ch App 770 (CA)

Pilba Trading & Agency v South East Asia Insurance Bhd & Anor [1998] 2 MLJ 53 (HC)

Pirelli General Cable Works Ltd v Oscar Faber & Partners [1983] 2 AC 1 (HL)

Pople v Evans [1969] 2 Ch 255 (Ch D)

Price v Strange [1978] Ch 337 (CA)

Pullen v Gutteridge Haskins and Davey Pty Ltd [1993] VicRp 4, [1993] 1 VR 27 (Supreme Court, Victoria)

Pyrene Co Ltd v Scindia Navigation Co Ltd [1954] 2 QB 402 (QBD)

Quackenbush v Ford Motor Co (1915) 167 App Div 433 (Appellate Division of the Supreme Court of New York)

Radford v De Froberville [1978] 1 All ER 33 (Ch D)

Raja Lob Sharuddin bin Raja Ahmad Terzali & Ors v Sri Seltra Sdn Bhd [2008] 2 MLJ 87 (CA)

Ranger v Great Western Railway Co (1854) 5 HL Cas 72

Rawlings v Rentokil Laboratories (1972) 223 EG 1947 (QBD)

Rawson v Samuel (1841) Cr & Ph 161

Rayfield v Hands [1960] Ch 1 (Ch D)

Razshah Enterprise Sdn Bhd v Arab Malaysian Finance Bhd [2009] 2 MLJ 102 (CA)

Re Bankruptcy Notice [1934] Ch 431 (CA)

Re Kaupthing Singer and Friedlander Ltd [2009] EWHC 2308 (Ch), [2010] Bus LR 428

Re Swire Mellor v Swire (1885) 30 Ch D 239 (CA)

Read v Brown (1888) 22 QBD 128 (CA)

Redland Bricks Ltd v Morris [1970] AC 652 (HL)

Rivtow Marine Ltd v Washington Iron Works [1974] SCR 1189 (Supreme Court, Canada)

Riyad Bank v Ahli United Bank (UK) Plc [2006] EWCA Civ 780, [2006] 2 Lloyd's Report 292

Robinson v Harman (1848) 1 Exch 850

Rogers v Whitaker [1992] HCA 58, 175 CLR 479 (High Court, Australia)

Rolls-Royce Power Engineering plc v Ricardo Consulting Engineers Ltd [2003] EWHC 2871, 98 ConLR 169

Ross v Caunters [1980] Ch 297 (Ch D)

Rowling v Takaro Properties Ltd [1988] AC 473 (PC)

Royal Brompton Hospital NHS Trust v Hammond [1999] BLR 162 (High Court, England)

Royal Brompton Hospital NHS Trust v Hammond (No 7) [2001] EWCA Civ 206, 76 ConLR 148

RSP Architects Planners & Engineers (Raglan Squire & Partners FE) v Management Corporation Strata Title Plan No 1075 & Anor [1999] 2 SLR 449 (Court of Appeal, Singapore)

RSP Architects Planners & Engineers v Ocean Front Pte Ltd and another appeal [1996] 1 SLR 113 (Court of Appeal, Singapore)

Rutter v Palmer [1922] 2 KB 87 (CA)

Ruxley Electronics and Construction Ltd v Forsyth [1996] AC 344 (HL)

Ryan v Mutual Tontine Westminster Chambers Association [1893] 1 Ch 116 (CA)

Saw Gaik Beow v Cheong Yew Weng & Ors [1989] 3 MLJ 301 (HC)

SCM (UK) Ltd v WJ Whittall & Son Ltd [1971] 1 QB 337 (CA)

Severn Trent Water Ltd v Barnes [2004] EWCA Civ 570, [2004] 2 EGLR 95

Shanghai Hall Ltd v Town House Hotel Ltd [1967] 1 MLJ 223 (FC)

Shen Yuan Pai v Dato Wee Hood Teck & Ors [1976] 1 MLJ 16 (HC)

Shiffon Creations (S) Pte Ltd v Tong Lee Co Pte Ltd [1991] 1 MLJ 65 (Court of Appeal, Singapore)

Shiloh Spinners Ltd v Harding [1973] AC 691 (HL)

Sim & Associates (sued as a firm) v Tan Alfred [1994] 3 SLR 169 (Court of Appeal, Singapore)

Simaan General Contracting Co v Pilkington Glass Ltd (No 2) [1988] QB 758 (CA)

Skandia Property (UK) Ltd v Thames Water Utilities Ltd [1999] BLR 338 (CA)

Skipskredittforeningen v Emperor Navigation SA [1998] 1 Lloyd's Rep 66 (QBD)

Smith and Snipes Hall Farm Ltd v River Douglas Catchment Board [1949] 2 KB 500 (CA)

Smith v Bush [1990] 1 AC 831 (HL)

Smith v Muscat [2003] EWCA Civ 962

Society of Lloyd's *v Leighs* [1997] 6 RILR 289 (CA)

Southampton Container Terminals Ltd v Schiffahrisgesellsch "Hansa Australia" Mgh & Co, The Maersk Colombo [2001] EWCA Civ 717, [2001] 2 Lloyd's Rep 275

Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency [2007] SGCA 37, [2007] 4 SLR 100

Sparham-Souter v Town and Country Developments (Essex) Ltd [1976] QB 858 (CA)

Spartan Steel & Alloys Ltd v Martin & Co (Contractors) Ltd [1973] QB 27 (CA)

Sri Minal Construction Sdn Bhd v Hong Kong Bank Malaysia Berhad [2007] 7 MLJ 367 (HC)

St Martins Property Corpn Ltd v Sir Robert McAlpine Ltd [1994] 1 AC 85 (HL)

Steel Authority Of India Ltd vs Gupta Brother Steel Tubes Ltd 9 September, 2009 (SC India)

Stein v Blake [1996] AC 243 (HL)

Steven Phoa Cheng Loon & Ors v Highland Properties Sdn Bhd & Ors [2000] 4 MLJ 200 (HC)

Stieller v Porirua City Council [1986] 1 NZLR 84 (Court of Appeal, New Zealand)

Stocznia Gdanska SA v Latvian Shipping Co [1998] 1 WLR 574 (HL)

Stooke v Taylor (1880) 5 QBD 569 (QBD)

Subramaniam a/l Paramasivam & Ors v Malaysian Airlines System Bhd [2002] 1 MLJ 45 (HC)

Surrey CC v Bredero Homes Ltd [1993] 1 WLR 1361 (CA)

Sutcliffe v Thackrah [1974] AC 727 (HL)

Sutherland Shire Council v Heyman [1985] HCA 41, 157 CLR 424 (High Court, Australia)

Suwiri Sdn Bhd v Government of the State of Sabah [2008] 1 MLJ 743 (FC)

Swain v Law Society [1983] 1 AC 598 (HL)

Swynson Ltd v Lowick Rose LLP [2017] UKSC 32, [2017] 3 All ER 785 (SC)

Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd [1986] AC 80 (PC)

Tam Kam Cheong v Stephen Leong Kon Sang & Anor [1980] 1 MLJ 36 (FC)

Tan Chee Wah lwn Sri Damansara Sdn Bhd [2006] 6 MLJ 752 (HC)

Technotrade v Larkstore Ltd [2006] EWCA Civ 1079, [2007] 1 All ER (Comm) 104

Teh Khem On & Anor v Yeoh & Wu Development Sdn Bhd & Ors [1995] 2 MLJ 663 (HC)

Tetuan Mokhtar Ngah & Co (sued as a firm) v Kubu Pengkalan Sdn Bhd [2015] 3 MLJ 409 (CA)

Thamesa Designs Sdn Bhd & Ors v Kuching Hotels Sdn Bhd [1993] 3 MLJ 25 (SC)

The Bank of East Asia, Ltd v Tsien Wui Marble Factory Ltd [1999] HKCFA 6, (1999) 2 HKCFAR 349

The Darley Main Colliery Co v Mitchell (1886) 11 App Cas 127 (HL)

The Havprins [1983] 2 Lloyd's Rep 356

The Winson [1982] AC 939

Thornton v Place (1832) 1 Mood & R 218

Woolley Development Sdn Bhd v Stadco Sdn Bhd (No 1) [2011] 6 MLJ 111 (CA)

Wrotham Park Estate Co v Parkside Homes Ltd [1974] 1 WLR 798 (Ch D)

WWF-World Wide Fund for Nature v World Wrestling Federation Entertainment Inc [2007] EWCA Civ 286, [2008] 1 All ER 74

Yuen Kun-yeu v A-G of Hong Kong [1988] AC 175 (PC)

LIST OF STATUTES

Malaysia
Civil Law Act 1956
Companies Act 1965
Construction Industry Payment and Adjudication Act 2012
Contract Enactment 1889
Contracts Act 1950
Courts of Judicature Act 1964
Housing Developers (Control and Licensing) Act 1966
Housing Developers (Control and Licensing) Ordinance 1993
Housing Development (Control and Licensing) Act 1966
Housing Development (Control and licensing) Enactment 1978
Lembaga Pembangunan Industri Pembinaan Malaysia Act 1994
Limitation Act 1953
Local Government Act 1976
Street, Drainage and Building Act 1974
Subordinate Courts Act 1948
Supreme Court of Judicature Act 1873
Uniform Building By-laws 1984

England and Wales
Chancery Amendment Act 1858
Contracts (Rights of Third Parties) Act 1999
Debtors Relief (Amendment) Act 1735
Defective Premises Act 1972
Insolvent Debtors Relief Act 1729
Judicature Act 1873
Latent Damage Act 1986
Law of Property Act 1925
Limitation Act 1939
Limitation Act 1963
Public Health Act 1936
Sale of Goods Act 1979
Senior Courts Act 1981
Supreme Court Act 1981

New Zealand
Building Act 1991

India
Contracts Act 1872

CHAPTER 1: INTRODUCTION

1.1 Introduction

The Malaysian construction industry is an important component of the national economy. It plays a pivotal role in the modernisation and transformation of the nation from being a developing nation to a developed nation. It is perceived to be the ultimate beneficiary in the Eleventh Malaysia Plan which sets out the nation's growth plans from 2016 to 2020 as most of the development expenditure will be infrastructure-centric.[1]

Malaysia has recognised the importance of the construction industry since the country's independence in 1957 when the industry was low-tech, labour intensive and crafts-based.[2] Since then, the industry has taken tremendous strides in terms of modern technology and ability to deliver complex high-tech projects. Malaysian contractors have also made forays into the international market especially in India, the United Arab Emirates and Vietnam.

In the past two decades from 1991 to 2010, the construction sector contributed an average of 4.09% to Gross Domestic Product with minimum 3% and maximum 5.7%.[3] The average growth of this sector was 4.74% with minimum -23% and maximum 21% during the same period.[4] During this period, its contribution to employment was also significant, accounting for an average of 8.56% with minimum 7.2% and maximum 9.5% of the total workforce of Malaysia.[5]

[1] Jeffrey Tan, 'Construction Sector "Ultimate Beneficiary" of 11th Malaysia Plan - Hong Leong' *The Edge Markets* (Kuala Lumpur, 5 May 2015) <www.theedgemarkets.com/my/article/construction-sector-ultimate-beneficiary-11th-malaysia-plan-hong-leong> accessed 29 April 2016.
[2] EM Kamal and others, 'The Critical Review on the Malaysian Construction Industry' Journal of Economics and Sustainable Development, (2012) 3 (13).
[3] Raza Ali Khan, Mohd Shahir Liew and Zulkipli Bin Ghazali, 'Malaysian Construction Sector and Malaysia Vision 2020: Developed Nation Status' Procedia - Social and Behavioral Sciences 109 (2014) 507-513 <www.sciencedirect.com/science/article/pii/S1877042813051306> accessed 28 April 2016.
[4] ibid.
[5] ibid.

In Malaysia, standard forms of construction contract are popularly in use. These include those formulated and published by local authoritative bodies viz. the Public Works Department (PWD) / Jabatan Kerja Raya (JKR), the Malaysian Institute of Architects / Pertubuhan Akitek Malaysia (PAM), and the Construction Industry Development Board (CIDB).[6] These organisations have each produced a suite of standard forms for different uses.[7] For contracts based on traditional general contracting and where bills of quantities form part of the contract, the latest forms from these bodies are the PAM Contract 2006 (With Quantities), the PWD Form 203A (To be Used where Bills of Quantities Form Part of the Contract) (Revised 1/2010), and the CIDB Standard Form of Contract for Building Works (2000 Edition).

Construction contracts often give rise to disputes which often occur when the contractor sues for the price and the employer counters with a claim for abatement of the price or a cross-claim for losses due to defective performance by the contractor.[8] When the contractor in a construction contract commits a breach of contract, the employer's main remedy lies in the recovery of damages. There are three situations where such a breach can take place.[9] First, where the work of the contractor is defective. Secondly, where there is a delay in the completion of the works. Thirdly, where there has been a failure of completion by the contractor. Besides the contractor, others involved in the construction project may be at fault for defects eg the sub-contractor and others down the hierarchy of contractors, professionals like the architect, engineer and quantity surveyor, and the local authority. This research focuses on the legal perspectives of such a claim for losses for defective work by and against parties in the construction matrix including in the main, by the employer against the contractor.

[6] This is a statutory organisation formed by the Lembaga Pembangunan Industri Pembinaan Malaysia Act 1994.
[7] For a more detailed account, see Sundra Rajoo, 'Standard Forms of Contract - The Malaysian Position' (International Bar Association (IBA) Annual Conference, Tokyo, Japan, 20 October 2014).
[8] *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd* [1993] 3 All ER 417 (HL) 429 (Lord Browne-Wilkinson).
[9] N Dennys, M Raeside and R Clay (general eds), *Hudson's Building and Engineering Contracts* (12th edn, Sweet & Maxwell 2010).

A defect in a building may be defined as 'a failing or shortcoming in the function, performance, statutory, or user requirement of a building'.[10] Such a defect may occur within the structure, fabric, services and other facilities of the defective structure.[11] Construction defects arise from deficiencies in the construction in contrast to those that occur due to improper maintenance.[12] Defective works may be caused by design fault, defective building materials or bad workmanship.[13] In construction contracts, the works cannot be said to have been practically completed if they are so defective as to prevent the owner from using the works as intended by the contract. As construction projects get bigger and more complex, the potential for defective work and a fractious relationship between the interested parties will also increase in tandem.

The standard forms of construction contract invariably contain provisions dealing with defective works. For instance, clause 15.1(a) of the PAM 2006 Contract provides that the works shall be deemed to be practically completed if the architect is of the opinion that the employer can have full use of the works for their intended purposes, notwithstanding that there may be works and defects of a minor nature still to be executed. Clause 48.1(a) of the PWD 203A Contract specifies that the contractor is responsible for any defect, imperfection, shrinkage or any other fault due to matters not conforming with the contract and which appears during the defects liability period. Similarly in the CIDB 2000 Contract, clause 27.1 prescribes that the contractor shall complete any outstanding work and remedy defects during the defects liability period.

[10] David S Watt, *Building Pathology: Principles and Practice* (2nd edn, Wiley-Blackwell 2007).
[11] ibid.
[12] The standard forms of construction contract have their own ways of defining defects. For example, the PAM 2006 Contract defines 'defects' to mean 'defects, shrinkages or other faults due to materials or workmanship not in accordance with the Contract and Nominated Sub-Contract and/or due to any faulty design (if any) undertaken by the Contractor and Nominated Sub-contractor'. See also the definition of 'defects' under clause 1.1 of the CIDB 2000 Contract. The PWD 203A Contract does not have a definition for this term.
[13] Building Research Establishment, *Quality Control on Building Sites* (HMSO 1981) Current Paper 7/81. The Building Research Establishment (BRE) in the United Kingdom found that 50% of building errors had their origin in the design stage and 40% in the construction stage.

The almost inevitability of defects has fuelled the popular use of the certificate of practical completion[14] which may be issued where the defects are of a *de minimis* nature but the completed building is nevertheless functional for its intended purpose thus not precluding the contractor from delivering it to the employer.[15] Usually upon the practical completion of the works and the certificate of practical completion being issued by the contract administrator, the defects liability period will begin.[16] Any defects, shrinkages or other faults arising during this period due to defective materials or workmanship must be put right by the contractor at his own expense.[17]

The contract administrator will usually mark the end of the defects liability period by issuing a further certificate known as the certificate of making good defects.[18] This records the contract administrator's opinion that defects appearing within the defects liability period and notified to the contractor have been duly made good. The contractor is usually then entitled to the remainder of the retention money, if any. It is the contract administrator's obligation to issue the final certificate if he is satisfied with the work.

The final certificate may influence whether damages are recoverable by the employer for defects. Generally, the courts will only hold that the final certificate is final, binding and conclusive in the presence of very clear words to such an effect.[19] Therefore, this turns on the terms of the particular contract.

[14] PAM 2006 Contract clause 15.2, PWD 203A Contract clause 39.3, CIDB 2000 Contract clause 20.2.
[15] See, for example, *City of Westminster v Jarvis & Sons Ltd* (1970) 7 BLR 64 (HL); *P & M Kaye Ltd v Hosier & Dickinson Ltd* [1972] 1 All ER 121 (HL); *HW Nevill (Sunblest) Ltd v William Press & Son Ltd* (1981) 20 BLR 78 (QBD); *Global Upline Sdn Bhd v Kerajaan Malaysia* [2016] 8 MLJ 441 (HC).
[16] PAM 2006 Contract clause 15.4 and Appendix, PWD 203A Contract clauses 1.1(g) and 48.1(a), CIDB 2000 Contract clauses 1.1 and 27.1.
[17] PAM 2006 Contract clause 15.4, PWD 203A Contract clause 48.0, CIDB 2000 Contract clause 27.2.
[18] PAM 2006 Contract clause 15.6, PWD 203A Contract clause 48.4, CIDB 2000 Contract clause 27.6.
[19] *East Ham Borough Council v West Bernard Sunley & Sons Ltd* [1965] 3 All ER 619 (HL); *P & M Kaye Ltd v Hosier & Dickinson Ltd* [1972] 1 All ER 121(HL); *Shen Yuan Pai v Dato Wee Hood Teck & Ors* [1976] 1 MLJ 16 (HC); *Fairweather Ltd v Asden Securities Ltd* (1979) 12 BLR 40 (QBD). However, see *Thamesa Designs Sdn Bhd & Ors v Kuching Hotels Sdn Bhd* [1993] 3 MLJ 25 (SC).

1.2 Research Gap

There does not appear to be any significant research done on the legal aspects of construction defect claims in Malaysia.[20] There seems to be only one PhD thesis whose scope shares some similarities with this research.[21] That thesis focuses on certain aspects of standard forms of building contract claims on a comparative basis between Scottish, English and Malaysian laws. It analyses certain important issues in building contract claims and provisions in the laws required to be addressed for future development. The issues covered by that thesis include laws of contract, practical completion in building operation, the final certificate, bankruptcy and determination in building contracts, arbitration of building disputes, negligence and defective buildings, and prescription and limitation period of claims.

There are certain issues covered by this research which are not included in that thesis and vice versa. Some of the issues not covered in that thesis but are included in this research include the loss suffered by the owner who is not the employer in a building contract, the employer's rights of set-off for defects, the effect of settlement by the main contractor with the employer, damages for non-financial loss and specific performance as a remedy for defects.

That thesis is comparative in nature and gives equal emphasis on the laws of the three different jurisdictions that it covers. Although the nature of this thesis demands a strong comparative flavour, it takes within its compass more than the three stated jurisdictions covered by that thesis. Moreover, the emphasis of this thesis is on the law

[20] Online searches were conducted on Malaysian Theses Online (http://myto.upm.edu.my) which lists the theses collection of public academic universities and university colleges as well as private academic universities in Malaysia. The websites of the major public universities in Malaysia were also searched. Additionally, online searches were done on EThOS (Electronic Theses Online Service) (http://ethos.bl.uk) which was developed by the EThOS partnership, comprising several United Kingdom Higher Education Institutions and the British Library. The website allows free access to the full text of United Kingdom doctoral theses that have been digitised. These online searches were done periodically so as to keep up-to-date.

[21] A Mohaimin Ayus, 'Building Contract Claims: A Comparative Study (Scotland, England and Malaysia)' (PhD thesis, University of Aberdeen (Faculty of Law) 1992).

of Malaysia and analysis is made on the law in other jurisdictions primarily for the purpose of how it can be usefully adopted in this country. Comparisons with other jurisdictions are not an end in themselves. At any rate, almost a quarter of a century has gone by since then and the law has leapt ahead in many important areas.

As regards law journal articles, there are several which touch on some of the topics of this research. These are outlined below. However, a research gap still exists for the following reasons. First, some of those articles deal with certain legal principles but are not specifically focused on their application in construction defect claims. Secondly, some of them have been written some time back and do not therefore reflect the current law.

Thirdly, doctrinal legal research which is the research methodology used for this thesis involves views, thoughts and opinions based on conceptual analysis and reasoning. There is no single voice which can justifiably claim to be all-correct to the exclusion of all others. The law will be much the better if there is a diversity of voices thrown into the ring. There are alternative views and perspectives articulated in this research which differ from that espoused in those law journal articles and hopefully, the law will be enriched to a certain extent because of that.

In social science research – including socio-legal research – a finding is made to explain a phenomenon. Unless there are flaws in the research design which invalidate the finding, then the finding becomes definitive. There is then no point in replicating the research because the same result would be reached. Not to mention that there will be no original contribution to the body of knowledge. Doctrinal research in the law is a different proposition altogether. It basically sets out to determine what the law should

be. If someone offers an opinion as to what the law should be for a particular issue, it would be remarkable to say that that opinion has suddenly become authoritative, that it has become unchallengeable, and that it stops others from making other views as to what the law in that regard should be. Further research in that area will only be redundant if everything that needs to be said has already been exhaustively said and all possible angles and perspectives have been thoroughly explored. Only then there is no point in going over the same ground.

Fourthly, this thesis aspires to draw some of the important and unsettled areas of construction defect claims into one conceptual whole whereas those journal articles deal with certain isolated issues only.

It may be instructive to analyse some of those law journal articles here. Clarence Edwin peers into the crystal ball to speculate on the future of the concept of privity of contract in this country through his article, 'Contracts for the Benefit of Third Parties - Will our Common Law See the Demise of Privity of Contract?'[22] which is in response to the enactment of the Contracts (Rights of Third Parties) Act 1999 in England which largely made obsolete the doctrine of privity of contract which had held sway in the common law jurisdictions for 139 years prior to such enactment. The writer accepts that although the Malaysian Contracts Act 1950 is silent on this doctrine, the case law is clear that it is applicable here. The writer then points out certain shortcomings in the 1999 Act. Although he expresses hope that our courts would depart from the privity rule which he says causes injustice, he thinks that such departure is more likely to come from legislative action.

[22] Clarence Edwin, 'Contracts for the Benefit of Third Parties - Will our Common Law See the Demise of Privity of Contract?' [2000] 4 MLJ i.

Grace Xavier in her article '*Donoghue v Stevenson* - A New Facade for the Construction Industry'[23] gives an exposition of negligence claims in construction. The writer then ventures into the issue of pure economic loss. She is strident in opposing the decision in *Murphy v Brentwood District Council*.[24] The writer says that the nature and scope of the duty of care under negligence must not or should not depend on the duties expressed in a contract. However she prefaces this by saying that the duties under a contract would show the kind of relationship that had given rise to the common law duty of care. The article is basically confined to English law with some Commonwealth cases for comparison.

Two articles on negligence claims against construction professionals are 'Construction Professionals and Defective Construction Works: A Note on Quantification of Damages'[25] and 'Professional Negligence in the Construction Industry'.[26] In the former article, the writers note that there are surprising very few cases from the Commonwealth which actually deal with the assessment of damages in actions for breach of duty against architects and engineers in the construction process. Nevertheless, they opine that the general principles applicable to contractors and builders should also apply to such professionals by analogy. They conclude that the present legal regime for such claims is laudable as it conforms to the compensatory function of damages and it has flexibility as judicial discretion can be exercised to award only damages which are reasonable or fair.

In the latter article, the writer examines negligence by professionals in the construction industry including the regulatory government bodies. The issues covered

[23] Grace Xavier, '*Donoghue v Stevenson* - A New Facade for the Construction Industry' [2001] 2 MLJ lxv.
[24] [1991] 1 AC 398 (HL).
[25] Wan Azlan Ahmad and Mohsin Hingun, 'Construction Professionals and Defective Construction Works: A Note on Quantification of Damages' [1997] 3 MLJ ccv.
[26] Saraswathy Shirke, 'Professional Negligence in the Construction Industry' [2009] 2 MLJ clxii.

include duty to exercise reasonable skill and care, professional standard and limitations of liability. The writer argues that it is unacceptable that the local authority is not liable if through negligence, it causes a home to be uninhabitable or valueless.

There are a few articles dealing with economic loss including 'Economic Loss - Current Principles of Recovery'[27] This article examines English law's treatment of recovery of pure economic loss. The writer observes that the law does not allow any remedy in tort for defective goods and buildings where the loss is purely economic and no sufficient proximity can be shown between the parties. Such a judicial stance, the writer notes, is based on policy grounds which are the fear of indeterminate liability and the inappropriateness of importing contractual warranties into situations in tort. The writer arrives at the conclusion that English law leaves little room for recovery of pure economic loss.

In the article '*Dr Abdul Hamid Abdul Rashid & Anor v Jurusan Malaysia Consultants (Sued as a Firm) & Ors*: Breakthrough for Recovery in Pure Economic Loss?',[28] the writer applauds the learned Judge in the case under consideration for holding that pure economic loss is recoverable in Malaysia in the face of mixed signals from previous court decisions. She says that this is a welcome relief for purchasers of properties who have been given the run-around as regards liability for construction claims. She hopes that finger-pointing and 'washing of hands' will soon be a thing of the past. This article is rather dated. Subsequent developments in our judicial pronouncements, although not jettisoning the right to pure economic loss, have dulled such optimism. Even if our courts are liberal in allowing claims for pure economic loss, there will still be finger-pointing due to the number of parties in the construction matrix

[27] Ter Kah Leng, 'Economic Loss - Current Principles of Recovery' [1992] 1 MLJ clxxviii.
[28] Grace Xavier, '*Dr Abdul Hamid Abdul Rashid & Anor v Jurusan Malaysia Consultants (Sued as a Firm) & Ors*: Breakthrough for Recovery in Pure Economic Loss?' [1998] 3 MLJ xxvi.

and the possibility of claims both in contract and in negligence. There will still be sufficient courtroom drama. The writer argues that imposing a limitation on claims for pure economic loss is inequitable and contrary to public policy especially where there is a clear breach of duty or a reckless disregard of such duty. The writer concludes that there is a moral expectation on third parties who have undertaken to carry out a task to do so with reasonable care and skill, and to deprive relief for pure economic loss is not upholding this moral expectation. She notes that in practice, the public relies on professionals and other persons to carry out their duties as is expected of them. She says that judges will have to fashion an effective remedy for breach of such duty.

Wong Weng Kwai also has an article on this topic which was published in two parts.[29] In the first part, the writer puts in a caveat that his article is not a definitive and exhaustive study of the difficult area of the law on pure economic loss but is rather a brief account of the implications of the post-*Hedley Byrne & Co Ltd v Heller & Partners Ltd* era by a broad examination of the common law's general principles for the protection of economic interests in general and the liability of financial advisers in particular. Prominence is given to the trilogy of cases of *Anns v Merton London BC,*[30] *Caparo Industries plc v Dickman*[31] and *Murphy v Brentwood District Council*.[32] He highlights the importance of this branch of the law on investors suing their financial advisers when mega deals went awry. His analysis is confined to English law.

In the second part, the writer wades in with an exposition of the modern theory of negligence as obtained in England. He then proceeds to a snapshot view of developments in the law on economic loss in New Zealand and Canada. He adds that

[29] Wong Weng Kwai, 'Pure Economic Loss: *Hedley Byrne* Revisited (Pt I)' [1995] 2 MLJ clxi and Wong Weng Kwai, 'Pure Economic Loss: *Hedley Byrne* Revisited (Pt II)' [1995] 2 MLJ clxxvii.
[30] [1978] AC 728 (HL).
[31] [1990] 2 AC 605 (HL).
[32] [1991] 1 AC 398 (HL).

Murphy has split the Commonwealth jurisdictions for the first time - possibly irreparably - over this aspect of the law of negligence. A large portion of the article is devoted to disputes related to derivative trading in his continuing focus on financial calamities where investors alleged negligence on the part of their financial advisers. The writer defines 'derivatives' as contracts between two parties concerning a security whose value is pegged to 'the values of some underlying interest rates or currencies or the level of an index or price of commodity products such as wheat petroleum or the value of a single equity or basket of equities'.

Another article is Ali Mohammad Matta's 'Claimability of Economic Loss: Malaysia Takes a Stand Amid Inconsistencies'.[33] The writer introduces the subject of pure economic loss by saying that what is pure economic loss is in itself a baffling question. He notes that the courts – even the English courts which developed this principle – have not been unanimous as to the exact nature of such a loss. He covers a big swath of the major common law jurisdictions including England, Canada, New Zealand, Australia, Singapore and Malaysia in trying to uncover the precise character of such a loss. His analysis of the Malaysian situation culminates in the pair of High Court decisions of *Dr Abdul Hamid Abdul Rashid & Anor v Jurusan Malaysia Consultants (sued as a Firm) & Ors*[34] and *Steven Phoa Cheng Loon & Ors v Highland Properties Sdn Bhd & Ors*[35] where James Foong J embraced the principle that pure economic loss is claimable in Malaysia.

Mohd Suhaimi Mohd Danuri in his article entitled 'The Proper Ways of Assessing Damages for Defective Building Works'[36] finds that the court cases show

[33] Ali Mohammad Matta, 'Claimability of Economic Loss: Malaysia Takes a Stand Amid Inconsistencies' [2003] 4 MLJ clxxviii.
[34] [1997] 3 MLJ 546 (HC).
[35] [2000] 4 MLJ 200 (HC).
[36] Mohd Suhaimi Mohd Danuri, 'The Proper Ways of Assessing Damages for Defective Building Works' Jurnal Undang-Undang dan Masyarakat 10 (2006) 21-35.

that damages for defective building works can take the forms of reinstatement cost, diminution in value and loss of amenity. He analyses the two factors that are usually employed by the courts in assessing damages which are 'the test of reasonableness' and 'the intention to remedy the defects'. His conclusion is that the essential requirements in assessing damages for defective building works should be: (a) the intention of the owner to remedy the defects and the reasonableness of such intention; and (b) the reasonableness of the remedial works.

Eugene YC Tan has written an article on 'The Common Law Right of Set-Off in Construction Contracts'.[37] This article deals with the question of whether there is a right of set-off against interim certificates issued in construction. The writer ends up with the finding that the right of set-off is permissible for all contracts in the absence of any provision to the contrary and interim certificates are not exceptions to the rule. The writer suggests that there are valid reasons for granting exception to interim certificates. His analysis of the law comes to the conclusion that the common law right of set-off can be excluded expressly or by clear implication in the contract.

From the foregoing exposition, it appears that there is scant research done on the law pertaining to construction defect claims in Malaysia. It is hoped that this research will plug some of the gaps and provide an update on the applicable law. These journal articles have also served to point to problem areas where research could beneficially be undertaken.

1.3 Problem Statement

The law concerning the recovery of damages and other remedies as a consequence of construction defects is prone to difficulties of analysis and controversy

[37] Eugene YC Tan, 'The Common Law Right of Set-Off in Construction Contracts' [1995] 3 MLJ cxxv.

stalks several aspects of it. This is due to the variety of factual situations which may arise and the overlapping of legal principles governing the types of recoverable damages and the manner in which the consequential losses are measured and calculated.

There are certain issues pertaining to construction defect claims in Malaysia where the law is unsettled, or where application of the law leads to unfairness or injustice, or where the applicable legal principles do not fit neatly into the larger conceptual framework of the law. These problem issues are identified from a review of the literature and some of the more important and pressing ones are selected for study. These issues, which will subsequently be referred to as 'the Research Issues', are set out in Table 1.1.

Table 1.1: The Research Issues, Clarification and Significance

Area	Research Issues	Clarification and Significance
1. Causes of action	1.1 Where loss is suffered by the owner who is not the employer in a construction contract, whether the owner and the employer have any cause of action against the errant contractor.	The current applicable law seems to preclude both the owner and the employer from staking a claim for substantial damages against the contractor who has caused the loss. The persons who have suffered damage is without a right to claim whereas the person causing the loss is unjustly enriched. This goes against the grain of justice.
	1.2 Where the parties involved in a construction project like the employer, main contractor, sub-contractors and architect have structured their respective liabilities by contract, whether a duty of care should be imposed which goes beyond the contemplation of the parties at the time of the making of the contracts.	The law is unclear here. The parties will be under a cloud of uncertainty and apprehension if such a duty of care invariably exists in parallel.

Table 1.1, continued

Area	Research Issues	Clarification and Significance
1. Causes of action	1.3 Whether a party to a contract should be exempted from liability for negligence at common law.	There is no current case law which decides on this issue decisively. A contracting party may wish to be governed only by the duty of care as prescribed by the contract but not also be exposed to negligence at common law.
	1.4 What should the test for negligence be?	The test for negligence seems to be settled here. However there are still problems in its implementation. There may still be room for improvement in formulating a test for negligence.
	1.5 Should claims for pure economic loss for defective buildings be allowed?	The present state of the law is that such claims are possible but the bar seems to be set unreasonably high. Claims for pure economic loss for defective construction appear to be a theoretical possibility but a practical impossibility. The issue is whether this is desirable or not.
	1.6 Should the local authority be liable for negligence to the original owner and subsequent owners of a building who were put to loss by the defective building?	The current law confers immunity on the local authority against such claims. This seems to work against public interest including public safety. Should this immunity be removed - especially for purchasers and derivative purchasers of residential properties?
	1.7 Should builders and others involved in the provision of houses be imposed with the obligations of a transmissible warranty of the quality of their work and of the fitness for occupation of the completed houses?	Purchasers under the Housing Development (Control and Licensing) Act 1966 are protected in contract to a certain degree against the developer. Not so the sub-purchasers. They may seek recourse by claiming against the developer for pure economic loss but this may yet prove impractical or even illusory.

Table 1.1, continued

Area	Research Issues	Clarification and Significance
2. Remedies	2.1 What should be the measure of damages for construction defects?	Reinstatement cost is favoured over diminution in value for damages for construction defects. What are the situations where this rule ought to be displaced?
	2.2 What set-offs can the employer make in the face of a claim by the contractor for payments under the construction contract?	Such set-offs will be affected by what is made plain by express language in the construction contract. What if the words in the contract are not clear or where there are no such words at all in the contract? How should the law approach such situations?
	2.3 Where the main contractor has settled with the employer for defects which were actually caused by the sub-contractor, what are the relevant issues to be considered if the main contractor then proceeds against the sub-contractor for recovery of the sum so paid or for the full measure of the defects?	Such issues do not seem to have come before the Malaysian courts yet. How should these issues be dealt with to ensure fairness?
	2.4 Should an award of damages to the employer for defective work be assessed solely by reference to financial loss?	In granting damages, the law has evolved to place great emphasis on financial loss. If the loss cannot be expressed in precise financial terms, it is unlikely that substantial damages will be awarded. Should this trajectory of the law be checked especially in modern times when other considerations like loss of amenity, distress and inconvenience have taken greater prominence?

Table 1.1, continued

Area	Research Issues	Clarification and Significance
2. Remedies	2.5 Under what conditions should an order for specific performance to rectify construction defects be appropriately granted?	For construction defects, damages are the normal remedy allowed by the courts. However, specific performance may be the more appropriate remedy in certain circumstances. This aspect of the law is not well developed in Malaysia.
3. Limitation periods	3.1 What should be the limitation period for latent defect claims in negligence?	Latent defects in buildings may manifest themselves long after the normal limitation period of six years to commence legal proceedings has expired. Our Limitation Act 1953 has stood still without any amendments to adequately address latent defects in buildings. The courts' interpretation of the law in this regard is ambiguous and uncertain. This is most undesirable.

The existence of these Research Issues is not conducive to the health of the construction industry. Perhaps there can be no panacea for such ills. Nevertheless, attempts should be made to find antidotes which could ease the problems. This then is the reason for this thesis.

1.4 Aim and Objectives of the Research

The aim of this study is to propose the most appropriate judicial and/or legislative responses to the law on construction defect claims in the Malaysian context with particular focus on areas which are still mired in controversy or are still developing as identified in Table 1.1.

The research questions for each of the Research Issues shown in Table 1.1 are as follows:

1. With regard to construction defect claims, what is the current law in Malaysia and how has the law evolved?
2. What is the law in the major common law jurisdictions - including England, Australia, New Zealand, Canada and Singapore - and the experience encountered in its application?
3. What are the possible improvements to the Malaysian legal framework to address the inadequacies in the law pertaining to construction defect disputes?

The objectives of this research which go towards achieving the aim of the research for each of the Research Issues shown in Table 1.1 are as follows:

1. With regard to construction defect dispute law, to determine the current law in Malaysia and the manner in which the law has developed.
2. To determine the law in the major common law jurisdictions - including England, Australia, New Zealand, Canada and Singapore - and the experience encountered in its application which may be of relevance to Malaysia with a view that such law may be usefully adopted here either in its original form or as adapted to suit our local conditions.
3. To propose an improved legal framework with regard to Malaysian law on construction defect disputes.

1.5 Scope and Limitations of the Research

In accordance with the legalistic nature of this research, the areas to be covered are the following:

1. relevant case law from Malaysia as well as foreign jurisdictions, and
2. relevant statutory law from Malaysia as well as foreign jurisdictions.

The term 'relevant' in the above context connotes the usefulness in answering the Research Issues. The foreign jurisdictions involved are the major common law jurisdictions including England, Australia, New Zealand, Canada and Singapore. These are the jurisdictions where the law is relatively highly-developed and which is supported by well-developed institutions for the administration of justice. The thread that links these jurisdictions with Malaysia is that all of them share a common legal tradition in that they practise the common law system. As such, the laws of these other jurisdictions are similar to that of Malaysia. Comparisons can relevantly be made. In fact, the Malaysian courts very frequently cite cases from these jurisdictions to assist them in decision-making.

The research will focus on the relevant legal aspects as they apply or ought to apply in Malaysia. Legal principles are increasingly developing a global perspective and the laws of most countries are influenced and enriched by the legal developments in other countries. Malaysia is no exception. Case law development in this field has been quite limited here so the laws from other countries are also analysed to determine whether they should be applied here. In fact Malaysia shares a legal tradition with the Commonwealth countries. Precedents from other Commonwealth countries, though not binding here, have a very high persuasive value. They should be followed if there are no exceptional local circumstances justifying a departure. In *United Asian Bank Bhd v Tai Soon Heng Construction Sdn Bhd,*[38] the Supreme Court gave the following wise counsel:

[38] [1993] 1 MLJ 182 (SC).

> In our judgment, it is important generally speaking, and more so in matters of commercial law, that there should be uniformity in the common law of the Commonwealth. We are of the view that this is good judicial policy and provides for consistency.[39]

In *Jamil bin Harun v Yang Kamsiah & Anor*,[40] Lord Scarman speaking for the Privy Council said that the Malaysian courts have the discretion whether or not to follow English law. The judge added that in deciding whether to follow English authorities, 'the courts will have regard to the circumstances of the states of Malaysia and will be careful to apply them only to the extent that the written law permits and no further than in their view it is just to do so'.

1.6 Research Methodology

The research methodology is doctrinal research. Doctrinal legal research is an endeavour predominantly concerned with the analysis of legal principles and the manner in which they have been developed and applied. In this respect, law is similar to the arts and humanities group of disciplines in the absence of a formal research methodology and the dependence on analysis and development of argument.[41] This traditional legal scholarship aims at collating principles from such study and assembling them 'into a coherent framework in the search for order, rationality and theoretical cohesion'[42] and making recommendations for the further growth of the law.[43] It is about coming to terms with the dynamics of past, present and future development in the law.[44]

This research involves identifying, analysing and reflecting on certain issues in construction defect claims that pose problems with the goal of gaining new insights and

[39] *United Asian Bank Bhd v Tai Soon Heng Construction Sdn Bhd* [1993] 1 MLJ 182 (SC) 193.
[40] [1984] 1 MLJ 217 (PC).
[41] P Chynoweth, 'Legal Research' in A Knight and L Ruddock (eds), *Advanced Research Methods in the Built Environment* (Wiley-Blackwell 2008) 28-38.
[42] M McConville and WH Chui, 'Introduction and Overview' in M McConville and WH Chui (eds), *Research Methods for Law* (Edinburgh University Press 2007) 1-15, 1.
[43] ibid.
[44] D Pearce, E Campbell and D Harding, *Australian Law Schools: A Discipline Assessment for the Commonwealth Tertiary Education Commission, vol III* (Australian Government Publishing Service (Pearce Report) 1987) vol 2, para 9.15.

proposing changes for the betterment of the law. The epistemological approach to the research is solely internal. No empirical data is involved. Accordingly, there is no need for experiments as in scientific research or observation, surveys and interviews as in social science research. Given these parameters, to achieve the aim of this research, the only choice for the method of research is doctrinal research.

For this library-based research, the primary sources are court decisions, statutes and standard forms of construction contract. The secondary sources are journal articles, books, conference and seminar papers, theses, dissertations and online resources.

The referencing style used in this thesis is the Oxford University Standard for the Citation of Legal Authorities (OSCOLA) Fourth Edition. OSCOLA was first introduced in 2000. Although originally conceived for internal use in Oxford University by its Faculty of Law, it is now used by law schools throughout the United Kingdom and other countries, as well as by a number of legal journals and publishers.[45] OSCOLA provides rules and examples for the main United Kingdom legal primary sources as well as for many types of secondary sources.[46] It does not purport to be comprehensive.[47] It is a footnote style and all citations appear in footnotes.[48] It is characterized by a minimum use of punctuation.[49]

[45] Sandra Meredith and Donal Nolan, *OSCOLA* (4th edn, Faculty of Law, University of Oxford 2012) <www.law.ox.ac.uk/oscola> accessed 2 June 2016.
[46] ibid.
[47] ibid.
[48] ibid.
[49] ibid.

1.7 Significance and Contribution of the Research

There are no official statistics on the incidence of construction defect claims in this country.[50] However, extrapolating from the fact that construction defects are rampant in the construction industry,[51] it would appear that the incidence of such claims is high. Accordingly, any means of reducing defect claims would be beneficial to the construction industry and to the country as a whole.

The research provides recommendations on the proper approaches to take to resolve controversial or difficult issues in construction defect claims. The research also provides recommendations on whether there is a need for legislative intervention. Many areas are still unclear. This would promote disputes and trigger litigation or arbitration as parties are unsure where they stand in the eyes of the law. Certainty of the law is of utmost importance.[52] Putting the law on a sound, rational and fair basis will reduce disputes in the construction industry and promote greater harmony amongst all the various parties and consequently, on a macro scale, contribute to the healthy and orderly growth of the construction industry in this country.

1.8 Structure of the Thesis

Chapter 1. Introduction

This sets out the background of the research project. It explains why the project is conceived. It deals with the research gap, the problem that needs to be addressed through the aim and objectives of the research, the scope and limitations of the research, the research methodology by way

[50] For litigation, there is no official data from the courts in this respect. All the locally-sponsored standard forms of construction contract contain an arbitration clause. As arbitration is a strictly private affair, there can be no official data. Construction claims are increasingly being given the attention they deserve as witnessed by the enactment of the Construction Industry Payment and Adjudication Act 2012 and the setting up of specialised construction courts in the Kuala Lumpur and Shah Alam High Courts.

[51] See, for example, Opalyn Mok, 'New Buildings could also have Structural Defects' *The Malay Mail Online* (Kuala Lumpur, 25 July 2013) <http://www.themalaymailonline.com/malaysia/article/new- buildings-could-also-have-structural-defects#Z6FyQRFx8qs7Kwco.97> accessed 19 January 2017; James Sommerville, 'Defects and Rework in New Build: An Analysis of the Phenomenon and Drivers' (2007) 25(5) Structural Survey 391.

[52] *Leigh and Sillavan Ltd v Aliakmon Shipping Co Ltd, The Aliakmon* [1986] 1 AC 785 (HL) 817 (Lord Brandon).

of introduction, and the significance and contribution of the research. It also provides a summary of the chapters in this thesis.

Chapter 2. Research Methodology

This chapter introduces the types of legal research. It describes in more detail the nature and implications of doctrinal research which is the research methodology utilised in this project. It goes on to compare doctrinal legal research with the research methodologies employed in other areas of learning. It examines the place and role of doctrinal legal research in the context of the built environment. It explains the reasons for using this research methodology for this project.

Chapter 3. Causes of Action

The law on construction defect claims has been broadly and conveniently divided into three areas for examination for the purpose of this thesis. These are causes of action, remedies and limitation periods. Their analyses are found in Chapters 3, 4 and 5 respectively. The right of an aggrieved party to a remedy for construction defects would usually be based on breach of contract or on the tort of negligence. This chapter focuses on three main issues: (a) the recovery of substantial damages for defects under breach of contract where the recovering party is not in a contractual relationship with the defaulting party and the recovering party has not suffered loss; (b) claims under negligence; and (c) claims for pure economic loss.

Chapter 4. Remedies

This chapter analyses the following aspects of remedies available for construction defect claims: (a) damages for financial loss; (b) the employer's rights of set-off for defects; (c) effect of settlement between the employer and the main contractor; (d) damages for non-financial loss; and (e) specific performance.

Chapter 5. Limitation Periods

The limitation period for a claim for breach of contract is six years from the date when the cause of action arises. This causes no difficulty in respect of construction defects as the cause of action arises from the date of delivery of the completed building by the contractor to the employer. This is the date when the contractor breaches the construction contract by delivering a building to the employer which is not defect-free. However, where a claim under the tort of negligence is pursued, the limitation period of six years commences on the date when there is damage. Patent defects pose few problems. However, for latent defects, the looming question is whether damage occurs at the date of delivery of the completed building to the employer or the date when the damage first occurs or is discovered or discoverable. These are the main themes of this chapter.

Chapter 6. Discussion of Findings

In this chapter, the results of the examination of the law in Malaysia and the major common law jurisdictions in Chapters 3, 4 and 5 will be analysed and discussed. The emphasis is on whether there is scope for

reform so as to put the law in Malaysia as regards the Research Issues on a firmer and more just basis.

Chapter 7. Conclusion and Recommendations

In this chapter, the findings of this research will be summarised and recommendations will be made as to the direction the law should be heading towards including whether there is a need for our Malaysian courts to re-look at the legal issues differently and the necessity for statutory intervention by Parliament in enacting new laws or amending present ones.

CHAPTER 2: RESEARCH METHODOLOGY

2.1 Introduction

The built environment is not a 'pure' discipline. It is usually considered to be multidisciplinary, if not interdisciplinary, encompassing the disciplines of management, economics, technology, design and law.[1]

John W Creswell suggests that research design involves the consideration of philosophical worldview assumptions, strategies of inquiry relevant to the worldview, and the specific methods of research that convert the approach into practice.[2] He says worldviews are a general orientation towards the world and the nature of research that a researcher has in mind.[3] WL Neuman calls such worldviews broadly conceived research methodologies.[4] John W Creswell identifies four worldviews, namely postpositivism, constructivism, advocacy/participatory and pragmatism.[5] The worldview will influence the choice of qualitative, quantitative or mixed methods approach for the research.[6]

The research methodology employed in this project is doctrinal research. This is the traditional form of legal research. Doctrinal legal research is an endeavour predominantly concerned with the analysis of legal principles and the manner in which they have been developed and applied.

[1] P Chynoweth, 'The Built Environment Interdiscipline: A Theoretical Model for Decision Makers in Research and Teaching' (International Conference on Building Education and Research (CIB W89 BEAR 2006), Hong Kong Polytechnic University, Hong Kong, People's Republic of China, 10-13 April 2006).
[2] John W Creswell, *Research Design: Qualitative, Quantitative, and Mixed Methods Approaches* (3rd edn, Thousand Oaks and Sage Publications 2009).
[3] ibid.
[4] WL Neuman, *Social Research Methods: Qualitative and Quantitative Approaches* (Allyn & Bacon 2000).
[5] John W Creswell, *Research Design: Qualitative, Quantitative, and Mixed Methods Approaches* (3rd edn, Thousand Oaks and Sage Publications 2009).
[6] ibid.

2.2 Types of Legal Research

Legal research 'is not merely a search for information; it is primarily a struggle of understanding'.[7] M McConville and WH Chui comment that there are two broad traditions in legal scholarship.[8] One is termed commonly as 'black-letter law'. It is premised essentially on the law being 'an internal self-sustaining set of principles' which can be derived by the study of statutory and judge-made law with little or no attachment to any external factors. This traditional legal scholarship aims at harvesting principles from such study and assembling them 'into a coherent framework in the search for order, rationality and theoretical cohesion'. The other tradition they refer to as 'law in context'. They say that this involves 'problems in society which are likely to be generalised or generalisable'. They add that in this approach, law itself becomes problematic, both in the sense that law may be the cause of a social problem, and in the sense that law may provide a solution.

Legal research has also been identified to fall into three main categories: doctrinal, reform-oriented and theoretical.[9] Doctrinal research is defined as 'research which provides a systematic exposition of the rules governing a particular legal category, analyses the relationship between rules, explains areas of difficulty and, perhaps, predicts future developments'. Reform-oriented research is defined as 'research which intensively evaluates the adequacy of existing rules and which recommends changes to any rules found wanting'. Theoretical research is defined as 'research which fosters a more complete understanding of the conceptual bases of legal principles and of the combined effects of a range of rules and procedures that touch on a particular area of activity'.

[7] MJ Lynch, 'An Impossible Task but Everybody has to do it - Teaching Legal Research in Law Methods' (1997) 89 Law Library Journal 415.
[8] M McConville and WH Chui, 'Introduction and Overview' in M McConville and WH Chui (eds), *Research Methods for Law* (Edinburgh University Press 2007) 1-15, 1.
[9] D Pearce, E Campbell and D Harding, *Australian Law Schools: A Discipline Assessment for the Commonwealth Tertiary Education Commission, vol II* (Australian Government Publishing Service (Pearce Report) 1987) para 9.15.

I Dobinson and F Johns define qualitative legal research as simply non-numerical in contrast with quantitative research which is numerical.[10] They identify four broad categories: doctrinal, problem, policy and law reform. The non-doctrinal categories often take into consideration the social factors involved and the social implications of the law. This type of research may include interviews and surveys. Such research is often called socio-legal research.

The 1980s witnessed the beginning of critical legal research which integrated methods and ideas from other disciplines such as sociology, anthropology and literary theory.[11] Whereas doctrinal legal research involves using legal reasoning and interpretative tools to evaluate legal rules and to make recommendations for the further growth of the law,[12] interdisciplinary or socio-legal research is focused on examining the law and the legal system to find out whether they benefit and protect the public.[13]

2.3 Doctrinal Legal Research

Doctrinal research aims to formulate legal doctrines by analysing legal rules. Legal rules in the common law jurisdictions including Malaysia are found in statutes and cases.

I Dobinson and F Johns define doctrinal research as research to find out what the law is in a particular area.[14] They posit that that is the researcher's principal or even sole aim. To fulfil this quest, the researcher analyses the relevant legislation and case

[10] I Dobinson and F Johns, 'Qualitative Legal Research' in M McConville and WH Chui (eds), *Research Methods for Law* (Edinburgh University Press 2007).
[11] DW Vick, 'Interdisciplinary and the Discipline of Law' (2004) 31 Journal of Law and Society 164.
[12] M McConville and WH Chui, 'Introduction and Overview' in M McConville and WH Chui (eds), *Research Methods for Law* (Edinburgh University Press 2007) 1-15.
[13] JH Schlegel, *American Legal Realism and Empirical Social Science* (University of North Carolina Press 1995).
[14] I Dobinson and F Johns, 'Qualitative Legal Research' in M McConville and WH Chui (eds), *Research Methods for Law* (Edinburgh University Press 2007).

law (the primary sources) together with relevant journal articles and commentaries on the legislation and case law (the secondary sources). The researcher may also delve into the evolution of the law in terms of judicial reasoning and legislative enactment.

P Chynoweth notes that doctrinal research is in sharp contrast with research in the natural sciences.[15] He adds that whilst the former concerns interpretative, qualitative analysis, the latter involves seeking answers to natural occurrences by the study of causal relationships between variables. He notes that although the interpretative aspect of doctrinal research resembles the *verstehen* tradition of the social sciences,[16] such resemblance is merely superficial and that fundamental differences exist between doctrinal research and scientific research. He is of the view that whereas scientific research in both the natural and social sciences depends on collecting empirical data to test or to support its theories, such means of testing the validity of the research findings are absent in doctrinal research.

Legal rules can be characterised as normative in that they mandate how people ought to conduct themselves.[17] They are solely prescriptive, without any element of explaining, predicting or understanding human behaviour.[18] In doctrinal research, the epistemological approach to the research is internal and participant-orientated,[19] thus earning it the tag of research *in* law.[20]

[15] P Chynoweth, 'Legal Research' in A Knight and L Ruddock (eds), *Advanced Research Methods in the Built Environment* (Wiley-Blackwell 2008) 28-38.
[16] TA Schwandt, 'Three Epistemological Stances for Qualitative Inquiry: Interpretivism, Hermeneutics and Social Constructionism' in NK Denzin and YS Lincoln (eds), *Handbook of Qualitative Research* (2nd edn, Thousand Oaks and Sage Publications 2000).
[17] H Kelsen, in M Knight (trs), *The Pure Theory of Law* (University of California Press 1967).
[18] P Chynoweth, 'Legal Research' in A Knight and L Ruddock (eds), *Advanced Research Methods in the Built Environment* (Wiley-Blackwell 2008) 28-38.
[19] HLA Hart, *The Concept of Law* (Clarendon Press 1961).
[20] HW Arthurs, *Law and Learning: Report to the Social Sciences and Humanities Research Council of Canada by the Consultative Group on Research and Education in Law* (Information Division, Social Sciences and Humanities Research Council of Canada 1983).

P Chynoweth suggests that doctrinal research is not totally cut off from the external world in reality.[21] He cites the example that an uncertain legal rule can sometimes be better interpreted if its historical and social contexts are taken into consideration. As the external environment takes on greater influence, the research would become increasingly more interdisciplinary.

Doctrinal research has a close affinity with the research undertaken in the humanities. It results in 'the development of scholastic arguments for subsequent criticism and reworking by other scholars, rather than any attempt to deliver results which purport to be definitive and final'.[22] The researcher would most likely consider himself as being 'involved in an exercise in logic and common sense rather than in the formal application of a methodology as understood by researchers in the scientific disciplines'.

P Chynoweth is not persuaded that a 'methodology' in the sense as understood in scientific research applies to doctrinal research.[23] He contends that unlike scientific research, the 'methods' used in doctrinal research are not consciously learned and used. He argues that 'the skills and conventions of legal analysis are instead learned at an instinctive level through exposure to the process, and they are then employed on the same basis in the development of legal argument'.

I Dobinson and F Johns say that doctrinal research may be considered as non-empirical on the ground that no empirical method is employed.[24] On that basis, it is

[21] P Chynoweth, 'Legal Research' in A Knight and L Ruddock (eds), *Advanced Research Methods in the Built Environment* (Wiley-Blackwell 2008) 28-38.
[22] P Chynoweth, 'Legal Research' in A Knight and L Ruddock (eds), *Advanced Research Methods in the Built Environment* (Wiley-Blackwell 2008) 28-38, 32.
[23] P Chynoweth, 'Legal Research' in A Knight and L Ruddock (eds), *Advanced Research Methods in the Built Environment* (Wiley-Blackwell 2008) 28-38, 34-35.
[24] I Dobinson and F Johns, 'Qualitative Legal Research' in M McConville and WH Chui (eds), *Research Methods for Law* (Edinburgh University Press 2007).

neither qualitative nor quantitative. However, they contend that this type of research is still qualitative in character, reasoning that it concerns not just finding the correct statutes and the relevant cases and making a statement out of it, but of selecting and weighing materials according to hierarchy and authority and taking into consideration the social context and interpretation.

As regards knowledge production in the sciences, T Becher says that it involves the piecemeal and cumulative aggregation of parts of knowledge which as time goes by, result in a comprehensive understanding of a particular phenomenon.[25] He notes that in contrast, the development of knowledge in the humanities disciplines including law is via the process of reiterative internal enquiry. Such enquiry is focused on multifaceted, rather than discrete, issues and attempts to develop a holistic understanding of the entire phenomenon and not of its individual components.

2.4 Doctrinal Legal Research in the Context of the Built Environment

P Chynoweth finds that doctrinal researchers in law are often misunderstood by the other members of the built environment research community who are overwhelmingly involved in scientific research, whether natural or social, with its attendant different methodologies and cultural norms.[26] The methods used in doctrinal research are concerned mainly with the study of legal texts to answer the question 'what is the law?' on specific topics. He notes that epistemologically, this contrasts with the questions posed in empirical research in most other component disciplines of the built environment.

[25] T Becher, 'The Disciplinary Shaping of the Profession' in BR Clark (ed), *The Academic Profession* (University of California Press 1987).
[26] P Chynoweth, 'Legal Research' in A Knight and L Ruddock (eds), *Advanced Research Methods in the Built Environment* (Wiley-Blackwell 2008) 28-38.

He observes that law shares a commonality with the arts and humanities group of disciplines in the absence of a formal research methodology and the dependence on analysis and development of argument. In this respect, the disciplines of law and design in the built environment differ from the disciplines of management, economics and technology which belong to either the natural sciences or the social sciences.

M Pendleton finds that traditional legal doctrinal criticism involves identifying, reading and digesting the particular area in focus but that this is rather straightforward.[27] The more challenging part of that enterprise consists of reflecting on the legal issues involved and using one's imagination to get new insights. He argues, 'Without imagination, reflection in any area of human knowledge may render technical results, yet will be sterile - it will create nothing new.'

In academic legal research, the 'discovery' element is not immediately apparent as compared to research in the natural sciences. The perception is that in law, as well as in the humanities and social sciences generally, there is no discovery of new truths but that the endeavours are merely directed at reviewing and analysing past and present social phenomena. The Australian Law Deans in the Pierce Report say that this view is fundamentally flawed:[28]

> Law is a highly sophisticated human construct that is constantly changing. A large part of legal research therefore consists of formulating hypotheses to give meaning to detailed legal rules already created (whether by statute or judicial decision) and projecting these hypotheses so as to create new patterns of rule-making. Often the most profound 'discoveries' are in fact those that give new coherence to familiar legal phenomena. For this reason, the process of ascertainment and synthesis of existing legal principles constitutes original research, as also does coming to terms with the dynamic of past, present and future legal development.

[27] M Pendleton, 'Non-Empirical Discovery in Legal Scholarship - Choosing, Researching and Writing a Traditional Scholarly Article' in M McConville and WH Chui (eds), *Research Methods for Law* (Edinburgh University Press 2007) 159-180, 162-163.
[28] D Pearce, E Campbell and D Harding, *Australian Law Schools: A Discipline Assessment for the Commonwealth Tertiary Education Commission, vol III* (Australian Government Publishing Service (Pearce Report) 1987) vol 2, para 9.15.

2.5 Choice of Doctrinal Research for this Study

This research is not aimed at explaining any particular social phenomenon. Social science research methods are therefore inapplicable. Observation or interviews will not achieve the desired results. The research is theoretical in nature. There are very few local people who have the breadth and depth of knowledge of the legal aspects of construction defect claims. Even these handful few might need to go through the entire exercise of this project to be able to tell with a high degree of competence as to what the law is and what the law should be which are at the heart of this research. This research is the germination of the researcher's own thoughts and ideas from the seedbed of the existing law and the views of other academic writers and commentators.

Malaysia is a common law jurisdiction.[29] The common law system is practised in England, the United States and most of the Commonwealth countries which are countries that had once been colonized by England. This stands in contrast to the civil law system which prevails in Europe and in countries which were once colonies of Spain and France.

The courts in common law jurisdictions make their decisions based on previous judicial pronouncements. Where a dispute involves a statute, the court's interpretation of that statute will determine how the law is to be applied. Common law judges are bound by the doctrine of stare decisis by which they are required to comply with previously decided cases by higher courts in the hierarchy where the facts are materially the same.

[29] For an account of the common law including its origins, see, for example, Arthur R Hogue, *Origins of the Common Law* (Liberty Fund 1986); Oliver Wendell Holmes Jr, *The Common Law* (Revised ed edn, Dover 1991); Theodore FT Plucknett, *A Concise History of the Common Law* (5th edn, Lawbook Exchange 2001); Roscoe Pound, *The Spirit of the Common Law* (Andesite 2017).

In making a decision, judges under the common law system may look to judicial decisions in other jurisdictions and may draw upon past or present judicial experience for analogies. Such flexibility allows the common law to cope with novel situations. Meanwhile, the doctrine of stare decisis gives certainty and uniformity to the law and thus provides for a stable legal environment.

As the Malaysian legal system shares a common pedigree with the other common law jurisdictions, the development of the law here is heavily influenced by that in other common law jurisdictions. Many of our Acts of Parliament - especially the vintage ones like the Contracts Act 1950[30] and the Limitation Act 1953[31] - are modelled on those from other jurisdictions. Decisions on the interpretation and application of such statutory provisions in the original jurisdictions are accordingly highly pertinent. Development of the law in the common law jurisdictions has benefited from the cross-fertilisation of thoughts, ideas and experiences, and has marched ahead in sync with the same drum-beat with rare exceptions.[32]

Our courts routinely refer to cases from the major common law jurisdictions to assist them in making decisions especially for matters which have hitherto never come before the courts here. Our law reports are replete with such references to cases from the main common law jurisdictions. Such precedents are not binding though highly persuasive authorities. Our courts have to perforce take into consideration local conditions, traditions, cultures, mores and customs as mandated by section 3 of the Civil Law Act 1956. Our law has been, without any doubt, considerably enriched and enhanced as a consequence of resorting to the collective formidable legal minds from

[30] This Act was first introduced as Contract Enactment 1889, later Cap 52 (revised FMS Enactments), and was modelled on the Indian Contracts Act 1872. Many of the sections are in fact couched in identical language.
[31] This Act used the English Limitation Act 1939 as a template.
[32] One such example is the approach to pure economic loss.

these other common law jurisdictions. Major common law jurisdictions often quoted in the Malaysian courts include England, Australia, Singapore, New Zealand and Canada where the law is relatively well-developed. The same approach is adopted in this study. Resort is also made to such major common law jurisdictions.

The cases and journal articles are identified and sourced mainly from the databases of LexisNexis, Westlaw and the British and Irish Legal Information Institute (BAILII) by using keyword searches. The cases and journal articles may then provide the trail to other relevant materials.

2.6 Choice of Research Issues for Research

This research is not a collection of all the areas in construction defect claims where problems lurk in the application of the law. Its sweep is much narrower. The criteria for the choice of problem issues to be studied are (a) where the law is unsettled, (b) where application of the law leads to unfairness or injustice, and (c) where the applicable legal principles do not fit nicely into the larger conceptual framework of the law. These problem issues are identified from the literature and some of the more important and pressing ones are selected for study.

It is not a happy situation where the law is in a state of flux and no one is sure what the exact law in a particular area is. This breeds uncertainty and unpredictability. No one can then be sure as to how to conduct themselves to avoid becoming liable for losses occasioned to others or to avoid running foul of the law. Disputants do not know where they stand in the eyes of the law. They may then be unwilling to compromise and prefer to take their chances by bringing the dispute to the bitter end in litigation or arbitration where a win-lose outcome awaits them. Chances of a win-win solution

becomes less likely. This destroys relationships. This promotes discords and disputes. This encourages a litigious approach to resolving problems which is neither economically nor socially beneficial or desirable.

Sometimes the application of legal principles gives rise to unfairness or injustice to a party. This is not of course the function of the law but is rather an unwitting side effect. Sometimes it may be difficult to formulate legal principles which are fair to all the relevant parties in all situations. The law has to walk a tightrope in balancing the rights of all the parties concerned.

Where the current legal principles in a particular area do not dovetail nicely into the larger picture of the law, then there is conceptual incoherence and irrationality. There is no holistic whole. For instance, the legal principles governing remedies for breach of a construction contract should ideally be the same as for breach of a sale and purchase agreement of a house. Principles of law should apply across the board unless its application in particular areas works injustice. Certainty, uniformity and predictability will otherwise be compromised. It is not desirable to have different laws for different areas. However, the law cannot be so stiff as to outlaw all exceptions. It is sometimes necessary to have exceptions to avoid injustice in particular situations. Where different competing priorities intersect, striking a good balance is often difficult but is necessary and is of utmost importance.

2.7 Conclusion

This research is an academic expedition in search of the legal rules and principles involved in construction defect claims. It is an endeavour to give reason and rationality to the legal doctrines concerned. It is a quest to prescribe a better

harmonisation and coherence to the law in this terrain so that it accords with both sound legal reasoning and social justice. To achieve such goals, it is necessary to utilise the principles and tools of doctrinal legal research.

CHAPTER 3: CAUSES OF ACTION

3.1 Introduction

In this research, the law on construction defect claims is examined under the three broad categories of causes of action, remedies and limitation periods so as to answer the Research Issues as set out in Chapter 1. This chapter seeks to analyse the law under the category of causes of action in Malaysia and certain relevant common law jurisdictions to meet Research Objectives No. 1 and 2.

Claims for losses caused by construction defects may be based on breach of contract or the tort of negligence. The principles of contract law and the law of negligence generally apply to construction defect claims. In this chapter, the application of some of these principles is analysed in such a contextual framework in three areas which pose challenging and vexing problems. These are (a) where the loss is suffered by the owner who is not the employer in a building contract; (b) claims under negligence; and (c) claims for pure economic loss.

3.2 Loss Suffered by the Owner Who is not the Employer in a Building Contract

Suppose a matrimonial home is in the name of the husband. As the husband is always busy at work, the wife engages a contractor to build a new kitchen. The kitchen turns out to be defectively constructed. The wife calls in and pays another contractor to do remedial work.

Under general contractual principles, the wife cannot recover from the original contractor substantial, as opposed to nominal, damages as she has suffered no loss since

neither the land nor the building belongs to her. Nor can the husband recover damages because there is no privity of contract. The Privy Council in *Kepong Prospecting Ltd & Ors v Schmidt*[1] emphatically held that the doctrine of privity of contract applies in Malaysia.[2] Any claim for damages would appear to simply disappear into a 'legal black hole'[3] because the party that suffers loss is without a claim and the party that has a claim cannot recover for the loss.

Such a scenario is not only confined to domestic contexts but it can also occur in commercial building contract situations where the owners are not the employers for various reasons, including reducing the incidence of tax. A rational system of law cannot tolerate such a wrong to go without any possibility of redress. That would be a manifest defect in the law. If this were not so, it would be like giving a carte blanche to a contracting party to abandon his obligations with impunity. This cries out for a solution; a solution which should not cause anarchy to established principles of law.

3.2.1 Rights of a Third Party to Sue

A party to a contract acquires certain rights and incurs certain obligations as against the other contracting party or parties. Logically, a third party should neither be able to claim any interest in the contract nor be liable to the contracting parties. Where the contract confers a benefit on a third party, a conundrum arises as to whether the third party can sue in his own name to claim the benefit.

[1] [1968] 1 MLJ 170 (PC).

[2] See also *Oversea Chinese Banking Corporation Ltd v Woo Hing Brothers (M) Sdn Bhd* [1992] 2 MLJ 86 (HC); *Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd* [1998] 1 MLJ 393 (FC); *Law Kam Loy & Anor v Boltex Sdn Bhd & 5 Ors* [2005] 4 AMR 525 (CA); *Suwiri Sdn Bhd v Government of the State of Sabah* [2008] 1 MLJ 743 (FC); *Ngan & Ngan Holdings & Anor v Central Mercantile Corp (M) Sdn Bhd* [2010] 1 MLJ 822 (CA); *Bacom Enterprises Sdn Bhd v Jong Chuk & Ors* [2011] 5 MLJ 820 (CA); *Woolley Development Sdn Bhd v Stadco Sdn Bhd (No 1)* [2011] 6 MLJ 111 (CA); *Boustead Naval Shipyard Sdn Bhd v Dynaforce Corp Sdn Bhd* [2015] 1 MLJ 284 (CA). In England, such a position has been profoundly changed by the Contracts (Rights of Third Parties) Act 1999.

[3] This colourful and yet colourless term was used by Lord Stewart in *GUS Property Management Ltd v Littlewoods Mail Order Stores Ltd* 1982 SC (HL) 157, 166.

3.2.1.1 The Privity Rule

The doctrine of privity of contract is that no one can acquire rights or be subjected to liabilities under a contract to which he is not a party. The modern approach to the doctrine can be said to have first taken root in *Tweddle v Atkinson*[4] where Wightman J held that 'it is now well established that at law no stranger to the consideration can take advantage of the contract though made for his benefit'. Such an approach was approved by the House of Lords in *Dunlop Pneumatic Tyre Co Ltd v Selfridge & Co Ltd*.[5]

Prior to the enactment of the Contracts (Rights of Third Parties) Act 1999 in England, Wales and Northern Ireland, the doctrine of privity of contract had endured intense judicial criticism.[6] Lord Diplock described the rule in *Swain v Law Society*[7] as 'an anachronistic shortcoming that has for many years been regarded as a reproach to English private law'.

In concluding that a contract for the benefit of a third party should be recognised if that is the expressed intention of the parties, Steyn LJ in *Darlington BC v Wiltshier Northern Ltd*[8] said that the autonomy of the will of the parties should be respected, that the parties' reasonable expectations should be given effect and that no doctrinal, logical or policy reason exists as to why this should not be so. In *Trident General Insurance Co Ltd v McNiece Bros Pty Ltd*,[9] the majority of the High Court of Australia[10] took the view that the time had arrived to reject the privity doctrine.

[4] [1861-73] All ER Rep 369, 370.
[5] [1915] AC 847 (HL).
[6] See, for instance, *Smith and Snipes Hall Farm Ltd v River Douglas Catchment Board* [1949] 2 KB 500 (CA); *White v John Warrick & Co Ltd* [1953] 2 All ER 1021 (CA); *Drive Yourself Hire Co (London) Ltd v Strutt* [1954] 1 QB 250 (CA); *Pyrene Co Ltd v Scindia Navigation Co Ltd* [1954] 2 QB 402 (QBD); *Rayfield v Hands* [1960] Ch 1 (Ch D).
[7] [1983] 1 AC 598 (HL) 611.
[8] [1995] 3 All ER 895 (CA) 903.
[9] [1988] HCA 44, 165 CLR 107 (High Court, Australia).
[10] Mason CJ, Wilson J and Toohey J.

3.2.1.2 The Malaysian Position

Our Contracts Act 1950 offers no clue as to the operation of such a doctrine here. In *Kepong Prospecting Ltd & Ors v Schmidt*,[11] the Privy Council held that the doctrine applies in Malaysia just as in England. Lord Wilberforce, after reviewing the Indian cases, recognised that the law was rightly stated by Sir John Beaumont CJ in the Indian case of *National Petroleum Co Ltd v Popatlal*.[12]

In *Razshah Enterprise Sdn Bhd v Arab Malaysian Finance Bhd*,[13] Abdul Malik Ishak JCA said that the doctrine is not accepted universally and instanced the case of *FC Seck Trading As Oversea Structural Company v Wong And Lee*[14] where the plaintiff sued the defendants for recovery of money mistakenly paid and Terrell Acting CJ held that the doctrine of privity of contract was inapplicable.

With the greatest respect, that was a misreading of *FC Seck*. In that case, a contractor was engaged by the employer to construct a swimming pool. The contract provided that a copy of certain plans was to be supplied free to the contractor. The architects demanded for and obtained $500 from the contractor for such a copy. The contractor sued the architects for recovery of the sum.

At first instance, the learned District Judge dismissed the contractor's claim on the sole ground that the architects were not parties to the contract between the employer and the contractor. Such reasoning was rejected by the court on appeal. The appellate court held that the contractor was not suing on the contract but was suing for money paid to the architects under a mistake of law. The money was not paid pursuant to the contract at all. Therefore, that case rejected not the privity doctrine itself but its

[11] [1968] 1 MLJ 170 (PC).
[12] AIR 1936 Bom 344.
[13] [2009] 2 MLJ 102 (CA) [58].
[14] [1940] MLJ 182.

applicability to the dispute there.

The doctrine has been viewed as consisting of two distinct rules.[15] The first rule is that only a party to a contract can sue on it. The second is that a person can only enforce a contract if he has given consideration to the promisor or some other person at the promisor's request. This conception is not without its disbelievers who thought that the two rules are actually one.[16]

The position in Malaysia is simpler as section 2(d) of the Contracts Act 1950 provides that consideration for a promise may come from the promisee or any other party. Accordingly, the doctrine as applicable here is restricted to the rule that only a party to a contract may sue on it. This view is embraced by the courts in India where section 2(d) of the Indian Contract Act is similarly worded as our section 2(d).[17]

Although there is statutory provision permitting a third party to give consideration, there is nothing which allows a third party to sue on a contract. In *Kepong Prospecting*, Lord Wilberforce held that although section 2(d) allows consideration to flow from someone other than the promisee, this does not allow a third party to enforce a contract nor is there any other provision capable of that effect. His Lordship noted that paragraphs (a), (b), (c) and (e) in fact support the English position that a third party has no right to sue on a contract.

[15] *Dunlop Pneumatic Tyre Co Ltd v Selfridge & Co Ltd* [1915] AC 847 (HL) 853; *Vandepitte v Preferred Accident Insurance Corpn of New York* [1933] AC 70 (PC) 79.
[16] See, for example, *Coulls v Bagot's Executor & Trustee Co Ltd* [1967] HCA 3, 119 CLR 460 (High Court, Australia) 494 (Windeyer J).
[17] See, for example, *Debnarayan Dutt v Chunilal Ghose* [1914] 41 Cal 137.

The judicial stance in India is the same. In the Indian decision of *Krishna Lal Sadhu v Pramila Bala Dasi*,[18] Rankin CJ held that besides there being nothing in section 2 of the Indian Contract Act to encourage the proposition that a third party can enforce a contract, the definitions of 'promisor' and 'promise' also do not permit such an interpretation.

3.2.1.3 Exceptions to the Privity Rule

Although the doctrine of privity works well in most circumstances, there are situations where its strict application leads to injustice. To enable real justice to be meted out, certain exceptions to the rule have been developed.

The principles of agency are widely regarded as an exception to the doctrine especially where the agent acts within the scope of his usual authority,[19] where the principal is not disclosed[20] and in some cases of agency of necessity.[21] Statutory intervention has also made inroads into this rule. Section 4(3) of the Civil Law Act 1956 has created the concept of absolute assignments.

The Federal Court in *UMW Industries Sdn Bhd v Ah Fook*[22] held that the requirements for an absolute legal assignment under section 4(3) of the Civil Law Act 1956 are: (a) the assignment must be in writing and signed by the assignor; (b) the assignment must be absolute and not by way of charge only; and (c) express notice in writing must have been given to the person liable to the assignor under the assigned chose in action. The court further added[23] that the assignment in writing need not be in any particular form as long as it is absolute in that it is intended to pass the entire

[18] [1928] 55 Cal 1315.
[19] *Watteau v Fenwick* [1893] 1 QB 346 (QBD).
[20] *Keighley, Maxsted & Co v Durant* [1901] AC 240 (HL); *Pople v Evans* [1969] 2 Ch 255 (Ch D); *The Havprins* [1983] 2 Lloyd's Rep 356.
[21] *The Winson* [1982] AC 939.
[22] [1996] 1 MLJ 365 (FC) 370-371.
[23] *UMW Industries Sdn Bhd v Ah Fook* [1996] 1 MLJ 365 (FC) 371.

interest of the assignor in the chose in action, relying on the case of *Curran v Newpark Cinemas Ltd*.[24]

3.2.1.4 Contracts (Rights of Third Parties) Act 1999

In 1937, the Law Revision Committee in the United Kingdom recommended that the rule be abolished and that statutory recognition be given to third party rights albeit with limitations. It was not until some 60 years later that those recommendations came to fruition in the form of the Contracts (Rights of Third Parties) Act 1999.

In the meantime, judicial impatience was apparent. Lord Reid in *Beswick v Beswick*[25] said that if there was further parliamentary procrastination, 'this House might find it necessary to deal with this matter'. Similarly, Lord Scarman in *Woodar Investment Development Ltd v Wimpey Construction UK Ltd*[26] said that further legislative delay might force the House to 'reconsider *Tweddle v Atkinson* and the other cases which stand guard over this unjust rule'.

The English Contracts (Rights of Third Parties) Act 1999 enables third parties to enforce contractual terms. A person who is not a party to a contract (a 'third party') may in his own right enforce a term of the contract if the contract expressly provides that he may.[27] He may also do so if the term purports to confer a benefit on him[28] unless a proper construction of the contract indicates that the parties did not intend the term to be enforceable by the third party.[29]

[24] [1951] 1 All ER 295 (CA) [B]. This case construed the meaning of section 136(1) of the English Law of Property Act 1925 which is equivalent to section 4(3) of our Civil Law Act 1956.
[25] [1968] AC 58 (HL) 72.
[26] [1980] 1 All ER 571 (HL).
[27] Section 1(1)(a).
[28] ibid.
[29] Section 1(2).

The third party need not exist at the time when the contract is made but must be expressly identified in the contract by name, as a member of a class or as answering a particular description.[30] Such a right cannot stand in isolation but is subject to and in accordance with any other relevant terms of the contract.[31] The third party has all the remedies available as if he had been a party to the contract.[32]

Furthermore, where a term of a contract excludes or limits liability as regards any matter, references in the Act to the third party enforcing the term shall be construed as references to his availing himself of the exclusion or limitation.[33] The rights of the third party have no effect on the right of the promisee to enforce any term of the contract.[34]

The promisor is protected from double liability.[35] In respect of a term of the contract which is enforceable by a third party, if the promisee has recovered from the promisor the third party's relevant loss, or the promisee's expense of making good to the third party the default of the promisor, then, in any proceedings instituted by the third party, the court or arbitral tribunal shall reduce any award to the third party to the extent appropriate taking into account the sum recovered by the promisee.[36]

3.2.2 Rights of the Contracting Party to Sue

Certainly a contracting party can sue for recovery of his own loss against the promisor. But if the real loss is suffered by a third party, generally he has no such right of action.

[30] Section 1(3).
[31] Section 1(4).
[32] Section 1(5).
[33] Section 1(6).
[34] Section 4. Section 1(7) defines 'the promisor' as the party to the contract against whom the term is enforceable by the third party, and 'the promisee' as the party to the contract by whom the term is enforceable against the promisor.
[35] Section 5.
[36] ibid.

3.2.2.1 The General Rule

Take the situation where A enters into a contract with B for the erection of a building by B on land belonging to C. The building so constructed is defective. The general rule that a party can only recover compensation for his own loss will bar A from recovering substantial damages from B since neither the building nor the land belongs to A and therefore A has not suffered any loss.

Lord Diplock in *Albacruz (Cargo Owners) v Albazero (Owners), The Albazero*[37] referred to the general rule of English law that apart from nominal damages, a plaintiff can only recover in an action for breach of contract the actual loss he has himself sustained. The antecedents of this supposed rule are suspect. Reliance is often placed on the two cases of *Robinson v Harman*[38] and *Livingstone v Rawyards Coal Co.*[39] In the former, Parke B said, 'The rule of the common law is, that where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation, with regard to damages as if the contract had been performed.'[40]

In the latter, Lord Blackburn referred to the general rule that compensatory damages should as nearly as possible 'put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong'.[41]

Neither of these two cases was concerned with the loss suffered by a third party and not by the plaintiff. Therefore, these two cases are not authority for the proposition

[37] [1977] AC 774 (HL).
[38] (1848) 1 Exch 850.
[39] (1880) 5 App Cas 25 (HL).
[40] *Robinson v Harman* (1848) 1 Exch 850, 855.
[41] *Livingstone v Rawyards Coal Co* (1880) 5 App Cas 25, 39.

that damages cannot be claimed by a party for a loss suffered by a third party. Despite there being no direct authority for such a rule, the authoritative statements by Lord Diplock in *Albacruz (Cargo Owners) v Albazero (Owners), The Albazero*[42] and also by Lord Browne-Wilkinson in *St Martins Property Corpn Ltd v Sir Robert McAlpine Ltd*[43] of such a general rule give the rule much credibility. Such a rule has been so well accepted and so often applied that its questionable pedigree seems scarcely to be of any concern.

The rationale for such a rule is simple enough. The object of compensation for loss is to make good a loss. Only the person who has suffered the loss is entitled to have it made good by compensation. Few would question the logic of such a rule. However, there are situations where exceptions are necessary to the general rule to achieve a just resolution of disputes.

3.2.2.2 Exceptions to the General Rule

There are at least four well-established exceptions to this general principle. First, a trustee has the right to recover damages for breach of contract in respect of the loss suffered by the beneficiary.[44] Secondly, an agent can recover for the loss sustained by an undisclosed principal.[45] Thirdly, a bailee has the right to recover for loss or damage to his bailor's goods.[46] Fourthly, a person who has insured goods with the relevant terms has the right to recover under the policy the full value of the goods even though the loss or part of it has been sustained by a third party.[47] The insured in such a

[42] [1977] AC 774 (HL).
[43] [1994] 1 AC 85 (HL). This case was heard together with *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd*.
[44] *Woodar Investment Development Ltd v Wimpey Construction UK Ltd* [1980] 1 All ER 571 (HL).
[45] *L/M International Construction Inc v The Circle Ltd Partnership* (1995) 49 ConLR 12 (CA).
[46] See *The Winkfield* [1902] P 42 (CA).
[47] See *Waters v Monarch Fire and Life Assurance Co* (1856) 5 El & Bl 870.

case must have an insurable interest in the goods, which often arises where he is either a part-owner or bailee.[48]

All these situations are more apparent than true exceptions to the general rule that a person can only recover a contractual loss sustained by him and not by a third party. The law has been fashioned to give effect to commercial practicalities by imputing the loss to the contracting party although such loss is actually sustained by a third party.

3.2.2.3 Modifications to the General Rule

There are two further formulations which are advocated to have a modifying effect on the general rule and frequently referred to simply as the narrow ground and the broader ground. The narrow ground is also variously referred to as 'the rule in *Dunlop v Lambert*',[49] 'the *Dunlop v Lambert* exception' and '*The Albazero* exception'.[50] Under the narrow ground, A sues B on behalf of or for the benefit of C. The broader ground is significantly different: A sues B to recover damages for himself to compensate for what is perceived to be his own loss.

(a) The Narrow Ground

This exception to the general rule was triggered by *Dunlop v Lambert*,[51] a Scots case concerning carriage of goods by sea. This case has since been treated by authoritative English textbook authors as authority for the broad proposition that a consignor may recover substantial damages against the ship owner if there is privity of contract between him and the carrier for the carriage of goods, although, if the goods are

[48] ibid.
[49] *Dunlop v Lambert* (1839) 6 Cl & Fin 600 (HL).
[50] *Albacruz (Cargo Owners) v Albazero (Owners), The Albazero* [1977] AC 774 (HL).
[51] (1839) 6 Cl & Fin 600 (HL).

not his property or at his risk, he will be accountable to the true owner for the proceeds of his judgment.

In his perceptive analysis of *Dunlop v Lambert*[52] in *Alfred McAlpine Construction Ltd v Panatown Ltd*,[53] Lord Clyde concluded that *Dunlop v Lambert* did not decide that a consignor can sue for damages for loss of a cargo even though he has suffered no loss, nor is it authority for the view that a consignor may recover on behalf of the consignee damages for a loss which has fallen upon the consignee. He said that the case merely decided that a consignor might be able to make a claim on the carrier if there is a special contract between the consignor and the carrier or between the consignor and the consignee, which varies the general rule that the risk passes to the consignee on delivery to the carrier.[54]

Despite the doubtful value of *Dunlop v Lambert*[55] as an authority in this respect, Lord Diplock in *The Albazero*[56] sought to rationalise the rule in the former so that it might fit into the pattern of English law. He treated the supposed rule as:

> … an application of the principle, acceptable also in relation to policies of insurance upon goods, that in a commercial contract concerning goods where it is in the contemplation of the parties that the proprietary interests in the goods may be transferred from one owner to another after the contract has been entered into and before the breach which causes loss or damage to the goods, an original party to the contract, if such be the intention of them both, is to be treated in law as having entered into the contract for the benefit of all persons who have or may acquire an interest in the goods before they are lost or damaged, and is entitled to recover by way of damages for breach of contract the actual loss sustained by those for whose benefit the contract is entered into.[57]

Lord Diplock thus considered the rule in *Dunlop v Lambert* as a solution to a practical problem which may occur in the context of commercial contracts where the property in

[52] ibid.
[53] [2001] 1 AC 518 (HL) 526.
[54] *Alfred McAlpine Construction Ltd v Panatown Ltd* [2001] 1 AC 518 (HL) 529 (Lord Clyde).
[55] (1839) 6 Cl & Fin 600 (HL).
[56] *Albacruz (Cargo Owners) v Albazero (Owners), The Albazero* [1977] AC 774 (HL).
[57] *Albacruz (Cargo Owners) v Albazero (Owners), The Albazero* [1977] AC 774 (HL) 847.

goods may pass from one party to another after the contract has been made and that loss of or damage to the goods may happen at a time when the property in the goods has passed from the consignor to another party. It would be expedient in such contexts that if the parties so intend that the consignor of the goods should be treated as having contracted for the benefit of all those who may acquire an interest in the goods before they are lost or damaged so as to be able to recover damages for their benefit.

Lord Diplock was of the opinion that the exception does not apply to contracts for the carriage of goods which contemplate that the carrier will also enter into separate contracts of carriage with whoever may become the owner of the relevant goods because complications, anomalies and injustices might arise from the co-existence of different parties of different rights of suit to recover under separate contracts of carriage which impose different obligations upon the parties to them, a loss which a party to one of those contracts alone has sustained.[58] It has also been said that the exception is also clearly inapplicable if such separate contracts are identical to the contract with the consignee.[59]

The same consideration applies to a building contract where the provision of a direct entitlement in a third party to sue the contractor in the event of a failure in the contractor's performance will not bring the exception into operation.[60] Lord Browne-Wilkinson said in *St Martins Property Corpn Ltd v Sir Robert McAlpine Ltd*:[61]

> If, pursuant to the terms of the original building contract, the contractors have undertaken liability to the ultimate purchasers to remedy defects appearing after they acquired the property, it is manifest the case will not fall within the rationale of *Dunlop v Lambert*. If the ultimate purchaser is given a direct cause of action against the contractor (as in the consignee or endorsee under a bill of lading) the case falls outside the rationale of the rule.[62]

[58] *Albacruz (Cargo Owners) v Albazero (Owners), The Albazero* [1977] AC 774 (HL).
[59] *Alfred McAlpine Construction Ltd v Panatown Ltd* [2001] 1 AC 518 (HL) 531 (Lord Clyde).
[60] *St Martins Property Corpn Ltd v Sir Robert McAlpine Ltd* [1994] 1 AC 85 (HL).
[61] [1994] 1 AC 85 (HL).
[62] *St Martins Property Corpn Ltd v Sir Robert McAlpine Ltd* [1994] 1 AC 85 (HL) 115.

The rationale behind the exception to the general rule that a person can only recover damages for a loss which he has himself suffered as observed by Lord Diplock in *The Albazero*, is that the exception would provide a remedy where no other would be available to a person sustaining loss which under a rational legal system ought to be compensated by the person who has caused it.[63]

In *St Martins Property Corpn Ltd v Sir Robert McAlpine Ltd*,[64] the House of Lords extended the rule in *Dunlop v Lambert* from contracts for the carriage of goods to building contracts. In that case, A entered into a building contract with B for the construction of a building on land which A then owned. A subsequently transferred the land to C. A also purported to assign the benefit of the contract to C. The assignment was held to be invalid as it was in breach of a clause in the contract prohibiting assignment without B's written consent. Therefore, C could not sue B when the building turned out to be defective. The House of Lords, however, held that A was entitled to recover from B substantial damages for such breach on the basis of the *Dunlop v Lambert* exception.

The decision was reached on the point that it was envisaged by A and B that ownership of the property might be transferred to a third party, C, so that it could be foreseen that a breach of the contract might cause loss to C. It has been argued by Lord Clyde in *Alfred McAlpine Construction Ltd v Panatown Ltd*[65] that such foresight and the intention of the parties to benefit a third party may not be necessary factors in the applicability of the exception. He elaborated:

[63] *Albacruz (Cargo Owners) v Albazero (Owners), The Albazero* [1977] AC 774 (HL).
[64] [1994] 1 AC 85 (HL).
[65] [2001] 1 AC 518 (HL) 530.

> Foreseeability may be relevant to the question of damages under the rule in *Hadley v Baxendale*,[66] but in the context of liability it is a concept which is more at home in the law of tort than in the law of contract. If the exception is founded primarily upon a principle of law, and not upon the particular knowledge of the parties to the contract, then it is not easy to see why the necessity for the contemplation of the parties that there will be potential losses by third parties is essential.[67]

Both *The Albazero* and *St Martins* established the point that A is accountable to C for any damages recovered by A from B as compensation for C's loss.

The scope of the exception was extended further in *Darlington BC v Wiltshier Northern Ltd*[68] by the English Court of Appeal. Whereas in both *The Albazero* and *St Martins*, it was within the contemplation of both A and B that the ownership of the property might be transferred to a third party before the completion of the contract, *Darlington BC* was concerned with the case where A did not own the property either at the date of the contract or at the date of the breach.

In that case, A and B entered into building contracts in respect of land owned by C. A assigned its rights under the building contracts to C. C sued B for breach of the contracts. B resisted by taking the point that C, as assignee, had no greater rights under the contracts than A had and that A had not suffered any loss because it did not own the land. All the three judges on the panel held that the narrow ground was applicable.

It was held that since both A and B knew that the building contracts were entered into for the benefit of C and it was foreseeable that breach of the contracts would cause loss to C, then C was entitled to recover damages from B as though C had been the employer under the contracts. Dillon and Waite LJJ said that if A had sued in

[66] (1854) 9 Exch 341.
[67] *Alfred McAlpine Construction Ltd v Panatown Ltd* [2001] 1 AC 518 (HL) 530 (Lord Clyde).
[68] [1995] 3 All ER 895 (CA).

its own name it would have held any damages awarded as constructive trustee for C.

Darlington BC has often been considered as further extending the rule in *St Martins* to cover situations where there is no transfer of any proprietary interest in the thing damaged. In other words, the rule does not depend on the transfer of any proprietary interest.

Another view is that that was not truly an extension of the principle as formulated and applied by Lord Browne-Wilkinson in *St Martins* but rather a recognition of the fact that the principle was not dependent on the transfer of a proprietary interest, and that it rested on a simpler notion which was that 'it was in the contemplation of the parties to the relevant contract that an identified third party, or at least a third party falling within an identified class, would or might suffer damage in the event that there was a breach of the contract'.[69]

Lord Clyde held in *McAlpine*[70] that he agreed with the general principle that a claimant could only recover damages for a loss which he himself had sustained. As Judge Richard Seymour QC in *Rolls-Royce Power Engineering plc v Ricardo Consulting Engineers Ltd*[71] aptly pointed out, if that is the general principle, there must be something extraordinary in a case to take the principle out of operation. He postulated that the narrow ground should be based on the requirement that at the time the contract was made, it should 'have been in the actual contemplation of the parties that an identified third party or a third party who was a member of an identified class would or might suffer damage in the event of a breach of the contract'.[72] The judge said

[69] *Rolls-Royce Power Engineering plc v Ricardo Consulting Engineers Ltd* [2003] EWHC 2871, 98 ConLR 169 [121] (Judge Richard Seymour QC).
[70] *Alfred McAlpine Construction Ltd v Panatown Ltd* [2001] 1 AC 518 (HL) 522.
[71] [2003] EWHC 2871, 98 ConLR 169 [123].
[72] *Rolls-Royce Power Engineering plc v Ricardo Consulting Engineers Ltd* 98 ConLR 169 [124] (Judge Richard Seymour QC).

that this is something which can easily be shown.[73] He also reasoned that there is no injustice in this as the possibility of loss would have been known at the time the contract was concluded.[74] He contended that this would in fact do justice because that was what the parties had contemplated.[75] He reasoned that if no such conditions are attached to the operation of any exceptions, then the general rule would be destroyed.[76]

(b) The Broader Ground

In the *St Martins* case, although Lord Griffiths reached the same final decision as the other members of the Appellate Committee, he cut his own path by doing so on the broader ground which is that A has suffered loss because he did not receive the benefits for which he had contracted with B. A will be entitled to substantial damages from B which, in his view, are the cost to A of providing C with the benefit. He refused to accept the proposition that in the case of a contract for work, labour and the supply of materials, the recovery of more than nominal damages for breach of contract should depend on the plaintiff having a proprietary interest in the subject matter of the contract at the date of the breach. He noted that in everyday life, contracts for work and labour are constantly placed by persons who have no proprietary interest in the subject matter of the contract.

Lord Griffiths' proposition was favourably received by three of the judges on the panel but they were not prepared to endorse it unequivocally at that stage. Lord Browne-Wilkinson was of the opinion that the proposition should be first examined by academic writers as it might have profound effects on commercial contracts. Since then, no fundamental flaw has been discerned in the broader ground although differences in opinion on the finer points of its application still abound.

[73] ibid.
[74] ibid.
[75] ibid.
[76] ibid.

In *Darlington BC*, another three-party building contract matter, the case was decided by all the three members of the court on the narrow ground. Steyn LJ decided the case also on the broader ground which he defined as where a builder fails to render the contractual service, the employer suffers a loss of bargain or expectation of interest which cost can be recovered on the basis of what it would cost to remedy the defect. He thought the broader ground is based on classic contractual theory which Lord Goff in *McAlpine* agreed.

The case of *Radford v De Froberville*[77] is also supportive of the broader ground. In that matter, the plaintiff owned a house which was divided into six flats which were tenanted. The plaintiff sold part of the adjoining garden to the defendant who undertook to erect a dividing wall on the plot sold so as to separate it from the plaintiff's land. The defendant failed to build the wall. The plaintiff claimed for the cost of building a similar wall on his own land.

The defendant argued that since the plaintiff did not occupy the property himself, he could not have suffered any damage due to the defendant's failure to build the wall because he was not there to enjoy it. Oliver J rejected this argument by holding that although the plaintiff's motive might be to transfer what he conceived to be a benefit on persons who have no contractual rights to demand for it, this could not alter the genuineness of his intentions. The learned judge said:

> If [the plaintiff] contracts for the supply of that which he thinks serves his interest - be they commercial, aesthetic or merely eccentric – then if that which is contracted for is not supplied by the other contracting party I do not see why, in principle, he should not be compensated by being provided with the cost of supplying it through someone else or in a different way, subject to the proviso,

[77] [1978] 1 All ER 33 (Ch D).

> of course, that he is seeking compensation for a genuine loss and not merely using technical breach to receive an uncovenanted profit.[78]

Oliver J's reliance on the simple fact that the plaintiff had a contractual right to have the wall built constituted a plain assertion of the plaintiff's right to recover damages on the basis of damage to his performance interest.

In their dissenting judgments in *McAlpine*, Lord Millett and Lord Goff expressly approved the broader ground. Lord Millett regarded Lord Griffiths in *St Martins* as not proposing to depart from the general rule that a party can only recover compensatory damages for a loss, which he has himself sustained.[79] He thought Lord Griffiths was insisting that, in certain kinds of contracts, the right to performance has a value, which is capable of being measured by the cost of obtaining it from a third party.[80]

Lord Millett disagreed with the view of Steyn LJ in *Darlington BC* that the broader ground can be included in the narrow ground because he reasoned that the narrow ground is an exception to the general rule that a plaintiff can only recover damages for his own loss whereas the broader ground considers the plaintiff as recovering for his own loss.[81] On this basis, the narrow ground is an exception to the general rule whereas the broader ground is an application of the general rule.

Lord Goff commented in *McAlpine* that Lord Griffiths in *St Martins* was concerned that a contracting party who contracts for a benefit to be conferred on a third party should himself have an effective remedy.[82] He thought that the broader ground not only addresses a special problem which arises in a particular context, such as

[78] *Radford v De Froberville* [1978] 1 All ER 33 (Ch D) 42.
[79] *Alfred McAlpine Construction Ltd v Panatown Ltd* [2001] 1 AC 518 (HL) 587.
[80] *Alfred McAlpine Construction Ltd v Panatown Ltd* [2001] 1 AC 518 (HL) 587 (Lord Millett).
[81] ibid.
[82] *Alfred McAlpine Construction Ltd v Panatown Ltd* [2001] 1 AC 518 (HL) 545.

carriage of goods by sea, but a general problem which arises where a party contracts for benefits to be conferred on others.[83]

The proposition that a party to a contract is entitled to damages measured by the value of his own defeated interest in having the contract performed was alluded to in *Woodar Investment Development Ltd v Wimpey Construction UK Ltd*[84] where Lord Scarman remarked:

> Likewise, I believe it open to the House to declare that, in the absence of evidence to show that he has suffered no loss, A, who has contracted for a payment to be made to C, may rely on the fact that he required the payment to be made as prima facie evidence that the promise for which he contracted was a benefit to him and that the measure of his loss in the event of non-payment is the benefit which he intended for but which has not been received. Whatever the reason, he must have desired the payment to be made to C and he must have been relying on B to make it. If B fails to make the payment, A must find the money from other funds if he is to confer the benefit which he sought by his contract to confer upon C.[85]

At first blush, the broader ground is attractive as it provides a common thread to link all situations where a party suffers a loss of expectation or performance interest. This would include cases like *Jackson v Horizon Holidays Ltd*[86] where the plaintiff made a contract with the defendant for a holiday for himself, his wife and two children in the then Ceylon. The holiday was a disaster and the defendant accepted that it was in breach of contract. The English Court of Appeal held that the plaintiff could recover damages not only for the discomfort and disappointment he suffered himself but also for that experienced by his wife and children.

However, on closer scrutiny, the broader ground is also beset with problems due, in the main, to the clashing interests of the parties. A problem with the broader ground which has yet to be satisfactorily resolved is whether A is accountable to C for the

[83] *Alfred McAlpine Construction Ltd v Panatown Ltd* [2001] 1 AC 518 (HL) 545 (Lord Goff).
[84] [1980] 1 All ER 571 (HL).
[85] *Woodar Investment Development Ltd v Wimpey Construction UK Ltd* [1980] 1 All ER 571 (HL) 591(Lord Scarman).
[86] [1975] 3 All ER 92 (CA).

damages recovered or is bound to expend the damages on providing for C the benefit which B was supposed to provide. Lord Griffiths in *St Martins* was of the view that A is so obliged. It has been suggested that the court should require an appropriate undertaking from A to pass on the damages to C as a condition for recovery.[87]

However, Lord Millett in *McAlpine* concurred with Steyn LJ in *Darlington BC* that A is not accountable to C for any damages recovered by A from B. Steyn LJ took the view that 'in the field of building contracts, like sale of goods, it is no concern of the law what the plaintiff proposes to do with his damages'.[88] As Lord Millett noted:

> The plaintiff is a contracting party who recovers for his own loss, not that of a third party. Whatever arrangements the third party may have entered into, these do not concern the plaintiff and cannot deprive him of his contractual rights. He is not accountable for the damages to anyone else, and he cannot be denied a remedy because 'it is not needed.'[89]

Lord Jauncey's view on this was the polar opposite of Lord Millett's as evident from the excerpt below:

> On the reasoning of Steyn LJ it would appear that the employer in such a case could recover the cost of effecting the necessary repairs and then put the money in his own pocket. This would be a particularly unattractive result and certainly not one which Lord Griffiths would have advocated. Indeed it would seem to raise very sharply the question of whether the employer had suffered any financial loss at all.[90]

Closely allied to the issue of whether A is accountable to C for the damages recovered from B is the question of whether it is a condition for recovery under the broader ground that A must intend to carry out the work for the benefit of C. In *St Martins*, Lord Griffiths answered this question in the affirmative. He referred to the fact that A suffers loss because he has to spend money to obtain the benefit of the agreement, which B has promised but failed to deliver. He added that the court should be satisfied that the

[87] John Cartwright, 'Damages, Third Parties and Common Sense' (1996) 10 JCL 244, 256.
[88] *Darlington BC v Wiltshier Northern Ltd* [1995] 3 All ER 895 (CA) 908.
[89] *Alfred McAlpine Construction Ltd v Panatown Ltd* [2001] 1 AC 518 (HL) 595 (Lord Millett).
[90] *Alfred McAlpine Construction Ltd v Panatown Ltd* [2001] 1 AC 518 (HL) 571 (Lord Jauncey).

repairs had been or would be carried out. Oliver J was similarly disposed in *Radford v De Froberville*[91] where he asked himself whether the plaintiff had 'a genuine and serious intention of doing the work'.

Lord Jauncey in *McAlpine* was of the view that the employer's entitlement to substantial damages depends on whether he has made good or intends to make good the effects of the breach as this produces a sensible result and avoids the recovery of an uncovenanted profit by an employer who does not intend to take steps to remedy the breach.[92] Lord Goff was of the opinion that the plaintiff's intention to make good the defects should be considered as it goes to the matter of reasonableness of his claim for damages.[93]

In the same case, Lord Jauncey raised doubt whether the broader ground would permit the recovery of consequential loss resulting to C due to delay and resultant loss of profits.[94] Lord Browne-Wilkinson took the view that the broader ground is only available if C does not have a direct cause of action against B.[95]

Lord Clyde in *McAlpine*[96] expressed difficulty in adopting the broader ground as a sound way forward. He said:

> [T]here is no obligation on the successful plaintiff to account to anyone who may have sustained actual loss as a result of the faulty performance. Some further mechanism would then be required for the court to achieve the proper disposal of the monies awarded to avoid a double jeopardy. Alternatively, in order to achieve an effective solution, it would seem to be necessary to add an obligation to account on the part of the person recovering the damages. But once that step is taken the approach begins to approximate to *The Albazero* exception.[97]

[91] [1977] 1 All ER 33 (Ch D).
[92] *Alfred McAlpine Construction Ltd v Panatown Ltd* [2001] 1 AC 518 (HL) 574.
[93] *Alfred McAlpine Construction Ltd v Panatown Ltd* [2001] 1 AC 518 (HL) 556. See also *Ruxley Electronics and Construction Ltd v Forsyth* [1996] AC 344 (HL) 372 (Lord Lloyd).
[94] *Alfred McAlpine Construction Ltd v Panatown Ltd* [2001] 1 AC 518 (HL) 573.
[95] *Alfred McAlpine Construction Ltd v Panatown Ltd* [2001] 1 AC 518 (HL) 577.
[96] *Alfred McAlpine Construction Ltd v Panatown Ltd* [2001] 1 AC 518 (HL) 533-534.
[97] *Alfred McAlpine Construction Ltd v Panatown Ltd* [2001] 1 AC 518 (HL) 534 (Lord Clyde).

Judge Richard Seymour QC in *Rolls-Royce Power Engineering plc v Ricardo Consulting Engineers Ltd*[98] had reservations on the viability of the broader ground. He said that it appears to decouple the assessment of damages for breach of contract from proof of any particular loss sustained by the claimant, and 'substituting some more or less notional quantification of damages for loss of bargain'.[99] He added that the characterisation of a notional loss of the claimant would mean that if the party which actually suffered the loss has an independent claim, for instance in tort, then the defaulting party could find himself having to pay double compensation.[100]

3.2.2.4 *Alfred McAlpine Construction Ltd v Panatown Ltd*[101]

In this case, the respondent, Panatown Ltd ('Panatown'), entered into a building contract with the appellant, Alfred McAlpine Construction Ltd ('McAlpine'), under which McAlpine undertook to construct an office building in Cambridge. The building contract was in a modified JCT Standard Form of Building Contract with Contractor's Design (1981 edition).

The site was owned by Unex Investment Properties Ltd ('UIPL'). Panatown and UIPL were both part of the Unex group of companies. The rather unusual arrangement of having Panatown, instead of UIPL, enter into the building contract was to avoid the incurring of tax by the group.

On the same day that the building contract was made, McAlpine entered into a Duty of Care Deed ('the DCD') with UIPL in which McAlpine undertook that, in

[98] [2003] EWHC 2871, 98 ConLR 169 [128].
[99] *Rolls-Royce Power Engineering plc v Ricardo Consulting Engineers Ltd* [2003] EWHC 2871, 98 ConLR 169 [128] (Judge Richard Seymour QC).
[100] ibid.
[101] [2001] 1 AC 518 (HL). Although this case has its findings and views on the narrow ground and the broader ground analysed in the preceding sections, it is still instructive to resurrcct this case for further discussion for the implications on the narrow and broader grounds of a direct cause of action granted by B to C.

respect of all matters which lay within the scope of its responsibilities under the building contract, it would exercise reasonable skill and care. UIPL had thus acquired a direct remedy against McAlpine should McAlpine run foul of the building contract.

The building was faultily constructed and there was also delay. Panatown alleged that the defects were so serious that the existing building might have to be demolished and entirely rebuilt.

Panatown commenced arbitration proceedings against McAlpine for damages arising from alleged breach by McAlpine of the building contract. In the arbitration, McAlpine raised a preliminary issue that Panatown was not entitled to substantial damages, as opposed to nominal damages, since Panatown had no proprietary interest in the site and had therefore suffered no loss. The arbitrator decided the issue in Panatown's favour. On appeal, the High Court reversed the decision. On appeal by Panatown, the Court of Appeal held in favour of Panatown.

McAlpine then appealed to the House of Lords. The two main issues confronting the House were as follows:

(a) whether Panatown was entitled to recover substantial damages from McAlpine notwithstanding that Panatown was, at all material times, not the owner of the land; and

(b) if so, whether the DCD precluded Panatown from recovering substantial damages from McAlpine.

By a three-two majority, the House of Lords allowed McAlpine's appeal against the decision of the Court of Appeal, holding that Panatown was not entitled to claim substantial damages from McAlpine. Four of the Law Lords formed the opinion that the existence of the DCD crippled Panatown's claim against McAlpine on the narrow ground.

Lord Clyde, in the lead judgment, remarked that the resolution of the problem in any particular case has to be reached in light of its own circumstances.[102] After noting that there was a plain and deliberate course adopted whereby the company with the potential risk of loss was given a distinct entitlement to sue the contractor, he held that the narrow ground was not available to Panatown.[103]

Lord Jauncey acknowledged that the DCD was not co-terminous with the building contract between Panatown and McAlpine as the remedies available to UIPL under the DCD were different from and less effective than those available under the building contract.[104] However, he did not consider that as sufficient to displace the general rule.[105] He said that since UIPL was entitled to sue McAlpine under the DCD, the need for an exception to the general rule ceased to apply.[106]

Lord Browne-Wilkinson held that the direct cause of action which UIPL had under the DCD was fatal to any claim to substantial damages made by Panatown against McAlpine based on the narrow ground.[107] Lord Goff also held that the existence of the DCD precluded Panatown's claim under the narrow ground.[108]

[102] *Alfred McAlpine Construction Ltd v Panatown Ltd* [2001] 1 AC 518 (HL) 530.
[103] *Alfred McAlpine Construction Ltd v Panatown Ltd* [2001] 1 AC 518 (HL) 531-532 (Lord Clyde).
[104] *Alfred McAlpine Construction Ltd v Panatown Ltd* [2001] 1 AC 518 (HL) 568.
[105] *Alfred McAlpine Construction Ltd v Panatown Ltd* [2001] 1 AC 518 (HL) 568 (Lord Jauncey).
[106] ibid.
[107] *Alfred McAlpine Construction Ltd v Panatown Ltd* [2001] 1 AC 518 (HL) 576-577.
[108] *Alfred McAlpine Construction Ltd v Panatown Ltd* [2001] 1 AC 518 (HL) 558.

In conformity with the other Law Lords' views, Lord Millett also rejected the narrow ground from being applied to the facts of this case.[109] However, he reached this conclusion without any reference to the DCD at all.

Lord Clyde did not consider the effect of the DCD on the broader ground unlike Lord Jauncey and Lord Brown-Wilkinson who concurred with him in the final decision. He seemed to have rejected the application of the broader ground to Panatown's claim outright and that the DCD would not have made any difference. He cautioned that the loss of an expectation is not the same as a breach of contract and that a 'breach of contract may cause a loss, but is not in itself a loss in any meaningful sense'.[110] He thought that a loss arising from a breach of contract must involve 'the incidence of some personal or patrimonial damage'.[111] He said, 'A loss of expectation might be a loss in the proper sense if damages were awarded for the distress or inconvenience caused by the disappointment.'[112]

Lord Jauncey took the stance that the DCD was equally relevant to the broader ground as to the narrow ground as both the grounds sought to find a rational way of avoiding the legal black hole.[113] He said that there was no justification for allowing A to recover from B as his own a loss, which was truly that of C when C had his own remedy against B.[114] He opined that were it not so, McAlpine could be liable twice over in damages.[115] He added that Panatown's claim for loss of expectation of interest could have only nominal value when UIPL had an enforceable claim and Panatown had no intention of taking steps to remedy the breach.[116]

[109] *Alfred McAlpine Construction Ltd v Panatown Ltd* [2001] 1 AC 518 (HL) 585.
[110] *Alfred McAlpine Construction Ltd v Panatown Ltd* [2001] 1 AC 518 (HL) 534 (Lord Clyde).
[111] ibid.
[112] ibid.
[113] *Alfred McAlpine Construction Ltd v Panatown Ltd* [2001] 1 AC 518 (HL) 574.
[114] *Alfred McAlpine Construction Ltd v Panatown Ltd* [2001] 1 AC 518 (HL) 574 (Lord Jauncey).
[115] ibid.
[116] ibid.

While conceding that the broader ground is sound in law, Lord Browne-Wilkinson held that the DCD barred recovery on the broader ground based on the following reasoning:

> The essential feature of the broader ground is that the contracting party A, although not himself suffering the physical or pecuniary damage sustained by the third party C, has suffered his own damage, being the loss of his performance interest ie the failure to provide C with the benefit that B had contracted for C to receive. In my judgment it follows that the critical factor is to determine what interest A had in the provision of the service for the third party C. If, as in the present case, the whole contractual scheme was designed, inter alia, to give UIPL and its successors a legal remedy against McAlpine for failure to perform the building contract with due care, I cannot see that Panatown has suffered any damage to its performance interest: subject to any defence based on limitation of actions, the physical and pecuniary damage suffered by UIPL can be redressed by UIPL exercising its own cause of action against McAlpine.[117]

The two dissenting judges allowed Panatown's claims under the broader ground. They advocated a more unrestrained approach to the broader ground. In respect of McAlpine's submission that the DCD had the effect of divesting Panatown of any right to recover damages from McAlpine under the building contract, Lord Goff answered that by noting that it would be a strange conclusion indeed that the effect of providing a subsidiary remedy for the owner of the land, UIPL, on a restricted basis (breach of duty of care), was that the building employer, who had furnished the consideration for the building, was excluded from pursuing its remedy in damages under the main contract, which made elaborate provision, under a standard form specially adapted for the particular development.[118]

Lord Goff was of the opinion that on the facts of the case, there was no possibility of double recovery from McAlpine and if there was such a possibility, it

[117] *Alfred McAlpine Construction Ltd v Panatown Ltd* [2001] 1 AC 518 (HL) 577-578 (Lord Browne-Wilkinson).
[118] *Alfred McAlpine Construction Ltd v Panatown Ltd* [2001] 1 AC 518 (HL) 558.

could be resolved by a joinder of the relevant party or parties to the proceedings.[119] He was also of the view that where A was permitted by C to procure building work on C's property, A was under a duty to take reasonable steps to procure the satisfactory completion of that work and if A recovered damages from the contractor for defective work, he should procure the necessary remedial work.[120] Lord Goff concluded that the existence of the DCD did not stand in the way of the enforcement by Panatown of its right to recover substantial damages from McAlpine under the building contract.[121]

Like Lord Goff, Lord Millett also expressly approved the broader ground. He confined it to building contracts and other contracts for the supply of work and materials where the claim arises from defective or incomplete work or delay in completing it.[122] He saw no possibility of the DCD raising the spectre of double recovery by reasoning that:

> Even though the plaintiff recovers for his own loss, this obviously reflects the loss sustained by the third party. The case is, therefore, an example, not unknown in other contexts, where breach of a single obligation creates a liability to two different parties. Since performance of the primary obligation to do the work would have discharged the liability to both parties, so must performance of the secondary obligation to pay damages. Payment of damages to either must pro tanto discharge the liability to both.[123]

In his view, the problem was not one of double recovery, but of ensuring that the damages were paid to the right party.[124] His proposed solution was that such an action should normally be stayed in order to allow the building owner to bring his own proceedings.[125] The court, he said, would need to be satisfied that the building owner was not proposing to make his own claim and was content to allow his claim to be

[119] *Alfred McAlpine Construction Ltd v Panatown Ltd* [2001] 1 AC 518 (HL) 559, 561 (Lord Goff).
[120] *Alfred McAlpine Construction Ltd v Panatown Ltd* [2001] 1 AC 518 (HL) 560 (Lord Goff).
[121] *Alfred McAlpine Construction Ltd v Panatown Ltd* [2001] 1 AC 518 (HL) 561 (Lord Goff).
[122] *Alfred McAlpine Construction Ltd v Panatown Ltd* [2001] 1 AC 518 (HL) 591.
[123] *Alfred McAlpine Construction Ltd v Panatown Ltd* [2001] 1 AC 518 (HL) 595 (Lord Millett).
[124] ibid.
[125] ibid.

discharged by payment to the building employer before allowing the building employer's action to proceed.[126]

He also noted that the development of the site was a group project financed by group money.[127] He thought it unlikely that the damages recovered by Panatown would simply be retained for its own benefit as such damages would almost certainly be held on trust to be applied at the direction of the group company which provided the building finance.[128]

The two minority judges, besides recognising that Panatown need not have any interest in the land or buildings, were prepared to award damages to Panatown without requiring Panatown to account for these damages to UIPL. Moreover they thought that the existence of a direct contractual claim by UIPL was neither material nor fatal to Panatown's recovery of damages based on a denial of its performance interest.

3.3 Claims under Negligence

An action for breach of contract is available to the contracting parties only. A subsequent purchaser of a defective building is unable to rely on breach of contract for redress against the builder. The subsequent purchaser might want to stake his claim against the builder for negligence for not exercising reasonable skill and care to avoid causing such defects although the prospect of success may be limited.

The tortious duty to exercise reasonable skill and care covers both acts and omissions. Where a person is under a duty to use care he cannot shirk that responsibility by delegating the performance of it to someone else, whether the

[126] ibid.
[127] *Alfred McAlpine Construction Ltd v Panatown Ltd* [2001] 1 AC 518 (HL) 592 (Lord Millett).
[128] *Alfred McAlpine Construction Ltd v Panatown Ltd* [2001] 1 AC 518 (HL) 592-593 (Lord Millett).

delegation is to a servant under a contract of service or to an independent contractor under a contract for services. This is equally true for both contractual obligations[129] and tortious obligations.[130]

3.3.1 Duty of care

The concept of duty of care finds different expressions in different jurisdictions. Here it is pertinent to explore the interpretation of such a concept in the major jurisdictions.

3.3.1.1 England

The principles of negligence have their beginnings in the celebrated case of *Donoghue v Stevenson*.[131] A consumer of a bottle of ginger beer containing a dead snail succeeded in her claim against the manufacturer for negligence resulting in injuries to her health and damage to her property other than the contaminated bottle of ginger beer.

Lord Atkin laid down the principle that where there is a duty to exercise care, reasonable care must be taken to avoid acts or omissions which can reasonably be foreseen to be likely to cause physical injury to persons or damage to property other than the defective property itself. A claim on the defective product either in the manner of making good or replacement is a claim for pure economic loss. Actual damage has to occur before tortious liability for negligence arises, mere apprehension of such damage gives rise to no liability.[132]

[129] See *Hughes v Percival* (1883) 8 App Cas 443 (HL) 446 (Lord Blackburn).
[130] See *Cassidy v Ministry of Health* [1951] 2 KB 343 (CA) 363 (Denning LJ).
[131] [1932] AC 562 (HL).
[132] See *Overseas Tankship (UK) Ltd v Morts Dock and Engineering Co Ltd, The Wagon Mound* [1961] AC 388 (PC) 425 (Viscount Simonds).

In *Hedley Byrne & Co Ltd v Heller & Partners Ltd*,[133] the House of Lords held that bankers would have been liable for economic loss caused by giving a negligent reference, but for an express disclaimer of responsibility. This hypothetical finding of liability was based upon a special relationship between the parties flowing from an assumption of responsibility.[134] Lord Reid said:

> A reasonable man, knowing that he was being trusted or that his skill and judgment were being relied on, would, I think, have three courses open to him. He could keep silent or decline to give the information or advice sought: or he could give an answer with a clear qualification that he accepted no responsibility for it or that it was given without that reflection or inquiry which a careful answer would require: or he could simply answer without any such qualification. If he chooses to adopt the last course he must, I think, be held to have accepted some responsibility for his answer being given carefully, or to have accepted a relationship with the inquirer which requires him to exercise such care as the circumstances require.[135]

Lord Devlin said that relationships that may give rise to a duty of care include those which are 'equivalent to contract'[136] which he characterised as those 'where there is an assumption of responsibility in circumstances in which, but for the absence of consideration, there would be a contract'.[137] According to him, such a relationship may be either general or particular. For examples of a general relationship, he cited those of solicitor and client and of banker and customer. For such general relationships, he thought that it is sufficient to prove their existence and the duty follows. For other relationships which are formed ad hoc, Lord Devlin said that the particular facts have to be examined to determine whether there is an express or implied undertaking of responsibility.

In responding to the appellants' argument that to exclude a duty of care from a contract, very clear words must be used, Lord Reid adopted the general rule proposed

[133] [1964] AC 465 (HL).
[134] *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465 (HL) 483 (Lord Reid), 494-495 (Lord Morris), 514 (Lord Hodson), 529 (Lord Devlin).
[135] *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465 (HL) 486 (Lord Reid).
[136] A term derived from the words of Lord Shaw in *Nocton v Lord Ashburton* [1914] AC 932 (HL) 972.
[137] *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465 (HL) 528-530.

by Scrutton LJ in *Rutter v Palmer*[138] that a contracting party is not exempted from liability for negligence 'unless adequate words are used'.[139] Whether adequate words are used would depend on the factual matrix. Lord Reid said that general words may suffice if there is no other type of liability to be excluded other than liability for negligence.

Lord Morris pointed to the scenario where someone, not being a customer of a bank, formally requested the bank for advice on certain financial matters which the bank normally dealt with.[140] He said that the bank would have no obligation to comply with the request. However, if the bank proceeded to give deliberate advice, even if gratuitously, the bank would have to bear a duty to exercise reasonable care in giving the advice. The bank would be liable if it was negligent although no enforceable contract came into being for want of consideration.

In *Smith v Bush*,[141] Lord Griffiths said that the phrase 'assumption of responsibility' should refer 'to the circumstances in which the law will deem the maker of the statement to have assumed responsibility to the person who acts upon the advice'. Lord Slynn in *Phelps v Hillingdon London BC Anderton*,[142] in commenting on the same phrase said that it does not mean that 'the professional person must knowingly and deliberately accept responsibility'. He added, 'It is not so much that responsibility is assumed as that it is recognised or imposed by law.'[143]

[138] [1922] 2 KB 87 (CA) 92.
[139] *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465 (HL) 492-493.
[140] *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465 (HL) 495.
[141] [1990] 1 AC 831 (HL) 862.
[142] [2001] 2 AC 619 (HL) 654.
[143] *Phelps v Hillingdon London BC Anderton* [2001] 2 AC 619 (HL) 654 (Lord Slynn).

Lord Bingham in *Her Majesty's Commissioners of Customs and Excise v Barclays Bank plc*,[144] whilst accepting that the test of assumption of responsibility must be applied objectively, noted the problem 'that the further this test is removed from the actions and intentions of the actual defendant, and the more notional the assumption of responsibility becomes, the less difference there is between this test and the threefold test'.

In *Home Office v Dorset Yacht Co Ltd*,[145] Lord Morris, after concluding that it would only be fair and reasonable that there existed a duty of care in that case commented that where the court is tasked with deciding whether a duty of care existed in a particular situation, the court is not making a decision as to policy. He said that it is not necessary to invoke policy 'where reason and good sense will at once point the way'. As Lord Radcliffe said in *Davis Contractors Ltd v Fareham UDC*,[146] the court is 'the spokesman of the fair and reasonable man'.

In the leading speech of Lord Wilberforce in *Anns v Merton London BC*,[147] he formulated a two-stage test of liability in negligence in the following words:

> First one has to ask whether, as between the alleged wrongdoer and the person who has suffered damage there is a sufficient relationship of proximity or neighbourhood such that, in the reasonable contemplation of the former, carelessness on his part may be likely to cause damage to the latter, in which case a prima facie duty of care arises. Secondly, if the first question is answered affirmatively, it is necessary to consider whether there are any considerations which ought to negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed or the damages to which a breach of it may give rise …[148]

[144] [2006] UKHL 28, [2007] 1 AC 181.
[145] [1970] AC 1004 (HL).
[146] [1956] AC 696 (HL) 728.
[147] [1978] AC 728 (HL) 751-752.
[148] *Anns v Merton London BC* [1978] AC 728 (HL) 751-752 (Lord Wilberforce).

The two-stage test has not been accepted as a universally applicable principle.[149] Reservations were made about it by Lord Keith in *Governors of the Peabody Donation Fund v Sir Lindsay Parkinson & Co Ltd*,[150] by Lord Brandon in *Leigh and Sillavan Ltd v Aliakmon Shipping Co Ltd, The Aliakmon*[151] and by Lord Bridge in *Curran v Northern Ireland Co-ownership Housing Association Ltd*.[152]

The two-stage test as advocated in *Anns* was subsequently applied by Lord Roskill in the House of Lords decision in *Junior Books Ltd v Veitchi Co Ltd*.[153] In that case, the defendants laid a floor in factory premises for the plaintiffs. There was no contractual relationship between them. The plaintiffs sued for negligence after the floor cracked. Lord Roskill accepted that the concept of proximity must always involve, at least in most cases, some degree of reliance.[154]

Case law development on the *Hedley Byrne* principle has recognised the need to add to what was subsequently to be described as the tests of proximity and foreseeability a third test which is whether, in the particular circumstances of the case, it is just and reasonable that the duty should be imposed. In *Governors of the Peabody Donation Fund v Sir Lindsay Parkinson & Co Ltd*,[155] Lord Keith said that in determining whether or not there is a duty of care of particular scope, it is material to consider whether it is just and reasonable that it should be so.

[149] See Andrew Phang, Cheng Lim Saw and Gary Chan, 'Of Precedent, Theory and Practice – The Case for a Return to *Anns*' [2006] Singapore Journal of Legal Studies where the authors argue that the two-stage test formulated by Lord Wilberforce in *Anns* for duty of care in the context of recovery for pure economic loss is superior to all the other tests or approaches. They contend that many of these other tests are substantially restatements of the *Anns* formulation but which cause more confusion conceptually as well as in application.
[150] [1985] AC 210 (HL) 240.
[151] [1986] 1 AC 785 (HL) 815.
[152] [1987] AC 718 (HL).
[153] [1983] 1 AC 520 (HL).
[154] *Junior Books Ltd v Veitchi Co Ltd* [1983] 1 AC 520 (HL) 547.
[155] [1985] AC 210 (HL) 241.

Bingham LJ in *Caparo Industries plc v Dickman*[156] was of the view that this third test was well put by Weintraub CJ in *Goldberg v Housing Authority of the City of Newark*[157] where Weintraub CJ said, 'Whether a duty exists is ultimately a question of fairness. The inquiry involves a weighing of the relationship of the parties, the nature of the risk, and the public interest in the proposed solution.'

Lord Bridge in *Caparo Industries* was of the view that the three necessary ingredients of a duty of care are the foreseeability of damage, the existence between the party owing the duty and the party to whom it is owed a relationship of 'proximity' or 'neighbourhood' and that the situation should be one where it is fair, just and reasonable that the law should impose a duty of care of a given scope. His Lordship cautioned that to be used as practical tests, the concepts of 'proximity' and 'fairness' must be capable of precise definition but these concepts are unable to fulfil that criterion and must therefore remain as 'convenient labels to attach to the features of different specific situations which, on a detailed examination of all the circumstances, the law recognises pragmatically as giving rise to a duty of care of a given scope'.

Therefore, the *Caparo* test postulates three determinants for the existence of a duty of care: (a) whether the damage suffered by the plaintiff is reasonably foreseeable; (b) whether there is a relationship of proximity between the plaintiff and the defendant; and (c) whether it is fair and reasonable that the defendant should owe the plaintiff a duty of care.

In *Caparo Industries*, a company engaged statutory auditors by contract to give an independent report to shareholders on the financial position of the company.

[156] [1990] 2 AC 605 (HL).
[157] (1962) 186 A 2d 291, 293.

Bingham LJ held that the auditors had voluntarily assumed direct responsibility to individual shareholders.[158] His Lordship said that the *Hedley Byrne* case shows that there is sufficient proximity between A and B if, even in the absence of a contract, A assumes the responsibility of giving deliberate advice to B, and as an extension to that 'if A engages B contractually to give advice to C, the relationship of B and C is no less proximate, however that expression is interpreted'.[159]

Lord Griffiths in *Smith v Bush*[160] propounded a test for the existence of a duty of care based on (a) foreseeability; (b) proximity; and (c) justice and reasonableness. In the House of Lords case of *Barrett v Enfield London BC*,[161] Lord Browne-Wilkinson said that the determination as to whether it is fair, just and reasonable to impose a liability in negligence on a particular class of would-be defendants depends on weighing the balance between the total detriment to the public interest in all cases from holding such class liable in negligence as against the total loss to all would-be plaintiffs if they are not to have a cause of action in respect of the loss they have individually suffered.

3.3.1.2 Australia

The High Court of Australia in *Sutherland Shire Council v Heyman*[162] declined to follow the two-stage test laid down in *Anns*. Brennan J said that it is preferable that new categories of negligence be created incrementally and by analogy with established ones, and not by a massive expansion 'restrained only by indefinable "considerations which ought to negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed"'.

[158] *Caparo Industries plc v Dickman* [1990] 2 AC 605 (HL) 684.
[159] *Caparo Industries plc v Dickman* [1990] 2 AC 605 (HL) 683.
[160] [1990] 1 AC 831 (HL).
[161] [2001] 2 AC 550 (HL).
[162] [1985] HCA 41, 157 CLR 424 (High Court, Australia).

3.3.1.3 Hong Kong

In *Yuen Kun-yeu v A-G of Hong Kong*,[163] the Privy Council hearing an appeal from the Hong Kong Court of Appeal held that for the future it should be recognised that the two-stage test is not to be regarded as a suitable guide to the existence of a duty of care in all circumstances and that an incremental approach as proposed by Brennan J in the *Sutherland Shire Council* case is to be preferred. Lord Keith was of the opinion that the second stage of the two-stage test only becomes relevant where some particular consideration of public policy excludes any duty of care.[164]

The Privy Council held that it is necessary to consider whether a close and direct relationship exists between the parties and this involves looking at all the circumstances, including the reasonable contemplation of injury or damage being caused to the plaintiff by the defendant's failure to exercise reasonable care and any consideration of public policy that may negative the imposing of a duty of care.

3.3.1.4 Singapore

The test for duty of care in Singapore is encapsulated in the Court of Appeal's decision in *Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency*.[165] There, Chan Sek Keong CJ expressed his opinion that a single test for determining or recognising a duty of care applicable for claims in negligence for all kinds of damages is desirable as this would be more coherent, consistent and reliable.[166] This would extend to claims for pure economic loss, whether arising from negligent misstatements or acts/omissions.[167] He recognised that there could be restrictions on

[163] [1988] AC 175 (PC) 191, 194.
[164] *Yuen Kun-yeu v A-G of Hong Kong* [1988] AC 175 (PC) 193. Lord Keith expressed a similar opinion in *Hill v Chief Constable of West Yorkshire* [1989] AC 53 (HL) 63 which was concurred in by the other members of the House who participated in the decision.
[165] [2007] SGCA 37, [2007] 4 SLR 100.
[166] *Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency* [2007] SGCA 37, [2007] 4 SLR 100 [71]-[72].
[167] *Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency* [2007] SGCA 37, [2007] 4 SLR 100 [71] (Chan Sek Keong CJ).

recovery of pure economic loss in certain situations based on policy considerations.[168] Despite that, he thought that a single test would still suffice.[169]

The proposed test consists of first the threshold issue of whether there is factual foreseeability. If this hurdle is cleared, the first part of the two-stage test is whether there is proximity between the claimant and the defendant. The second stage involves policy considerations. As to the reason for factual foreseeability being merely a threshold consideration and not integrated as a main part of the test, the reason offered by Chan Sek Keong CJ was that in most cases, this is likely to be met.[170]

The first stage of proximity focuses on the closeness of the relationship between the parties.[171] This would include whether there is physical, circumstantial as well as causal proximity.[172] This would also encompass the twin considerations of voluntary assumption of responsibility and reliance.[173] The Chief Justice explained that if A has voluntarily assumed responsibility for his acts or omissions towards B and this has been relied upon by B, then it is only right that the law be such that A is liable for negligence in causing physical damage or economic loss to B.[174]

Where the preliminary issue of factual foreseeability and the legal proximity test have been fulfilled, then a prima facie duty of care arises.[175] The final stage of policy considerations should then be applied to the facts of the case to ascertain whether this

[168] ibid.
[169] ibid.
[170] *Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency* [2007] SGCA 37, [2007] 4 SLR 100 [115].
[171] *Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency* [2007] SGCA 37, [2007] 4 SLR 100 [77] (Chan Sek Keong CJ).
[172] *Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency* [2007] SGCA 37, [2007] 4 SLR 100 [81] (Chan Sek Keong CJ).
[173] ibid.
[174] ibid.
[175] *Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency* [2007] SGCA 37, [2007] 4 SLR 100 [83] (Chan Sek Keong CJ).

duty should be negated.[176] Examples of relevant policy considerations are whether there is a contractual web linking the parties which has defined their rights and liabilities and the relative bargaining positions of the parties.[177]

Reference to the facts of decided cases will be made in applying the test. Such an incremental approach will keep a check on any inappropriate expansion of the scope of liability under negligence.[178] However, if there is no judicial precedent on similar facts, reliance on general principles is both valid and desirable.[179] The court said that such 'interaction of the universal with the particular' would 'aid in the development of a rational and purposive concept of negligence which can achieve fairness and justice in each case'.[180] This would not preclude liability from being extended where it is fair and just to do so having regard to policy considerations of avoiding indeterminate liability against a tortfeasor.[181] The court admitted that this test is basically a restatement of the two-stage test advocated in *Anns*, as modified by the threshold requirement of factual foreseeability.[182]

3.3.1.5 Malaysia

The Court of Appeal in *KGV & Associates Sdn Bhd v The Co-Operative Central Bank Ltd*[183] adopted wholesale the approach taken by Lord Bingham in *Her Majesty's Commissioners of Customs and Excise v Barclays Bank plc*[184] on the tests to determine whether a defendant owes a duty of care in tort to the plaintiff not to cause pure economic loss.

---

[176] ibid.
[177] ibid.
[178] *Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency* [2007] SGCA 37, [2007] 4 SLR 100 [43] (Chan Sek Keong CJ).
[179] ibid.
[180] ibid.
[181] *Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency* [2007] SGCA 37, [2007] 4 SLR 100 [73] (Chan Sek Keong CJ).
[182] ibid.
[183] [2006] 5 MLJ 513 (CA).
[184] [2006] UKHL 28, [2007] 1 AC 181.

Lord Bingham had articulated three tests. First, whether the defendant has assumed responsibility for his words and deeds in respect of the plaintiff, or is to be treated by the law as such. Secondly, under what is commonly referred to as the threefold test, whether the plaintiff's loss was a reasonably foreseeable consequence of what the defendant did or did not do; whether the relationship between the parties was one of sufficient proximity; and whether in all the circumstances it is fair, just and reasonable to impose a duty of care on the defendant towards the plaintiff. Thirdly, under the incremental test as proposed by Brennan J in *Sutherland Shire Council*, whether the complaint against the defendant is one where it has been previously decided that there is a duty of care or is not far removed from established categories.

Lord Bingham further made five general observations. First, an assumption of responsibility suffices to found liability and it may not be necessary to enquire further. However, this is not a mandatory condition of liability. In the absence of such an assumption, then it is necessary to make further enquiries to decide whether a duty of care existed. Secondly, the assumption of responsibility test has to be applied objectively and is not based on what the defendant thought or intended. Thirdly, the threefold test does not provide a simple solution to the conundrum of whether a duty of care arises in a novel situation. Fourthly, the incremental test is not of much help by itself unless it is used in tandem with a test or principle which can identify the legally relevant features of a situation. Fifthly, Lord Bingham thought that the decisions reached in the leading cases are in every or almost every instance sensible and just, irrespective of the test applied. The Law Lord said that notwithstanding that, a test of liability in negligence is still necessary otherwise the law would denigrate to 'a morass of single instances'. He said that this serves to emphasise the importance of the details

of the circumstances and the relationship between the parties in the particular case.

In that case, Lord Hoffmann said that phrases like 'proximate', 'fair, just and reasonable' and 'assumption of responsibility' are useful but they should be applied discriminately to situations where they can actually provide useful guidance.[185]

Gopal Sri Ram JCA in *KGV & Associates*[186] concluded from the observations of Lord Bingham and Lord Hoffmann in *Her Majesty's Commissioners of Customs and Excise v Barclays Bank plc* that although there are several useful tests, indicia or guidelines to determine whether a duty of care exists, ultimately the answer is very much dependent on the facts of the particular case. The learned judge said that a useful guide is afforded by the question of whether there was an assumption of responsibility.[187] If this is answered positively, then, prima facie, a duty of care may be found to exist.[188] His Lordship also supported the incremental test in that if the facts of the case in issue are similar to that of a decided case where a duty of care was found to exist, the more likely the court will find a duty of care to exist in the particular case.[189]

The Federal Court in *Lok Kok Beng & 49 Ors v Loh Chiak Eong & Anor*[190] held that the preferred test for claims for negligence is the threefold test as enunciated in *Caparo Industries* with its requirements of foreseeability, proximity and policy considerations.

[185] *Her Majesty's Commissioners of Customs and Excise v Barclays Bank plc* [2006] UKHL 28, [2007] 1 AC 181 [35] (Lord Hoffmann).
[186] *KGV & Associates Sdn Bhd v The Co-Operative Central Bank Ltd* [2006] 5 MLJ 513 (CA) [10].
[187] Gopal Sri Ram JCA in *KGV & Associates Sdn Bhd v The Co-Operative Central Bank Ltd* [2006] 5 MLJ 513 (CA) [11].
[188] ibid.
[189] ibid.
[190] [2015] 4 MLJ 734 (FC) [34].

3.3.2 Relationship between Contractual Duty and Duty of Care in Tort

In *Groom v Crocker*,[191] the point in dispute was whether damages for injured feelings and reputation were claimable in tort. Such damages could not then be claimed in contract according to *Addis v Gramophone Co Ltd*.[192] Sir Wilfrid Greene MR in *Groom v Crocker*[193] said that the relationship of solicitor and client is a contractual one and it is on that basis that any duty arises, and it has 'no existence apart from that relationship'. Both Scott and MacKinnon LJJ concurred.

Oliver J in *Midland Bank Trust Co Ltd v Hett, Stubbs & Kemp*[194] pointed out that prior to *Esso Petroleum Co Ltd v Mardon*,[195] there was no case at the level of the Court of Appeal or the House of Lords which made a clear decision that the *Hedley Byrne* duty and a co-extensive contractual duty can exist side by side and none where 'anything but the most tentative doubt' had been said of the rationale or the continuing validity of the principle laid down by the Court of Appeal in *Groom v Crocker*.

In *Esso Petroleum Co Ltd v Mardon*, the claim was framed both in contract and in tort under the *Hedley Byrne* principle. It was argued that the two duties, contractual and tortious, were mutually exclusive and that *Groom v Crocker* and the subsequent line of cases were authority for the proposition that any duty in tort which might otherwise exist was merged and extinguished in the contract between the parties and this must then be treated as the exclusive and conclusive source of the rights between them.

The Court of Appeal rejected that argument and held that in addition to and quite apart from the liability in contract, the plaintiffs were liable to the defendant in tort in

[191] [1939] 1 KB 194 (CA).
[192] [1909] AC 488 (HL).
[193] [1939] 1 KB 194 (CA) 205.
[194] [1979] Ch 384 (Ch D) 428.
[195] [1976] QB 801 (CA).

the sense of the *Hedley Byrne* principle. Lord Denning MR said that 'in the case of a professional man, the duty to use reasonable care arises not only in contract, but is also imposed by the law apart from contract, and is therefore actionable in tort'.[196]

In *Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd*,[197] Lord Scarman's sentiment was that it is not appropriate to impose a duty of care in a contractual context, principally because the parties have already exercised their rights to determine the obligations between them and moreover, it is necessary to avoid confusion in the law.

In *Greater Nottingham Co-operative Society Ltd v Cementation Piling and Foundations Ltd*,[198] the sub-contract between the parties provided for certain liabilities to be accepted which were to exercise skill and care in the design of the concrete piling but the contract was silent as to executing the work with care and skill. It was held by the Court of Appeal that the situation did not permit the grafting on the contractual relationship a duty of care.

In *Henderson v Merrett Syndicates Ltd*,[199] the Names on a number of syndicates at Lloyd's sued both their members' agents and managing agents for losses which they had suffered. The House of Lords held that, besides their various contractual duties, the managing agents owed a duty of care in tort both to direct and indirect Names to carry out their functions with reasonable skill and care. Lord Goff in his principal speech said that the governing principle was that found in *Hedley Byrne* and that this imposes liability for words as well as deeds, and for pure economic loss as well as physical damage.

[196] *Esso Petroleum Co Ltd v Mardon* [1976] QB 801 (CA) 819.
[197] [1986] AC 80 (PC) 107.
[198] [1989] QB 71 (CA).
[199] [1995] 2 AC 145 (HL).

Lord Goff delved into the issue whether the contractual context excluded any duty of care in tort.[200] After reviewing the authorities and the literature, Lord Goff rejected the notion that the existence of a contractual duty excludes any parallel duty in tort between the same parties. However, Lord Goff accepted that such a concurrent duty in tort cannot be imposed where such duty is so inconsistent with the contract that the parties must be assumed to have agreed to limit or exclude the duty in tort.[201]

Lord Goff clarified that based on the *Hedley Byrne* principle, an assumption of responsibility coupled with reliance may give rise to a tortious duty of care irrespective of whether there is a contract between the parties, and that unless the contract precludes the plaintiff from doing so, he, who has available to him concurrent remedies in contract and tort, may elect the one most advantageous.[202]

3.3.3 Liability of Employer under Negligence

The employer has a duty to check that the professionals engaged by him are competent and possess the necessary skills for the tasks to be performed by them. The employer, to avoid being liable for negligence, has to make inquiries and investigations into their qualifications and credentials.[203]

3.3.4 Liability of Sub-Contractor to Employer under Negligence

Lord Goff in *Henderson v Merrett Syndicates Ltd*[204] referred to the normal contractual chain of building owner, main contractor and sub-contractor and said, obiter, that in the event of faulty performance by the sub-contractor, usually the building owner will not be able to recover damages from the sub-contractor direct under the *Hedley*

[200] *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145 (HL) 184-194.
[201] *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145 (HL) 194. This principle was adopted in *Credit Guarantee Corp Malaysia Bhd v SSN Medical Products Sdn Bhd* [2017] 2 MLJ 629 (CA) [36] (Harmindar Singh JCA).
[202] *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145 (HL) 194.
[203] *Datuk Bandar Dewan Bandaraya Kuala Lumpur v Ong Kok Peng & Anor* [1993] 2 MLJ 234 (SC).
[204] [1995] 2 AC 145 (HL) 196.

Byrne principle on the ground of the sub-contractor's negligence. This is because there is generally no assumption of responsibility by the sub-contractor direct to the building owner, 'the parties having so structured their relationship that it is inconsistent with any such assumption of responsibility'.[205] For support for this view, Lord Goff raised the conclusion reached in *Simaan General Contracting Co v Pilkington Glass Ltd (No 2)*[206] where Bingham LJ said that such responsibility of the sub-contractor is 'inconsistent with the structure of the contract the parties have chosen to make'.

In *John F Hunt Demolition Ltd v ASME Engineering Ltd*,[207] Judge Peter Coulson QC emphasised that whether the sub-contractor owes a duty of care at common law to the employer must depend on the exact terms of the main contract and the sub-contract. He said that based on the authorities, two further principles are discernible: (a) where the damage is physical damage to property, then the starting point is that a duty of care will usually be owed subject to the issue of foreseeability; and (b) there is no such duty if the contractual provisions preclude it.[208]

3.3.5 Liability of Construction Professionals

James Foong J in *Steven Phoa Cheng Loon & Ors v Highland Properties Sdn Bhd & Ors*[209] expressed his strong sentiments against professionals whose only concern is their own self-interest rather than the interest of those directly affected and the public which has placed so much faith and reliance on them to perform their duties professionally. The learned judge further held that if an unqualified person has represented himself as qualified and competent, he has to be judged by the relevant professional standard.

[205] *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145 (HL) 196 (Lord Goff).
[206] [1988] QB 758 (CA) 781.
[207] [2007] EWHC 1507 (TCC), [2008] 1 All ER 180 [33].
[208] *John F Hunt Demolition Ltd v ASME Engineering Ltd* [2007] EWHC 1507 (TCC), [2008] 1 All ER 180 [33] (Judge Peter Coulson QC).
[209] [2000] 4 MLJ 200 (HC).

3.3.5.1 Professional Standard

For construction professionals to be held liable under negligence, there must be a threshold to judge them. It is necessary to define this threshold and the components that go into it.

The conduct of those who possess special skills is judged according to the standard of a skilled and competent person in their respective profession.[210] The standard expected of a professional man is that of the reasonable average, and no more.[211] In *Midland Bank Trust Co Ltd v Hett, Stubbs & Kemp*,[212] the view of Oliver J is that 'if there is some practice in a particular profession, some accepted standard of conduct which is laid down by a professional institute or sanctioned by common usage', then this ought to be taken into consideration.

In *Greaves & Co (Contractors) Ltd v Baynham Meikle & Partners*,[213] a case on the standard expected of consulting engineers in designing and giving advice, Lord Denning MR held of a professional man that '[t]he law does not usually imply a warranty that he will achieve the desired result, but only a term that he will use reasonable care and skill'.[214] This will be so unless there are special circumstances which make it otherwise.

In *George Hawkins v Chrysler (UK) Ltd & Burne Associates*,[215] Neil LJ said that a consulting engineer who is retained to advise or to design does not, by implication of law, warrant fitness of purpose. The court distinguished between a person contracted

[210] *Greaves & Co (Contractors) Ltd v Baynham Meikle & Partners* [1975] 3 All ER 99 (CA).
[211] *Eckersley v Binnie & Partners* (1988) 18 ConLR 1 (CA) (Bingham LJ).
[212] [1979] Ch 384 (Ch D) 402.
[213] [1975] 3 All ER 99 (CA), [1975] 1 WLR 1095 (CA) 1100.
[214] See also *Hanafiah, Raslan, Mohamed & Partners v Weng Lok Mining Co Ltd* [1977] 1 MLJ 248 (HC) 250 (Chang Min Tat J).
[215] (1986) 38 BLR 36 (CA) 55.

for both design and supply of a product, and a person who is a professional man providing advice or design alone. The Court of Appeal said that the former may be under an implied contractual duty to ensure that the product is reasonably fit for its intended purpose whereas the latter will not normally be implied to have given any warranty except that reasonable skill and care will be taken in giving the advice or preparing the designs.

In *Manufacturers' Mutual Insurance Ltd v Queensland Government Railways*,[216] the High Court of Australia held that a faulty design does not necessarily mean there is negligence on the part of the designing engineers. Windeyer J explained thus, 'But a man may use skill and care, he may do all that in the circumstances could reasonably be expected of him, and yet produce something which is faulty because it will not answer the purpose for which it was intended.'[217]

Defects or errors alone do not prove negligence. It is necessary to prove actual negligence. If an architect issues a certificate for a wrong amount, this does not by itself prove that the architect has been negligent.[218] In *Sim & Associates (sued as a firm) v Tan Alfred*,[219] the Singapore Court of Appeal held that an architect is not invariably liable whenever loss results from his acts. Rather, the court held, it must be shown that the architect has been negligent in that he has failed to exercise the requisite standard of care.

[216] [1968] HCA 52, 118 CLR 314 (High Court, Australia).
[217] *Manufacturers' Mutual Insurance Ltd v Queensland Government Railways* [1968] HCA 52, 118 CLR 314 (High Court, Australia).
[218] *Sutcliffe v Thackrah* [1974] AC 727 (HL) 760 (Lord Salmon).
[219] [1994] 3 SLR 169 (Court of Appeal, Singapore).

In *Bolam v Friern Hospital Management Committee*,[220] a case on medical negligence, McNair J gave his opinion as to the applicable test for professionals:

> But where you get a situation which involves the use of some special skill or competence, then the test whether there has been negligence or not is not the test of the man on the top of a Clapham omnibus, because he has not got this special skill. The test is the standard of the ordinary skilled man exercising and professing to have that special skill.[221]

The judge further remarked about the applicable test, widely referred to later as the *Bolam* direction or test, as follows:

> A doctor is not guilty of negligence if he has acted in accordance with a practice accepted as proper by a responsible body of medical men skilled in that medical act ... Putting it the other way round, a doctor is not negligent, if he is acting in accordance with such practice, merely because there is a body of opinion that takes a contrary view.[222]

The *Bolam* test has two limbs. The first limb requires a professional person to exercise reasonable care in undertaking the tasks associated with his particular profession. By the second limb, a professional defendant will not be liable under the first limb if he has complied with a responsible professional practice, allowing for the possibility that there may be more than one such practice. The practice adopted must be regarded as proper by a responsible body of persons in that profession.

The House of Lords analysed the proper construction and application of the *Bolam* test in *Bolitho v City and Hackney Health Authority*.[223] The House held that in applying the *Bolam* test the court must inquire whether the professional opinion is capable of withstanding logical analysis.

[220] [1957] 2 All ER 118 (QBD).
[221] *Bolam v Friern Hospital Management Committee* [1957] 2 All ER 118 (QBD) (McNair J).
[222] ibid.
[223] [1998] AC 232 (HL).

The Malaysian Court of Appeal in *Lim Teck Kong v Dr Abdul Hamid Abdul Rashid* & *Anor*[224] approved the *Bolam* test for professional negligence.[225]

The *Bolam* test has ceased to be good law in Malaysia due to *Foo Fio Na v Dr Soo Fook Mun & Anor*[226] where the Federal Court departed from the *Bolam* test in favour of the approach in *Rogers v Whitaker*.[227] Essentially the *Rogers* test agrees that the standard of care imposed on a person with some special skill or competence is that of the ordinary skilled person exercising and professing to have that special skill. However, that standard is not determined solely by reference to the practice followed or supported by a responsible body of opinion in the particular profession.

3.3.5.2 Services Rendered through a Limited Liability Company

A plaintiff is able to claim against a negligent professional personally even though the services were rendered through a limited liability company if there has been a voluntary assumption of responsibility. This was decided by the case of *Merrett v Babb*.[228] This is important where the company which provided the professional services is insolvent or where there is insufficient insurance protection.

3.3.5.3 Project Managers

A project manager may be liable if he fails to warn his client even though he is not responsible for the original default. In *Chesham Properties Ltd v Bucknall Austin Project Management Services Ltd*,[229] Chesham were property developers and Bucknall were members of Chesham's professional team. Chesham claimed that the contractor was given extensions of time which were not justified. Chesham alleged that these were

[224] [2006] 3 MLJ 213 (CA).
[225] In *Steven Phoa Cheng Loon & Ors v Highland Properties Sdn Bhd & Ors* [2000] 4 MLJ 200 (HC) where the plaintiffs' claim was entirely in tort, James Foong J did not refer to the *Bolam* test.
[226] [2007] 1 MLJ 593 (FC).
[227] [1992] HCA 58, 175 CLR 479 (High Court, Australia).
[228] [2001] EWCA Civ 214, [2001] QB 1174.
[229] (1996) CILL 1189.

granted to cover up the negligence of the professional team. It was held that the project manager was liable for negligence for failing to report to the employer on the faults of other professionals.

In *Royal Brompton Hospital NHS Trust v Hammond (No 7*),[230] the court examined the scope of duty of project managers to exercise reasonable skill and care. It was alleged that the project managers had been negligent in failing to monitor decisions by the architect to grant extensions of time to the contractor. The court held that the project managers' duty was not to ensure that the contract administration decisions were all correct but only that they were undertaken efficiently, otherwise the project managers would virtually be obliged to undertake everyone else's work.

3.3.5.4 Architects and Engineers

In *Sutcliffe v Thackrah*,[231] in commenting on the duty of the architect to make binding decisions on the parties under the RIBA contract, Lord Reid said 'perhaps most important, he has to decide whether work is defective'. Architects and engineers have a greater duty to inspect carefully where the works are critical and the design is riskier than usual.[232]

The extent of the duty of care of consultant engineers is illustrated by the case of *Lim Teck Kong v Dr Abdul Hamid Abdul Rashid & Anor*.[233] The plaintiffs engaged the services of the first defendant, a firm of consultant civil and structural engineers, to build a bungalow. The plaintiffs entered into a building contract with the contractor to build the bungalow based on the recommendation of the first defendant. Under the building contract, the contractor agreed to construct the building based on the drawings

[230] [2001] EWCA Civ 206, 76 ConLR 148.
[231] [1974] AC 727 (HL) 736-737.
[232] *George Fischer Holding Ltd v Multi Design Consultants Ltd* (1998) 61 Con LR 85 (QBD).
[233] [2006] 3 MLJ 213 (CA).

and specifications prepared by the first defendant or under his direction. The bungalow collapsed a few years after it was built. The Court of Appeal found that the first defendant had failed to conduct thorough tests on the site. The first defendant had also failed to examine whether it was safe to build the bungalow on the site using the design. The first defendant was held to be negligent.

It was held in *Alfred McAlpine Construction Ltd v Forum Architects*[234] that an architects' partnership did not owe any duty of care to a design and build contractor because the contract was with a limited company set up by the partnership. The court took the view that design professionals can have others to assist them but they cannot delegate away their responsibility to ensure that their work is carried out with due care.

In *Clay v AJ Crump & Sons Ltd*,[235] the demolition contractors decided against demolishing a wall to protect against trespassers. The architect asked the demolition contractors whether it was safe for the wall to be left in that state. However, he did not inspect the wall himself. The wall collapsed, injuring a workman. The workman succeeded in his claim against the contractor, the demolition contractors and the architect.

3.3.5.5 Does the Architect/Engineer Act in the Capacity of an Arbitrator?

In *Ranger v Great Western Railway Co*,[236] a company engaged Ranger to be the contractor and Brunel as the engineer. Ranger alleged fraud on the part of the company through its engineer on two counts. First, Ranger claimed to be misled by the inspection pits into underestimating the hardness of the rock to be excavated leading to him tendering at an economically unviable price. Secondly, Ranger discovered later

[234] [2002] EWHC 1152 (TCC), [2002] BLR 378.
[235] [1964] 1 QB 533 (CA).
[236] (1854) 5 HL Cas 72.

that Brunel was a shareholder in the company.

On the second point, Ranger contended that Brunel was empowered to decide on how Ranger was performing his duties and how much of the contract price had become payable to Ranger from time to time as well as how much was due for additional works. Accordingly, it was alleged that Brunel's duties were judicial in character but he was also a shareholder in the company and therefore he was acting as a judge in his own cause.

Lord Cranworth LC, after referring to *Grand Junction Canal v Dimes*[237] where it was held that the decision of a judge made in a cause in which he has an interest is voidable, said that that principle did not apply to that case as the contract never intended the engineer to act neutrally between the parties.[238] His Lordship added that under the contract, the engineer was acting as the company's agent, that the engineer's decisions were in fact the decisions of the company and that the engineer personified the company.

In *Sutcliffe v Thackrah,*[239] the employer and the builders adopted the RIBA form of contract. The employer appointed an architect to design the building and to issue interim certificates to the builders in the course of the building works. The builders defaulted and another firm was appointed to complete the works at a higher cost. The original builders went into liquidation. The employer successfully sued the architect for negligence and breach of duty in negligently certifying that more money was due than was in fact due.

[237] (1852) 3 HL Cas 759.
[238] *Ranger v Great Western Railway Co* (1854) 5 HL Cas 72, 89.
[239] [1974] AC 727 (HL).

In that case, Lord Reid said that generally the professional man in the exercise of his professional activity is left to make his own investigation and to make his decision but he is not thereby acting as an arbitrator because he 'is not determining a dispute: he is deciding what to do in all the circumstances'.[240] Lord Reid rejected the suggestion that an architect acting under a RIBA form of contract is protected by immunity as 'quasi-arbitrators', as there is nothing judicial about his functions since there is no dispute.[241]

Lord Reid commented on the dual functions of the architect thus, 'In many matters he is bound to act on his client's instructions, whether he agrees with them or not; but in many other matters requiring professional skill he must form and act on his own opinion.'[242]

Lord Morris defined a quasi-arbitrator as one who is selected informally by two or more persons to decide on a disputed matter between them where the provisions of the Arbitration Act do not apply.[243] Lord Morris said that the 'mere fact that an architect must act fairly as between a building owner and a contractor does not of itself involve that the architect is discharging arbitral functions'.[244] He further said that the situation where a building owner and a contractor agree to be bound by an architect's certificate showing a sum due is to be conclusive evidence of the works having been duly performed and that the contractor is thereby entitled to receive payment of such sum does not of itself indicate that the architect is an arbitrator or quasi-arbitrator in issuing his certificate.[245] This would apply generally but as Lord Morris cautioned, every case has to be looked at according to its own facts and circumstances including the

[240] *Sutcliffe v Thackrah* [1974] AC 727 (HL) 735.
[241] *Sutcliffe v Thackrah* [1974] AC 727 (HL) 737-738.
[242] *Sutcliffe v Thackrah* [1974] AC 727 (HL) 736-737.
[243] *Sutcliffe v Thackrah* [1974] AC 727 (HL) 744-745.
[244] ibid.
[245] *Sutcliffe v Thackrah* [1974] AC 727 (HL) 752-753 (Lord Morris).

provisions of the contract.[246]

Viscount Dilhorne pointed to the arbitration clause in the contract and held that that alone made it highly unlikely that the contracting parties agreed that the architect should stand as an arbitrator between them 'for then there might be an arbitration upon an arbitration'.[247]

3.3.5.6 Liability of Construction Professionals to the Contractor

Professionals like engineers, architects and surveyors engaged in construction would be interested to know whether, as a general rule, they owe a duty of care to the contractor not to cause pecuniary loss to the contractor in the course of certifying and of accepting or rejecting claims in the face of the contractual relationships between the employer, contractor and the professional. Every case will of course be dependent on its own facts and circumstances including the relevant contractual terms.

In *Arenson v Casson Beckman Rutley & Co*,[248] it was contended that the architect owed no duty to the contractor because if otherwise, it would place the architect at risk of being 'shot at from both sides'. Lord Salmon, in rejecting the argument, said that the architect, besides owing a duty to the building owner as his client under the contract between them to use reasonable care in issuing his certificates, also owed a similar duty of care to the contractor arising out of their proximity based on the principle in *Hedley Byrne*.

In *Pacific Associates Inc v Baxter*,[249] the plaintiff was a contractor which had entered into a contract with the employer, the Ruler of Dubai. The defendant was an

[246] ibid.
[247] *Sutcliffe v Thackrah* [1974] AC 727 (HL) 757.
[248] [1977] AC 405 (HL) 438.
[249] [1990] 1 QB 993 (CA).

engineer appointed by the employer. The plaintiff claimed that the defendant had continuously failed to certify its claims and had finally rejected them. Thus the plaintiff claimed damages against the defendant for having acted negligently or for being in breach of his duty to act fairly and impartially in the administration of the contract.

The contract between the employer and the contractor allowed the contractor to claim for additional expenses incurred in the event that the contractor encountered unforeseen physical conditions or artificial obstructions. The contractor must first give notice to the engineer, which if satisfied that such circumstances could not be reasonably foreseen, should certify the additional expense incurred by the contractor to be paid by the employer.

After work commenced, the engineer served notice that he was not satisfied with the progress of the work. The contractor then claimed for additional expenses but the engineer rejected the claim. The dispute was then submitted to arbitration between the contractor and the employer with the engineer not being formally a party to the arbitration.

The arbitration was settled by a formal agreement between the employer and the contractor with the employer paying £10m to the contractor in full and final settlement of all the contractor's claims against the employer. The employer made a reciprocal agreement in which it acknowledged that the settlement was also in full and final settlement of all claims against the contractor by the employer and those claiming under it.

Subsequently, the contractor commenced a writ action against the engineer for the remainder of its alleged loss after taking into consideration the amount of the settlement sum with the employer. The contractor pleaded that by the engineer's continual failure to certify the contractor's claims and his final rejection of those claims, the engineer had acted negligently and alternatively was in default of his duty to act fairly and impartially in the contract administration.

After combing through the authorities, Purchas LJ commented in *Pacific Associates Inc v Baxter* that 'there is no one touchstone with which to determine the existence or otherwise of a duty of care in any particular circumstance'.[250] The crux of the matter in that case was whether besides the engineer's contractual duty to the employer to perform his duties in a professional manner, the engineer had accepted a direct duty towards the contractor and whether the contractor had relied on the engineer's due performance of his contractual duties which was more than giving rights to the contractor to seek relief against the employer under the contract.[251]

The general principle is that where the parties have structured their respective liabilities by contract, the court will be slow to add a duty of care which goes beyond the contemplation of the parties at the time of the making of the contract.[252] However, the obligations do not remain fixed subject only to specific variations as in contracts but that a change in the relationship affecting the existence or nature of a duty of care in tort cannot be excluded.[253]

[250] *Pacific Associates Inc v Baxter* [1990] 1 QB 993 (CA) 1008.
[251] *Pacific Associates Inc v Baxter* [1990] 1 QB 993 (CA) 1009 (Purchas LJ).
[252] *Pacific Associates Inc v Baxter* [1990] 1 QB 993 (CA) 1010 (Purchas LJ) drawing an analogy with *Greater Nottingham Co-operative Society Ltd v Cementation Piling and Foundations Ltd* [1989] QB 71 (CA).
[253] *Pacific Associates Inc v Baxter* [1990] 1 QB 993 (CA) 1010-1011 (Purchas LJ).

There is no definite answer to the question of whether the engineer owes a duty in tort to the contractor to exercise reasonable skill and care.[254] The answer can only be given after considering the factual circumstances of the particular case especially the contractual scheme put in place.[255] An important aspect of this is whether it was envisaged that a failure by the engineer to carry out his duties under the contract would foreseeably cause any loss to the contractor which he could not recover against the employer under his rights under the contract.[256]

In *Michael Salliss & Co Ltd v Calil and William F Newman & Associates,*[257] Judge Fox-Andrews QC said that it is apparent that a contractor under a JCT ? contract relies on the architect to act fairly as between the employer and him in matters such as certification. He added that if the architect acts unfairly in the building employers' interest by certifying low or merely failing to exercise reasonable care and skill in his certification, it is proper that the contractor should have the right to recover loss from the unfair architect besides the right against the employer in arbitration to have the certificate reviewed.[258] He said that if this was otherwise, then 'contracting could be a hazardous operation'.[259] Purchas LJ in *Pacific Associates*[260] described this comment as 'of not a little force and in my judgment it isolates an aspect of this case over which I have had a good deal of doubt'.

Purchas LJ felt that the resolution of the issue lay in the circumstances at the tender stage when the relationship between the parties was first formed and in determining the issue of whether the contractor had relied on any assumption of liability

[254] *Pacific Associates Inc v Baxter* [1990] 1 QB 993 (CA) 1011 (Purchas LJ).
[255] ibid.
[256] ibid.
[257] (1987) 13 ConLR 68 (QBD) 78.
[258] *Michael Salliss & Co Ltd v Calil and William F Newman & Associates* (1987) 13 ConLR 68 (QBD) 78 (Judge Fox-Andrews QC).
[259] ibid.
[260] *Pacific Associates Inc v Baxter* [1990] 1 QB 993 (CA) 1019.

in tort appearing to be accepted by the engineer which would provide the contractor remedies not included under the terms of the contract being tendered by it.[261] He was of the view that if the contractor had wanted an extra-contractual protection against defaults by the engineer then it should have stipulated for it otherwise the contractor must be deemed to have accepted the position of the engineer as set out in the contract.[262]

A clause in the contract provided that 'neither the engineer nor any of his staff shall be in any way personally liable for the acts or obligations under the contract'. The general rule is that a party to a contract is not exempted from liability for negligence unless adequate words are used.[263] However, general words may suffice if there is no other kind of liability to be excluded except liability for negligence.[264]

In *Junior Books Ltd v Veitchi Co Ltd*,[265] Lord Roskill considered the effect of an exclusion clause in the main contract on the position as between one party to that contract and a third party whilst acknowledging that the issue did not arise for decision there. Lord Roskill said that 'in principle I would venture the view that such a claim according to the manner in which it was worded might in some circumstances limit the duty of care' by bringing in the analogy with *Hedley Byrne* where the plaintiffs ultimately failed in their claims due to the defendants' disclaimer of responsibility.[266]

Lord Brandon in *Leigh and Sillavan Ltd v Aliakmon Shipping Co Ltd, The Aliakmon*[267] commented on this passage by Lord Roskill by saying that Lord Roskill's observation was obiter dictum and that there was no analogy between the disclaimer in

[261] *Pacific Associates Inc v Baxter* [1990] 1 QB 993 (CA) 1020.
[262] ibid.
[263] *Rutter v Palmer* [1922] 2 KB 87 (CA) 92 (Scrutton LJ).
[264] *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465 (HL) 492-493 (Lord Reid).
[265] [1983] 1 AC 520 (HL).
[266] *Junior Books Ltd v Veitchi Co Ltd* [1983] 1 AC 520 (HL) 546.
[267] [1986] 1 AC 785 (HL) 817.

Hedley Byrne which had direct effect between the plaintiffs and the defendants, and an exclusion of liability clause in a contract where the plaintiff is a party but the defendant is not and then concluding that 'I do not therefore find in the observation of Lord Roskill relied on any convincing legal basis for qualifying a duty of care owed by A to B by reference to a contract to which A is, but B is not, a party.'

Purchas LJ in *Pacific Associates* took the view that the absence of a direct contract between A and B does not necessarily preclude the enforceability of a clause limiting A's liability in a contract between B and C, 'when the existence of that contract is the basis of the creation of a duty of care asserted to be owed by A to B'.[268] His Lordship added that while such an exclusion clause may not be directly binding between the parties, it cannot be left out in considering the contractual scheme 'against which the contractor demonstrates reliance on, and the engineer accepts responsibility for, a duty in tort, if any, arising out of the proximity established between them by the existence of that very contract'.[269]

Ralph Gibson LJ held that there was no express or implied undertaking of responsibility by the engineer to the contractor unlike the case of *Hedley Byrne* where the facts were markedly different.[270] The judge pointed out that the contractor did not request the engineer to carry out services of any kind.[271] The engineer came into the picture as a consequence of the building contract between the employer and the contractor, and the employer engaging the engineer to carry out certain functions under the contract. The engineer was obligated by his contract with the employer to act fairly and impartially in the performance of his functions.

[268] *Pacific Associates Inc v Baxter* [1990] 1 QB 993 (CA) 1022-1023.
[269] *Pacific Associates Inc v Baxter* [1990] 1 QB 993 (CA) 1022-1023 (Purchas LJ).
[270] *Pacific Associates Inc v Baxter* [1990] 1 QB 993 (CA) 1027.
[271] *Pacific Associates Inc v Baxter* [1990] 1 QB 993 (CA) 1028 (Ralph Gibson LJ).

The contractual matrix between the employer, contractor and engineer would deter the engineer from negligently making unfair decisions against the contractor.[272] If the engineer acted unfairly towards the contractors, the contractor had a recourse to arbitration to set right the wrong done.[273] The employer would be compelled to pay the sums rightfully due to the contractor in addition to the costs of the arbitration.[274] The employer could then recover such losses from the engineer.[275]

Ralph Gibson LJ said that the duty of the engineer to act fairly and impartially was a duty owed only to the employer.[276] He said, as regards whether it was just and reasonable in all the circumstances to impose liability, that even without the disclaimer clause, the answer would still be in the negative.[277] He further held that to impose on the engineer a duty of care to the contractor in the circumstances 'would cut across and be inconsistent with the structure of relationships created by the contracts, into which the parties had entered, including in particular the machinery for settling disputes' and 'would be unreasonable and unjust'.[278]

Even if the engineer owed a duty of care to the contractor, the disclaimer clause would have the effect of dispelling such a duty. For such a conclusion, Ralph Gibson LJ relied on the words of Lord Devlin in *Hedley Byrne,*[279] 'A man cannot be said voluntarily to be undertaking a responsibility if at the very moment when he is said to be accepting it he declares that in fact he is not.'[280] As to the fact that the disclaimer clause existed in a contract where the engineer was not a contracting party, Ralph Gibson LJ was of the view that this should not prevent the words having the effect

[272] *Pacific Associates Inc v Baxter* [1990] 1 QB 993 (CA) 1029 (Ralph Gibson LJ).
[273] ibid.
[274] ibid.
[275] ibid.
[276] *Pacific Associates Inc v Baxter* [1990] 1 QB 993 (CA) 1030.
[277] *Pacific Associates Inc v Baxter* [1990] 1 QB 993 (CA) 1031-1032 (Ralph Gibson LJ).
[278] *Pacific Associates Inc v Baxter* [1990] 1 QB 993 (CA) 1032 (Ralph Gibson LJ).
[279] *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465 (HL) 533.
[280] *Pacific Associates Inc v Baxter* [1990] 1 QB 993 (CA) 1033.

which all the parties to this arrangement, namely contractor, employer and engineer, plainly expected and intended them to have.[281]

Russell LJ posed the question, 'Given the contractual structure between the contractor and the employer, can it be fairly said that it was ever within the contemplation of the contractor that, outside the contract, it could pursue a remedy against the engineer?'[282] He thought the answer could only be in the negative.[283] In answer to the point that the disclaimer clause was not contractually binding between the engineer and the contractor since there was no contract between them, Russell LJ thought that it was nevertheless effective as 'there must be a presumption against the condition being present for no purpose' and that it 'destroys the duty of the engineer, if duty there ever was'.[284] *Pacific Associates* was approved by the House of Lords in *White v Jones*.[285]

The facts of the Singapore case of *Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency*[286] mirrored those in *Pacific Associates*. In *Spandeck*, the appellant was the contractor engaged by the Government of Singapore as the employer to redevelop a medical facility at an army camp. Under the contract, the respondent was made the superintending officer whose responsibilities included certifying interim payments to be due to the appellant. The contract entitled the appellant to bring arbitration proceedings against the employer for under-certification of payments.

The appellant filed proceedings against the respondent for negligence for not applying the necessary professional skill and judgment in certifying payments to the

[281] ibid.
[282] *Pacific Associates Inc v Baxter* [1990] 1 QB 993 (CA) 1037.
[283] *Pacific Associates Inc v Baxter* [1990] 1 QB 993 (CA) 1037 (Russell LJ).
[284] *Pacific Associates Inc v Baxter* [1990] 1 QB 993 (CA) 1038.
[285] [1995] 2 AC 207 (HL) 274 (Lord Browne-Wilkinson), 279 (Lord Mustill).
[286] [2007] SGCA 37, [2007] 4 SLR 100.

appellant in a fair and unbiased manner to avoid the appellant having to suffer pure economic loss. The appellant alleged that the respondent had negligently undervalued and under-certified the appellant's work, thus breaching this duty of care. The crux of the dispute was whether the respondent owed the appellant a duty of care.

Drawing from the decisions reached in *Pacific Associates*, the Court of Appeal held that there was no legal proximity between the parties for a duty of care to arise.[287] This was due to the arbitration clause in the contract which enabled the appellant to seek redress from the employer.[288] The court held that the respondent did not owe the appellant any duty of care to certify payments to the appellant correctly.[289]

The court also delved into the issue of how policy considerations would affect its decision on the assumption that proximity had been proved. The court held that such considerations would preclude a duty of care from being superimposed on a contractual framework.[290]

The view from the authorities seems to be that the mere fact of the professional entering into a contract of employment to undertake certain duties required by the employer's contract with a contractor, and by so acting, it cannot be concluded in fact that the professional has voluntarily assumed responsibility to the contractor to discharge his duties with care.[291]

In *Riyad Bank v Ahli United Bank (UK) Plc*,[292] Buxton LJ, in addressing the proposition that if a contractual chain exists, that chain ought not to be prevailed upon

[287] *Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency* [2007] SGCA 37, [2007] 4 SLR 100 [108].
[288] ibid.
[289] ibid.
[290] *Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency* [2007] SGCA 37, [2007] 4 SLR 100 [114].
[291] Ian Duncan Wallace, 'Charter for the Construction Professional?' (1990) 6 Const LJ 207 para 13.
[292] [2006] EWCA Civ 780, [2006] 2 Lloyd's Report 292 [32].

by a claim in tort as exemplified by *Simaan General Contracting Co v Pilkington Glass Ltd (No. 2)* and *Pacific Associates*, noted that those two cases did not consider the situation where discussions and representations were made directly to the party who consequently suffered loss. He cautioned that there cannot be a general proposition that a contractual chain must always preclude responsibility for advice to a non-contractual party.[293] He concluded that it all depends on the facts.[294]

3.4 Pure Economic Loss

The necessary expenses needed to repair construction defects or the depreciation in value of the property due to the defects is considered as plain pecuniary loss or pure economic loss. The term 'pure economic loss' is often distinguished from 'economic loss' although both refer to financial loss. Although these two terms are often used confusingly, it is suggested that pure economic loss is financial loss resulting from a loss in value of the property itself. Economic loss is financial loss which flows from personal injury or damage to property other than the property itself. The Federal Court in *Lok Kok Beng & 49 Ors v Loh Chiak Eong & Anor*[295] defined pure economic loss as 'financial loss suffered by a plaintiff, due to the negligence of the defendant which does not arise from any physical damage to his person or property'.

In *Caparo Industries*, Lord Bridge remarked that a duty of care to avoid causing injury to the person or property of others is quite different from a duty of care to avoid causing purely economic loss to others. Considerable hurdles are placed for claiming damages for mere financial loss in tort. The entitlement to claims for pure economic loss under negligence has split the Commonwealth jurisdictions.

[293] *Riyad Bank v Ahli United Bank (UK) Plc* [2006] EWCA Civ 780, [2006] 2 Lloyd's Report 292 [32] (Buxton LJ).
[294] ibid.
[295] [2015] 4 MLJ 734 (FC) [37]. Reliance was placed on *Pilba Trading & Agency v South East Asia Insurance Bhd & Anor* [1998] 2 MLJ 53 (HC) and *UDA Holdings Bhd v Koperasi Pasaraya (M) Bhd and other appeals* [2009] 1 MLJ 737 (FC).

3.4.1 England

Some of the more defining cases on pure economic loss in England and a relevant statute are discussed below.

3.4.1.1 *Morrison Steamship Co Ltd v Greystoke Castle (Owners of Cargo lately laden on)*[296]

The decision of the House of Lords in this case shows that the mere fact that the primary damage suffered by a plaintiff is pecuniary is no definite bar to an action in negligence provided the right circumstances exist. Any lingering doubt was dispelled by the decision in *Hedley Byrne*.

3.4.1.2 *Hedley Byrne & Co Ltd v Heller & Partners Ltd*[297]

If the principles set out in *Donoghue v Stevenson* are confined to the kind of facts disclosed in that case, then they would apply only to cases involving a manufacturer of consumable goods containing a latent defect sold to a direct purchaser or used by someone to whom a duty of care by the manufacturer is owed who has not had a prior opportunity of examining the goods and who then suffers physical damage from consuming them.

The modern law of negligence causing pure economic loss has its genesis in *Hedley Byrne* which came more than three decades after *Donoghue v Stevenson*. The principles laid down in *Hedley Byrne* are well-stated in the headnotes:

> [A] negligent, though honest, misrepresentation, spoken or written, may give rise to an action for damages for financial loss caused thereby, apart from any contract or fiduciary relationship, since the law will imply a duty of care when a party seeking information from a party possessed of a special skill trusts him to exercise due care, and the party knew or ought to have known that reliance was being placed on his skill and judgment.

[296] [1947] AC 265 (HL).
[297] [1964] AC 465 (HL).

No physical injury to person or property was involved in this case. The plaintiff suffered pure economic loss as a result of relying on a statement negligently made by the defendant about the financial position of a company. The House of Lords held that the defendant would have been liable for damages had there not been a disclaimer of liability. This broke new ground as hitherto, the rule was that in the absence of contract, a claim for negligent misrepresentation could not lie.

In *Hedley Byrne*,[298] Lord Morris held that 'if someone possessed of a special skill undertakes, quite irrespective of contract, to apply that skill for the assistance of another person who relies upon such skill, a duty of care will arise'. He further considered that where a person is in such a position 'that others could reasonably rely upon his judgment or his skill or upon his ability to make careful inquiry', and he 'takes it upon himself to give information or advice to, or allows his information or advice to be passed on to, another person who, as he knows or should know, will place reliance upon it, then a duty of care will arise'.[299]

3.4.1.3 *Dutton v Bognor Regis UDC*[300]

In the 40 years after *Donoghue v Stevenson*, it was accepted that the principles propounded by Lord Atkin there were restricted to cases of physical damage to person or to property other than the property which gives rise to the damage. Then came this case. Here, the Court of Appeal extended the principle of *Donoghue v Stevenson* to a building defect case where there was no damage to person or other property.

[298] *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465 (HL) 502.
[299] *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465 (HL) 502-503 (Lord Morris). The *Hedley Byrne* principle was subsequently extended to different situations. Thus, in *White v Jones* [1995] 2 AC 207, the solicitors who negligently failed to carry out their client's instructions in drawing up a will were held liable to the intended beneficiaries.
[300] [1972] 1 QB 373 (CA).

In this case, the plaintiff was the second purchaser of a house. Soon after she moved in, she found serious defects in the internal structure of the house. Investigations revealed that this was due to an inadequate foundation as it was constructed on the site of a rubbish tip. She claimed against the local council whose building inspector was negligent in failing to detect the defect at an early stage of the building works. She was held to be entitled to recover from the local authority the estimated cost of repair together with a sum representing the diminished value of the house as repaired.

Lord Denning MR addressed the argument of counsel that if a building inspector negligently passes a house as properly built and it collapses and injures a person, the council is liable; whereas if the owner discovers the defect in time to repair it which in fact he does, then the council is not liable.[301] He said that it is 'an impossible distinction'; the council is liable in either case. He said that the damage done there was not solely economic loss; it was physical damage to the house. He extended the same prescription to chattels.

Lord Denning MR held the council liable for reason that it was entrusted by Parliament and received public funds to ensure that houses were properly built so as to protect purchasers and occupiers of houses.[302] Besides the council, Lord Denning MR was also inclined to include the builder and the council's inspector as being liable for the owner's loss.[303]

Lord Denning MR's ruling extended the scope of the *Donoghue v Stevenson* duty in two aspects - first, to cover damage to the article itself and secondly to remedying a defect which has become patent. Such an extension, if applied to chattels,

[301] *Dutton v Bognor Regis UDC* [1972] 1 QB 373 (CA) 396 (Lord Denning MR).
[302] *Dutton v Bognor Regis UDC* [1972] 1 QB 373 (CA) 475 (Lord Denning MR).
[303] ibid.

would mean that the owner of a chattel which developed a defect could recover from the negligent manufacturer the cost of repair or replacement at least if continued use of the chattel in its defective state was likely to cause injury.[304]

3.4.1.4 *Anns v Merton London BC*[305]

Dutton was approved by the House of Lords in *Anns*. It was held in this case that a local authority was liable in negligence to the plaintiffs who took out long leases of a block of flats built on inadequate foundations not complying with relevant building regulations, on the basis of failure by the authority to discover by inspection the inadequacy of the foundations before they were covered over.

Lord Wilberforce, in a speech with which three of the other four members of the House of Lords agreed, was of the view that the recoverable damages included not only for personal injury and damage to property but also damage to the dwelling-house itself.[306] He added that recovery for such damage to the house followed from 'normal principle' and if classification was required, the relevant damage was 'material, physical damage'.[307]

Lord Jauncey, in the subsequent case of *Murphy v Brentwood District Council*,[308] thought that the 'normal principle' referred to was that as laid down in *Donoghue v Stevenson* and applied in *Home Office v Dorset Yacht Co Ltd*. Lord Jauncey said that two matters could be discerned from Lord Atkin's speech in *Donoghue v Stevenson*, namely (a) that damage to the offending article was not within the scope of the duty, and (b) that the duty only extended to articles which were likely to

[304] *Murphy v Brentwood District Council* [1991] 1 AC 398 (HL) (Lord Jauncey).
[305] [1978] AC 728 (HL).
[306] *Anns v Merton London BC* [1978] AC 728 (HL) 759.
[307] *Anns v Merton London BC* [1978] AC 728 (HL) 759-760.
[308] [1991] 1 AC 398 (HL) 498.

be used before any reasonable opportunity of inspection.[309] *Donoghue v Stevenson* would therefore appear to disallow rather than support the recovery of damages for damage to the house itself which was detected before the damage had caused any injury to persons or other property.

As to the amount recoverable for the damage to the house in *Anns*, Lord Wilberforce said that it was the amount of expenditure necessary to restore the dwelling to a condition in which it was no longer a danger to the health or safety of the occupants and possibly expenses arising from necessary displacement depending on the circumstances.[310] He said he had derived much assistance on the question of damages generally from the dissenting judgment of Laskin CJ in the Canadian Supreme Court case of *Rivtow Marine Ltd v Washington Iron Works*[311] and from the judgments of the New Zealand Court of Appeal in *Bowen v Paramount Builders (Hamilton) Ltd*.[312]

In *Rivtow Marine Ltd*, the Supreme Court of Canada, by a majority of seven to two, dismissed a claim against manufacturers for the cost of repairing a dangerous defect in a crane by reason that the manufacturer of a potentially dangerous article was not liable in tort for damage arising in the article itself or for economic loss arising from the defect in the article. Laskin J, in a dissenting judgment, after referring to the liability of the manufacturers for injury to consumers or users of their products arising from negligence, stated, 'If recovery for economic loss is allowed when such injury is suffered, I see no reason to deny it when the threatened injury is forestalled.'[313]

[309] *Murphy v Brentwood District Council* [1991] 1 AC 398 (HL) 499. This second matter was again emphasised by Lord Wright in *Grant v Australian Knitting Mills Ltd* [1936] AC 85 (PC) 105.
[310] *Anns v Merton London BC* [1978] AC 728 (HL) 759-760.
[311] [1974] SCR 1189 (Supreme Court, Canada) 1220-1221.
[312] [1977] 1 NZLR 394 (Court of Appeal, New Zealand).
[313] *Rivtow Marine Ltd v Washington Iron Works* [1974] SCR 1189 (Supreme Court, Canada) 1221-1222.

Reverting to *Anns*, the House of Lords held that local authorities are under a duty pursuant to the Public Health Act 1936 to consider properly the matter of whether they should inspect the carrying out of building work.[314] If they decide to inspect, they are required to use reasonable care in carrying out their supervisory function of ensuring compliance with the building byelaws but this should only be within the extent of discretion bona fide exercised as regards to the time and manner of inspection.[315]

The doctrine formulated in *Anns* is that a local authority which exercises statutory control over building operations is liable in tort to a building owner or occupier for the cost of remedying a dangerous defect in the building which results from the negligent failure by the authority to ensure that the building was erected in conformity with applicable building byelaws or regulations.

The liability arises not from the breach of any statutory duty, but from the failure to exercise a common law duty of care in the performance of the statutory duties. This doctrine is essentially a reiteration, with some modifications, of the principles of law first promulgated by the Court of Appeal in *Dutton*.[316]

Lord Wilberforce in *Anns*[317] said that the cause of action arose 'when the state of the building is such that there is present or imminent danger to the health or safety of persons occupying it'. As regards the contention that an endless, indeterminate class of potential plaintiffs may be called into existence, Lord Wilberforce said that this can be

[314] *Anns v Merton London BC* [1978] AC 728 (HL) 755 (Lord Wilberforce).
[315] *Anns v Merton London BC* [1978] AC 728 (HL) 755 (Lord Wilberforce). Section 61 of the Public Health Act 1936, as originally enacted, provided that a local authority was empowered to make regulations which might include stipulations for the deposit of plans of buildings and for the inspection of building work. Under section 64, the local authority must reject the plans if they were defective or involve work which would contravene any of the building regulations.
[316] Templeman LJ in *Dennis v Charnwood BC* [1983] QB 409 (CA) 415 said that based on that decision in *Anns*, the local authorities must also be liable for negligence if they fail to use reasonable care in considering and approving plans.
[317] *Anns v Merton London BC* [1978] AC 728 (HL) 759-760.

disposed of because only an owner or occupier, who is such when the damage occurs, has a right of action.[318]

3.4.1.5 *Junior Books Ltd v Veitchi Co Ltd*[319]

The House of Lords in this matter was confronted with the question of a builder's liability to the owner of the building with whom he had no contractual relationship. The builder was found liable for negligence on a claim for economic loss.

3.4.1.6 *Dennis v Charnwood BC*[320]

Templeman LJ in this case made it clear that not every failure by a local authority to detect a defect in a plan or a defect in a building imposes liability on it.[321] He went on to explain that the local authority is not liable if it could not have detected the defect by reasonable care in the exercise of its statutory functions or if the defect is not likely to threaten the safety or comfort of the occupiers.[322] He added that since the statutory duty of the local authority is only supervisory in nature, there may be defects which the builder - but not the local authority - is liable.[323]

3.4.1.7 *D & F Estates Ltd v Church Comrs for England*[324]

In this case, the main contractors employed sub-contractors to carry out the internal plastering of a block of flats. The first plaintiff, a company controlled by the second and third plaintiffs, took a lease of one of the flats and then occupied it. Some of the plaster came loose and fell. The plaintiffs claimed damages in negligence, including the cost of remedial works, the cost of cleaning the carpets and other items dirtied or damaged by the falling plaster and loss of rent while the remedial works were carried

[318] *Anns v Merton London BC* [1978] AC 728 (HL) 758.
[319] [1983] 1 AC 520 (HL).
[320] [1983] QB 409 (CA).
[321] *Dennis v Charnwood BC* [1983] QB 409 (CA) 420.
[322] *Dennis v Charnwood BC* [1983] QB 409 (CA) 421 (Templeman LJ).
[323] ibid.
[324] [1989] AC 177 (HL).

out. The issue was whether there is liability in tort for pure economic loss where a defect in the object causes damage to the object itself.

Lord Bridge, who delivered the leading speech, and Lord Oliver cast doubts as to the extent to which the decision in *Anns* was capable of being reconciled with pre-existing principle. Lord Bridge thought the only way to reconcile *Anns* with *Donoghue v Stevenson* was on the assumption that in a complex structure the constituent parts may be considered as separate items of property distinct from the part which has given rise to the damage.

Lord Bridge noted that when a hidden defect in a chattel is discovered before it causes external injury or damage there is no room for the application of the *Donoghue v Stevenson* principle.[325] He went on to say that applying the same principle to real property in respect of the liability of the builder of a permanent structure which is dangerously defective would mean that liability can only arise when the defective structure causes personal injury or damage to property other than the structure itself.[326]

Lord Bridge added that if the defect is discovered before any damage occurs, the loss sustained by the owner of the structure, who has to repair or demolish it to avoid danger to third parties, would appear to be purely economic.[327] He was of the opinion that to impose on the builder such a duty of care to any person acquiring an interest in the building would be to impose on him the obligations of an indefinitely transmissible warranty of quality. Lord Oliver said that *Anns* had introduced in regards to the

[325] *D & F Estates Ltd v Church Comrs for England* [1989] AC 177 (HL) 206.
[326] ibid.
[327] ibid.

construction of buildings an entirely new type of product liability, if not, indeed, an entirely novel concept of the tort of negligence.[328]

Lord Oliver concurred with Lord Bridge's analysis that the only way to treat *Anns* as an ordinary application of the *Donoghue v Stevenson* principle was upon the hypothesis that in the case of a complicated structure the other constituent parts can be treated as separate items of property distinct from that portion of the whole which has caused the damage.[329] That hypothesis could be further stretched so that the damages would include, and in some cases might be restricted to, the costs of replacing or making good the defective part on the ground that such remedial work would be essential to the repair of the property which had been damaged by it.[330]

3.4.1.8 *Murphy v Brentwood District Council*[331]

Murphy was a ground-breaking decision. *D & F Estates Ltd* was fortified by this later case in which the House of Lords expressly departed from *Anns* and comprehensively rejected the reasoning upon which it was based. In *Murphy*, the plaintiff purchased from a construction company a new house constructed on an in-filled site on a concrete raft foundation to prevent damage from settlement. The plans and calculations for the raft foundation were submitted to the local council for building regulation approval. The council referred the plans and calculations to consulting engineers and upon their recommendation approved the design under the building regulations and byelaws. About 11 years later, the plaintiff noticed serious cracks in the house and found that the raft foundation was defective and that differential settlement beneath it had caused it to distort. The plaintiff sold the house but obtained £35,000 less due to the defects.

[328] *D & F Estates Ltd v Church Comrs for England* [1989] AC 177 (HL) 211.
[329] *D & F Estates Ltd v Church Comrs for England* [1989] AC 177 (HL) 212.
[330] *D & F Estates Ltd v Church Comrs for England* [1989] AC 177 (HL) 212 (Lord Oliver).
[331] [1991] 1 AC 398 (HL).

He sued the council on the ground that it was liable for the consulting engineers' negligence in recommending approval of the plans. He alleged that he and his family had suffered an imminent risk to health and safety because gas and soil pipes had broken and there was a risk of further breaks.

The question calling for determination was whether the defendant council owed the plaintiff a duty to take reasonable care to protect him from the particular kind of damage which he had in fact suffered which was the defective house itself, and not injury to person or health nor damage to anything else.

Whilst conceding that the *Anns* decision affords a measure of justice, Lord Keith was concerned that it is impossible to find any coherent and logically based doctrine behind it and that this would throw the law of negligence into a state of confusion.[332] Lord Keith noted that in the case of a building, it is right that a careless builder is liable, on the principle of *Donoghue v Stevenson*, where a latent defect causes physical injury to anyone, whether owner, occupier, visitor or passer-by, or to the property of any such person.[333] However that principle cannot bring about liability towards an occupier who knows the full extent of the defect yet continues to occupy the building.[334]

Lord Keith, after approving what Stamp LJ said in *Dutton*[335] that there is no liability in tort on a manufacturer towards the purchaser from a retailer of an article which turns out to be useless or valueless through defects due to careless manufacture said that in principle it is difficult to distinguish between an article which is useless or valueless and one which is defective so as to be dangerous in use but which is

[332] *Murphy v Brentwood District Council* [1991] 1 AC 398 (HL) 472.
[333] *Murphy v Brentwood District Council* [1991] 1 AC 398 (HL) 464.
[334] *Murphy v Brentwood District Council* [1991] 1 AC 398 (HL) 464 (Lord Keith).
[335] *Dutton v Bognor Regis UDC* [1972] 1 QB 373 (CA) 414-415.

discovered by the purchaser in time to avoid any possibility of injury.[336] The purchaser may want to repair the defect or discard the article but in either case the loss is purely economic.[337]

Lord Keith also criticised the time that a cause of action accrues under the *Anns* doctrine. Lord Wilberforce in *Anns*[338] regarded that a cause of action arises when the state of the building is such that there is present an imminent danger to the health or safety of persons occupying it. He had also referred to the relevant damage as being material, physical damage.[339] Therefore there must be both material physical damage and present or imminent danger to the health or safety of occupants. If that is so, there would be no cause of action where the building had suffered no material damage but a structural survey had revealed an underlying defect giving rise to imminent danger.[340] This would diminish the value of the house, thus causing economic loss to the owner.[341]

Lord Keith was of the opinion that although the damage in *Anns* was said to be physical damage by Lord Wilberforce, it was really purely economic loss,[342] drawing from the judgment of Deane J in *Sutherland Shire Council v Heyman*.[343]

Lord Keith was concerned about the wide ramifications of the *Anns* doctrine when taken to its logical conclusion. First, if the local authority carries such a duty, so too must the builder.[344] By logical extension so too must the manufacturer of a chattel.[345] There would effectively be a 'transmissible warranty of quality' applicable in

[336] *Murphy v Brentwood District Council* [1991] 1 AC 398 (HL) 465.
[337] *Murphy v Brentwood District Council* [1991] 1 AC 398 (HL) 465 (Lord Keith).
[338] *Anns v Merton London BC* [1978] AC 728 (HL) 760.
[339] *Anns v Merton London BC* [1978] AC 728 (HL) 759 (Lord Wilberforce).
[340] *Murphy v Brentwood District Council* [1991] 1 AC 398 (HL) 466 (Lord Keith).
[341] ibid.
[342] *Murphy v Brentwood District Council* [1991] 1 AC 398 (HL) 466.
[343] [1985] HCA 41, 157 CLR 424, (1985) 60 ALR 1, 60-61.
[344] *Murphy v Brentwood District Council* [1991] 1 AC 398 (HL) 469 (Lord Keith).
[345] ibid.

wide and divergent areas.[346] The purchaser of an article who found that it had a dangerous defect before that defect had caused any damage would be entitled to recover from the manufacturer the cost of rectifying the defect or the loss sustained in discarding it if economic repair was not possible.[347] Then it might be argued that there should also be a right to recovery where the defect renders the article not dangerous but merely useless on the ground that the economic loss in either case would be the same.[348] A similar argument could be made where the defect causes the destruction of the article itself, without resulting in any personal injury or damage to other property.[349]

In respect of Lord Bridge's suggestion in *D & F Estates*[350] of a complex structure theory to reconcile the decision in *Anns* and the principle in *Donoghue v Stevenson*, Lord Keith was of the view that this would be unrealistic in the case of a building the whole of which had been erected and equipped by the same contractor.[351] The whole package provided by the contractor should then be regarded as one unit made unsound by a defect in the particular part.[352] That theory could be viable if, for instance, the electric wiring had been installed by a sub-contractor and due to a defect from lack of care, a fire broke out which destroyed the building.[353]

The complex structure theory postulates that a complex chattel or structure might be considered as being formed of separate constituent parts and one part, when it caused damage to another part of the same structure or chattel, may be regarded in the law of tort as having caused damage to 'other property' consistent with the *Donoghue v Stevenson* principles.

---

[346] ibid.
[347] ibid.
[348] ibid.
[349] The view of the American courts is that damage to a chattel itself due to careless manufacture does not found a cause of action in negligence or in product liability. See *East River Steamship Corp v Transamerica Delaval Inc* (1986) 476 US 858 (United States Supreme Court); *Aloe Coal Co v Clark Equipment Co* (1987) 816 F 2d 110.
[350] *D & F Estates Ltd v Church Comrs for England* [1989] AC 177 (HL) 206.
[351] *Murphy v Brentwood District Council* [1991] 1 AC 398 (HL) 470.
[352] *Murphy v Brentwood District Council* [1991] 1 AC 398 (HL) 470 (Lord Keith).
[353] ibid.

The complex structure theory seemed to be the underlying rationale in *Quackenbush v Ford Motor Co*[354] where the Appellate Division of the Supreme Court of New York held that the plaintiff could recover damages in tort from the manufacturer for damage to her motor car resulting from an accident due to faulty brakes. However *Quakenbush*'s standing as an authority had been considerably quashed by the unanimous decision of the United States Supreme Court in *East River Steamship Corp v Transamerica Delaval Inc*[355] that a manufacturer owes no liability in tort for damage caused by a defect in a product which injures itself. Blackmun J in *East River Steamship Corp*[356] said that purely economic loss is essentially the failure of the purchaser to receive the benefit of his bargain which is traditionally the core concern of contract law.

Another criticism leveled by Lord Keith on the *Anns* case is that since the loss is the expenditure needed to avert the danger which is pure economic loss, there is no logic in restricting the remedy to situations where there is present or imminent danger to health or safety.[357]

Lord Keith felt that to re-establish a degree of certainty in this area of law, it is necessary to depart from *Anns*.[358] Lord Keith nevertheless conceded that broadening the swipe of the tort of negligence 'may tend to inhibit carelessness and improve standards of manufacture and construction' though he cautioned that 'overkill may present its own disadvantages',[359] citing *Rowling v Takaro Properties Ltd*.[360] He also conceded that

[354] (1915) 167 App Div 433 (Appellate Division of the Supreme Court of New York).
[355] (1986) 476 US 858 (United States Supreme Court).
[356] *East River Steamship Corp v Transamerica Delaval Inc* (1986) 476 US 858 (United States Supreme Court) 870.
[357] *Murphy v Brentwood District Council* [1991] 1 AC 398 (HL) 470.
[358] *Murphy v Brentwood District Council* [1991] 1 AC 398 (HL) 471-472.
[359] *Murphy v Brentwood District Council* [1991] 1 AC 398 (HL) 472 (Lord Keith).
[360] [1988] AC 473 (PC) 502.

liability on the *Anns* basis may tend to spur building owners to repair dangerous defects rather than risk injury.[361]

Lord Keith considered *Anns* as 'a remarkable example of judicial legislation'.[362] Lord Keith summarised his opposition to *Anns* on the ground that it did not proceed on any basis of established principle.[363]

Lord Bridge expressed the view that the principles enunciated in *Donoghue v Stevenson* are equally applicable to buildings.[364] He said that the only possible exception is where a building is so close to the boundary of the land that after detection of the dangerous defect it remains a potential source of injury to persons or property on neighbouring land in which case the building owner ought to be able to recover in tort from the negligent builder the cost of overcoming the danger, whether by repair or by demolition, so as to protect himself from potential liability to third parties.[365]

Lord Bridge admitted that the complex structure theory is unrealistic and artificial.[366] He said that the different structural elements in any building form a single indivisible unit.[367] The different parts are essentially interdependent and any defect in one part must necessarily affect all the other parts of the building.[368] Therefore any defect in any part is a defect of the whole.[369]

[361] *Murphy v Brentwood District Council* [1991] 1 AC 398 (HL) 472 (Lord Keith).
[362] *Murphy v Brentwood District Council* [1991] 1 AC 398 (HL) 471.
[363] ibid.
[364] *Murphy v Brentwood District Council* [1991] 1 AC 398 (HL) 475.
[365] *Murphy v Brentwood District Council* [1991] 1 AC 398 (HL) 475 (Lord Bridge).
[366] *Murphy v Brentwood District Council* [1991] 1 AC 398 (HL) 478.
[367] *Murphy v Brentwood District Council* [1991] 1 AC 398 (HL) 478 (Lord Bridge).
[368] ibid.
[369] ibid.

Lord Bridge said that the theory does not hold true of defective foundations of a building which cause differential settlement and consequent cracking.[370] The building is now defective as a whole.[371] Even if the initial damage could be considered as damage to other property, Lord Bridge argued that once the defect is known, the house is unfit for habitation and the building is no more a source of danger.[372]

Under the *Anns* doctrine, the building owner only has a cause of action if there is present or imminent danger to the health or safety of the occupants.[373] As a corollary to this, the recoverable damages are confined to expenditure necessary to make the building safe in that respect. Lord Bridge was of the opinion that the requirement of present imminent danger to health or safety before a cause of action arises poses two insurmountable hurdles such that the application of the *Anns* doctrine will lead to rather irrational and capricious results.[374]

First, where the building defect is first discovered there is no present or imminent danger but the defect will get more serious and in due course will be a danger to health or safety.[375] Should the owner repair the defect now and lose any right to recover from the negligent local authority or should he wait until such time that a danger arises and repairs cost more?[376] Secondly, where the latent defect causes the sudden and total collapse of the building without the defect having been discovered earlier.[377] The collapsed building then poses no danger to health or safety.[378] Lord Bridge said it would be strange for the owner to be without any remedy in such a case

[370] *Murphy v Brentwood District Council* [1991] 1 AC 398 (HL) 478-479.
[371] *Murphy v Brentwood District Council* [1991] 1 AC 398 (HL) 478-479 (Lord Bridge).
[372] *Murphy v Brentwood District Council* [1991] 1 AC 398 (HL) 478-479.
[373] *Anns v Merton London BC* [1978] AC 728 (HL) 759 (Lord Wilberforce).
[374] *Murphy v Brentwood District Council* [1991] 1 AC 398 (HL) 480.
[375] *Murphy v Brentwood District Council* [1991] 1 AC 398 (HL) 480 (Lord Bridge).
[376] ibid.
[377] ibid.
[378] ibid.

whereas it would be otherwise if the defect had been discovered before the building collapsed.[379]

Lord Bridge offered that there may be situations where there is no contract but a special relationship of proximity exists between the builder and building owner which is sufficiently akin to contract such that there is the element of reliance which broadens the scope of the duty of care owed by the builder to the owner to include purely economic loss.[380]

Lord Oliver felt that the description of the damage in *Anns*[381] as 'material, physical damage' was a misnomer as it is 'incontestable on analysis that what the plaintiffs suffered was pure pecuniary loss and nothing more'.[382] He said that it does not make sense to provide a remedy where the structural defect has shown itself by some physical sign, such as a crack or a fractured pipe, but to deny a remedy where the defect has been discovered for instance by a structural survey in connection with a proposed sale.[383]

Lord Oliver looked to Brennan J's judgment in *Sutherland Shire Council* and said that the critical question is not the nature of the damage in itself, be it physical or pecuniary, but whether the scope of the duty of care in the particular circumstances of the case is such as to encompass the kind of damage which has been suffered by the plaintiff.[384] In other words, whether there is sufficient 'proximity' between the plaintiff

[379] *Murphy v Brentwood District Council* [1991] 1 AC 398 (HL) 480 (Lord Bridge).
[380] *Murphy v Brentwood District Council* [1991] 1 AC 398 (HL) 481.
[381] *Anns v Merton London BC* [1978] AC 728 (HL) 759 (Lord Wilberforce).
[382] *Murphy v Brentwood District Council* [1991] 1 AC 398 (HL) 484.
[383] *Murphy v Brentwood District Council* [1991] 1 AC 398 (HL) 484 (Lord Oliver).
[384] *Murphy v Brentwood District Council* [1991] 1 AC 398 (HL) 485-486.

and defendant such that there rested on the latter a duty to take care to safeguard the plaintiff from that loss which has been suffered.[385]

Lord Oliver said neither in *Anns* nor in *Murphy* was there any reliance by the plaintiff on a statement or advice on which he had a right to rely and where it was contemplated that he would be likely to rely as in *Hedley Byrne*.[386] Lord Oliver commented that in borderline cases like *Spartan Steel and Alloys Ltd v Martin & Co (Contractors) Ltd*,[387] resolution has been achieved pragmatically not by applying logic 'but by the perceived necessity as a matter of policy to place some limits, perhaps arbitrary limits, to what would otherwise be an endless, cumulative causative chain bounded only by theoretical foreseeability'.[388]

Lord Oliver said that inflicting physical injury to the person or property of another universally needs to be justified.[389] Causing economic loss does not.[390] If it is to be considered as wrongful there must be some factor other than that the loss has occurred and that such occurrence could be foreseen.[391]

Lord Oliver, in commenting on the *Anns* doctrine of limiting the liability of the builder for a latent defect to the cost of correcting the defect such that it no longer poses an imminent threat to the health or safety of the occupant, questioned whether there is any logical basis for such a distinction and on what principle that underpins such a duty when the defect is perceived to be an imminent danger to health.[392]

---

[385] *Murphy v Brentwood District Council* [1991] 1 AC 398 (HL) 486 (Lord Oliver).
[386] *Murphy v Brentwood District Council* [1991] 1 AC 398 (HL) 486. The element of reliance is not the only exception to the rule that there is no duty to take reasonable care to protect against pure economic loss. See, for example, *Morrison Steamship Co Ltd v Greystoke Castle (Owners of Cargo lately laden on)* [1947] AC 265 (HL); *Ross v Caunters* [1980] Ch 297 (Ch D).
[387] [1973] QB 27 (CA).
[388] *Murphy v Brentwood District Council* [1991] 1 AC 398 (HL) 486.
[389] *Murphy v Brentwood District Council* [1991] 1 AC 398 (HL) 487.
[390] *Murphy v Brentwood District Council* [1991] 1 AC 398 (HL) 487 (Lord Oliver).
[391] ibid.
[392] *Murphy v Brentwood District Council* [1991] 1 AC 398 (HL) 488.

The need for a distinction between mere defects and dangerous defects is that if a dangerous defect had not been discovered until someone was injured, the defendant would have been liable for damages for the resultant physical injury on the *Donoghue v Stevenson* principle so it would make no sense to deny liability for the cost of preventing such injury from ever occurring.[393] Lord Oliver's rebuttal to this was once a latent defect is discovered, the plaintiff's expenditure is not for minimising the damage or in preventing the injury from occurring but is in order to enable him to continue to use the property or the chattel as the injury will not happen unless the plaintiff makes it happen by courting a danger of which he is aware.[394]

Lord Jauncey was concerned that the *Anns*' concept of imminent danger will give rise to considerable practical difficulties.[395] He questioned whether this means it is bound to occur although not for some time, or it is likely to occur in the immediate future as different persons will have different perceptions of this concept.[396] He also said that if the house collapses without any warning any latent defect in it has been removed.[397] He raised the conundrum that it would be very strange if the owner should have no remedy in such a case but should have a remedy if the danger had shown itself before collapse.[398]

3.4.1.9 *Nitrigin Eireann Teoranta v Inco Alloys Ltd*[399]

In this case, May LJ disallowed the plaintiff's claim against the defendants as the defect was simply damage to the item itself 'constituting a defect of quality resulting in economic loss irrecoverable in negligence'.

[393] *Murphy v Brentwood District Council* [1991] 1 AC 398 (HL) 488 (Lord Oliver).
[394] *Murphy v Brentwood District Council* [1991] 1 AC 398 (HL) 488-489.
[395] *Murphy v Brentwood District Council* [1991] 1 AC 398 (HL) 497-498.
[396] *Murphy v Brentwood District Council* [1991] 1 AC 398 (HL) 498 (Lord Jauncey).
[397] ibid.
[398] ibid.
[399] [1992] 1 All ER 854 (QBD).

3.4.1.10 The Defective Premises Act 1972

In its report on *Civil Liability of Vendors and Lessors of Defective Premises*,[400] the English Law Commission said that the word 'defective' carries two meanings. Looking from a tort perspective, 'premises are defective only if they constitute a source of damage to the person or property of those who are likely to come on to them or to find themselves in their vicinity'. This is in line with the *Donoghue v Stevenson* principle where damages are recoverable only for damage to the person or to property. Looking from a contract angle, a house is defective if its condition falls short of the standard which the purchaser is entitled to expect. The report referred to this as 'defects of quality'. The Law Commission recommended the amending of the law to protect purchasers and lessees of *dwellings* (*not* commercial or industrial premises) to give them a right of recovery for defects of quality against builders.[401] This led to the enactment of the Defective Premises Act 1972.

This enactment, though falling short of the liberal regime which *Anns* advocated, affords to some of the most vulnerable segments of society entitlement to certain claims for pure economic loss which *Murphy* denied. Section 1(1) of the Act imposes a duty on a builder of a dwelling to the purchaser and subsequent purchasers to ensure that the dwelling is built in a professional manner with proper materials so that it will be fit for habitation when completed. However, in addition to being limited to dwellings, liability under the Act is subject to a limitation period of six years from the completion of the work and to the exclusion provided for by section 2.

[400] Law Commission, *Civil Liability of Vendors and Lessors of Defective Premises* (Law Commission No. 40, 1970).
[401] Emphasis added.

3.4.2 Australia

Below are some of the more important cases on pure economic loss emanating from Australia.

3.4.2.1 *Sutherland Shire Council v Heyman*[402]

The High Court of Australia declined to follow *Anns* in *Sutherland Shire Council* where it held the council not liable for negligence in approving plans which subsequently showed inadequate footings.

In that case, the pivotal role of the reliance principle as an element in the cause of action which the plaintiff sought to establish was the focus of close analysis, especially in the judgment of Mason J. The primary theme of his judgment, and a secondary theme in the judgments of Brennan and Deane JJ is that a duty of care sufficient in scope to make the local authority liable for the damage sustained can only be grounded on the concept of reliance. However, there is nothing in the ordinary relationship between a local authority, as statutory supervisor of building works, with the purchaser of a defective building which is capable of bringing about such a duty.

Brennan J criticised the approach taken in *Anns* which he characterised as a 'massive extension of a prima facie duty of care restrained only by indefinable "considerations which ought to negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed"'.[403] He advocated for an incremental approach in the development of novel categories of negligence and by analogy with established categories.

[402] [1985] HCA 41, 157 CLR 424 (High Court, Australia).
[403] *Sutherland Shire Council v Heyman* [1985] HCA 41, 157 CLR 424 (High Court, Australia) 44.

Deane J said that he disagreed with the categorisation of the loss sustained in the *Anns*' circumstances as 'material, physical damage'.[404] His reason was that the only property which could be said to have been damaged in such a case is the building itself which could not be said to have been subjected to 'material, physical damage' by reason merely of the defective foundations since the building never existed otherwise than with its foundations in that condition.

3.4.2.2 *Bryan v Maloney*[405]

However, in *Bryan v Maloney*, the High Court of Australia by a majority supported the trial judge's decision that a council was liable for negligence to a derivative owner of a property who was put to loss by the defective house. The court expressed the view that there was proximity in the relationship between the subsequent purchaser and the builder in a number of important respects. The connecting link of the house was itself substantial. It was a permanent structure expected to be used indefinitely and was likely to represent one of the most - and possibly the most - significant investment which the subsequent owner would make during his lifetime. It was obviously foreseeable by the builder that the negligent construction of a house with inadequate foundations was likely to cause economic loss to the owner of the house at the time when inadequacy of the foundations first surfaced.

3.4.3 New Zealand

The courts in New Zealand have also contributed their views on pure economic loss, the more important cases of which are as follows.

[404] *Sutherland Shire Council v Heyman* [1985] HCA 41, 157 CLR 424 (High Court, Australia) 60-61.
[405] [1995] HCA 17, 182 CLR 609 (High Court, Australia).

3.4.3.1 *Bowen v Paramount Builders (Hamilton) Ltd*[406]

In this New Zealand Court of Appeal case, the plaintiff building owner sought to recover from the builder in tort the cost of making good damage caused by subsidence due to inadequate foundations. Richmond P held that the *Donoghue v Stevenson* principles apply to a builder erecting a house under a contract with the owner.[407] He went further to say that if 'actual physical damage to the structure of the house' is caused by the latent defect, then there is 'no reason in principle why such damage should not give rise to a cause of action, at any rate if that damage occurs after the house has been purchased from the original owner'.

Richmond P premised his holding on the views of Lord Denning MR and Sachs LJ in *Dutton*[408] and also on *Quackenbush v Ford Motor Co.*[409] He held that the measure of damages would include the whole cost of remedial works together with any diminution in value of the house if complete restoration is impossible.

3.4.3.2 *Stieller v Porirua City Council*[410]

This case concerned plaintiffs who had bought a house under construction. It was later discovered that the weatherboards on the exterior of the house did not comply with the standard required by the building byelaws. The local authority was held liable by the New Zealand Court of Appeal in damages for failing to discover this on inspection. This was despite the fact that the condition of the weatherboards never posed a danger to persons or property.

[406] [1977] 1 NZLR 394 (Court of Appeal, New Zealand).
[407] *Bowen v Paramount Builders (Hamilton) Ltd* [1977] 1 NZLR 394 (Court of Appeal, New Zealand) 410.
[408] *Dutton v Bognor Regis UDC* [1972] 1 QB 373 (CA) 396, 403-404.
[409] (1915) 167 App Div 433 (Appellate Division of the Supreme Court of New York).
[410] [1986] 1 NZLR 84 (Court of Appeal, New Zealand).

3.4.3.3 *Invercargill City Council v Hamlin*[411]

The Privy Council declined to follow *Murphy* in this case. During the course of construction of a house, a building inspector from the city council inspected and approved the work to be in compliance of the council's by-laws. Years later, cracks surfaced in the house leading to the owner's claim against the city council which succeeded both at the New Zealand Court of Appeal and at the Privy Council.

The reasons given by the Privy Council in not following *D & F Estates* and *Murphy* appeared to be first, the local courts are entitled to develop the common law of New Zealand according to local policy considerations. Second, the community standards and expectations in New Zealand demanded the imposition of a duty of care on both local authorities and builders to ensure compliance of by-laws.

3.4.4 Canada

In Canada, the concept of pure economic loss is captured in the cases as follows.

3.4.4.1 *City of Kamloops v Nielsen*[412]

In this case, when a dwelling house was being built, the municipal authority discovered that the foundations were faulty. The authority issued a 'stop work' order against further construction until proper foundations had been laid. This order was however ignored by the builder and the building owner. After the building was completed the owner went into occupation without having obtained the necessary occupancy permit.

[411] [1996] AC 624 (PC).
[412] (1984) 10 DLR (4th) 641 (Supreme Court, Canada).

Three years later he sold the house to the plaintiff who later discovered the defects in the foundation. The plaintiff claimed against the original owner in fraud and the authority in negligence. The plaintiff argued that the authority's faults were failing to take the appropriate legal action to enforce the stop work order and to prevent occupation of the house without an occupancy permit. The authority and the original owner were found to be jointly liable. By a majority of three to two, the Supreme Court of Canada allowed the plaintiff's recovery of his purely economic loss in the amount to make good the foundations.

3.4.4.2 *Winnipeg Condominium Corp No 36 v Bird Construction*[413]

This case involved a developer who engaged a general contractor to construct an apartment block. The work was carried out according to plans drawn by architects. A sub-contractor installed the external cladding which consisted of slabs of stones. The plaintiff, who was the subsequent owner of the apartment, had to repair a section of the cladding which had fallen. He sued the contractor, architects and the sub-contractor for recovery of the repair cost due to their negligence.

The contractor applied to strike out the plaintiff's claim for reason that it disclosed no reasonable cause of action. The application failed at the court of first instance and also at the Canadian Supreme Court. La Forest J in rationalising this conclusion said that a reasonable standard of care should be imposed on anyone who takes part in the 'construction of a large house and permanent structure which, if negligently constructed, has the capacity to cause serious damage to other persons and property in the community'.

[413] (1995) 121 DLR (4th Ed) 193 (Supreme Court, Canada).

La Forest J said that at least as regards dangerous defects there are compelling policy reasons for imposing upon contractors tortious liability for the cost of repair of these defects. La Forest J concluded that where a contractor or any other person is negligent in the planning or construction of a building which results in defects which pose a real and substantial danger to the occupants, the reasonable costs of repairing the defects and putting the building into a non-dangerous condition are, in principle, recoverable in tort by the occupants. The Supreme Court of Canada thus embraced *Anns* rather than *Murphy*.

3.4.5 Singapore

Closer to home, the Singapore courts' views on pure economic loss are shown in the following cases.

3.4.5.1 *RSP Architects Planners & Engineers v Ocean Front Pte Ltd and another appeal*[414]

The issue in this case was whether the plaintiff, a management corporation of a condominium, had a cause of action against the developers and the architects for pure economic loss sustained from defective construction of the common property in the building. The Court of Appeal of Singapore opted not to follow *Murphy* and *D & F Estates* and found the builders and architects liable for negligence.

3.4.5.2 *Man B&W Diesel S E Asia Pte Ltd and another v PT Bumi International Tankers and another appeal*[415]

In this Singapore apex court case, Bumi had entered into a main contract with MSE. MSE in turn had a sub-contract with MBS for the latter to deliver a satisfactory

[414] [1996] 1 SLR 113 (Court of Appeal, Singapore).
[415] [2004] SGCA 8, [2004] 2 SLR 300 (Court of Appeal, Singapore).

engine. The court held that such a contractual arrangement meant that Bumi had committed itself to looking to MSE alone for redress. There was no assumption of duty by MBS towards Bumi. Bumi could have, by altering the contractual structure, made MBS assume that responsibility, but it did not. The Court of Appeal held that it is not for the court to help a party to improve his commercial bargain after the event.

The Singapore Court of Appeal made the observation that the cases in England (for example, *Junior Books Ltd v Veitchi Co Ltd*),[416] Australia (for example, *Bryan v Maloney*),[417] New Zealand (for example, *Invercargill City Council v Hamlin*)[418] and Canada (for example, *Winnipeg Condominium Corp No 36 v Bird Construction Co*),[419] where pure economic loss was allowed, the losses were not strictly purely economic in nature but were suffered on account of damage to homes.

3.4.6 Malaysia

In Malaysia, the views of the courts on pure economic loss can be seen from the following major decisions.

3.4.6.1 *Kerajaan Malaysia lwn Cheah Foong Chiew dan Lain-Lain*[420]

In this case, the plaintiff entered into a contract with Sigoh Din Sdn Bhd, a consultant firm which would then be responsible for superintending and supervising the construction of buildings for the plaintiff. The plaintiff sued the three defendants, who were employees of Sigoh, under negligence for failing to carry out their duties, resulting in the plaintiff having to incur losses in making good defects. The third defendant applied to strike out the claim against him under Order 18 rule 19, Rules of the High

[416] [1983] 1 AC 520 (HL).
[417] [1995] HCA 17, 182 CLR 609 (High Court, Australia).
[418] [1996] AC 624 (PC).
[419] (1995) 121 DLR (4th Ed) 193 (Supreme Court, Canada).
[420] [1993] 2 MLJ 439 (HC).

Court 1980 on the ground, inter alia, that the plaintiff had no reasonable cause of action against him.

The third defendant, a graduate engineer, argued that he was only working under the instruction and supervision of Sigoh. In allowing the third defendant's application, the High Court held that he was only responsible to Sigoh, and not to the plaintiff.

Furthermore, the court found that the plaintiff's loss was pure economic loss as there was no injury to any person or damage to the property of another due to the defects. The court held that it is not reasonable for an employee, including a skilled worker, working under a person or a construction company, to be liable to the owner of a building for his negligence which results in pure economic loss. The learned judge said that the *Murphy* decision was reasonable and appropriate, and he even went to the extent of declaring that it should be accepted forever.[421]

3.4.6.2 *Nepline Sdn Bhd v Jones Lang Wootton*[422]

The narrative in this case was that a tenant sued a firm of registered real estate agents for damages for failing to disclose to the tenant the fact that the premises were subject to a pending foreclosure proceeding. The defendant had advertised the premises for rent and knew that the premises were the subject matter of a pending foreclosure action. The tenant answered the advertisement and subsequently entered into a tenancy agreement for the premises. The court in the foreclosure action made an order for sale of the premises and the tenant claimed the return of the deposit from the defendant.

[421] *Kerajaan Malaysia lwn Cheah Foong Chiew dan Lain-Lain* [1993] 2 MLJ 439 (HC) 448.
[422] [1995] 1 CLJ 865 (HC).

Whilst agreeing that the case concerned pure economic loss and that generally there is a need to limit recoverability of damages for such loss, nevertheless, considering the local circumstances of the case, the High Court judge said that he did not have the slightest doubt that the defendant owed a duty of care to the tenant to inform him of the foreclosure. The court cited the reasons for judicial reluctance to impose liability for pure economic loss as set out by RP Balkin and JLR Davis in *Law of Torts*[423] viz: (a) the fear of indeterminate liability; (b) disproportion between defendant's blameworthiness and the extent of his liability; (c) interrelationship between liability in tort and contract; (d) the need for certainty; and (e) the effect of insurance. The court said that such fears were not relevant in those circumstances as the tenant's claim was for a definite amount.

3.4.6.3 *Teh Khem On & Anor v Yeoh & Wu Development Sdn Bhd & Ors*[424]

In this case, the owners of a house had purchased it from the vendor/builder. After entering into possession, they discovered various defects in the house including cracks on the wall, uneven ground and a leaking bathroom. The owners claimed against the vendor/builder in contract for the defects. They also claimed against the architect and the engineer for damages in negligence. The court found the vendor/builder liable for breach of contract but dismissed the claim against the architect and the engineer for the pure economic loss.

Peh Swee Chin J opted for the decisions in *Murphy* and *D & F Estates*. In the preference that he took, he was no doubt influenced by the spectre of extending the scope of liability 'for an indeterminate class'.

[423] RP Balkin and JLR Davis, *Law of Torts* (LexisNexis) 421-424.
[424] [1995] 2 MLJ 663 (HC).

3.4.6.4 *Dr Abdul Hamid Abdul Rashid & Anor v Jurusan Malaysia Consultants (sued as a Firm) & Ors*[425]

The plaintiffs in this case were owners of land on which they wished to construct a house. That task was contracted to the first defendant, an engineering firm. The fourth defendant was the sole proprietor of the first defendant. The second defendant, the town council, approved the building plans. About three and a half years later, the house collapsed due to landslide.

The plaintiffs claimed against the first and fourth defendants in contract and tort. The plaintiffs' claim against the second defendant stood on negligence and breach of statutory duties under the Local Government Act 1976, Street, Drainage and Building Act 1974 and the Uniform Building By-laws 1984. The claim under the Uniform Building By-laws 1984 was a non-starter as it was not in force at the time it was said to have been breached.

The judge, after trawling through the case law of England, Australia, New Zealand, Canada and Singapore, pointed out that the primary reason against allowing pure economic loss is to prevent the creation or extension of liability to 'an indeterminate amount for an indeterminate time to an indeterminate class'.[426] He disputed the truth of such a rationale as 'a misconception and an unallied fear'.

As regards indeterminate amount, his view was that the damages claimable are not so because they are for the expenses sustained in repairing or replacing the defective product. As regards indeterminate time, he adopted the opinion in the Australian High

[425] [1997] 3 MLJ 546 (HC).
[426] *Ultramares Corporation v Touche* (1931) 174 NE 441, 444 (Cardozo CJ). In *Bellefield Computer Services Ltd v E Turner & Sons Ltd* [2000] EWHC Admin 284, [2000] BLR 97 at 100, Schiemann LJ said that there are various control devices for excluding or limiting liability for pure economic loss which include remoteness of damage, the defendant belonging to a class of persons not appropriate to be imposed with liability and limitation periods.

Court case of *Bryan v Maloney* that this can be 'limited by the element of reasonableness both in the requirement that the damage be foreseeable and in the content of the duty of care'. As for indeterminate class, he cited with approval another passage in *Bryan v Maloney* to the effect that there is no distinction between the relationship between the builder and the original owner and the relationship between the builder and a subsequent owner concerning the foreseeability of a particular kind of economic loss.

Predicated upon these arguments, he wondered why there is such limitation on claims for pure economic loss 'for after all the entire concept of negligence is to extend liability beyond the borders of privity'. He added, 'To impose such a restriction is highly inequitable particularly in cases where the duty of care and the breach of such duty are found to be substantiated.'

As to the argument that legislation is the way to resolve the matter, he said that this is 'by no means a solution, since the principle of negligence itself is founded on common law' and that:

> In Malaysia, we do not possess [the Defective Premises Act 1972 of the United Kingdom]. To adopt the decisions of *Murphy* and *D & F Estates* which are based on a foreign policy of no application here would leave the entire group of subsequent purchasers in this country without relief against errant builders, architects, engineers and related personnel who are found to have erred. If there is any fear that this approach may encumber the local authorities to pay out substantial claims due to their negligence in granting approvals or inspecting building works, there is section 95 of the Street, Drainage and Building Act 1977 [sic] which prohibits such authorities to be sued.[427]

[427] *Dr Abdul Hamid Abdul Rashid & Anor v Jurusan Malaysia Consultants (sued as a Firm) & Ors* [1997] 3 MLJ 546 (HC) 565 (James Foong J). Section 95(2) of the Street, Drainage and Building Act 1974 is as follows:

> The State Authority, local authority and any public officer or officer or employee of the local authority shall not be subject to any action, claim, liabilities or demand whatsoever arising out of any building or other works carried out in accordance with the provisions of this Act or any by-laws made thereunder or by reason of the fact that such building works or the plans thereof are subject to inspection and approval by the State Authority, local authority, or such public officer or officer or employee of the State Authority or the local authority and nothing in this Act or any by-laws made thereunder shall make it obligatory for the State Authority or the local authority to inspect any building, building works or materials or the site of any proposed building to ascertain that the provisions of this Act or any by-laws made thereunder are complied with or that plans, certificates and notices submitted to him are accurate.

The judge asserted that a claim for economic loss is available not only to defective buildings and structures but is also applicable for 'all situations by analogy'. His general conclusion is that 'a claim for pure economic loss can be entertained in an action for negligence.' The claim against the first and fourth defendants in contract and tort succeeded whereas the claim against the second defendant failed.

3.4.6.5 *Pilba Trading & Agency v South East Asia Insurance Bhd & Anor*[428]

In this case, an insured party sent a damaged car for repair at a workshop appointed by the insurer. As a result of a long delay at the workshop, the insured incurred expenses in hiring an alternative vehicle. The insured claimed against the insurer in negligence. The High Court dismissed the claim on the ground, inter alia, that the alleged loss was pure economic loss which is not claimable under the established law even where foreseeable.[429]

3.4.6.6 *Majlis Perbandaran Ampang Jaya v Steven Phoa Cheng Loon & Ors*[430]

This case involved three blocks of apartments known as the Highland Towers. Block 1 collapsed in a landslide. The respondents in this action who were from Blocks 2 and 3 had to evacuate. In that tragedy, 48 people died. The respondents sued various parties including the appellant, the local authority, for negligence and nuisance.

The Federal Court held that pure economic loss is recoverable for negligence under Malaysian law as it is similarly recoverable in all major Commonwealth jurisdictions. Steve Shim CJSS noted that in England, pure economic loss for negligence is recoverable on two alternate bases: the 'categorization approach' and the 'open-ended approach'. The first involves determining if the plaintiff's claim falls into a

[428] [1998] 2 MLJ 53 (HC).
[429] *Pilba Trading & Agency v South East Asia Insurance Bhd & Anor* [1998] 2 MLJ 53 (HC) 61-62, 64.
[430] [2006] 2 MLJ 389 (FC).

recognized category of liability. The second is applied where the facts of a case do not fall within a recognised category of liability but the court considers further whether a duty of care is nevertheless owed by the defendant to the plaintiff. Steve Shim CJSS hastened to qualify the two approaches by saying that they do not exist in 'strict water tight compartments' as was held in *Kane v New Forest District Council*.[431]

Steve Shim CJSS expressed his inclination to accept the views of the courts in Australia and Singapore on pure economic loss for negligence. He had earlier commented that the position in Australia was that pure economic loss in the law of negligence is not confined to particular categories or approaches with particular reference to the High Court case of *Perre v Apand Pty Ltd*[432] which he said seemed to have adopted the 'open-ended approach' in assessing such claims.

For the situation in Singapore, he noted the 'open-ended approach' taken in *RSP Architects Planners & Engineers (Raglan Squire & Partners FE) v Management Corporation Strata Title Plan No 1075 & Anor*[433] which view has been confirmed in *Man B&W Diesel S E Asia Pte Ltd and another v PT Bumi International Tankers and another appeal*.[434] Steve Shim CJSS agreed with the Singapore Court of Appeal's adoption of Lord Oliver's dictum in *Murphy* that the crucial question is not the nature of the damage itself, be it physical or pecuniary, but whether the scope of the duty of care in the circumstances of the case is such as to cover damage of the kind sustained by the plaintiff. He noted that *Murphy* involves the application of the *Caparo* test which takes into consideration foreseeability, proximity and the additional requirement of justice, fairness and reasonableness.

[431] [2001] EWCA Civ 878, [2001] 3 All ER 914.
[432] [1999] HCA 36, 198 CLR 180 (High Court, Australia).
[433] [1999] 2 SLR 449 (Court of Appeal, Singapore).
[434] [2004] SGCA 8, [2004] 2 SLR 300 (Court of Appeal, Singapore).

Steve Shim CJSS found the local authority negligent in approving the diversion of a stream and the building and drainage plans relating to the development submitted by the developer. However, the local authority was saved by section 95(2) of the Street, Drainage and Building Act 1974 which conferred immunity on it. He did not delve into the question of whether the local authority would have been liable for pure economic loss if there was no such provision as section 95(2).

Abdul Hamid Mohamad FCJ said that economic loss under limited situations may be allowed but the effects of section 3 of the Civil Law Act 1956[435] must be taken into account. He was of the opinion that the elements to be considered in evaluating a claim for pure economic loss are public policy, the local circumstances and whether it is fair, just and reasonable to allow it on the facts of the case.

3.4.6.7 *Lok Kok Beng & 49 Ors v Loh Chiak Eong & Anor*[436]

At the Court of Appeal level of this case,[437] it was held that the weight of judicial opinion is against extending the *Donoghue v Stevenson* principle to cover pure economic loss after referring to *D & F Estates Ltd*, *Murphy*, *Kerajaan Malaysia lwn Development Sdn Bhd & Ors Cheah Foong Chiew dan Lain-Lain*, and *Teh Khem On & Anor v Yeoh & Wu Development Sdn Bhd & Ors*. The court did not expressly say there is room for exceptions but it did cite Lord Keith in *Murphy*[438] that the 'right to recover for pure economic loss, not flowing from physical injury, did not then extend beyond the situation where the loss had been sustained through reliance on negligent mis-statements, as in *Hedley Byrne*'.[439]

[435] Section 3(1) of the Civil Law Act 1956 provides that except where there is written law in force, the courts in Peninsula Malaysia shall apply the common law of England and the rules of equity as administered in England on 7 April 1956 provided always that the said common law, rules of equity and statutes of general application shall be applied so far only as local circumstances permit and subject to such qualifications as local circumstances render necessary.
[436] [2015] 4 MLJ 734 (FC).
[437] *Loh Chiak Eong & Anor v Lok Kok Beng & Ors* [2013] 1 MLJ 27 (CA) [61].
[438] *Murphy v Brentwood District Council* [1991] 1 AC 398 (HL) [468].
[439] *Loh Chiak Eong & Anor v Lok Kok Beng & Ors* [2013] 1 MLJ 27 (CA) [61] (Mohd Hishamudin JCA).

In this case, certain purchasers of industrial buildings sued the architects for failure to ensure that the developer obtain the Certificates of Fitness for Occupation on time. The local authority granted planning approval for the project with a condition that the developer must comply with the requirements of the Department of Environment. The developer had problems in complying with this requirement and consequently, the architects refused to apply for the Certificates of Fitness for Occupation and later resigned as the architects for the project. The purchasers could only lawfully occupy the buildings after some eight years of delay. The purchasers sued the architects for their financial loss on the ground of professional negligence.

The court held that it would not be just and reasonable to impose a duty of care on the architects to the purchasers to ensure that there was no undue delay by the developer in obtaining the occupancy certificates from the local authority. The court further held that the purchasers' sole remedy lay in suing the developer for breach of contract under their sale and purchase agreements with the developer or for negligence.

The court noted that there was a further relevant consideration which was that the purchasers suffered purely financial loss as such loss did not involve 'any personal injury or structural defects or damage to property'.[440] The Court of Appeal adopted the view of the Singapore Court of Appeal in *Man B&W Diesel S E Asia Pte Ltd and another v PT Bumi International Tankers and another appeal*,[441] that the cases in England (for instance, *Junior Books Ltd v Veitchi Co Ltd*),[442] Australia (for example, *Bryan v Maloney*),[443] New Zealand (for example, *Invercargill City Council v Hamlin*)[444]

[440] ibid.
[441] [2004] SGCA 8, [2004] 2 SLR 300 (Court of Appeal, Singapore).
[442] [1983] 1 AC 520 (HL).
[443] [1995] HCA 17, 182 CLR 609 (High Court, Australia).
[444] [1996] AC 624 (PC).

and Canada (for example, *Winnipeg Condominium Corp No 36 v Bird Construction Co*),[445] often cited as authorities for the proposition that there could be a duty of care even in cases of supposedly 'pure' economic losses, 'upon a closer examination of the facts of these cases, it will be noted that in these cases the losses were in a sense not purely economic in nature; for in these cases the economic losses were suffered on account of damage to homes'.[446]

The Court of Appeal also observed that the Singapore Court of Appeal case of *RSP Architects Planners & Engineers v Ocean Front Pte Ltd and another appeal*,[447] where a claim for 'economic loss' for the tort of negligence was allowed, involved not a purely economic loss as the court took into consideration the fact that the negligence of the developers in constructing the common property resulted in defects which the management corporation had to rectify.[448]

The appeal to the Federal Court was dismissed. Zainun Ali FCJ, speaking for the Federal Court, said that the proximity requirement should take into consideration whether the claim is for pure economic loss not flowing from personal injury or damage to the property.[449] The Federal Court took the view that 'a more restricted approach is preferable for cases of pure economic loss'.[450] The reason given was that 'such loss might lead to an indeterminate liability being imposed on a particular class of defendants, thus leading to policy issues'.[451]

The Federal Court further said that 'the concepts of voluntary assumption of responsibility and reliance are seen as important factors to be established for purposes

[445] (1995) 121 DLR (4th Ed) 193 (Supreme Court, Canada).
[446] *Loh Chiak Eong & Anor v Lok Kok Beng & Ors* [2013] 1 MLJ 27 (CA) [62] (Mohd Hishamudin JCA).
[447] [1996] 1 SLR 113 (Court of Appeal, Singapore).
[448] *Loh Chiak Eong & Anor v Lok Kok Beng & Ors* [2013] 1 MLJ 27 (CA) [62] (Mohd Hishamudin JCA).
[449] *Lok Kok Beng & 49 Ors v Loh Chiak Eong & Anor* [2015] 4 MLJ 734 (FC) [35].
[450] *Lok Kok Beng & 49 Ors v Loh Chiak Eong & Anor* [2015] 4 MLJ 734 (FC) [35] (Zainun Ali FCJ).
[451] ibid.

of fulfilling the proximity requirement'.[452] Thus, the Federal Court was more circumspect than the Court of Appeal which expressed the view that pure economic loss will only be allowed in *Hedley Byrne* situations where reliance is placed on negligent mis-statements.

It is also to be noted that the Federal Court was indecisive on whether the fact that a claim is a claim for pure economic loss should weigh on the proximity requirement or the policy consideration requirement under the threefold test. The Federal Court said that in the instant case, consideration must be given to the contract between the developer and the purchasers which clearly spelt out the rights and liabilities of the parties, and that no action could be sustained against the architect if the remedy sought had been specifically provided for in the contract.[453]

Furthermore, the Federal Court held that in determining the existence of a duty of care in claims for pure economic loss under negligence, 'much would depend on the facts and circumstances of each case'.[454] The door is therefore not closed for claims for pure economic loss in non-*Hedley Byrne* scenarios.

3.4.6.8 *UDA Holdings Bhd v Koperasi Pasaraya (M) Bhd and other appeals*[455]

In this Federal Court decision, one of the leave-questions was whether its judgment in *Majlis Perbandaran Ampang Jaya v Steven Phoa Cheng Loon & Ors* precludes a claim for pure economic loss against a local authority and/or the Government of Malaysia. As Abdul Aziz Mohamad FCJ incisively observed, the question did not require the court to decide whether a local authority is liable for pure

[452] ibid.
[453] *Lok Kok Beng & 49 Ors v Loh Chiak Eong & Anor* [2015] 4 MLJ 734 (FC) [64] (Zainun Ali FCJ).
[454] *Lok Kok Beng & 49 Ors v Loh Chiak Eong & Anor* [2015] 4 MLJ 734 (FC) [68] (Zainun Ali FCJ).
[455] [2009] 1 MLJ 737 (FC).

economic loss.[456] It merely required the court to analyse the findings in the *Majlis Perbandaran Ampang Jaya* case to determine whether that case had laid down any such general principle.[457]

At the Court of Appeal level, Low Hop Bing JCA said that it was plain that the majority judgment by the Federal Court in *Majlis Perbandaran Ampang Jaya* exempts a local authority from liability for pure economic loss due to negligence and nuisance.[458] He noted that in that case, the Federal Court was not asked to decide and had therefore not decided whether a local authority is insulated against liability for pure economic loss arising from a breach of statutory duty.[459] Another judge on the panel, James Foong JCA, held that public policy does not exempt a local authority and the Government from liability for pure economic loss arising from breach of statutory duty and he held them thus liable.[460]

At the Federal Court, Zulkefli FCJ's reading of *Majlis Perbandaran Ampang Jaya* actuated him to come to the conclusion that pure economic loss, irrespective of the type of tort which causes it, is irrecoverable as against the local authority by virtue of section 3 of the Civil Law Act 1956.[461] On this point, Zaki Azmi CJ was in total agreement with Zulkefli FCJ.[462]

However, Abdul Aziz Mohamad FCJ was unable to agree with the other two judges on the panel. The judge's reasons for his inference stemmed from first, that if the statements of Abdul Hamid Mohamad FCJ were intended to be a general rule, they should be made in the context of the scope of duty of care as applicable to local

[456] *UDA Holdings Bhd v Koperasi Pasaraya (M) Bhd and other appeals* [2009] 1 MLJ 737 (FC) [55].
[457] ibid.
[458] *UDA Holdings Bhd v Koperasi Pasaraya Malaysia Bhd and other appeals* [2007] 6 MLJ 530 (CA) [107].
[459] *UDA Holdings Bhd v Koperasi Pasaraya Malaysia Bhd and other appeals* [2007] 6 MLJ 530 (CA) [107] (Low Hop Bing JCA).
[460] *UDA Holdings Bhd v Koperasi Pasaraya Malaysia Bhd and other appeals* [2007] 6 MLJ 530 (CA) [7].
[461] *UDA Holdings Bhd v Koperasi Pasaraya (M) Bhd and other appeals* [2009] 1 MLJ 737 (FC) [149].
[462] *UDA Holdings Bhd v Koperasi Pasaraya (M) Bhd and other appeals* [2009] 1 MLJ 737 (FC) [13].

authorities.[463] Abdul Hamid Mohamad FCJ did not make that clear.[464] Abdul Aziz Mohamad FCJ thought that what Abdul Hamid Mohamad FCJ meant was simply that because of the limited financial resources of the local authority, it would not be fair, just or reasonable for it to bear the onerous burden of paying damages for pure economic loss as a result of the kind of default that happened in *Majlis Perbandaran Ampang Jaya*.[465]

Secondly, Abdul Hamid Mohamad FCJ said in *Majlis Perbandaran Ampang Jaya*, 'The discussion in this judgment covers nuisance as well.'[466] Abdul Aziz Mohamad FCJ construed that to mean that if the discussion was on the scope of the duty of care, it could not have covered nuisance as well.[467] Furthermore, Abdul Hamid Mohamad FCJ had emphasised that his judgment was confined to one factual situation only which was the particular local authority's failure to promptly and effectively implement the drainage master plan that it had promised.[468]

Abdul Aziz Mohamad FCJ concluded that Abdul Hamid Mohamad FCJ did not intend that what he said on the local authority's liability to extend to other factual situations.[469] Abdul Aziz Mohamad FCJ said that his conclusion was buttressed by the fact that the leave-question before Abdul Hamid Mohamad FCJ was 'whether pure economic loss is recoverable under our Malaysian jurisprudence with reference to (a) negligence and (b) nuisance' and the latter had answered as follows:[470]

> While economic loss under limited situations may be allowed, Malaysian courts will have to consider the effects of section 3 of the Civil Law Act 1956 and, considering the 'public policy' and the 'local circumstances', whether it is fair, just and reasonable to allow it on the facts and in the circumstances of the

[463] *UDA Holdings Bhd v Koperasi Pasaraya (M) Bhd and other appeals* [2009] 1 MLJ 737 (FC) [77] (Abdul Aziz Mohamad FCJ).
[464] ibid.
[465] *UDA Holdings Bhd v Koperasi Pasaraya (M) Bhd and other appeals* [2009] 1 MLJ 737 (FC) [77].
[466] *Majlis Perbandaran Ampang Jaya v Steven Phoa Cheng Loon & Ors* [2006] 2 MLJ 389 (FC) [84].
[467] *UDA Holdings Bhd v Koperasi Pasaraya (M) Bhd and other appeals* [2009] 1 MLJ 737 (FC) [77].
[468] *UDA Holdings Bhd v Koperasi Pasaraya (M) Bhd and other appeals* [2009] 1 MLJ 737 (FC) [78] (Abdul Aziz Mohamad FCJ).
[469] *UDA Holdings Bhd v Koperasi Pasaraya (M) Bhd and other appeals* [2009] 1 MLJ 737 (FC) [79].
[470] *UDA Holdings Bhd v Koperasi Pasaraya (M) Bhd and other appeals* [2009] 1 MLJ 737 (FC) [80].

case.[471]

3.5 Conclusion

Where the loss is suffered by the owner who is not the employer in a building contract, the authorities indicate that the courts are inclined to prevent injustice by preventing the loss caused by the contract-breaker from disappearing into the proverbial black hole through the use of creative strategies to accommodate a claim for substantial damages. This is particularly so for property developments where it is envisaged that employers will transfer the completed works to purchasers.[472]

The Supreme Court in *Swynson Ltd v Lowick Rose LLP*[473] summoned the term 'transferred loss' to describe this type of loss. The principle of transferred loss, whether in the narrow or broader form, is an exception - and not an alternative - to a fundamental principle of the law of obligations.[474] It would appear that both the narrow and the broader grounds would only be acceptable to the courts in circumstances where it is necessary to provide 'a remedy where no other would be available to a person sustaining loss which under a rational legal system ought to be compensated by the person who has caused it',[475] thus preventing the claim from disappearing into a legal black hole. All the modern case law on this stresses that it is driven by legal necessity.[476]

Under the broader ground, a plaintiff may recover for itself substantial damages in respect of loss suffered by a third party as a consequence of the breach of contract by the defendant by reason that the loss represents damage to the plaintiff's interest in

[471] *Majlis Perbandaran Ampang Jaya v Steven Phoa Cheng Loon & Ors* [2006] 2 MLJ 389 (FC) [86] (Abdul Hamid Mohamad FCJ).
[472] See *Offer-Hoar v Larkshore Ltd* [2006] EWCA Civ 1079, [2007] 1 All ER (Comm) 104 [86] (Rix LJ).
[473] [2017] UKSC 32, [2017] 3 All ER 785 (SC) [14] (Lord Sumption) [52] (Lord Mance).
[474] *Swynson Ltd v Lowick Rose LLP* [2017] UKSC 32, [2017] 3 All ER 785 (SC) [16] (Lord Sumption).
[475] *St Martins Property Corpn Ltd v Sir Robert McAlpine Ltd* [1994] 1 AC 85 (HL) (Lord Browne-Wilkinson).
[476] *Swynson Ltd v Lowick Rose LLP* [2017] UKSC 32, [2017] 3 All ER 785 (SC) [16] (Lord Sumption).

having the contract performed according to its terms. The unrestricted support of the broader ground by Lord Goff and Lord Millett, and the statement by Lord Browne-Wilkinson that this ground is sound in law in *McAlpine* would mean that the broader ground represents good law in England.

In *DRC Distributions Ltd v Ulva Ltd*,[477] Flaux J was of the view that the broader ground does not apply to contracts for sale of goods. The reasoning was that in *McAlpine*, the minority judges 'limited its scope to contracts for the supply of services, such as the building contract under consideration in that case' whereas building contracts are for the supply of both goods and services.[478] However, those statements by Lord Goff and Lord Millett are at best ambiguous. It cannot be concluded that *McAlpine* lays down the rule that the broader ground has no application to contracts for sale of goods. Such a demarcation cannot be supported by logic or principle.

It is clear law now that where the parties contemplate that proprietary interests may be transferred from one party to another after the contract has been formed, the party entering into the contract is to be regarded as entering into the contract on behalf of itself and the other party and is entitled to recover substantial damages for the loss actually sustained by the other party. This has been extended to the situation where the contracting party did not even possess the proprietary interest at the time of contract.

What can be distilled from the authorities is that the court will consider the terms of the contract and the surrounding circumstances to determine whether the exceptions can apply. The exceptions could not apply where it was contemplated that C would become a party to a separate contract with B. If the parties have intended that the

[477] [2007] EWHC 1716 (QB) [70].
[478] *DRC Distributions Ltd v Ulva Ltd* [2007] EWHC 1716 (QB) [70] (Flaux J), referring to *Alfred McAlpine Construction Ltd v Panatown Ltd* [2001] 1 AC 518 (HL) 552 (Lord Goff), 591 (Lord Millett).

exceptions would not apply or could not be regarded as having contracted for the benefit of the third party, this would exclude the operation of the exceptions.

Where claims under negligence are concerned, the road to a simple formulaic solution is strewn with considerable difficulties as was recognised by Lord Roskill in *Caparo Industries*[479] where he said that 'there is no simple formula or touchstone' capable of providing 'in every case a ready answer to the question, given certain facts, the law will or will not impose liability for negligence or in cases where such liability can be shown to exist, determine the extent of that liability'.

That notwithstanding, a basic road map to finding negligence is necessary and the one suggested by Bingham LJ in *Caparo Industries* is widely adopted. In summarising the authorities, the judge listed three criteria to establish liability, namely (a) foreseeability of harm, (b) proximity and (c) that as a matter of policy it is just and reasonable to impose a duty of care.

This threefold test in terms as laid down in *Caparo Industries* has been endorsed recently by the Federal Court in *Lok Kok Beng & 49 Ors v Loh Chiak Eong & Anor*[480] and is therefore the applicable test for claims for negligence in Malaysia.

Where claims for pure economic loss are concerned, the principles laid down in *Donoghue v Stevenson* for damages in tort are restricted to cases where there is physical damage to person or to property other than the property which gives rise to the damage. To extend coverage to damage to the property itself which is for pure economic loss would certainly involve a lot of judicial reluctance. The House of Lords had allowed

[479] *Caparo Industries plc v Dickman* [1990] 2 AC 605 (HL) 628.
[480] [2015] 4 MLJ 734 (FC).

pure economic loss in *Anns* but this was subsequently overruled by a subsequent panel in *Murphy*.

On the principles established by *Donoghue v Stevenson*, if a manufacturer sells a chattel having a latent defect which makes it dangerous to persons or property, the manufacturer will be liable in the tort of negligence for injury to persons or damage to property which the chattel causes. If the dangerous defect is detected before it causes any personal injury or damage to property, the defect becomes merely a defect in quality as the danger is now known and the chattel cannot be used safely unless the defect is repaired.

The loss suffered by the owner or hirer of the chattel is purely economic. Such loss may be recoverable from a party who owes the loser a relevant contractual duty. It is recoverable in tort only if there is a special relationship of proximity giving rise to a duty of care. No such special relationship exists between the manufacturer of a chattel and a remote owner or hirer which imposes on the manufacturer a duty of care to protect him from pure economic loss.

The main obstacle to recognising pure economic loss in construction law is the fear of spinning the law of negligence into a state of uncertainty and confusion. The concept does not fit snugly into the tapestry of the existing law. If the doctrine applies against the builder to make him liable to property owners, it must also apply against the local authority and vice versa. It will impose on the builder and local authority the obligations of an indefinitely transmissible warranty of quality.

This will ripple through to other terrains, notably to chattels. If the same principle is applied to chattels, then the owner of a chattel which becomes defective can recover damages from the negligent manufacturer. The counter argument to that is that if it is possible to recover economic loss when the injury is suffered, then why should this not be allowed to prevent the injury from happening in the first place?

Difficulty lies in aligning this doctrine with the established rules of negligence. The 'complex structure theory' postulated to justify claims for the defective structure itself so as to accord well with the *Donogue v Stevenson* principles is obviously unconvincing. The classification of the nature of the damage as 'material, physical damage' is also not very helpful.

As to the contention that the reception of such a doctrine would create an indeterminate class of potential plaintiffs, an answer to that is that only the owner or occupier when the damage occurs at the material time has a cause of action. Despite the English courts' vexing over the conceptual issues involved, England remains the only major Commonwealth jurisdiction not to embrace claims for pure economic loss. Australia, Canada, New Zealand and Singapore are all on board the pure economic loss bandwagon.

There was no authoritative statement by the apex Malaysian court on the recoverability of pure economic loss prior to *Majlis Perbandaran Ampang Jaya*. There was no consistent approach by the lower courts. *Majlis Perbandaran Ampang Jaya* put it beyond doubt that pure economic loss is recoverable for negligence in Malaysia. Steve Shim CJSS seemed to take a more relaxed approach to the recoverability of pure economic loss. Abdul Hamid Mohamad FCJ, though, seemed to contend for a more

restrictive approach and listed factors like public policy, local circumstances and whether it is fair, just and reasonable to allow it in the circumstances of the case.

The Federal Court in *Lok Kok Beng* in holding that the viability of claims for pure economic loss under negligence depends on the facts and circumstances of each case has thus confirmed that such claims are possible but the court stressed that this would only be under very restrictive conditions. The tenor of this judgment is that claims for pure economic loss will not even be able to pass the *Caparo* proximity test. It appears that such claims will only be allowed if there is *Hedley Byrne* kind of reliance.

The Street, Drainage and Building Act 1974 in section 95(2) affords broad immunity to the local authority from claims arising from building works. Even without this statutory protection, the local authority seems to be beyond the reach of claims for pure economic loss as a matter of public policy given the robust statements on this in *Majlis Perbandaran Ampang Jaya*. The majority judgment in *UDA Holdings Bhd v Koperasi Pasaraya (M) Bhd and other appeals*[481] goes to the extent of cocooning the local authority from any claims for pure economic loss for all causes of action in tort.

The above survey of the law has been done to fulfil Research Objectives No. 1 and 2 in regard to the selected issues in construction defect claims that fall under the broad category of causes of action.

[481] [2009] 1 MLJ 737 (FC).

CHAPTER 4: REMEDIES

4.1 Introduction

The preceding chapter has dealt with causes of action in construction defect claims. This chapter is conceptualized to move on to the next category of the trilogy of broad areas which is the remedies available in such claims. The purpose of this chapter is to cast a net out and trawl through the primary and secondary sources of information to seek out the law in Malaysia and other relevant common law jurisdictions to meet Research Objectives No. 1 and 2.

Remedies for construction defect claims pose a minefield of problems. The issues dealt with in this chapter are (a) damages for financial loss; (b) the employer's rights of set-off; (c) effect of settlement by the main contractor with the employer; (d) damages for non-financial loss and (e) specific performance.

4.2 Damages for Financial Loss

Construction defects arise as a result of the contractor's failure to achieve the precise contractual objective. Usually the building is functional and capable of being used for its purpose. Nevertheless the employer has not got what he contracted for and the loss is normally reflected in financial terms.

Where the contractor is liable for defective work, there are two dominant types of measure of damages that may be available to the employer: the cost of reinstatement and the diminution in value. The cost of reinstatement is the ordinary measure of

damages for defective work by the contractor as illustrated by the case of *Lim Chon Jet & Ors v Yusen Jaya Sdn Bhd*.[1] As Oliver J said in *Radford v De Froberville*:[2]

> If [the plaintiff] contracts for the supply of that which he thinks serves his interests – be they commercial, aesthetic or merely eccentric – then if that which he contracts for is not supplied by the other contracting party I do not see why, in principle, he should not be compensated by being provided with the cost of supplying it through someone else or in a different way, subject to the proviso, of course, that he is seeking compensation for a genuine loss and not merely using a technical breach to secure an uncovenanted profit.[3]

4.2.1 Test of Reasonableness

In *Ruxley Electronics and Construction Ltd v Forsyth*,[4] the defendant had contracted to build a swimming pool for the plaintiff. The contract stipulated that the deep end of the pool should be 7 feet 6 inches deep but as constructed, it was only 6 feet deep. The plaintiff claimed damages in the sum required to reconstruct the pool to the specified depth. The House of Lords rejected the plaintiff's claim for reinstatement costs on the ground that such costs were out of all proportion to the benefit to be obtained. The pool was held to be perfectly safe to dive in. The court also found that there was no diminution in value so a claim on this ground also failed.

In articulating the principles to be applied in granting damages for construction defects, the House of Lords in *Ruxley Electronics* invoked not only English authority, notably the speech of Lord Cohen in *East Ham Corpn v Bernard Sunley & Sons Ltd*,[5] but also authoritative statements of principle from the High Court of Australia (*Bellgrove v Eldridge*)[6] and the United States (*Jacob's & Youngs Inc v Kent*).[7] Lord Lloyd gave guidance as to the circumstances in which cost of reinstatement is the appropriate measure of damages:

---

[1] [2011] 8 CLJ 598 (HC).
[2] [1978] 1 All ER 33 (Ch D).
[3] *Radford v De Froberville* [1978] 1 All ER 33 (Ch D) 42 (Oliver J).
[4] [1996] AC 344 (HL).
[5] [1966] AC 406 (HL).
[6] [1954] HCA 36, 90 CLR 613 (High Court, Australia).
[7] (1921) 129 NE 889.

> Where the cost of reinstatement is less than the difference in value, the measure of damages will invariably be the cost of reinstatement. By claiming the difference in value the plaintiff would be failing to take reasonable steps to mitigate his loss. In many ordinary cases, too, where reinstatement presents no special problem, the cost of reinstatement will be the obvious measure of damages, even where there is little or no difference in value, or where the difference in value is hard to assess. This is why it is often said that the cost of reinstatement is the ordinary measure of damages for defective performance under a building contract.

Lord Lloyd further added that if it is unreasonable for the plaintiff to insist on reinstatement, for example where the expense of the work involved would be out of all proportion to the benefit to be obtained, then the plaintiff will be confined to the loss in value. The cost of remedy is central, and often decisive, to the issue of reasonableness in this context.

In the same case, Lord Mustill observed that the test of reasonableness plays a central role in determining the basis of recovery. Lord Mustill added that this will be decisive in a case where the cost of reinstatement is wholly disproportionate to the non-monetary loss suffered by the employer but he qualified this by saying that 'it would be equally unreasonable to deny all recovery for such a loss'.

Another judge who delivered his decision in the same case, Lord Jauncey, was of the opinion that if it is unreasonable in a particular case to award the cost of reinstatement it must be that the loss sustained does not extend to the need to reinstate.

Lord Lloyd adopted the principles laid down by Cardozo J in *Jacob's & Youngs Inc v Kent*[8] that first, the cost of reinstatement is not the appropriate measure of damages if the expenditure would be out of all proportion to the benefit to be obtained

[8] (1921) 129 NE 889.

and, secondly, the appropriate measure of damages in such a case is the difference in value, even though this may result in a nominal award.

Where repairing the defects is a reasonable course to take, then the cost of reinstatement will be the preferred award even where this is substantially greater than the diminution in value.[9] Whether it is reasonable or not to award the cost of remedial work, the context of the particular contract must be considered.[10]

It was argued for the plaintiff in *Ruxley Electronics* that because there was no diminution in value, the cost of reinstatement was the proper measure. Lord Bridge's response to this was that to hold that the measure of the building owner's loss is the cost of reinstatement, however unreasonable it would be to incur that cost, seems to fly in the face of common sense. He said where there is no difference in commercial value between the work as built and the work as contracted for but the owner has lost something in terms of amenity, convenience or aesthetic satisfaction and the defect could only be corrected by demolition and rebuilding, then the cost of such a remedy would be so greatly out of proportion to any benefit to be gained by the owner that no reasonable owner would think of incurring such cost.

The critical importance of reasonableness was emphasised in *Southampton Container Terminals Ltd v Schiffahrisgesellsch "Hansa Australia" Mgh & Co, The Maersk Colombo*[11] where Clarke LJ said, 'As I read the authorities, where reinstatement is the appropriate basis for the assessment of damages, it must be both reasonable to reinstate and the amount awarded must be objectively fair as between the claimants and the defendants.'

[9] *Ruxley Electronics and Construction Ltd v Forsyth* [1996] AC 344 (HL). See also *Bellgrove v Eldridge* [1954] HCA 36, 90 CLR 613 (High Court, Australia); *East Ham Corpn v Bernard Sunley & Sons Ltd* [1966] AC 406 (HL).
[10] *Ruxley Electronics and Construction Ltd v Forsyth* [1996] AC 344 (HL) (Lord Jauncey).
[11] [2001] EWCA Civ 717, [2001] 2 Lloyd's Rep 275.

The court in *Vercoe v Rutland Fund Management Ltd*[12] was of the view that in controlling the amount of damages to be awarded for breach of contract as in *Ruxley Electronics*, reference should be made to the strength of the plaintiff's interest in performance of a contractual duty, judged objectively and weighing that against the legitimate interests of the defendant so that the remedy awarded is not oppressive to the defendant and is properly proportionate to the wrong done to the plaintiff.

4.2.2 Time at which Damages for the Remedial Work should be Assessed

If the dispute drags on and the costs of remedial work have changed materially during this period, the issue of the time at which damages for such work ought to be assessed may arise. That should usually be the time when the defects were discovered.[13]

4.2.3 Test of Foreseeability

The court in *Hospitals for Sick Children Board of Governors v McLaughlin & Harvey plc*[14] thought that foreseeability is a consideration in valuing the amount of reinstatement cost. It said the plaintiff 'can only recover as damages the cost which the defendant ought reasonably to have foreseen that he would incur and the defendant would not have foreseen unreasonable expenditure'.

In *McGlinn v Waltham Contractors Ltd*,[15] the court held that foreseeability is plainly of importance in assessing the correct measure of damages. The court added that if the plaintiff's only interest in the property is limited, or if he could buy a satisfactory replacement for the property in the market, then it would not have been

[12] [2010] EWHC 424 (Ch), [2010] Bus LR D141.
[13] *East Ham Corpn v Bernard Sunley & Sons Ltd* [1966] AC 406 (HL).
[14] (1987) 19 ConLR 25 (QBD).
[15] [2007] EWHC 149 (TCC), [2008] Bus LR 233.

foreseeable that he would carry out repair/reinstatement, and his loss should be the diminution in value of the property or the cost of purchasing a replacement.

4.2.4 Intention to Sell the Defective Property

Where the owner of a building sells the property with defects due to the contractor's fault for which the cost of reinstatement is the appropriate measure, but such sale does not result in loss due to the defects, then the loss that the law supposes is avoided and no damages are recoverable. It is not in law right or reasonable to compensate the owner for such a loss. An illustration of this principle is afforded by the case of *Birse Construction Ltd v Eastern Telegraph Co Ltd*[16] where the defendant construction company failed to properly construct a residential training college. The claimants intended to sell the college without remedying the defects. The court rejected the claimants' claim for recovery of the cost of rectifying the defects.

If the sale of the property without rectification of the defects results in a loss to the owner, then that loss may be recoverable as the proper measure of loss. Such diminution in value was awarded in *Rawlings v Rentokil Laboratories*.[17] This was a case where the plaintiff had engaged the defendants to damp-proof the walls of his house. The defendants failed to do their job properly. As a result, the plaintiff was only able to sell the house at a reduced price. The court held the defendants liable to the plaintiff for the difference.

4.2.5 Demolition and Rebuilding

There may be situations where it is justifiable for the employer to recover the cost of demolishing the property and building afresh as damages on the basis of the cost

[16] [2004] EWHC 2512 (TCC), [2004] 47 EG 164 (CS).
[17] (1972) 223 EG 1947 (QBD).

of reinstatement. In *Ruxley Electronics*, Lord Jauncey said, 'Where the contract breaker has entirely failed to achieve the contractual objective it may not be difficult to conclude that the loss is the necessary cost of achieving that objective.' He added that if a building is constructed so defectively that it fails completely to meet its designed purpose, the owner may have little difficulty in recovering the necessary cost of reconstructing as his loss.

In *Harrison v Shepherd Homes Ltd*,[18] the claimants had bought houses which had defective piles. The court had to decide on the question whether it was reasonable for the claimants to be awarded damages representing the full cost of repiling the properties and the necessary costs associated with vacating the houses when being partly demolished and rebuilt. The court held that the claim for reinstatement cost was not reasonable in the circumstances.

Among the reasons given by the court in reaching this decision were first, the engineering experts agreed that from a structural engineering point of view the cracking and movement would not warrant those works. The cracks were so fine that they were difficult to see and those that were larger were below the threshold that engineers would normally be concerned about. Secondly, there were only remote to low probabilities of significant movements of the foundations in the future. Thirdly, the claimants would likely sell their existing houses and use the money to move elsewhere. Fourthly, the costs of repiling and associated costs would be out of all proportion to the loss suffered. Fifthly, the houses had already been built for some eight years. Investigations had been made and there was less uncertainty as to the future performance of the houses. Upon these reasons, the court held that it was unreasonable to award the cost of major

[18] [2011] EWHC 1811 (TCC).

remedial works and that the proper compensation was an award based on diminution in value.

In *McGlinn v Waltham Contractors Ltd*,[19] the defendants had built a house for the claimant. The claimant, being dissatisfied with the works, completely demolished the house. The claimant sought to recover the costs of demolition and of building anew. The defects affected the whole house: the floors, the walls and the roof. However, those defects were mainly aesthetic in nature. The house was not structurally unsound or dangerous. The court said it was an extreme course to knock down a newly completed building in such circumstances. The court concluded that the right measure of loss was the cost of repair work for the defects and that it would be unreasonable to assess the damages by reference to any other methodology.

However, in *Bellgrove v Eldridge*,[20] the High Court of Australia did allow the plaintiff's claim for the cost of demolishing and rebuilding a house. The builder had put grossly under-strength concrete and mortar in the foundations of the house and in its brickwork. The builder argued that the foundations could be underpinned, or alternatively replaced in small sections. The builder also contended that the house had a marketable value for speculative builders prepared to do reinstatement of this kind and therefore diminution in value would be the appropriate compensation. On the facts, these arguments were not acceptable to the court.

4.2.6 Intention to Reinstate

Concerning the question of whether the intention to reinstate is relevant in considering whether cost of reinstatement should be awarded, Lord Jauncey emphasised

[19] [2007] EWHC 149 (TCC), [2008] Bus LR 233.
[20] [1954] HCA 36, 90 CLR 613 (High Court, Australia).

in *Ruxley Electronics* that normally the court is not concerned with how a plaintiff uses an award of damages for a loss which has been established. However, he added, 'Intention, or lack of it, to reinstate can have relevance only to reasonableness and hence to the extent of the loss which has been sustained.'

Lord Lloyd in the same case said, 'But it does not follow that intention is not relevant to reasonableness, at least in those cases where the plaintiff does not intend to reinstate', after prefacing this by saying that he totally accepted the principle that normally, the courts are not concerned with what a plaintiff will do with the damages recovered.

He added, 'Where a plaintiff is contending for a high as opposed to a low cost measure of damages the court must decide whether in the circumstances of the particular case such high cost measure is reasonable.' He took the view that a factor that may be relevant is the genuineness of the plaintiff's intention to take the avenue which involves the higher cost. He noted, 'Absence of such desire (indicated by untruths about intention) may undermine the reasonableness of the higher cost measure.' Accordingly, the intention to reinstate is relevant because it may be some evidence of whether the cost of carrying out remedial works is disproportionate to the benefit to be obtained and also whether it is reasonable to reinstate.

In *Ruxley Electronics*, the plaintiff gave an undertaking that he would spend any damages which he might receive on rebuilding the swimming pool in support of his claim for reinstatement cost. The question was whether this would make any difference. Lord Lloyd answered emphatically, 'Clearly not.' The reason given was that it would not be right for the plaintiff to create a loss which was non-existent so as to

punish the defendants for committing the breach of contract. In support, he cited the principle that the 'basic rule of damages, to which exemplary damages are the only exception, is that they are compensatory not punitive'.

Where there is no diminution in value and no intention to remedy, it is unlikely that the court will award remedial cost. As Sir Robert Megarry VC said in *Tito v Waddell (No 2)*[21] in reference to a plaintiff under such circumstances, 'I cannot see why he should recover the cost of doing work which will never be done. It would be a mere pretence to say that this cost was a loss and so should be recoverable as damages.'

4.2.7 The Existence of Different Remedial Schemes

If there are two or more equally effective remedial schemes available, the plaintiff should opt for the cheapest. If he chooses otherwise, then he cannot recover more than the cost of the cheapest scheme. Such a proposition was made in *Hospitals for Sick Children Board of Governors v McLaughlin & Harvey plc*,[22] where the court said that this is in accordance with the principle that the plaintiff has a duty to mitigate his loss, whether this is a part of the requirement that he acts reasonably or otherwise.

Another aspect of this duty to mitigate loss which the court addressed was that if the plaintiff is suffering loss due to the property not being capable of use, this duty 'may require him to repair it as quickly as possible, even if earlier repairs would cost more than later repairs would'. On a further aspect of the duty to mitigate loss, the court said, 'The duty to mitigate may require the plaintiff to have regard to advice from third parties, or even from the defendant, or from the defendant's advisers.'

[21] [1977] Ch 106 (Ch D).
[22] (1987) 19 ConLR 25 (QBD).

In the case of *George Fischer Holding Ltd v Multi Design Consultants Ltd*,[23] the remedial work had not been undertaken at the time of the trial. There were two proposed remedial schemes, one of which was significantly cheaper than the one favoured by the claimant. Each of the schemes was criticised by the proponents of the other. Both the schemes had not been designed with full details and thus, it was speculative as to which was the better one. Consideration had to be given to the competency of the designer, with the help of the specialist knowledge of the particular manufacturer and a contractor well-versed in using the system, to develop a proper detailed solution to all the probable problems that might be encountered. Additionally, the guarantees and bonds offered by the manufacturer and contractor had to be evaluated.

In holding that the proper measure of loss was by reference to the less expensive scheme, the court said that that scheme would be so much the cheaper and there was nothing to suggest that it would do more harm to the appearance of the buildings, which the court thought should be the reverse. The court held that the cheaper alternative must clearly be preferred unless the criticisms of its expected effectiveness, taking all the relevant considerations into account, could be proved on a balance of probabilities. The court held that such proof had not been given.

A different approach may apply if a plaintiff has taken professional advice and implemented a repair scheme based on that advice. The court in *Hospitals for Sick Children* held that in certain cases it would be foreseeable that a plaintiff would decide which remedial scheme to adopt with the help of expert advice, and that it would be foreseeable that the plaintiff would be influenced by and comply with such advice. In such cases, prima facie, the plaintiff is entitled to the cost of the work carried out in

[23] (1998) 61 ConLR 85 (QBD).

accordance with that expert advice, even if, with hindsight, criticism could be made of the scheme that was carried out. In such a case, for the defendant to defeat the damages claim based on work actually carried out, the defendant must normally show that the advice upon which the plaintiff relied on was negligently given.

The court summarised its conclusions in *Hospitals for Sick Children* by saying that where there have been no remedial works done by the plaintiff as at the time of the trial, then the court has to decide what works should be done so as to assess damages to be awarded to the plaintiff. The court said that the parties are entitled to propose their own schemes for the remedial works and then it would be up to the court to choose between them or their variants. The court added that such evaluation has to be undertaken on the criterion of what the plaintiff can reasonably do. Where the remedial works have already been executed, the court said that 'it is not for the court to consider de novo what should have been done and what costs should have been incurred either as a check upon the reasonableness of the plaintiff's actions or otherwise'.

The importance of the plaintiff's reliance on expert advice was considered in the context of an assessment of damages in *Skandia Property (UK) Ltd v Thames Water Utilities Ltd*.[24] In that case, the claimant was advised by experts that a tanking system was the only practical way to protect a building that had been damaged by a flood caused by the defendant. However, unknown to the experts at the time of such advice, pressure grouting treatment had been performed some time prior to the flood. This meant that the flood had not in fact damaged the integrity of the building. The system that was put in place as part of the remedial scheme was thus unnecessary.

[24] (1999) BLR 338 (CA).

In assessing damages, the court rejected the claimant's claim for the cost of the tanking system, despite the absence of any suggestion of negligent advice by the experts. The Court of Appeal said that if there had been an escape of water which caused some physical damage, then, prima facie, the plaintiff could only recover for the loss occasioned by that physical damage. The court said that for the plaintiff to recover damages over and above the cost of reinstatement of physical damage, he had to show the reasonableness of incurring expenses beyond that quantifiable figure. The court emphasised that it would 'be rare if ever that a plaintiff will be able to establish the reasonableness of any assumption of damage to something which is accessible and inspectable'.

The court further emphasised that the fact that a plaintiff has simply placed reliance on an expert's advice cannot be sufficient as a test to determine whether the plaintiff has acted reasonably in making an assumption. However, the court did add that if the plaintiff has furnished all the material facts to the expert and the expert has conducted all reasonable investigations, then 'the advice will be a highly significant factor'.

Hospitals for Sick Children is therefore doubtful as an authority for the wide proposition that the employer's decision to demolish and rebuild if made with expert advice will conclusively pin the contractor with the costs of such work, and that all other considerations are essentially rendered irrelevant.[25]

4.2.8 Double Recovery

Reinstatement cost and diminution in value are not mutually exclusive heads of damages. There may be situations where even with remedial works, there is still a

[25] *McGlinn v Waltham Contractors Ltd* [2007] EWHC 149 (TCC), [2008] Bus LR 233.

diminution in value. If the remedial work is substantial, it may affect the investment value of the property. It may also affect the property aesthetically, resulting in a depreciation of its value. In such circumstances, it may be proper to award both repair cost and diminution in value. This is not a matter of double recovery but of adequately compensating the plaintiff for his loss.

4.2.9 Claim for Savings Made by the Contractor

The contractor may have been enriched by the defective work in the sense that he may have expended less cost. For instance, he could have used cheaper materials than specified in the contract but which have not diminished the value of the property. The question is whether the employer can recover damages based on such a cost-saved basis.

4.2.9.1 Claims under Contract

In the House of Lords decision in *East Ham Corpn v Bernard Sunley & Sons Ltd*,[26] Lord Cohen adopted a passage in *Hudson's Building and Engineering Contracts*,[27] where the editors state that there are three possible bases of assessing damages, namely, (a) the cost of reinstatement; (b) the difference in cost to the builder of the actual work done and work specified; or (c) the diminution in value of the work due to the breach of contract.[28]

Assessment of damages by the cost difference to the contractor of the actual work done and the work specified conceivably only applies where the loss by the employer is financial in nature. As was said by Dillon LJ in *Surrey CC v Bredero*

[26] [1966] AC 406 (HL).
[27] EJ Rimmer and IN Duncan Wallace, *Hudson's Building and Engineering Contracts* (8th edn, Sweet & Maxwell 1959) 319.
[28] *East Ham Corpn v Bernard Sunley & Sons Ltd* [1966] AC 406 (HL) 434. These three bases are repeated in the 12th edition (2010) together with a fourth base which is loss of amenity.

Homes Ltd,[29] damages for breach of contract 'may, in an appropriate case, cover profit which the injured plaintiff has lost, but they do not cover an award to a plaintiff who has himself suffered no loss, of the profit which the defendant has gained for himself by his breach of contract'. *Hudson*[30] says that where there is no claim for restitutionary damages, the court does not, save in limited and exceptional circumstances, adopt as the appropriate measure, the profit which the defendant has gained as a result of his breach, whether deliberate or otherwise.[31]

4.2.9.2 Claims for Restitution

Hudson suggests that if a plaintiff wishes to force a cynical contract-breaker, who has caused the plaintiff no loss, to disgorge the fruits of his wrongdoing, then any remedy lies in restitution rather than breach of contract.[32] The function of damages is to fulfil the plaintiff's expectations by placing him in the position he would have been in had the contract not been breached whereas restitution is intended to return the plaintiff to the position he was in before the contract was breached.[33] In determining whether consideration has failed, the test 'is not whether the promisee has received a specific benefit, but rather whether the promisor has performed any part of the contractual duties in respect of which the payment is due'.[34] This test was adopted by the Federal Court in *Berjaya Times Squares Sdn Bhd v M Concept Sdn Bhd*.[35]

[29] [1993] 1 WLR 1361 (CA).
[30] Nicholas Dennys and Mark Raeside and Robert Clay (general eds), *Hudson's Building and Engineering Contracts* (12th edn, Sweet & Maxwell 2010).
[31] Nicholas Dennys and Mark Raeside and Robert Clay (general eds), *Hudson's Building and Engineering Contracts* (12th edn, Sweet & Maxwell 2010) para 7-010.
[32] ibid.
[33] *Baltic Shipping Co v Dillon* [1993] HCA 4, 176 CLR 344 (High Court, Australia).
[34] *Stocznia Gdanska SA v Latvian Shipping Co* [1998] 1 WLR 574 (HL) 588 (Lord Goff).
[35] [2010] 1 MLJ 597 (FC) [18] (Gopal Sri Ram FCJ).

The question looms large in English law as to whether restitution may be ordered even where there has only been partial performance of a contract.[36] However, in Malaysia the relevant law is trite. This follows *Berjaya Times Square* where it was held that the quasi-contractual remedy of restitution is applicable in cases where there has been a total failure of consideration.[37] The innocent party then has the remedy of suing to recover monies paid under the contract to the guilty party.[38] If the consideration has only partially failed, he may only claim damages.[39] Inherent in the context of construction defects is that consideration cannot have wholly failed. Therefore, any attempt to engage restitution to deprive the defaulting contractor of his ill-gotten gains would crash into a wall.

4.3 Employer's Rights of Set-Off for Defects

Faced with a claim by the contractor for payment, the employer will be most desirous of setting off such a claim by a cross-claim of his own against the contractor for any defective works. If the employer pays the contractor first before making his own claim against the contractor, there will be a time lapse during which he loses the use of the relevant amount of money. More importantly, the employer takes the risk of not being able to enforce any subsequent judgment made in his favour against the contractor. Actual recovery of compensation for the loss may be in jeopardy if the contractor subsequently becomes insolvent.

[36] See, for example, *Ebrahim Dawood Ltd v Heath (Est 1927) Ltd* [1961] 2 Lloyd's Rep 512 (QBD); *Goss v Chilcott* [1996] AC 788 (PC); *Ferguson v Sohl* (1992) 62 BLR 95 (CA); *White Arrow Express Ltd v Lamey's Distribution Ltd* [1995] NLJR 1504 (CA); *Ministry of Sound (Ireland) Ltd v World Online Ltd* [2003] EWHC 2178 (Ch), [2003] 2 All ER (Comm) 823.
[37] *Berjaya Times Squares Sdn Bhd v M Concept Sdn Bhd* [2010] 1 MLJ 597 (FC) [17] (Gopal Sri Ram FCJ).
[38] *Berjaya Times Squares Sdn Bhd v M Concept Sdn Bhd* [2010] 1 MLJ 597 (FC) [20] (Gopal Sri Ram FCJ).
[39] ibid.

4.3.1 Nature of a Set-off

In English law, the term 'set-off' has no definite meaning and is therefore confusing. It may refer to a process where two sums are netted off against each other leaving only a single liability for the balance. The term may also refer to rights which prevent a person from enforcing a claim where there is a cross-claim against him while both liabilities are kept intact.

Set-off is a general principle founded in simple convenience and fairness.[40] The exercise of a right of deduction or set-off is in essence a provisional act. It does not decide anything finally. It does not prevent either party from subsequently proving his claim or cross-claim. It has no effect on the final outcome of the dispute.

4.3.2 Types of Set-offs

In *Aectra Refining and Manufacturing Inc v Exmar NV,*[41] Hoffmann LJ adopted the classification of set-offs suggested by Philip Wood, in his book *English and International Set-Off,*[42] into two categories: 'independent set-off' and 'transaction set-off'. Independent set-off does not require any relationship between the transactions out of which the two cross-claims arise. In English law this is based on section 13 of the Insolvent Debtors Relief Act 1729 (2 Geo II c 22) as amended by the Debtors Relief (Amendment) Act 1735 (8 Geo II c 24). The requirements are that the cross-claims must be due and payable and either liquidated or capable of being quantified by referring to ascertainable facts which do not in their nature need estimation or valuation.

Hoffmann LJ defined transaction set-off as 'a cross-claim arising out of the same transaction or one so closely related that it operates in law or in equity as a complete or

[40] *Melham Ltd v Burton (Collector of Taxes)* [2006] UKHL 6, [2006] 1 WLR 2820 [22] (Lord Walker).
[41] [1994] 1 WLR 1634 (CA).
[42] Philip Wood, *English and International Set-Off* (Sweet & Maxwell 1989).

partial defeasance of the plaintiff's claim'.[43] Transaction set-off covers two categories: (a) a common law abatement of the price of goods or services for breach of warranty; and (b) equitable set-off.[44]

4.3.3 Counterclaim

A counterclaim is for all intents and purposes an action by the defendant against the plaintiff. It is not restricted to debts or liquidated damages. It is not necessary that the claim should be analogous to that of the plaintiff's. A claim based on contract may be opposed to one founded on tort, or vice-versa.[45] A cross-claim which is accepted as a defence of set-off has the effect of extinguishing either the whole or part of the plaintiff's claim.[46]

In *Permodalan Plantations Sdn Bhd v Rachuta Sdn Bhd,*[47] Salleh Abbas LP described a counterclaim as follows:

> A counterclaim on the other hand is also a cross-claim which a defendant has against a plaintiff but in respect of which the defendant can bring a separate action against the plaintiff if he wishes to do so. Thus, to all intents and purposes a counterclaim is a separate and independent action by the defendant, which the law allows to be joined to the plaintiff's action in order to avoid multiplicity or circuity of suits.[48]

Salleh Abbas LP said that a counterclaim, like a set-off, is a statutory creation. He said that under the common law 'the court has no power to allow an action by a plaintiff to be met by a cross-claim of the defendant against the plaintiff' and the defendant is forced to commence a separate action to pursue his claim. A defendant was able to add his counterclaim to the plaintiff's suit only with the enactment of the Supreme Court of

[43] *Aectra Refining and Manufacturing Inc v Exmar NV* [1994] 1 WLR 1634 (CA).
[44] ibid.
[45] *Stooke v Taylor* (1880) 5 QBD 569 (QBD) 576 (Cockburn CJ).
[46] See *Re Bankruptcy Notice* [1934] Ch 431 (CA) 437.
[47] [1985] 1 MLJ 157 (FC).
[48] *Permodalan Plantations Sdn Bhd v Rachuta Sdn Bhd* [1985] 1 MLJ 157 (FC) (Salleh Abbas LP).

Judicature Act, 1873, section 24(3). The contrast between a set-off and a counterclaim is found in Order 18 rule 17[49] and Order 15 rule 2 of the Rules of Court 2012.[50]

4.3.4 Independent or Legal Set-off

The concept of independent or legal set-off which applies in England appears to be irrelevant in the Malaysian context.

4.3.4.1 The English Position

Legal set-off is a statutory creation. In England, it traces its origin to the Insolvent Debtors Relief Acts 1729 and 1735 which provided that where there were mutual debts between the plaintiff and the defendant, one debt may be set off against the other. Such rights have been continued in subsequent statutes and are now contained in section 49(2) of the Senior Courts Act 1981 and rule 16.6 of the Civil Procedure Rules.[51]

Legal set-off has no effect on the substantive rights of the parties against each other, at least not until both causes of action have merged into a judgment.[52] It is procedural in that it enables a defendant to have his cross-claim tried together with the plaintiff's claim instead of having it to be the subject of a separate action. It therefore ensures that judgment will be given simultaneously on claim and cross-claim, thus relieving the defendant from having to find the money to satisfy a judgment in the

[49] Order 18, rule 17 (Defence of set-off)
Where a claim by a defendant to a sum of money (whether of an ascertained amount or not) is relied on as a defence to the whole or part of a claim made by the plaintiff, it may be included in the defence and set-off against the plaintiff's claim, whether or not it is also added as a counterclaim.

[50] Order 15, rule 2 (Counterclaim against plaintiff)
2.(1) Subject to rule 5(2), a defendant in any action who alleges that he has any claim or is entitled to any relief or remedy against a plaintiff in the action in respect of any matter (whenever and however arising) may, instead of bringing a separate action, make a counterclaim in respect of that matter; and where he does so he shall add the counterclaim to his defence.

(2) Rule 1 shall apply in relation to a counterclaim as if the counterclaim were a separate action and as if the person making the counterclaim were the plaintiff and the person against whom it is made a defendant.

[51] See *Re Kaupthing Singer and Friedlander Ltd* [2009] EWHC 2308 (Ch), [2010] Bus LR 428.
[52] *Stein v Blake* [1996] AC 243 (HL) 251 (Lord Hoffman).

plaintiff's favour before his cross-claim has been determined. A set-off can only be asserted in legal proceedings as a defence. It does not arise in any other context.

The cross-claim may be based upon an entirely different subject matter. A right of legal set-off must involve sums which are due and which are either liquidated or capable of ascertainment without valuation or estimation at the time of pleading.[53] Therefore legal set-off is unavailable against a claim for unliquidated or uncertain damages.

4.3.4.2 The Malaysian Position

Section 25(2) of the Courts of Judicature Act 1964 provides some additional powers to the High Court as listed in the Schedule. Item 13 of the Schedule allows a defence of set-off. However, the proviso to the section requires this power to be exercised in accordance with any written law or rules of court.[54]

In *Damodaran v Vesudevan*,[55] the Federal Court held that the court has jurisdiction over any matter specified in the Schedule, whether or not there is any written law or rules of court relating to that matter. The court was of the view that if there is written law or rules of court relating to the matter, the court must exercise its power in accordance with them. If there is no such written law or rules, the court can still exercise the power and is entitled to fall back on the relevant English law. In that case, the Federal Court held that a claimant in a land dispute was entitled to register lis pendens against the disputed land despite there being no written law or rules of court relating to the registration of lis pendens.

[53] See *Axel Johnson Petroleum AB v MG Mineral Group AG* [1992] 1 WLR 270 (CA); *Stein v Blake* [1996] AC 243 (HL) 251.
[54] As for the Sessions Court and the Magistrate's Court, such power is found in item 6(1) of the Third Schedule of the Subordinate Courts Act 1948.
[55] [1975] 2 MLJ 231 (FC) 232.

The case landed at the Privy Council but the issue of section 25(2) and the Schedule as the statutory sources of power to order the registration of lis pendens was not taken up in the appeal. However, Lord Diplock who delivered the judgment of the Privy Council commented that the original common law doctrine of lis pendens and the statutory modifications of it in England have no application to Malaysia. His Lordship used the reasoning that section 6 of the Civil Law Act 1956 expressly excludes the law of England relating to land from the general reception of English common law and rules of equity as part of the law of Malaysia and also that there is no provision in the National Land Code for the registration of lis pendens.

Undoubtedly Lord Diplock's observations were such that unless there is a written law or rules of court on the relevant matter in the Schedule, the power conferred by section 25(2) on that matter remains unexercisable. This was the view adopted by the Federal Court in *Pahang South Union Omnibus Co Bhd v Ministry of Labour and Manpower & Anor*[56] where it was held that section 25(2) gives only enabling powers in respect of the matters specified in the Schedule.

The Federal Court in *Permodalan Plantations* held that in Malaysia, there is no legal set-off. The analysis by Salleh Abbas LP was as follows:

> We have no statutes dealing with a defence of set-off as are available in the United Kingdom. Neither have the United Kingdom statutes on the subject been incorporated in our Civil Law Act 1956 which deals with the reception of English law in this country. Section 3(1) of this Act only enacts that 'the Court shall, in West Malaysia or any part thereof, apply the Common Law of England and the rules of equity as administered in England on the 7th day of April, 1956'. Clearly, equitable set-off is included in the expression 'rules of equity' which the Court is required to apply under the section. But the legal set-off which is based on statute is in no way included in the expression 'the Common Law of England' which we are required to apply.[57]

[56] [1981] 2 MLJ 199 (FC).
[57] *Permodalan Plantations Sdn Bhd v Rachuta Sdn Bhd* [1985] 1 MLJ 157 (FC) (Salleh Abbas LP).

Salleh Abbas LP continued by reasoning that since there were no Malaysian statutes equivalent to the United Kingdom statutes on this topic, only equitable and not legal set-off is part of our law.[58]

4.3.4.3 Limitations of Legal Set-off

The confinement of legal set-off to circumstances where both claim and cross-claim are for ascertained or readily ascertainable sums seriously erodes its utility. The courts had developed two doctrines to mitigate this limitation.

The first is the doctrine of abatement which was developed by the courts of common law. It allows a party to a contract for the purchase of goods or services or both to obtain a reduction in the price payable to the extent that the value of the goods or services has been diminished by a breach of contract by the seller. The second is that of equitable set-off.

4.3.5 Common Law Set-off or Abatement

In *Thornton v Place,*[59] the plaintiffs' claims for damages for slating work done were resisted by a defence of defective work. The court held that the plaintiffs were entitled to the contract price less a deduction of a sum necessary to alter the work to make it fit the specification.

The principle laid down in *Mondel v Steel*[60] was that when the buyer of goods is sued by the seller for the price, the defendant need not set off by a separate proceeding in the nature of a cross-action, the amount of damages which he has suffered as a result

[58] ibid.
[59] (1832) 1 Mood & R 218.
[60] (1841) 8 M & W 858 (Park B).

of a breach of the contract, 'but simply to defend himself by showing how much less the subject matter of the action was worth by reason of the breach of contract'.[61]

In *H Dakin & Co Ltd v Lee*,[62] a builder sued for payment for works done to the defendant's house. An official referee rejected the claim because in certain respects the works did not meet the specification. Both the Divisional Court and the Court of Appeal held that the official referee's decision was wrong. The builder was held entitled to recover payment, less an appropriate deduction for the cost of remedial works.

The maximum abatement is the amount of the claim. In *CA Duquemin Ltd v Slater*,[63] a contractor carried out refurbishment and extension works. The arbitrator awarded to the employer a larger sum by way of abatement for defects than the value of the contractor's claim. His Honour Judge Newey QC decided that the arbitrator had acted beyond his jurisdiction, and that the greatest possible abatement was to reduce the contractor's claim to zero.

In *Mellowes Archital Ltd v Bell Projects Ltd*,[64] a sub-contractor sought summary judgment for sums due on an interim application. The Court of Appeal held that the main contractor was not entitled to use its delay claim as abatement and the sub-contractor was granted summary judgment. Buxton LJ reviewed the law of abatement at length in coming to such a holding. He said that the measure of abatement must be limited to the difference in value of the thing itself. The cost of repairing damage to anything else other than the thing itself is irrecoverable.

[61] This is statutorily codified under the English Sale of Goods Act 1979, section 53(1), which states that a buyer may set up against the seller a breach of warranty in diminution or extinction of the price, or by way of equitable set-off.
[62] [1916] 1 KB 566 (CA).
[63] (1993) 37 ConLR 147 (QBD).
[64] (1997) 58 ConLR 22 (CA).

4.3.5.1 Non-Availability for Professional Services

In *Hutchinson v Harris*,[65] the Court of Appeal strongly doubted that the defence of abatement applies to claims for professional services. In *Foster Wheeler Group Engineering Ltd v Chevron UK Ltd*,[66] the court held that the defence of abatement does not apply in respect of contracts for professional services out of deference to the Court of Appeal in *Hutchinson v Harris* though not without some reluctance.

4.3.5.2 Whether Interim Certificates are in a Special Position

In *Dawnays Ltd v FG Minter Ltd*,[67] Lord Denning MR made some general observations, which were not essential to the decision in the case, and were therefore obiter dicta, in the following terms: 'An interim certificate is to be regarded virtually as cash, like a bill of exchange. It must be honoured. Payment must not be withheld on account of cross-claims whether good or bad - except so far as the contract specifically provides.' It seems that Lord Denning MR was suggesting that there was a special rule of construction for cross-claims in the building contract cases which operated in the opposite direction to the principle found in *Mondel v Steel*. That would usher in a new paradigm.

The apparent rule of law in *Dawnays* was overruled by the House of Lords in *Gilbert-Ash (Northern) Ltd v Modern Engineering (Bristol) Ltd*.[68] Lord Morris answered Lord Denning's suggestion by saying that for building contracts, there are no overriding rules or principles beyond those which are generally applicable for the interpretation of contracts.[69] Lord Morris referred to interim certificates in building contracts and said that they do not bring about a special class of debts which cannot be

[65] (1978) 10 BLR 19 (CA).
[66] (29 February 1996) QBD.
[67] [1971] 1 WLR 1205 (CA) 1209.
[68] [1974] AC 689 (HL).
[69] *Gilbert-Ash (Northern) Ltd v Modern Engineering (Bristol) Ltd* [1974] AC 689 (HL) 699-700.

resisted under any circumstances by any defence or set-off. Lord Morris alluded that the parties must abide by the provisions on interim certificates in the building contract.

4.3.5.3 Modification by Contract

In *Dawnays*, a sub-contractor's application for summary judgment under Order 14 of the Rules of the Supreme Court for sums of money stated in an interim certificate issued by the owner's architect, was resisted by the main contractor on the ground that clause 13 of the 'green form' of nominated sub-contract provided that:

> The contractor shall notwithstanding anything in this sub-contract be entitled to deduct from or set off against any money due from him to the sub-contractor (including any retention money) any sum or sums which the sub-contractor is liable to pay to the contractor under the sub-contract.

Edmund-Davies LJ, in addressing the construction of clause 13 of the sub-contract and particularly the phrase 'any sum or sums which the sub-contractor is liable to pay', said that the main contractor did not refer in his defence to any sum which the sub-contractor 'may be liable to pay', or 'which is asserted by the main contractor to be due'.[70] He found that the main contractor could not even provide a rough figure as to the sum which the sub-contractor was so liable to pay. He said that unless the main contractor could prove that a definite and liquidated sum was owed to it by the sub-contractor, the former could not make use of clause 13 in the manner contended by it.

The judge observed that if this was not so, then the sub-contractor could not have access to the money owed to it until the completion of the contract and there would be further delay if the main contractor opted for resolution by arbitration. He said that as a consequence, the sub-contractor could be denied its money for an unconscionable period with the possibility of serious financial implications. Such a construction of the clause was not impossible but Edmund-Davies LJ said that this could only be so if the

[70] *Dawnays Ltd v FG Minter Ltd* [1971] 1 WLR 1205 (CA) 1210-1211.

sub-contract was absolutely clear on that and reflected what the parties had understood and intended to be the consequences of the contract.

Lord Denning MR, who delivered the main judgment, also rejected the defence of the main contractor upon his construction of clause 13 of the sub-contract.

Although the House of Lords in *Gilbert-Ash* overruled Lord Denning's dictum in *Dawnays* that there was a special rule of construction applicable to cross-claims in building contract matters contrary to the rule laid down in *Mondel v Steel,* it did not however hold that *Dawnays* was wrongly decided by the Court of Appeal.

The crucial condition 14 in *Gilbert-Ash* provided that if the sub-contractor was in breach of any condition, the contractor could 'suspend or withhold payment of any moneys due or becoming due to the sub-contractor'. That condition also provided that the contractor reserved the right to set off from any payments certified as due 'the amount of any bona fide contra accounts and/or other claims which he, the contractor, may have against the sub-contractor in connection with this or any other contract'. There could hardly be any doubt that that clause enabled the contractor to set off any cross-claims, even those arising from other contracts unless *Dawnays* applied.

It is noteworthy that this condition was materially different from clause 13 of the sub-contract in *Dawnays*. Lord Morris had pointed this out and that the two provisions must be construed differently.[71]

The House held that the contractor was entitled to set off its claim for defects and delays against sums certified as due to the subcontractor. In addressing the

[71] *Gilbert-Ash (Northern) Ltd v Modern Engineering (Bristol) Ltd* [1974] AC 689 (HL) 702-703.

competing demands of the law's remedies for breach of contract and of business's requirements for cash flow, Lord Diplock said that it is always valid for contracting parties to exclude by agreement remedies for breach which would otherwise be available in law but clear express words must be used.[72]

In the *Dawnays* case, the central issue in dispute was whether, upon the proper construction of the sub-contract in the RIBA form, the contractor had the right to deduct from the moneys certified to be due to the sub-contractor under interim certificates only sums established or admitted to be payable by the sub-contractor to him, or in addition, claims exceeding the sums certified to be due which were in dispute. On this point, there was a division of opinion among the five Law Lords in the *Gilbert-Ash* case.

Lord Diplock and Lord Salmon considered that the Court of Appeal was wrong in its decision on the construction point in *Dawnays* in favour of the sub-contractor. Viscount Dilhorne said that if the loss in the *Dawnays* case had been quantified, then the decision would have been wrong.[73] As the loss in *Dawnays* was not quantified, it necessarily implied that Lord Dilhorne was correct in saying that the Court of Appeal had rightly decided the construction point in *Dawnays*. The remaining two Law Lords, Lord Reid and Lord Morris, considered that *Dawnays* was probably rightly decided on that issue.

In *Mottram Consultants Ltd v Bernard Sunley & Sons Ltd*,[74] the House of Lords was again faced with a construction point on a particular contract as to whether an employer could set off money allegedly owed to it by the builder against money certified to be due to the builder under interim certificates. That issue was not free of

[72] *Gilbert-Ash (Northern) Ltd v Modern Engineering (Bristol) Ltd* [1974] AC 689 (HL) 717 (Lord Diplock).
[73] *Gilbert-Ash (Northern) Ltd v Modern Engineering (Bristol) Ltd* [1974] AC 689 (HL) 713.
[74] [1975] 2 Lloyd's Rep 197 (HL).

difficulty. The House of Lords held by a majority of 3:2[75] that the right of set-off by the employer had been excluded and that the builder was entitled to summary judgment.

In that case, Lord Cross took the position that one should approach each case without any 'parti pris' in favour of or against the existence of a right of set-off. A condition of the contract here stipulated that the only sums which can be deducted from the amount stated to be due in an interim certificate are (a) retention money and (b) any sum previously paid. The printed form which the parties used provided for a third permissible deduction which the parties deleted.

Lord Cross observed that when parties use a printed form and delete parts of it, one can have regard to what has been deleted as part of the surrounding circumstances to construe what they have chosen to retain. He added that the fact that the parties had deleted the permissible deduction showed that they had directed their minds (inter alia) 'to the question of deductions under the principle of *Mondel v Steel* and decided that no such deductions should be allowed'.

The overall tenor of the judgment did not seem to indicate that the presumption laid down in *Mondel v Steel* should be ignored. If a contract is completely silent, whether expressly or impliedly, as to the right of set-off, then a default position must be presumed, which is that there is a right of set-off. Lord Salmon in the *Mottram Consultants* case said that the effect of the majority view was to depart from what had been held by the House of Lords in *Gilbert-Ash*, in so far as it purported to overrule *Dawnays*.[76]

[75] Lord Cross, Lord Wilberforce and Lord Hodson; Lord Salmon and Lord Morris dissenting).
[76] *Mottram Consultants Ltd v Bernard Sunley & Sons Ltd* [1975] 2 Lloyd's Rep 197 (HL) 215.

In *Acsim (Southern) Ltd v Dancon Danish Contracting and Development Co Ltd*,[77] the sub-contract provided that the 'contractor shall be entitled to set off against any money, including any retention money, otherwise due under this subcontract, the amount of any claim for loss and/or expense which has actually been incurred by the contractor, by reason of any breach of or failure to observe the provisions of this subcontract by the subcontractor'. The sub-contract also said that the 'rights of the parties in respect of set-off' were in this case agreed to be those set out in the relevant clause and 'no other rights whatsoever shall be implied as terms of this subcontract relating to set-off'.

In construing such set-off provisions, Gibson LJ took the view that as the relevant clause dealt with a right of set-off 'against any money otherwise due under this subcontract', it was inapplicable if the claim was for work not done.[78] He added that such a defence did not necessarily raise a breach of contract but merely asserted that the sum claimed had not been earned.

Neill LJ said that a claim that the work had not been completed could not be a set-off.[79] This was a pure defence against a claim for payment for work done.[80] He added that similarly, a claim that the work had not been properly performed was a pure defence rather than a counterclaim or set-off though he admitted that 'this point is more controversial'.[81]

Slade LJ also saw no reason why it should not be open to the contractor to contend that the work for which the claim for interim payment was demanded had not been properly executed, by way of defence in accordance with the principles enunciated

[77] (1989) 19 ConLR 1 (CA).
[78] *Acsim (Southern) Ltd v Dancon Danish Contracting and Development Co Ltd* (1989) 19 ConLR 1 (CA).
[79] *Acsim (Southern) Ltd v Dancon Danish Contracting and Development Co Ltd* (1989) 19 ConLR 1 (CA) 79.
[80] *Acsim (Southern) Ltd v Dancon Danish Contracting and Development Co Ltd* (1989) 19 ConLR 1 (CA) 79 (Neill LJ).
[81] ibid.

by Lord Diplock in *Gilbert-Ash*.[82]

In *Pembenaan Leow Tuck Chui & Sons Sdn Bhd v Dr Leela's Medical Centre Sdn Bhd*,[83] a builder sought via Order 14 proceedings against the employer for the sum due under the penultimate progress payment certificate issued by the architect in respect of the construction of a private hospital. The employer had alleged defective work and challenged the correctness of the certificate. The pivotal issue that called for decision here was whether, upon the true construction of the building contract, an obligation rested on the employer to pay the sum at once without regard to pending disputes including cross-claims by the employer.

The Supreme Court had to consider whether it was available to the employer to rely on its claims for liquidated and non-liquidated damages to defeat the summary judgment application under Order 14. It is relevant to note that the architect had not invoked his powers under the building contract to direct the builder to do rectification works in response to the employer's complaints of defective work, materials and/or over-valuation. In the event, the builder was under no obligation to remedy the deficiencies complained of.

The court noted that if the employer had considered that the architect had failed in his duty to make the necessary deductions due to alleged defective work or materials not in conformity with the terms of the contract thus resulting in over-certification of the sums payable, the employer had several other remedies to turn to. In reaching his decision, Edgar Joseph Jr SCJ made an intense analysis of *Dawnays*, *Gilbert-Ash* and *Mottram Consultants*. In *Gilbert-Ash*, Lord Salmon had said that:

[82] *Acsim (Southern) Ltd v Dancon Danish Contracting and Development Co Ltd* (1989) 19 ConLR 1 (CA) 80.
[83] [1995] 2 MLJ 57 (SC).

> The parties to building contracts or sub-contracts, like the parties to any other type of contract are, of course, entitled to incorporate in their contract any clause they please. There is nothing to prevent them from extinguishing, curtailing or enlarging the ordinary rights of set off, provided they do so expressly or by *clear implication*.[84]

However, in the same case, Lord Diplock required a higher threshold for displacing the common law rights of set-off than did Lord Salmon and the other Law Lords on the panel, when he said:

> But in construing such a contract [a building contract] one starts with the presumption that neither party intends to abandon any remedies for its breach arising by operation of law, and *clear express words* must be used in order to rebut this presumption.[85]

In *Gilbert-Ash*,[86] Lord Diplock said that the *expressio unius* rule of construction cannot be utilised to exclude the right of the employer to set up breaches of other warranties in diminution or extinction of the sums due in payment certificates. In the same case, Lord Reid was clearly of the opinion that the principle was applicable.[87]

Edgar Joseph Jr SCJ in *Pembenaan Leow Tuck Chui* was of the opinion that Lord Cross' speech in *Mottram Consultants* showed that he was applying the *expressio unius* principle in unmistakable terms.[88] Edgar Joseph Jr SCJ maintained that since both Lord Hodson and Lord Wilberforce had concurred in unqualified terms with the

[84] *Gilbert-Ash (Northern) Ltd v Modern Engineering (Bristol) Ltd* [1974] AC 689 (HL) 722-723 (Lord Salmon) (emphasis added).
[85] *Gilbert-Ash (Northern) Ltd v Modern Engineering (Bristol) Ltd* [1974] AC 689 (HL) 717 (Lord Diplock) (emphasis added).
[86] *Gilbert-Ash (Northern) Ltd v Modern Engineering (Bristol) Ltd* [1974] AC 689 (HL) 719.
[87] The *expressio unius* principle was applied against a building owner in *Gold v Patman and Fotheringham Ltd* [1958] 1 WLR 697 (CA).
[88] The passage in *Mottram Consultants Ltd v Bernard Sunley & Sons Ltd* [1975] 2 Lloyd's Rep 197 (HL) 209 (Lord Cross) (emphasis added) that was referred to was as follows: 'One must, I think, first ask oneself what the position would have been had the contract not been varied. Suppose that Mottrams were alleging that the architect had negligently stated in several interim certificates that expenses had been incurred by the contractor in executing the works which had not in fact been incurred and were claiming to deduct the amounts which they said had been improperly included in the earlier certificates from the amount stated to be due in a subsequent certificate. In the absence of any suggestion of fraud on the part of the architect or the contractor - and there is, of course, no suggestion of fraud here - I cannot see how it could have been argued that such a deduction could be made. Condition 28(d) states that the only sums which can be deducted from the amount stated to be due in an interim certificate are: (i) retention money; and (ii) any sum previously paid. It is, *moreover*, to be noted that the printed form which the parties used provided for a third permissible deduction which the parties deleted.' Edgar Joseph Jr SCJ thought that the deletion of the third permissible deduction was therefore an additional and not a decisive reason for the majority decision. Therefore the decision of the majority would still be the same if no regard was paid to the deletion.

whole of the judgment of Lord Cross, the *expressio unius* principle must form the ratio decidendi of the *Mottram Consultants* case. He further said:

> [T]he express enumeration of permitted set-offs in a contract or sub-contract, can imply that a defendant builder or main contractor, as the case may be, is limited to making such deductions from the amounts claimed as fall strictly within the scope of the permitted set-offs, and nothing else, on the basis of the *expressio unius* principle.[89]

Applying the *expressio unius* principle to the present case, the contended set-off by the employer did not fall into any of the seven permitted categories of set-off in the contract. The Supreme Court held that the employer's alleged right to a set-off had 'been extinguished, not expressly but by clear implication'.

Edgar Joseph Jr SCJ was in disagreement with the view taken by Gill CJ, when speaking for the Federal Court in *Alliance (Malaya) Engineering Co Sdn Bhd v San Development Sdn Bhd*,[90] that the House of Lords in *Gilbert-Ash* had disapproved of *Dawnays*. Edgar Joseph Jr SCJ pointed out that actually the majority view in *Gilbert-Ash* was that *Dawnays* was correctly decided as far as the construction of clause 13 of the sub-contract there was concerned. He noted that Gill CJ had also failed to see the differences in the language of clause 13 of the sub-contract in the *Dawnays* case and condition 14 of the sub-contract in the *Gilbert-Ash* case.

In *Dataran Rentas Sdn Bhd v BMC Constructions Sdn Bhd*,[91] the appellant and respondent had entered into a construction contract in the form of the PAM Standard Form Building Contract 1969 Edition (Without Quantities). The appellant failed to make payment to the respondent for amounts due under four interim certificates within the stipulated time.

[89] *Pembenaan Leow Tuck Chui & Sons Sdn Bhd v Dr Leela's Medical Centre Sdn Bhd* [1995] 2 MLJ 57 (SC).
[90] [1974] 2 MLJ 94 (FC) 99.
[91] [2008] 2 MLJ 856 (CA).

The respondent then determined the contract under clause 26(1)(a) of the PAM Conditions. Subsequently, the respondent issued a section 218(2)(l) notice under the Companies Act 1965 to the appellant who failed to pay the amount due. The respondent then filed a winding up petition pursuant to section 218(1)(e) read with section 218(2)(a) of the Companies Act 1965 to wind up the appellant on the ground that it was unable to pay its debt. The appellant was then wound up. The appellant alleged that the determination of the contract by the respondent was wrong and that there were defective works.

Relying on the dictum in *Pembenaan Leow Tuck Chui* that the right of set-off is restricted to those expressly allowed under the contract, Zulkefli JCA found that the appellant had no right of set-off under the PAM contract against the certified sum. There was no architect's instruction issued under clause 2(1) that the works carried out by the respondent were defective. In the unpaid interim certificates, the architect had stated: 'Addition/Deduction for works not in accordance with the contract' as being 'RM nil'.

In *Society of Lloyd's v Leighs*,[92] Lloyd's claimed against a number of names in respect of premium payable to Lloyd's. The contract in question provided that the payment of such premium should be 'in all respects free and clear from any set-off, counterclaim or other deduction on any account whatsoever'. The names raised the defence that Lloyd's had been guilty of fraudulent misrepresentation. They contended that this was a pure defence and that the clause did not apply. The court was unpersuaded by this argument. It considered that the words 'or other deduction on any

[92] [1997] 6 RILR 289 (CA).

account whatsoever' would probably be wide enough to capture the reduction or extinction of the premium by way of 'pure' defence.

The case of *Skipskredittforeningen v Emperor Navigation SA*[93] concerned a dispute between a borrower and the lender. The loan agreement provided that all payments to be made by the borrower shall be 'without set-off, counterclaim or condition whatsoever'. The borrower claimed that its prima facie indebtedness ought to be equitably reduced by the amount of its loss allegedly resulting from a failure on the lender's part to take reasonable care in realising the vessel used as security for the loan. Mance J agreed with the submission that the reality was that it was still a set-off within the words 'without set-off . . . whatsoever'. He relied on *Mondel v Steel* and *Gilbert-Ash* to hold that a plea in abatement in relation to contracts for sale or work can be excluded by clear words and that the clause was widely worded enough to overcome the borrower's contention.

In *BOC Group plc v Centeon LLC,*[94] an obligation to pay a deferred instalment of the price for the sale of the share capital of a company was expressed to be absolute or unconditional, and not to be affected by a number of matters explicitly mentioned 'or by any other matter whatsoever'. The issue was whether the language of the clause precluded a right of set-off or counterclaim. Evans LJ held not. In reaching his conclusion, he posed certain questions: If the parties did appreciate the possibility of set-off, would the reasonable man have expected them to exclude it by clear words? If so, were the words used clear enough to have that effect? He regarded the word 'whatsoever' in the circumstances of the case to be ambivalent. He noted that there was no specific mention in the clause of deduction, withholding or payment in full.

[93] [1998] 1 Lloyd's Rep 66 (QBD).
[94] [1999] 1 All ER (Comm) 970 (CA).

It is submitted that the decision is quite arguable. The phrase 'or by any other matter whatsoever' appeared to be all-encompassing. If that was not so, what other meaning or implication could be placed on the phrase? The practical reality is that parties to contracts habitually used similar words to cover every possible situation.

A widely drafted clause forbidding set-off, deduction or withholding may well be able to exclude reliance on any claim to pay less than the full amount, whether that claim is based on a 'pure' defence, abatement, set-off or counterclaim.[95] The case of *Totsa Total Oil Trading SA v Bharat Petroleum Corpn Ltd*[96] involved a sale and purchase of oil. The contract contained provisions that payment was to be made against an invoice and the usual shipping documents, 'without discount, deduction, set-off or counterclaim' and without, also, any 'withholding'. The buyer claimed that what was in fact shipped was just over 900,000 barrels of crude oil and between 42,000 and 45,000 barrels of water. The seller raised an invoice for payment for the oil as well as for the water as if it was oil.

Counsel for the buyer asserted that the nature of the buyer's defence did not have to take the form of a claim to abatement, set-off or counterclaim. He pressed the point that the buyer was under no obligation to pay for the water. He submitted that the restrictive conditions said what could not be deducted, but said nothing about what the contract required to be paid in the first place.

The court was unconvinced. The court observed that any cross-claim of the buyer might be put forward as a counterclaim, claim to equitable set-off or claim to

[95] *Totsa Total Oil Trading SA v Bharat Petroleum Corpn Ltd* [2005] EWHC 1641 (Comm).
[96] [2005] EWHC 1641 (Comm).

abate a price. It noted that each of such claims seemed to come within the restrictive conditions. Set-off and counterclaim were expressly provided for, and a claim for abatement involved claiming a deduction from the price.

The court held that the buyer was disabled by the terms of the contract to pay less than the amount of the invoice at this stage and must proceed by separate proceedings on its contention that some of what was delivered was in fact water. It also noted that such a clause was widely used in the oil industry for the purpose of overcoming shortage claims.

4.3.6 Equitable Set-off

Another species of set-off which is applicable in Malaysia is equitable set-off as pronounced in *Permodalan Plantations*.

4.3.6.1 Evolution of Equitable Set-off

It is generally agreed that the modern law of equitable set-off dates back to *Hanak v Green*[97] with Morris LJ's judgment being described as 'authoritative' by Dillon LJ in *BICC plc v Burndy Corpn*[98] and 'masterly' by Lord Diplock in *Gilbert-Ash (Northern) Ltd v Modern Engineering (Bristol) Ltd.*[99] Morris LJ gave the definitive account of the evolution of this doctrine. As explained there, before the enactment of the Judicature Acts there were circumstances in which a court of equity would intervene to restrain someone who had commenced an action at law from proceeding with the trial of the action or from levying execution of a judgment until further order. The circumstances included the existence of an unliquidated cross-claim by the defendant which was recognised in equity but not in law, and regarded by the court of equity as

[97] [1958] 2 QB 9 (CA).
[98] [1985] Ch 232 (CA) 247.
[99] *Gilbert-Ash (Northern) Ltd v Modern Engineering (Bristol) Ltd* [1974] AC 689 (HL) 717.

justifying the protection of the defendant from the plaintiff's claim, even though no legal set-off was available.

With the fusion of law and equity under the Judicature Acts, such cross-claims can now be asserted in the principal action by way of the distinct defence of equitable set-off. Such a defence of set-off rests on the basis that 'a court of equity would say that neither of these claims ought to be insisted upon without taking the other into account'.[100] This type of set-off is characterised as 'equitable' because it permits the setting off in an action at law of unliquidated sums that, prior to 1873, could only be pursued at law by means of a separate action, and could only affect the proceedings at law by the grant of an equitable injunction. It does not otherwise appeal to any specifically equitable doctrine.[101] It is a special type of cross-claim in that it operates in the litigation to extinguish the claim and prevent its original establishment, rather than to provide a sum to be netted off against the claim once established.[102]

4.3.6.2 Test of Equitable Set-off

Drawing from his analysis of *Bankes v Jarvis,*[103] Morris LJ in *Hanak v Green* identified two factors as being critical in qualifying a cross-claim as an equitable set-off: it would have been 'manifestly unjust' for the claim to be enforced without regard to the cross-claim; and 'there was a close relationship between the dealings and transactions which gave rise to the respective claims'.[104] He did not elaborate on the degree of closeness required in the relationship.

[100] *Hanak v Green* [1958] 2 QB 9 (CA) 26 (Morris LJ).
[101] *Smith v Muscat* [2003] EWCA Civ 962 [40] (Buxton LJ).
[102] *Federal Commerce & Navigation Co Ltd v Molena Alpha Inc, The Nanfri* [1978] QB 927 (CA) 973-974 (Lord Denning MR).
[103] [1903] 1 KB 549 (DC).
[104] *Hanak v Green* [1958] 2 QB 9 (CA) 24.

In *Bankes v Jarvis*, two separate but related transactions were involved. In the first transaction, the plaintiff acted as agent or trustee for his son who had bought a veterinary surgeon's practice from the defendant. As part of that transaction he had also agreed to pay the rent and to indemnify the defendant against liability under a lease of the premises at which the practice was situated. Subsequently, the son decided to leave the country, and authorised the plaintiff to sell the practice. The second transaction took place when the plaintiff sold it back to the defendant.

Under the second transaction, the defendant owed £50. Under the first transaction, the son owed the defendant £21 for rent and £30 for failure to perform covenants in the lease. When the plaintiff sued the defendant for the £50, the defendant claimed to be able to set off the £51. That was a quantified cross-claim for unliquidated damages. The court held that the defendant could do so.

In *Hanak v Green*, the plaintiff claimed against a builder for non-completion of the works. The builder had three counterclaims and relied on them by way of set-off. The first was a claim under the building contract itself for loss caused by the plaintiff's refusal to admit the builder's workmen. The second was a quantum meruit claim for extra work performed outside the contract. The third was for trespass to the builder's tools, and thus was founded in tort. Morris LJ left the third item aside as the first two already exceeded the plaintiff's claim. He held that 'it seems to me that a court of equity would say that neither of these claims ought to be insisted upon without taking the other into account'.[105] In the same case, Sellers LJ was of the opinion that all three items could be set off because the first 'arises directly under and affected the contract on which the plaintiff herself relies', and the other two were 'closely associated with and

[105] *Hanak v Green* [1958] 2 QB 9 (CA) 26 (Morris LJ).

incidental to the contract'.[106] Morris LJ added that the 'question as to what is a set-off is to be determined as a matter of law and is not in any way governed by the language used by the parties in their pleadings'.[107]

Federal Commerce & Navigation Co Ltd v Molena Alpha Inc, The Nanfri[108] was the occasion for Lord Denning MR to make a further elucidation of the doctrine of equitable set-off:

> [I]t is not every cross-claim which can be deducted. It is only cross-claims that arise out of the same transaction or are closely connected with it. And it is only cross-claims which go directly to impeach the plaintiff's demands, that is, so closely connected with his demands that it would be manifestly unjust to allow him to enforce payment without taking into account the cross-claim ..."[109]

In *The Nanfri*,[110] Goff LJ took a similar stand as to the requirement of fairness when he said that the doctrine operates in situations where it would be 'unfair for the creditor to be paid his claim without allowing that of the debtor if and insofar as well founded and thus to raise an equity against the creditor or, as it has been expressed, impeach his title to be paid'. He also clarified that equitable set-off which is really a defence, does not arise from every cross-claim, or from every cross-claim coming from the same contract.

In *Leon Corpn v Atlantic Lines and Navigation Co Inc, The Leon*,[111] Hobhouse J while noting that equitable principles derive from a sense of justice and fairness and should develop and adapt as the need arises, nevertheless is not an exercise of discretion but is an application of legal principle. He suggested that 'manifest injustice' was the wrong test and that the correct test was impeachment of title.

---

[106] *Hanak v Green* [1958] 2 QB 9 (CA) 31.
[107] *Hanak v Green* [1958] 2 QB 9 (CA) 26.
[108] [1978] QB 927 (CA).
[109] *Federal Commerce & Navigation Co Ltd v Molena Alpha Inc, The Nanfri* [1978] QB 927 (CA) 974-975 (Lord Denning MR). Earlier in *Henriksens Rederi A/S v PHZ Rolimpex, The Brede* [1974] QB 233 (CA) 248, Lord Denning MR had said much the same thing, 'It is available whenever the cross-claim arises out of the same transaction as the claim; or out of a transaction that is closely related to the claim.' The origin of the 'impeachment' test can be traced to *Rawson v Samuel* (1841) Cr & Ph 161, 179 where Lord Cottenham said, 'The equity of the bill impeached the title to the legal demand.'
[110] *Federal Commerce & Navigation Co Ltd v Molena Alpha Inc, The Nanfri* [1978] QB 927 (CA) 981.
[111] [1985] 2 Lloyd's Rep 470 (QBD) 474-475.

In *Bank of Boston Connecticut v European Grain and Shipping Ltd, The Domique*,[112] Lord Brandon speaking of equitable set-off, pointed to *Rawson v Samuel* as the foremost authority in providing the relevant test. However, he thought that the concept of a cross-claim being such as 'impeached the title of the legal demand' was out of place in the modern world. He was more receptive to a different version of the relevant test suggested in *Attorney-General for Newfoundland v Newfoundland Railway Co.*[113] In *Attorney-General for Newfoundland v Newfoundland Railway Co,*[114] Lord Hobhouse in the Judicial Committee of the Privy Council, in deciding whether the government's cross-claim for unliquidated damages could be set off against the company's claim, did not apply the criterion that the cross-claim 'impeached the title to the legal demand', but rather that it was a cross-claim 'flowing out of and inseparably connected with the dealings and transactions which also give rise' to the claim.

Lord Brandon did not refer to *Hanak v Green* or *The Nanfri* in *The Domique*. Nor did he mention the element of fairness. In *Geldof Metaalconstructie NV v Simon Carves Ltd,*[115] Rix LJ commented that the arguments in *Newfoundland Railway* were such that there was no particular need to emphasise the requirements of justice and fairness. He noted that the set-off between the original parties was undisputed and that the disputed set-off as against the assignees was debated on a more technical level based on the assignment.

[112] [1989] AC 1056 (HL) 1101.
[113] (1888) 13 App Cas 199 (PC).
[114] (1888) 13 App Cas 199 (PC) 213.
[115] [2010] EWCA Civ 667, [2010] 4 All ER 847.

In *Dole Dried Fruit and Nut Co v Trustin Kerwood Ltd,*[116] the Court of Appeal referred to the test formulated by Lord Denning in *The Nanfri* and held that the test approved by Lord Brandon in *The Domique* was 'the same test in different language'.

Lloyd LJ in *Dole Dried Fruit*[117] held that for all ordinary purposes, the modern law of equitable set-off is to be taken as accurately set out by the Court of Appeal in *Hanak v Green*. He said that it is not sufficient that the cross-claim is somehow related to the transaction giving rise to the claim. The cross-claim and the claim must be so closely connected that it would be manifestly unjust to allow the plaintiff to enforce payment without taking the cross-claim into account.

Lloyd LJ also said that the 'claim and crossclaim must arise out of the same contract or transaction, and must also be so inseparably connected that the one ought not to be enforced without taking into account the other'.[118] There must be some unwitting error in the passage. The first limb of this passage is unsupportable by the authorities and is at odds with the test proposed by Lord Denning in *The Nanfri* which was endorsed by Lloyd LJ. The present case was itself a two-contract case and this did not bar the doctrine of equitable set-off from taking hold.

In that case, the defendant was the plaintiff's exclusive distributor in England for prunes and raisins. In accordance with the agency agreement, the plaintiff sold its products to the defendant under a series of separate contracts of sale. The plaintiff sued for the price of the latest transaction whereas the defendant wanted to set off its counterclaim for repudiation by the plaintiff of the agency agreement. The court held that the counterclaim was a valid set-off. Lloyd LJ recognised that this was a two-

[116] [1990] 2 Lloyd's Rep 309 (CA) 310 (Lloyd LJ).
[117] *Dole Dried Fruit and Nut Co v Trustin Kerwood Ltd* [1990] 2 Lloyd's Rep 309 (CA) 310-311.
[118] *Dole Dried Fruit and Nut Co v Trustin Kerwood Ltd* [1990] 2 Lloyd's Rep 309 (CA).

contract situation. He acknowledged that each individual sale contract was not governed by the terms of the distributorship agreement.

He based his decision on the ground that the agency agreement was wholly for the purpose of the parties entering into contracts for the sale and purchase of the plaintiff's goods. In such circumstances, he noted, the claim and counterclaim were sufficiently closely connected to make it unjust to allow the plaintiff to claim the price of the goods sold and delivered without taking into consideration the defendant's counterclaim for damages for breach of the agency agreement.

In *Esso Petroleum Co Ltd v Milton*,[119] an oil company plaintiff had entered into a licence agreement with a garage licensee defendant. The plaintiff claimed for the price of petrol delivered to the defendant. The defendant raised a set-off for damages for repudiation of the licence agreement against the otherwise admitted claim. The plaintiff applied for summary judgment. The plaintiff resisted the alleged set-off on three grounds: (a) that the contract provided that the petrol had to be paid under direct debit arrangements which was akin to payment by cheque and therefore precluded a right of set-off; (b) that by clause 34 of the contract, the defendant had agreed not 'for any reasons to withhold payment of any amount due to the plaintiffs'; and (c) that there was insufficient connection between the claim involving past deliveries of petrol and the cross-claim for damages for loss of future profits.

[119] [1997] 3 All ER 593 (CA).

The court held that: (a) the direct debit argument succeeded;[120] (b) clause 34 was unreasonably wide and therefore unenforceable;[121] and (c) the counterclaim was insufficiently connected with the claim.[122]

Thorpe LJ commented that 'claims to equitable set-off ultimately depend upon the judge's assessment of the result that justice requires'.[123]

Simon Brown LJ said that the close connection needed for an equitable set-off cannot arise merely from the fact that both the claim and counterclaim are from a single business relationship between the parties.[124] Simon Brown LJ, after saying that the modern law of equitable set-off is to be found in *Hanak v Green* and *The Nanfri*, restated the test as follows:

> For equitable set-off to apply it must therefore be established, first that the counterclaim is at least closely connected with the same transaction as that giving rise to the claim, and second that the relationship between the respective claims is such that it would be manifestly unjust to allow one to be enforced without regard to the other.[125]

This test is very similar to Lord Denning's.

In *Bim Kemi AB v Blackburn Chemicals Ltd*,[126] the claim by the claimant was for damages for repudiation of a 1994 distribution agreement for the supply of a product called Dispelair. The defendant disputed the existence of the 1994 agreement, but alternatively counterclaimed for damages for its repudiation by the claimant. The defendant also tried to set off a counterclaim for breach of the parties' 1984 licensing

[120] *Esso Petroleum Co Ltd v Milton* [1997] 3 All ER 593 (CA) (Thorpe LJ and Sir John Balcombe), while Simon Brown LJ dissented.
[121] *Esso Petroleum Co Ltd v Milton* [1997] 3 All ER 593 (CA) (Simon Brown LJ and Sir John Balcombe), with Thorpe LJ silent on this point.
[122] *Esso Petroleum Co Ltd v Milton* [1997] 3 All ER 593 (CA) (Simon Brown LJ and Sir John Balcombe), with Thorpe LJ also of the opinion that the counterclaim was so speculatively unrealistic as to be unarguable.
[123] *Esso Petroleum Co Ltd v Milton* [1997] 3 All ER 593 (CA) 606.
[124] *Esso Petroleum Co Ltd v Milton* [1997] 3 All ER 593 (CA) 605.
[125] *Esso Petroleum Co Ltd v Milton* [1997] 3 All ER 593 (CA) 604.
[126] [2003] EWCA Civ 889, [2004] 2 Costs LR 201.

agreement concerning other products. The court disallowed the claimant's application to strike out that set-off.

The court held that the two agreements were inseparably connected in the context of the parties' business relationship. It noted that the 1994 agreement supplemented the 1984 agreement rather than replaced it and that both continued in tandem during the period before termination. Potter LJ considered the circumstances satisfied Lord Brandon's test in *The Domique* of a 'close and inseparable connection'.

Potter LJ was of the opinion that Lord Brandon's formulation of the test is preferable to that of Lord Denning's in *The Nanfri* on the ground that although 'it emphasizes that the degree of closeness required is that of an "inseparable connection"', it also clarifies 'that it is not necessary that the cross-claim should arise out of the same contract; all that is required is that it should flow from the dealings and transactions which gave rise to the subject of the claim'.

The correct test for equitable set-off has recently gained the attention of the Court of Appeal in *Geldof Metaalconstructie NV v Simon Carves Ltd.*[127] Rix LJ considered the formulation by Lord Denning in *The Nanfri*, without any reference to the concept of impeachment, as the best statement of the test, and the one most frequently referred to and applied, namely: 'cross-claims…so closely connected with [the plaintiff's] demands that it would be manifestly unjust to allow him to enforce payment without taking into account the cross-claim'.

[127] [2010] EWCA Civ 667, [2010] 4 All ER 847.

In *Permodalan Plantations Sdn Bhd v Rachuta Sdn Bhd*,[128] the appellants had entered into an agreement ('the sale agreement') to buy mawa coconut seeds from the respondents. It was provided in the sale agreement that the respondents undertook to ship the seeds to any destination as specified by the appellants and would be entitled to reimbursement for the costs and expenses in connection with the shipment.

After disputes broke out between them, the appellants started two civil suits against the respondents. In the first suit, the appellants claimed damages from the respondents for breach of the sale agreement by delivering to them non-mawa seeds. That suit was then still pending.

The present appeal concerned the second suit where the appellants claimed from the respondents for a refund of a total sum of $350,000 which they had given to the respondents to provide a bank guarantee required by the Royal Malaysian Customs for the shipment.

The sale agreement made no mention of such requirement. The parties agreed by correspondence ('the guarantee agreement') that the appellants furnish such money 'in the performance of' the sale agreement and that it should be refunded 'in full upon the cessation of the sale agreement or earlier if the parties mutually agree'.

The respondents admitted receiving the $350,000. However, they denied liability to refund the full amount on the ground that the appellants failed to pay to them three sums of money which they alleged to be due to them. They pleaded a defence of set-off and added a counterclaim. The three sums which they alleged were due to them were:

[128] [1985] 1 MLJ 157 (FC).

(a) $223,756 being the balance of the price of mawa seeds supplied to the appellants which they had not paid;

(b) $40,000 being the price of 2,000 bags of rock phosphate supplied to the appellants; and

(c) $6,543.30 being the handling and other charges incurred by the respondents in shipping the seeds to the appellants.

The appellants disputed the respondents' right to a set-off since the respondents had already admitted receiving the sum of $350,000 and contended that if the respondents wished to put forth a defence of set-off, they should do so in the first suit because the sums sought to be set off by the respondents were all related to the performance of the sale agreement which was the basis for the first suit.

Salleh Abbas LP said that if a cross-claim raised by the defendant as a set-off 'does not and cannot absolve the plaintiff's claim because it arises from a separate transaction', then 'the cross-claim is not necessarily a set-off, though it is so described, and that such cross-claim could, because of its nature and quality, only amount to a counterclaim'. The Lord President said that a counterclaim is wider in scope than a defence of set-off. He explained that whereas a counterclaim 'is a separate action by a defendant against a plaintiff', a set-off 'is essentially a defence, although a defendant is entitled to add it as counterclaim'. He reasoned that as 'a defence to a plaintiff's action, the matter sought to be set off must essentially be connected with or form part of the

matter upon which the plaintiff's action is founded'. Salleh Abbas LP said that 'the set-off must be clearly connected with the claim'.

The Federal Court held that all three items pleaded to set off the claim were correctly pleaded. As for the sum of $40,000 there was no dispute that it was the unpaid price for the supply of 2,000 bags of phosphate to the appellants. The court noted that although it neither belonged to the sale agreement nor to the guarantee agreement, 'nevertheless, as alleged, it is a mutual debt due from the appellants'. Concerning the sum of $6,545.30, there was also no dispute that this sum was incurred by the respondents in connection with the shipment of mawa seeds and for which the appellant agreed to reimburse under the sale agreement. The sum of $223,756.00 was the respondents' claim in respect of the balance of the price of mawa seeds supplied to the appellants. It was obvious that the claim was based on the sale agreement. The court found that the two agreements were inter-connected and constituted one cause or matter; the guarantee agreement complemented the sale agreement.

In *Bukit Cerakah Development Sdn Bhd v L'Grande Development Sdn Bhd*,[129] an employer was the developer of a project comprising two phases. It engaged the same contractor for both phases. For each phase, the employer and the contractor entered into a contract in the PWD form. Phase 2 was in fact earlier than phase 1. After disputes erupted between the parties, the contractor filed two separate suits against the employer in respect of each of the phases.

In the phase 2 suit, the contractor claimed for sums due under interim certificates. The employer met this by a defence and counterclaim alleging fraud, breach of contract and negligence by the contractor. In its counterclaim, the employer

[129] [2008] 3 MLJ 547 (CA).

claimed a sum of RM46,210,924.68 for reason that 243 out of the 331 units lacked structural integrity and had therefore to be demolished. For this purpose, it relied on interim certificate 14 issued by the architect.

In the phase 1 suit, the contractor claimed for the sum of RM3,665,582.94 as being due on interim certificates. The employer put up a defence and counterclaim to the contractor's claim. Among the pleas taken, the employer sought to set off monies owing from the contractor to the employer under the phase 2 contract against any sum that might be due from the employer to the contractor under the phase 1 contract. The employer relied on clause 50 of the phase 2 contract for his right to a set-off.[130]

In his judgment, Gopal Sri Ram JCA said that both the employer and the contractor had a right of set-off against each other unless there is a contrary intention by the parties.[131] He added, 'Such a contrary intention may appear from express words used by the parties or by clear implication from what they said or did.'[132]

It was held that clause 50 expressly gave the employer a right of set-off. The court noted that the words 'shall be entitled to deduct any money owing from the Contractor to the Government' in clause 50 supported such a conclusion. It further noted that the right of set-off was not confined to the particular contract but included 'any other contracts' to which the employer and the contractor were parties. This necessarily meant that the phase 1 contract was also included.

[130] The relevant clause 50 was as follows:

> The Government or the SO on its behalf shall be entitled to deduct any money owing from the Contractor to the Government under this Contract from any sum which may become due or is payable to the Contractor under this Contract or any other contracts to which the Government and the Contractor are parties thereto. The SO in issuing any certificate under Clause 47, shall have regard to any such sum so chargeable against the Contractor, provided always that this provision shall not affect any other remedy to which the Government may be entitled for the recovery of such sums.
>
> The terms 'the Government' and 'SO' referred to the employer and architect respectively.

[131] *Bukit Cerakah Development Sdn Bhd v L'Grande Development Sdn Bhd* [2008] 3 MLJ 547 (CA) (Gopal Sri Ram).
[132] ibid.

On this point, the result should clearly be in the employer's favour. However, the contractor threw some impediments in the way of such result, one of which was that no liquidated sum had been quantified by the employer. The contractor contended that the requirement of 'any amount owing' in clause 50 had therefore not been met. The court held that the phrase 'any money owing' did not refer to a liquidated sum. It was of the opinion that if that was the intention of the parties, then they should have been more specific in their language.

In holding that the phrase 'any money owing' used in clause 50 did not have the effect of depriving the employer of its right of equitable set-off, the court said that such right is available where there is a cross claim that goes 'directly to impeach the plaintiff's demands, that is, so closely connected with his demands that it would be manifestly unjust to allow him to enforce payment without taking into account his cross-claim' as cited from Lord Denning MR's judgment in *Federal Commerce & Navigation Co Ltd v Molena Alpha Inc, The Nanfri*.[133]

The court also adopted the observation in *Hiap Tian Soon Construction Pte Ltd and another v Hola Development Pte Ltd and another*[134] where the Singapore High Court had to deal with a clause that employed the phrase 'money due'. It was held there that the phrase did not exclude an equitable set-off. Lai Siu Chiu J, after citing the judgment of Thean J in *Pacific Rim Investments Pte Ltd v Lam Seng Tiong & Anor,*[135] said as follows:

> [A]ll that is required from the party purporting to exercise the right of set-off is that he seeks to quantify his loss in a bona fide way by reasonable means. The party does not actually have to produce a specific and final figure, quantified by

[133] [1978] QB 927 (CA).
[134] [2002] SGHC 258, [2003] 1 SLR 667 (High Court, Singapore).
[135] [1995] 3 SLR 1 (Court of Appeal, Singapore).

professional quantity surveyors, contrary to what the first plaintiff suggested. Similarly, the fact that the estimated figure may eventually turn out to be too high or too low is not, in itself, sufficient to preclude a party from relying on set-off as a defence.[136]

4.3.6.3 Whether Claim should be Liquidated or Unliquidated

Before *Hanak v Green*, there appeared to be no case where an equitable set-off was permitted in respect of a primary claim for unliquidated damages. *Hanak v Green* changed that. It is true that the Court of Appeal in *Hanak v Green* did not consider *McCreagh v Judd*.[137] In the latter case, the court held that, prior to the Judicature Act 1873, it was clear that a liquidated debt could not be used to set off an unliquidated claim. In the upshot the court disallowed the defendant from setting off an award in his favour obtained earlier under the Agricultural Holdings Act which exceeded the plaintiff's judgment arising from his claim for damages for breach of contract to repair the farm premises where the defendant was a tenant.

In *Bim Kemi*, Potter LJ agreed with the views taken by the editors of *Halsbury's Laws of England*[138] that in principle a defendant should be allowed a plea of equitable set-off against an unliquidated monetary claim on the ground that since it has long been recognised that the defendant may rely on a cross-claim for damages against an otherwise unimpeachable liquidated claim, the equities are more clearly in his favour if the primary claim is unliquidated and therefore has yet to be established in amount. Potter LJ considered that *Hanak v Green* is a sub silentio authority that an unliquidated cross-claim may be set off against an unliquidated primary claim and is preferable to the decision in *McCreagh v Judd*.

[136] *Hiap Tian Soon Construction Pte Ltd and another v Hola Development Pte Ltd and another* [2002] SGHC 258, [2003] 1 SLR 667 (High Court, Singapore) [38] (Lai Siu Chiu J).
[137] [1923] WN 174 (KBD).
[138] *Halsbury's Laws of England* (4th edn, reissue) vol 42, para 430, note 15.

4.3.6.4 Is Equitable Set-off merely Procedural or Substantive as well?

Equitable set-off is a procedural defence. However, the way that this doctrine has developed indicates that it is not simply that but has come to be recognised as a true or substantive defence as well. It is now generally accepted that an equitable set-off can be used outside the context of legal proceedings, in particular it can prevent a person from exercising his contractual or other legal rights which he would otherwise have.[139] In *Fuller v Happy Shopper Markets Ltd,*[140] Lightman J stressed that equitable set-off operates not only procedurally, but also substantively as a defence.

In *The Nanfri*, there was a dispute about payment of hire under three time charters. The terms of the charters provided for hire to be paid twice monthly in advance, default of which entitled the owners to withdraw the vessel. The charterers made certain deductions from hire, some of which the owners disputed. One of the questions for decision by the court was whether the charterers had the right to deduct from hire valid claims which constituted an equitable set-off without the owners' consent. The Court of Appeal by a majority[141] held that the charterers were so entitled.

This decision thus established that an equitable set-off can be relied on outside the context of legal proceedings as an immediate answer to a liability for a debt due and to the exercise of rights which are contingent on such non-payment such as a right to terminate a contract.[142] Cumming-Bruce LJ said that 'it is probably true to say that it was only Morris LJ's judgment in *Hanak v Green* that brought clearly to the attention of the legal profession and the commercial world the possibilities of equitable set off as a defence'.[143]

[139] *Fearns v Anglo-Dutch Paint & Chemical Co Ltd* [2010] EWHC 2366 (Ch).
[140] [2001] 1 WLR 1681 (Ch D) 1690.
[141] Lord Denning MR and Goff LJ, Cumming-Bruce LJ dissenting on this point.
[142] *Fearns v Anglo-Dutch Paint & Chemical Co Ltd* [2010] EWHC 2366 (Ch).
[143] *Federal Commerce & Navigation Co Ltd v Molena Alpha Inc, The Nanfri* [1978] QB 927 (CA) 997.

In fact, in *Rawson v Samuel*,[144] Lord Cottenham had pointed out the same path when he described earlier cases in which an equitable set-off had been allowed as cases in which 'the equity of the bill impeached the title to the legal demand'. The words are plain that it was not merely the right to obtain judgment on the demand that was impeached, but the right to the demand itself.

That equitable set-off has a substantive nature to it was explicitly said by Hoffmann LJ in *Aectra Refining and Manufacturing Inc v Exmar NV*[145] as the defendant is contending that 'although the facts alleged by the plaintiff entitle him to judgment for the amount claimed, a wider examination of related facts would show that the claim is wholly or partly extinguished'. The debtor may be able to protect his position by means of an injunction.[146]

4.3.7 Question of Actionability or Jurisdiction

The question of actionability or jurisdiction can arise most notably where the cross-claim is subject to an arbitration clause or where it is subject to the jurisdiction of the courts of another country because of a foreign jurisdiction clause. The issue then arises as to whether the cross-claim can be soundly pleaded as a set-off to the plaintiff's claim.

For common law set-off, the authorities favour allowing the set-off to be pleaded, despite it being subject to an arbitration clause or a foreign jurisdiction clause. For instance, in *Gilbert-Ash*, an issue was whether an abatement for defective work could be pleaded in defence of a claim by a builder for payment due under an architect's

[144] (1841) Cr & Ph 161, 179.
[145] *Aectra Refining and Manufacturing Inc v Exmar NV* [1994] 1 WLR 1634 (CA) 1650.
[146] Rory Derham, *The Law of Set-Off* (3rd edn, OUP) para 4.30.

certificate. The House of Lords held that it could, even though the question of whether the work was defective was subject to an arbitration clause.

Lord Diplock said that the contractor could apply for a stay of his own action pending arbitration but if he did not, the court would proceed to ascertain whether the defence was made out.[147] Lord Salmon noted that it would 'emasculate' the right of set-off if the courts were to say to the defendant 'Pay up now and arbitrate later.'[148] This is rational. As Lord Diplock emphasised in the *Gilbert-Ash* case, *Mondel v Steel* is 'no mere procedural rule designed to avoid circuity of action but a substantive defence at common law'.[149]

Hoffmann LJ said in *Aectra Refining and Manufacturing Inc v Exmar NV* that the same is also true for equitable set-off. As a consequence of that, where a plaintiff has chosen to commence action in a particular forum, it would be rather unreasonable 'to rely upon an arbitration or jurisdiction clause to confine the court to the facts which he chooses to prove and prevent it from examining related facts as well'.[150]

4.4 Effect of Settlement between Employer and Main Contractor

In a construction contract of any reasonable size, there is usually a contractual chain, at the apex of which is the employer, followed by the main contractor, sub-contractor, sub-sub-contractor and probably others as well. Where a defect is caused by a party lower in the chain eg the sub-contractor, the main contractor is liable to the employer for the defect. The sub-contractor is in turn liable to the main contractor for the defect.

[147] *Gilbert-Ash (Northern) Ltd v Modern Engineering (Bristol) Ltd* [1974] AC 689 (HL) 720.
[148] *Gilbert-Ash (Northern) Ltd v Modern Engineering (Bristol) Ltd* [1974] AC 689 (HL) 726.
[149] *Gilbert-Ash (Northern) Ltd v Modern Engineering (Bristol) Ltd* [1974] AC 689 (HL) 717.
[150] *Aectra Refining and Manufacturing Inc v Exmar NV* [1994] 1 WLR 1634 (CA). This dictum was adopted by Potter LJ in *Bim Kemi AB v Blackburn Chemicals Ltd* [2003] EWCA Civ 889, [2004] 2 Costs LR 201.

If the employer's claim against the main contractor has not been tried or settled, the main contractor's claim against the sub-contractor will be determined by the court in the normal way. However, if a judgment has arisen in the employer's claim against the main contractor, then that judgment sum will be the basis on which the main contractor's claim against the sub-contractor will be decided since this is the most reasonable way.[151] This is an exception to the rule that damages for breach of contract are assessed as at the time of breach.

If the main contractor settles with the employer, what effect will this have on the liability of the sub-contractor towards the main contractor?

4.4.1 *Biggin & Co Ltd v Permanite Ltd*[152]

In this case, Somervell LJ was of the view that it was foreseeable by the parties that in the circumstances of the case, they would contemplate litigation and reasonable settlement.[153] This case is authority for the principle that the main contractor can recover from the sub-contractor the settlement sum that he paid to the employer provided that he can establish that the sum paid in settlement is reasonable and that the settlement resulted from the breach by the sub-contractor of the sub-contract. In a normal building contract chain, it can hardly be said that the sub-contractor would not have foreseen such an eventuality.

[151] *Bovis Lend Lease Ltd v RD Fire Protection Ltd* [2003] EWHC 939 (TCC), 89 ConLR 169 [68] (Judge Anthony Thornton QC).
[152] [1951] 2 KB 314 (CA).
[153] *Biggin & Co Ltd v Permanite Ltd* [1951] 2 KB 314 (CA) 322.

4.4.2 *P & O Developments Ltd v Guy's and St Thomas' NHS Trust* [154]

As was put succinctly in this case, 'The settlement sets a maximum to the claim.'[155] Here, Judge Bowsher QC produced two reasons as to the relevance of the settlement based on *Biggin*. First, as the court favours settlements, there could be an inclination to accept that a settlement is based on a fair value in respect of the loss.[156] The judge added that if a third party's claim is settled, the settlement may be evidence of the claim's actual value although this may not be conclusive and the settlement may lower the level of evidence needed to prove the claim. This first reason refers to the settlement for its evidential value. The other reason is that the second rule in *Hadley v Baxendale* may be applicable as the parties might have in their reasonable contemplation the reasonable settlement of claims.

4.4.3 *Bovis Lend Lease Ltd v RD Fire Protection Ltd*[157]

In this case, the employer (Braehead) was embroiled in major disputes with the main contractor (Bovis). Each had claims against the other in the litigation between them. Braehead had claimed damages from Bovis for myriad defects which included defects to the fire protection work. Before trial, these disputes were resolved by a settlement agreement.

The actual dispute in this case involved sub-contract works for fire protection and dry lining works. Initially Bovis appointed Baris for this sub-contract package. Later Bovis engaged R D Fire to complete the works. It was assumed in the case that Baris carried out about 90% of the fire protection works while R D Fire completed the balance of 10%.

[154] (1998) 62 ConLR 38 (TCC).
[155] *P & O Developments Ltd v Guy's and St Thomas' NHS Trust* (1998) 62 ConLR 38 (TCC) [38].
[156] *P & O Developments Ltd v Guy's and St Thomas' NHS Trust* (1998) 62 ConLR 38 (TCC) [38]-[39] (Judge Bowsher QC).
[157] [2003] EWHC 939 (TCC), 89 ConLR 169.

Preliminary issues were sought to be determined by the court as to the effect of the settlement between Braehead and Bovis on the claims by Bovis against the two sub-contractors for damages for the defective work done by them. Bovis also made a further claim against R D Fire under a warranty in the sub-contract where R D Fire certified and guaranteed the work done by Baris earlier.

Bovis contended that it had suffered loss in making the settlement with Braehead and that this was partly due to the defective work done by Baris and R D Fire. However, Bovis was unable to ascertain the parts of the global settlement sum that were due to the breaches by Baris and/or R D Fire.

The court held that a main contractor who settled with the employer can recover from the sub-contractor the sum so paid if it can prove that the settlement was reasonable and that the sub-contractor has caused the loss. The court also held that this general rule is also applicable where more than one sub-contractor have caused the loss but it must be established the part of the overall settlement which is attributable to the fault of any particular sub-contractor. Bovis did not give evidence of the break-down of the settlement sum nor of the negotiations and circumstances of the settlement.

Such a settlement with the employer creates a ceiling for any recovery from the sub-contractor. This is necessary to prevent the main contractor from making a profit out of the settlement. The court held that the rule in *Biggin* operates both as a rule of evidence and as a rule for the quantification of damages. As such, even if the main contractor opts to prove its loss by some other way rather than by relying on the settlement, it is precluded from recovering more than the settlement sum.

The court also held that if it can be established that the settlement was unreasonable, then it cannot be used as evidential basis to prove the loss of the main contractor but nevertheless, the settlement sum will still set a maximum limit to the sum recoverable by the main contractor.

The court also took the view that if the main contractor frames his claim on his performance interest in the sub-contract, this could not be rejected simply because he has no property interest in the construction of the works but that this would be confined to cases where even though the main contractor does not have any legal liability to carry out or pay for the repairs, the repairs had been or will be carried out and the damages recovered by the main contractor will ultimately go to the person who has paid for the repairs. Such a claim must take into consideration the settlement.

Baris and R D Fire contended that the settlement absolved them from any liability towards Bovis. Whether that argument could succeed was among the preliminary issues that the court was asked to determine. Bovis argued that first, it was entitled to ignore the settlement in its claims against the two sub-contractors and secondly, that it was impossible to ascertain the part of the settlement relating to the fire protection works nor to its loss from entering into the settlement attributable to the two sub-contractors' defaults.

Where the main contractor has paid damages to the employer for breach of the main contract which has been directly caused by the sub-contractor, the main contractor can seek reimbursement from the sub-contractor under the sub-contract. This is inherent in a chain of building contracts and is entirely foreseeable. Such a settlement affects the main contractor's claim against the sub-contractor in two aspects: it sets an

upper limit to and is primary evidence of the claim. Accordingly, both the main contractor's pre-existing potential liability to the employer and the sub-contractor's consequent potential liability to the main contractor 'have been subsumed into and replaced by the settlement'.[158]

These two reasons given in *P & O Developments* for the relevance of the settlement to the liability of the sub-contractor provided to the judge in *Bovis Lend Lease* the answer to the question of who has the burden of proving the settlement. The judge held in *Bovis Lend Lease* that if the *Biggin* principles are merely evidential in nature, then the main contractor can choose to bypass the settlement and prove its loss in other ways.[159] In that case, the burden lies on the sub-contractor to prove the settlement if it wishes to rely on the settlement setting a maximum value to the damages recoverable.

The judge said that since the *Biggin* principles also impinge upon the causation and remoteness of damage, the burden will rest on the main contractor to prove the settlement in order to establish the loss it has sustained resulting from the settlement. The settlement sets an upper limit to the recovery by the main contractor because any excess would amount to a profit for the main contractor. Even if the main contractor opts to prove its loss in some other way, the cap created by the settlement still applies as the settlement is relevant in the assessment of damages.

As to the consequence of Bovis' failure to identify the specific sum in the settlement allocatable to each of the two sub-contractors' breaches of contract, the sub-contractors' contention was that Bovis could recover nothing. Bovis argued that in such

[158] *Bovis Lend Lease Ltd v RD Fire Protection Ltd* [2003] EWHC 939 (TCC), 89 ConLR 169 [76] (Judge Anthony Thornton QC).
[159] *Bovis Lend Lease Ltd v RD Fire Protection Ltd* [2003] EWHC 939 (TCC), 89 ConLR 169 [86] (Judge Anthony Thornton QC).

a case, the settlement should be ignored in the quantification of damages recoverable from the sub-contractors; if not it would have lost out by the settlement and this would go counter to the policy of the courts to encourage the settlement rather than the litigation of disputes.

As to the consequences of an unreasonable settlement, the plaintiff needs to prove that the fact and amount of the settlement were reasonable in the face of all the circumstances in order to establish that the loss is a result of the defendant's breach.[160] If the plaintiff fails to do so, then 'the loss has been caused not by the breach but by the plaintiff's voluntary assumption of liability under the settlement' and this can also be considered as his failure to mitigate his loss.[161]

If the settlement is held to be unreasonable, it would still set a ceiling to the damages recoverable.[162] In *Bovis Lend Lease*, the judge said that 'if it could be shown that the settlement constituted a break in the chain of causation or was a wholly unreasonable failure to mitigate Bovis's loss, nothing would be recoverable from the sub-contractors'.[163]

The judge amplified that statement by saying that if the main contractor voluntarily settles on unfavourable and unreasonable terms, then such settlement breaks the link between the sub-contractor's breach and any loss by the main contractor and in that event, nothing is recoverable.[164] The court held that on the assumption that Bovis had suffered loss by the settlement but could not identify such loss in the global settlement, Bovis' claim for damages was dismissed.

[160] *General Feeds Inc Panama v Slobodna Plovidba Yugoslavia* [1999] 1 Lloyd's Rep 688 (QBD) 691 (Colman J).
[161] ibid.
[162] *Bovis Lend Lease Ltd v RD Fire Protection Ltd* [2003] EWHC 939 (TCC), 89 ConLR 169 [109] (Judge Anthony Thornton QC).
[163] ibid.
[164] *Bovis Lend Lease Ltd v RD Fire Protection Ltd* [2003] EWHC 939 (TCC), 89 ConLR 169 [113] (Judge Anthony Thornton QC).

There is the possibility of another criterion: whether the main contractor also has to establish that it was reasonable to settle. This point is not free from difficulties as the judicial opinions indicate. On the one hand, in *P & O Developments Ltd v Guy's and St Thomas' NHS Trust*,[165] Judge Bowsher QC thought that that would be a requirement in appropriate cases. On the other hand, in *DSL Group Ltd v Unisys International Services Ltd*[166] and in *Royal Brompton Hospital NHS Trust v Hammond*,[167] Judge Hicks QC thought that evidence on that point would not be relevant or even admissible.

In *Pacific Associates Inc v Baxter*,[168] the contractor sustained losses in the form of delay and additional expenses due to unforeseeable conditions. It sought compensation from the engineer who rejected the claim. It managed to obtain partial satisfaction of such losses from an arbitration settlement with the employer. For the remaining losses, it sued the engineer for negligence. The Court of Appeal dismissed the claim, primarily for the reason that the engineer owed no duty of care to the contractor.

Ralph Gibson LJ suggested that the claim failed also on the further reason that there was a break in the chain of causation by saying that the alleged negligence of the engineer was not a cause of the contractor choosing to settle the claim with the employer for part only of the damages which were properly due to it.[169] His Lordship added that if such a result was not a foreseeable consequence of any negligence by the engineer, then 'the negligence of the engineer in rejecting the contractor's claims could be regarded as relegated to no more than part of the history and circumstances in which

[165] (1998) 62 ConLR 38 (TCC) 54-56.
[166] (1994) 41 ConLR 33 (QBD) 42-43.
[167] [1999] BLR 162 (English High Court) [20].
[168] [1990] 1 QB 993 (CA).
[169] *Pacific Associates Inc v Baxter* [1990] 1 QB 993 (CA) 1034.

the contractor's decision was made to settle those arbitration proceedings'.[170] The other two judges on the panel echoed that sentiment.

Sustaining on the principle laid down in *Pacific Associates*, in *Bovis Lend Lease*, R D Fire contended that the settlement between Bovis and Braehead had similarly decoupled the chain of causation between its breaches of contract and Bovis' loss. The reasoning was that the settlement agreement had freed Bovis of any liability to Braehead such that any loss it might have suffered by virtue of the settlement was not a consequence of the defects but was a result of the fact that Bovis agreed to the settlement.

The judge held that the chain of causation had not been broken. However the judge's reasons for this are rather difficult to follow. He found that the terms of the settlement agreement precluded the interpretation that the chain of causation had been broken.[171] The settlement agreement expressly provided that it was to 'constitute the terms of settlement of all disputes that exist between Bovis and Braehead'.

It further provided that the settlement terms were accepted by both parties 'in full and final settlement of all costs, claims, liabilities and demands between the parties' and that 'Bovis shall have no further liability for defects in the Works other than latent defects'. The judge concluded from these settlement terms that Bovis was not thereby released from liability but that 'such liability as Bovis has is being compromised by certain payments and other consideration passing in both directions and, as a result of that multiple exchange of consideration, the defects claims are being compromised'.[172]

[170] *Pacific Associates Inc v Baxter* [1990] 1 QB 993 (CA) 1034 (Ralph Gibson LJ).
[171] *Bovis Lend Lease Ltd v RD Fire Protection Ltd* [2003] EWHC 939 (TCC), 89 ConLR 169 [141] (Judge Anthony Thornton QC).
[172] *Bovis Lend Lease Ltd v RD Fire Protection Ltd* [2003] EWHC 939 (TCC), 89 ConLR 169 [142] (Judge Anthony Thornton QC).

4.5 Damages for Non-Financial Loss

In *Ruxley Electronics and Construction Ltd v Forsyth,*[173] a swimming pool was built 6 feet deep instead of 7 feet 6 inches as contracted. The House of Lords rejected a claim for repair cost as this would be disproportionate to the end to be attained. The House held that the value of the property had not been diminished either, and so a claim on that ground also failed. The injured party's rights were invaded but, in financial terms, he suffered no loss. Any prospect of obtaining substantial, as opposed to nominal, damages was defeated by the conventional rules of awarding damages for breach of contract. Other than in law, the result has nothing to commend it, in principle, in common sense, in everything else. It was not that there was no loss. Just that the loss could not be captured in strict monetary terms. Has the law marched boldly on since then? Is there any juridical basis to cure such a clear injustice?

Where deficiencies in construction work have caused loss which cannot be expressed in financial terms, the difficulty arises of aligning the measure of damages within the basic compensatory framework. An appropriate starting point for an appraisal of measure of damages harks back to the year 1848 with Parke B's much quoted words in *Robinson v Harman,*[174] 'The rule of the common law is that where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed.' This rule has wielded enormous influence over the development of the law on remedies for breach of contract. The construction placed by the courts on this rule has often stood in the way of allowing damages for non-financial loss.

[173] [1996] AC 344 (HL).
[174] (1848) 1 Exch 850, 855.

The law on damages for breach of contract has developed almost exclusively in a commercial context so that the criteria for measuring loss normally assume that the contracting parties' interests in the bargain are purely commercial and that the damage resulting from a breach of contract is measurable in purely economic terms.[175] Such an assumption may not always be appropriate.[176]

In *Ruxley Electronics*, Lord Lloyd, after observing that damages for loss of amenity would not be available in most construction defect cases, was most sympathetic to such a plight when he asked, 'Is there any reason why the court should not award by way of damages for breach of contract some modest sum, not based on difference in value, but solely to compensate the buyer for his disappointed expectations?'[177] He continued to lament, 'Is the law of damages so inflexible, as I asked earlier, that it cannot find some middle ground in such a case?'[178] The need is even more pressing where the contract-breaker has benefited from the breach. To do nothing would be to dignify the wrong.

Lord Mustill in *Ruxley Electronics* viewed the remedies of reinstatement and diminution in value as being not exhaustive and that:

> ... the law must cater for those occasions where the value of the promise to the promisee exceeds the financial enhancement of his position which full performance will secure. This excess, often referred to in the literature as the 'consumer surplus' … is usually incapable of precise valuation in terms of money, exactly because it represents a personal, subjective and non-monetary gain. Nevertheless where it exists the law should recognise it and compensate the promisee if the misperformance takes it away.[179]

[175] *Ruxley Electronics and Construction Ltd v Forsyth* [1996] AC 344 (HL) 353 (Lord Bridge).
[176] ibid.
[177] *Ruxley Electronics and Construction Ltd v Forsyth* [1996] AC 344 (HL) 374.
[178] *Ruxley Electronics and Construction Ltd v Forsyth* [1996] AC 344 (HL) 374 (Lord Lloyd).
[179] *Ruxley Electronics and Construction Ltd v Forsyth* [1996] AC 344 (HL) 360-361 (Lord Mustill).

In *Attorney General v Blake*,[180] Lord Nicholls observed that:

> It is equally well established that an award of damages, assessed by reference to financial loss, is not always 'adequate' as a remedy for a breach of contract. The law recognises that a party to a contract may have an interest in performance which is not readily measurable in terms of money. On breach the innocent party suffers a loss. He fails to obtain the benefit promised by the other party to the contract. To him the loss may be as important as financially measurable loss, or more so. An award of damages assessed by reference to financial loss, will not recompense him properly. For him a financially assessed measure of damages is inadequate.[181]

4.5.1 Damages for Distress

The aggrieved party may want to claim for damages for the mental distress that he has undergone as an aftermath of the wrong done to him.

4.5.1.1 General Rule

The House of Lords in *Addis v Gramophone Co Ltd*[182] held that the general rule is that damages for breach of contract do not include damages for mental distress. Mellor J in *Hobbs v London and South Western Railway Co*[183] said that it is not possible to recover damages 'for the mere inconvenience, such as annoyance and loss of temper, or vexation, or for being disappointed in a particular thing which you have set your mind upon, without real physical inconvenience resulting'. He continued, 'That is purely sentimental, and not a case where the word inconvenience … would apply.'[184] Such a rule is founded upon considerations of policy.[185]

[180] [2001] 1 AC 268 (HL).
[181] *Attorney General v Blake* [2001] 1 AC 268 (HL) 282 (Lord Nicholls).
[182] [1909] AC 488 (HL).
[183] (1875) LR 10 QB 111.
[184] *Hobbs v London and South Western Railway Co* (1875) LR 10 QB 111, 122 (Mellor J).
[185] *Watts v Morrow* [1991] 1 WLR 1421 (CA) 1445 (Bingham LJ).

4.5.1.2 Exceptions to the General Rule

But the rule is not absolute. There are two possible exceptions: (a) where the contractual objective is to provide pleasure, and (b) where there is physical inconvenience.

(a) Express or Implied Promise to Provide Pleasure

In *Watts v Morrow*,[186] Bingham LJ said, 'Where the very object of a contract is to provide pleasure, relaxation, peace of mind or freedom from molestation, damages will be awarded if the fruit of the contract is not provided or if the contrary result is procured instead.'

It is unnecessary that the very object of the contract must be to provide such mental benefits. Relief may lie if there is an express or implied promise in the contract for the provision of peace of mind or freedom from distress.[187] Lord Hutton said in *Farley v Skinner*[188] that a practical test is necessary to strike a balance between the need 'to preserve the fundamental principle that general damages are not recoverable for anxiety and aggravation and similar states of mind caused by a breach of contract' and the need 'to prevent the exception expanding to swallow up, or to diminish unjustifiably, the principle itself'. He postulated such a test for cases falling within the exception and where damages ought to be awarded and which rests on three requirements being satisfied viz. (a) the matter forming the subject matter of the individual claimant's claim for damages is of importance to him; (b) the individual claimant must have made it clear to the other party that the matter is of importance to him; and (c) the action to be taken in relation to the matter is included as a specific term

[186] [1991] 1 WLR 1421 (CA) 1445.
[187] *Watts v Morrow* [1991] 1 WLR 1421 (CA) 1442 (Ralph Gibson LJ).
[188] [2001] UKHL 49, [2002] 2 AC 732 [54].

of the contract.[189] He proposed that if these three requirements are met, then the claim for damages ought not to be dismissed just because 'the fulfilment of that obligation is not the principal object of the contract or on the ground that the other party does not receive special and specific remuneration in respect of the performance of that obligation'.[190]

(b) Physical Inconvenience Caused

In *Watts*, the Court of Appeal held that damages are recoverable even for cases not falling within the exceptional category if there is 'physical inconvenience and discomfort caused by the breach and mental suffering directly related to that inconvenience and discomfort'.[191] If those effects are foreseeably suffered during a period when defects are being repaired, damages are recoverable even though the cost of the repairs is not recoverable as such.[192]

The principles expressed in *Watts* for the determination of whether and when contractual damages for inconvenience or discomfort can be recovered were expressly approved by the House of Lords in *Farley*.[193] Commenting on the dicta in *Watts*, Lord Scott had this to say in *Farley*:

> … the adjective 'physical', in the phrase 'physical inconvenience and discomfort', requires, I think, some explanation or definition. … If the cause is no more than disappointment that the contractual obligation has been broken, damages are not recoverable even if the disappointment has led to a complete mental breakdown. But, if the cause of the inconvenience or discomfort is a sensory (sight, touch, hearing, smell etc) experience, damages can, subject to the remoteness rules, be recovered.[194]

[189] *Farley v Skinner* [2001] UKHL 49, [2002] 2 AC 732 [54] (Lord Hutton).
[190] ibid.
[191] *Watts v Morrow* [1991] 1 WLR 1421 (CA) 1445 (Bingham LJ).
[192] ibid.
[193] *Farley v Skinner* [2001] UKHL 49, [2002] 2 AC 732 [86] (Lord Scott).
[194] *Farley v Skinner* [2001] UKHL 49, [2002] 2 AC 732 [85] (Lord Scott).

Damages for physical inconvenience and distress were awarded in *Harrison v Shepherd Homes Ltd*[195] to the claimants because of problems with the levels to the paths and driveways, the need for investigations, surveys and monitoring, and the other sensory aspects arising from the construction defects. The learned judge hastened to add that these physical aspects must be differentiated from the considerable worry, anxiety and other problems which the claimants had undoubtedly suffered because of the builder's breaches for which there was no recovery of damages in law.[196] The court also made an award for future loss for this head.

In Malaysia, the High Court in *Subramaniam a/l Paramasivam & Ors v Malaysian Airlines System Bhd*[197] held that damages for discomfort and inconvenience are recoverable in tort. There is no reason why such damages do not apply for breach of contract as well since the differences between a claim in tort and a claim in contract do not intrude into this area.

4.5.1.3 Quantum

Such awards for inconvenience and discomfort should be restrained and modest.[198] Lord Denning MR said in *Perry v Sidney Phillips & Son*[199] that not excessive, but modest compensation may be awarded for anxiety, worry and distress. Lord Steyn in *Farley* said, 'It is important that logical and beneficial developments in this corner of the law should not contribute to the creation of a society bent on litigation.'[200]

[195] [2011] EWHC 1811 (TCC), (2011) 27 Const LJ 709.
[196] *Harrison v Shepherd Homes Ltd* [2011] EWHC 1811 (TCC), (2011) 27 Const LJ 709 [327] (Ramsey J).
[197] [2002] 1 MLJ 45 (HC).
[198] *Watts v Morrow* [1991] 1 WLR 1421 (CA) 1445 (Bingham LJ); *Farley v Skinner* [2001] UKHL 49, [2002] 2 AC 732 [28] (Lord Steyn).
[199] [1982] 1 WLR 1297 (CA).
[200] *Farley v Skinner* [2001] UKHL 49, [2002] 2 AC 732 [28].

In *Berent v Family Mosaic Housing*,[201] a case of subsidence, the court at first instance awarded the claimants £5,000 for living for nine months in a property with cracks in both external and internal walls. However, the appeal court reduced this to £150, relying on *Eiles v London Borough of Southwark*.[202]

4.5.1.4 Double Recovery

In *Farley*, Lord Scott indicated that damages for discomfort could not be recoverable in addition to diminution in value.[203] However that objection must be on the basis that there would otherwise be double recovery and not that the various heads of damages are mutually exclusive.

4.5.2 Damages for Loss of Amenity

Another possible remedy for the innocent party is to seek damages for loss of amenity.

4.5.2.1 General Rule

Defects arising from construction contracts ordinarily will not attract damages for loss of amenity - the reduced pleasure the building affords in use. In *Harrison*, Ramsey J was of the view that although the fulfilment of the obligation to provide a properly constructed property and to remedy any defects may give pleasure, relaxation, peace of mind, that is not the object.[204] He did not think that a major or important object is to avoid the worry arising from defects in the property or the failure to make good those defects.[205]

[201] [2012] EWCA Civ 961.
[202] [2006] EWHC 1411 (TCC).
[203] *Farley v Skinner* [2001] UKHL 49, [2002] 2 AC 732 [109].
[204] *Harrison v Shepherd Homes Ltd* [2011] EWHC 1811 (TCC), (2011) 27 Const LJ 709 [324].
[205] *Harrison v Shepherd Homes Ltd* [2011] EWHC 1811 (TCC), (2011) 27 Const LJ 709 [324] (Ramsey J).

4.5.2.2 Exception to the General Rule

Loss of amenity may be recoverable if it can be treated that the defendant has failed to provide such a promised intangible benefit. One of the well-established exceptions to the general rule laid down in *Addis* that in claims for breach of contract, the plaintiff cannot recover damages for his injured feelings is when the object of the contract is to afford pleasure. The 'holiday' cases of *Jarvis v Swans Tours Ltd*[206] and *Jackson v Horizon Holidays Ltd*[207] established that if the plaintiff has booked a holiday with a tour operator and if the tour operator breaches the contract by failing to provide what the contract calls for, the plaintiff may recover damages for his disappointment.

The trial judge in *Ruxley Electronics* took the view that the contract was one for the provision of a pleasurable amenity. The plaintiff's pleasure was not as great as it would have been if the swimming pool had been built to the contracted depth and so he was awarded damages for loss of amenity. On appeal, the House of Lords held that the court has power to award such damages and that in some circumstances such power may be essential to enable the court to do justice.[208]

4.5.2.3 Quantum

Damages for loss of amenity are also restrained. In *Ruxley Electronics*, the trial judge awarded the plaintiff £2,500 for loss of amenity and there was no appeal against that quantum. Lord Lloyd said, 'I should, however, add this note of warning. [The plaintiff] was, I think, lucky to have obtained so large an award for his disappointed expectations.'[209]

[206] [1973] QB 233 (CA).
[207] [1975] 3 All ER 92 (CA).
[208] *Ruxley Electronics and Construction Ltd v Forsyth* [1996] AC 344 (HL) 354 (Lord Bridge).
[209] *Ruxley Electronics and Construction Ltd v Forsyth* [1996] AC 344 (HL) 374.

4.5.2.4 Loss of Amenity and Distress

The courts have often treated loss of amenity and distress together as if they are inseparable twins. It is submitted that these two concepts are different and need not always be expressed in the same breath. Loss of amenity is the deprivation of enjoyment. Distress can be physical or mental. The former takes place where the physical body of a person is affected eg where a staircase is built so steeply that it takes extra effort and care to use it safely. Mental distress affects the mind eg where a wooden staircase is constructed with such thin planks that it looks like it is on the verge of collapsing.

4.5.3 *Wrotham Park* Damages

In *Wrotham Park Estate Co v Parkside Homes Ltd*,[210] the defendants had, in breach of a restrictive covenant in the plaintiffs' favour, constructed houses at a site. Brightman J refused to grant a mandatory injunction requiring the defendants to pull down the houses as that would be an unforgivable waste of much needed houses. He awarded damages in lieu of an injunction under the jurisdiction which originated with the Chancery Amendment Act 1858 (Lord Cairns' Act).[211]

The defendants argued that since the plaintiffs had conceded that the value of the estate had not been diminished by 'one farthing' even, application of the basic rule in contract to measure damages by that sum of money which would put the plaintiffs in the same position as they would have been in if the contract had not been broken would lead to nil or purely nominal damages. Brightman J responded with the following analytical basis:

[210] *Wrotham Park Estate Co v Parkside Homes Ltd* [1974] 1 WLR 798 (Ch D).
[211] The Chancery Amendment Act 1858, commonly known as Lord Cairns' Act, conferred jurisdiction on the Court of Chancery in England to award damages in addition to or in lieu of injunction or specific performance. Prior to that, the Court of Chancery would grant only equitable reliefs, such as injunction or specific performance, and leave it to the parties to seek damages in the courts of common law. Lord Cairns' Act was repealed but such jurisdiction survives in section 50 of the Supreme Court Act 1981. In Malaysia there is no such statutory provision (see *Shiffon Creations (S) Pte Ltd v Tong Lee Co Pte Ltd* [1991] 1 MLJ 65 (Court of Appeal, Singapore).

> That would seem, on the face of it, a result of questionable fairness on the facts of this case. … If for social and economic reasons, the court does not see fit in the exercise of its discretion, to order demolition of the 14 houses, is it just that the plaintiffs should receive no compensation and that the defendants should be left in undisturbed possession of the fruits of their wrongdoing? Common sense would seem to demand a negative answer to this question.[212]

Brightman J reviewed relevant cases in the areas of wayleave,[213] infringement of patent and wrongful detention and use of goods where the wrong had caused no loss to the plaintiff who was nevertheless awarded damages assessed by reference to a reasonable sum which could have been charged if permission had been sought by the defendant to do the prohibited act. Brightman J posed to himself the question whether he should apply a like principle where the defendant had invaded the plaintiff's rights in order to reap a financial profit for himself.[214] The formulation of that question was not made in terms of breach of contract but rather of invasion of the plaintiffs' property rights. However the wrong that he was considering was not an unlawful interference with the plaintiffs' property but was a breach of contract in the form of a restrictive covenant benefiting the plaintiffs by reason of their ownership of the property. Furthermore, his analysis was based on the extent and nature of the damages for breach of contract to which the plaintiffs were entitled.

The judge considered that if the plaintiffs were given a nominal sum, or no sum, justice would manifestly not have been done. He assessed damages at 5% of the defendants' profit, this being the amount of money which could reasonably have been demanded for a relaxation of the restrictive covenant.

[212] *Wrotham Park Estate Co v Parkside Homes Ltd* [1974] 1 WLR 798 (Ch D) 339 (Brightman J).
[213] Wayleave cases concerned the defendant trespassing by carrying coals along an underground way through the plaintiff's mine. Although the value of his land had not been diminished by the wrong, the plaintiff could recover damages equivalent to what he would have received if he had been paid for a wayleave: see *Martin v Porter* (1839) 5 M & W 351; *Jegon v Vivian* (1871) LR 6 Ch App 742; *Phillips v Homfray* (1871) LR 6 Ch App 770 (CA).
[214] *Wrotham Park Estate Co v Parkside Homes Ltd* [1974] 1 WLR 798 (Ch D) 341.

In assessing and quantifying the damages in *Wrotham Park*, Brightman J held that the plaintiffs were entitled to such a sum of money as might reasonably have been demanded by the plaintiffs from the defendants as a quid pro quo for relaxing the covenant. There is an inherent artificiality to such a fictitious approach as the plaintiffs might not agree to sell their right of insisting on performance by the defendants of their contractual obligation. Brightman J recognised such artificiality when he noted that on the facts, the plaintiffs, rightly aware of their obligations towards existing residents, would surely not have granted any relaxation.[215] The court is also required to ignore the possibility that one party could in fact have been expected to act unreasonably.

Wrotham Park was approved and applied by the Federal Court in *Tam Kam Cheong v Stephen Leong Kon Sang & Anor*[216] though not in the area of construction defects.

4.5.4 Features of *Wrotham Park* Damages

Hudson says that cases where damages have been awarded on the basis of the amount that the claimant would have been entitled to charge for the infringement of a right possessed by the claimant, are confined to cases where there has been some infringement of a proprietary right.[217] This does not seem correct in light of the following analysis.

4.5.4.1 Applicability to Positive Covenants

In *Alfred Templeton & Ors v Low Yat Holdings Sdn Bhd & Anor*,[218] Edgar Joseph Jr J further expanded the scope of *Wrotham Park* to allow damages to a

[215] *Wrotham Park Estate Co v Parkside Homes Ltd* [1974] 1 WLR 798 (Ch D) 341.
[216] [1980] 1 MLJ 36 (FC).
[217] Nicholas Dennys and Mark Raeside and Robert Clay (general eds), *Hudson's Building and Engineering Contracts* (12th edn, Sweet & Maxwell 2010) para 7-010.
[218] [1989] 2 MLJ 202 (HC).

beneficiary of a positive covenant who could not obtain specific performance. Form would prevail over substance if entitlement to *Wrotham Park* damages depends on whether the contractual duty broken is positive or negative. For most contracts where a positive obligation is imposed, it may be possible to imply a corresponding negative obligation not to do an act inconsistent with the positive obligation.

4.5.4.2 No Necessity for Injunction

In *Bredero*, the Court of Appeal refused damages to the plaintiffs as they had never sought an injunction but only common law damages, not damages in equity under Lord Cairns' Act. The conclusion was that since the plaintiffs' damages were to be assessed on ordinary common law principles, and they could not show any damage, only nominal damages could be available. Dillon LJ was not inclined to the possibility of awarding, as common law damages, the gain which the defendant had earned by his breach of contract.[219] This decision cannot now be considered as good law.

In *Attorney-General v Blake*,[220] Lord Nicholls' reference to publication of confidential information in breach of contract before the innocent party has time to apply to the court for urgent relief was a pointer that he did not intend to confine such award of damages in *Wrotham Park* to cases where damages are awarded in lieu of an injunction under Lord Cairns' Act.

4.5.4.3 Availability for Breach of Contract

That the damages awarded in *Wrotham Park* are available for breach of contract can plainly be found in the leading speech in *Blake*[221] by Lord Nicholls when commenting on *Wrotham Park*: that the case showed that both in contract and in tort,

[219] *Surrey CC v Bredero Homes Ltd* [1993] 1 WLR 1361 (CA).
[220] [2001] 1 AC 268 (HL) 282.
[221] *Attorney General v Blake* [2001] 1 AC 268 (HL) 283-284 (Lord Nicholls).

damages are not always confined to the recovery of financial loss after he expressed doubt as to why it should be more permissible to expropriate personal rights than to expropriate property rights.

It is clear that Lord Nicholls did not treat the significance of *Wrotham Park* as being limited to an invasion of property rights. He discussed the case in the section of his speech dealing with breach of contract.[222] It is true that the action in *Wrotham Park* was brought not against the original covenantor but against its successor in title. It could hardly be convincing to say that this would have any material difference.

In another passage, Lord Nicholls remarked that in the right circumstances, damages are awarded based on the benefit gained by the wrongdoer.[223] He said that this is applicable to interference with property rights and also to breach of contract.[224]

In his review of damages under Lord Cairns' Act, in particular, the issues of whether substantial damages are recoverable for an infringement which has not occasioned any financial loss and whether, in an appropriate case, the recoverable damages can be based on the profit gained by the defendant from the infringement, Lord Nicholls said that the authorities show that the courts often answered those issues in the affirmative by the decisions made.[225] The formulation identified by Lord Nicholls for the application of this approach was described as 'in a suitable case' and 'when the circumstances require'.[226] He also approved Brightman J's decision in *Wrotham Park*

[222] There are four sub-headings in the part of Lord Nicholls' speech which contains his general analysis of the law: interference with rights of property, breach of trust and fiduciary duty, damages under the Chancery Amendment Act 1858 and breach of contract.
[223] *Attorney General v Blake* [2001] 1 AC 268 (HL) 285.
[224] *Attorney General v Blake* [2001] 1 AC 268 (HL) 285 (Lord Nicholls).
[225] *Attorney General v Blake* [2001] 1 AC 268 (HL) 281.
[226] *Attorney General v Blake* [2001] 1 AC 268 (HL) 281, 283, 285.

that if the plaintiffs were given a nominal sum, or no sum, justice would manifestly not have been done.[227]

Lord Nicholls in *Blake* held that damages are not always strictly confined to financial loss and that in a suitable case damages for breach of contract may be measured by the benefit gained by the defaulter from the breach. Those conclusions were in terms expressed as applicable generally to damages for breach of contract and not limited to claims falling under Lord Cairns' Act.

In *Experience Hendrix LLC v PPX Enterprises Inc*,[228] the claimant was a company effectively owned by Jimi Hendrix's father to whom the Hendrix estate had assigned the benefit of a restrictive covenant under which the defendant had agreed not to grant any further licences or contracts without the consent of the estate. In breach of the restrictive covenant, the defendant granted a further licence from which he obtained payments. The claimant conceded that it could not prove or quantify any financial loss. The Court of Appeal still awarded the claimant a reasonable sum as damages for breach of contract. There were present in that case the twin elements of a restrictive covenant and of damages being awarded in addition to an injunction, thus falling under the jurisdiction of Lord Cairns' Act. However, Peter Gibson LJ's holding suggests that he was disposed to a broader availability of *Wrotham Park* damages for breach of contract. He said that it was apparent that Lord Nicholls in *Blake* regarded *Wrotham Park* as a guiding authority on compensation for breach of a contractual obligation.[229]

[227] *Attorney General v Blake* [2001] 1 AC 268 (HL) 283 (Lord Nicholls).
[228] [2003] EWCA Civ 323, [2003] 1 All ER (Comm) 830.
[229] *Experience Hendrix LLC v PPX Enterprises Inc* [2003] EWCA Civ 323, [2003] 1 All ER (Comm) 830 [56] (Peter Gibson LJ).

In *WWF-World Wide Fund for Nature v World Wrestling Federation Entertainment Inc*,[230] Chadwick LJ made the explicit view, although obiter, that the power to grant damages on a *Wrotham Park* basis does not depend on Lord Cairns' Act; it exists at common law.

The Privy Council in *Pell Frischmann Engineering Ltd v Bow Valley Iran Ltd*[231] touched upon *Wrotham Park* damages. It is not explicitly clear from the speech of Lord Walker in delivering the judgment of the Privy Council as to whether damages for non-financial loss are to be confined to claims under Lord Cairns' Act. The better view is that they are not so restricted. Lord Walker's conclusion that the decision in *Blake* decisively covers 'non-proprietary breach of contract'[232] was in terms not confined to damages under Lord Cairns' Act. Also, Lord Walker cited the judgment of Chadwick LJ in *World Wide Fund for Nature* as supporting the proposition that, although damages under Lord Cairns' Act are awarded in lieu of an injunction, it is not necessary that an injunction should actually have been claimed or that there should have been any prospect on the facts of it being granted.[233]

In *Devenish Nutrition Ltd v Sanofi-Aventis SA (France)*,[234] the Court of Appeal held that a contractual right is a form of property even though it does not have some of the qualities of a property right. The court proposed, 'If the law of remedies were to be required to be coherent in economic terms, and this were the critical factor, the same remedies ought to be provided in each of these situations.'[235]

[230] [2007] EWCA Civ 286, [2008] 1 All ER 74 [54].
[231] [2009] UKPC 45, [2011] 1 WLR 2370.
[232] *Pell Frischmann Engineering Ltd v Bow Valley Iran Ltd* [2009] UKPC 45, [2011] 1 WLR 2370 [48].
[233] *Pell Frischmann Engineering Ltd v Bow Valley Iran Ltd* [2009] UKPC 45, [2011] 1 WLR 2370 [48].
[234] [2008] EWCA Civ 1086, [2009] Ch 390 [38] (Arden LJ).
[235] *Devenish Nutrition Ltd v Sanofi-Aventis SA (France)* [2008] EWCA Civ 1086, [2009] Ch 390 [38] (Arden LJ).

4.5.4.4 No Necessity for Exceptional Circumstances

While Lord Nicholls emphasised in *Blake* that an award of an account of profits was only appropriate in exceptional circumstances,[236] he did not impose the same condition to an award of *Wrotham Park* damages. It is therefore apparent that in his view there is no requirement to establish the existence of exceptional circumstances in order for *Wrotham Park* damages to avail to the innocent party.

4.5.4.5 Basis is Justice

The touchstone of an award of damages on the *Wrotham Park* basis is justice.[237] Chadwick LJ in *World Wide Fund for Nature* said that an award of damages on the *Wrotham Park* basis is made as 'a just response to circumstances in which the compensation which is the claimant's due cannot be measured (or cannot be measured solely) by reference to identifiable financial loss'.[238] Mance LJ's reference to practical justice in *Experience Hendrix* echoed Brightman J's test, approved by Lord Nicholls, of whether depriving the claimant of a remedy would be manifestly unjust. This position is supported by *Chitty on Contracts*[239] as follows:

> At the very least it can be said that the same broad measure previously applied in tort cases of deliberately wrongful interference may now be used in cases of breach of contract where the defendant acted in disregard of the claimant's rights, but the latter cannot show that he suffered loss.[240]

4.5.4.6 Assessment of *Wrotham Park* Damages

There appears to be no universal consensus on the theoretical basis for the assessment of *Wrotham Park* damages.

---

[236] *Attorney General v Blake* [2001] 1 AC 268 (HL) 285.
[237] *Jones v IOS (RUK) Ltd* [2012] EWHC 348 (Ch) [98] (Judge Hodge QC).
[238] [2007] EWCA Civ 286, [2008] 1 All ER 74 [59].
[239] Huge G Beale (ed), *Chitty on Contracts* (30th edn, Sweet & Maxwell 2008) vol 1.
[240] Huge G Beale (ed), *Chitty on Contracts* (30th edn, Sweet & Maxwell 2008) vol 1, para 26-027.

(a) Compensatory or Restitutionary?

The law can in such cases of non-monetary loss act by ordering payment over of a percentage of any profit.[241] In *Experience Hendrix*, the Court of Appeal ordered the defendant to make a reasonable payment to the claimant to be measured by benefits gained by the defendant from the breach.[242]

In *Blake*, Lord Nicholls approved Brightman J's assessment of damages as being the amount of money which could reasonably have been demanded for giving up the covenant.[243] He also said that in a suitable case damages for breach of contract may be measured by the benefit gained from the breach by the wrongdoer who must make a reasonable payment in respect of the benefit he has gained.[244]

However, it is clear from the speeches in the House of Lords in *Blake*'s case that *Wrotham Park* damages are not a gains-based remedy. Lord Hobhouse in his dissenting judgment concurred with Lord Nicholls that such damages are compensatory in nature.[245] He considered that *Wrotham Park* was a case of compensatory damages, the plaintiffs' loss being the sum which they could have extracted from the defendants as the price of their consent to the development.[246] That view was in line with Lord Nicholls' approval as correct the measure of damages awarded under Lord Cairns' Act which he held may include damages measured by reference to the benefits likely to be obtained in the future by the defendant. Lord Nicholls said, 'The measure of damages awarded in this type of case is often analysed as damages for loss of a bargaining

[241] *Experience Hendrix LLC v PPX Enterprises Inc* [2003] EWCA Civ 323, [2003] 1 All ER (Comm) 830 [26] (Mance LJ).
[242] *Experience Hendrix LLC v PPX Enterprises Inc* [2003] EWCA Civ 323, [2003] 1 All ER (Comm) 830 [56]-[58].
[243] *Attorney General v Blake* [2001] 1 AC 268 (HL) 283.
[244] *Attorney General v Blake* [2001] 1 AC 268 (HL) 283-284 (Lord Nicholls).
[245] *Attorney General v Blake* [2001] 1 AC 268 (HL) 298.
[246] *Attorney General v Blake* [2001] 1 AC 268 (HL) 298 (Lord Hobhouse).

opportunity or, which comes to the same, the price payable for the compulsory acquisition of a right.'[247]

Lord Nicholls also instanced the case of *Penarth Dock Engineering Co Ltd v Pounds*[248] as another example of the same principle. This involved the non-removal of a floating dock by the defendants which had caused the plaintiffs no actual loss. The court held the defendant liable for more than nominal damages. Lord Denning MR in that case said, 'The test of the measure of damages is not what the plaintiffs have lost, but what benefit the defendant obtained by having use of the berth.'[249] In the course of his judgment in *Blake*, Lord Nicholls observed:

> Damages are measured by the plaintiff's loss, not the defendant's gain. But the common law, pragmatic as ever, has long recognised that there are many commonplace situations where a strict application of this principle would not do justice between the parties. Then compensation for the wrong done to the plaintiff is measured by a different yardstick.[250]

In *World Wide Fund for Nature*, Chadwick LJ considered that although in *Experience Hendrix*, Mance LJ said that 'it is natural to pay regard to profit made by the wrongdoer' an award of *Wrotham Park* damages is an award of compensatory damages and is not properly to be characterised as a gains-based award.[251] In *Jaggard v Sawyer*,[252] Sir Thomas Bingham MR in holding that the award of damages in *Wrotham Park* was compensatory said that Brightman J's attention to the profits made by the defendants was not so as to strip the defendants of their unjust gains, but because of the obvious connection between the profits earned by the defendants and the sum which the defendants would reasonably have been willing to pay for a release of the covenant. A further exposition on this issue was afforded by Millett LJ in *Jaggard*:

---

[247] *Attorney General v Blake* [2001] 1 AC 268 (HL) 281.
[248] [1963] 1 Lloyd's Rep 359 (QBD).
[249] *Penarth Dock Engineering Co Ltd v Pounds* [1963] 1 Lloyd's Rep 359 (QBD) 362.
[250] *Attorney General v Blake* [2001] 1 AC 268 (HL) 278-280 (Lord Nicholls).
[251] *WWF-World Wide Fund for Nature v World Wrestling Federation Entertainment Inc* [2007] EWCA Civ 286, [2008] 1 All ER 74 [57].
[252] [1995] 2 All ER 189 (CA) 202.

> It is plain from his judgment in the *Wrotham Park* case that Brightman J's approach was compensatory, not restitutionary. He sought to measure the damages by reference to what the plaintiff had lost, not by reference to what the defendant had gained. He did not award the plaintiff the profit which the defendant had made by the breach, but the amount which he judged the plaintiff might have obtained as the price of giving its consent. The amount of the profit which the defendant expected to make was a relevant factor in that assessment but that was all.[253]

This was also the approach taken by the Court of Appeal in *Severn Trent Water Ltd v Barnes*[254] where Potter LJ said the only relevance of the defendant's profits is that they are likely to be a useful reference point for the court to fix a fair price for a notional licence. In the words of Chadwick LJ in *World Wide Fund for Nature*:

> To label an award of damages on the *Wrotham Park* basis as a 'compensatory' remedy and an order for an account of profits as a 'gains-based' remedy does not assist an understanding of the principles on which the court acts. The two remedies should, I think, each be seen as a flexible response to the need to compensate the claimant for the wrong which has been done to him.[255]

(b) Account of Profits

An account of profits is available only where it is necessary to do justice and accordingly, it is not an appropriate remedy in principle where damages are an adequate remedy.[256] However, in certain circumstances an account of profits is preferable to an award of damages.[257] In *Blake*, Lord Nicholls confirmed that the court always has a discretion regarding the grant of the remedy of an account of profits.[258] He explained further that in the same way as a plaintiff's interest in the performance of a contract may make it just and equitable for the court to grant the remedy of specific performance or an injunction, so the plaintiff's interest in performance may render it just and equitable

[253] *Jaggard v Sawyer* [1995] 2 All ER 189 (CA) 211-212 (Millett LJ).
[254] [2004] EWCA Civ 570, [2004] 2 EGLR 95 [41].
[255] *WWF-World Wide Fund for Nature v World Wrestling Federation Entertainment Inc* [2007] EWCA Civ 286, [2008] 1 All ER 74 [59].
[256] *Devenish Nutrition Ltd v Sanofi-Aventis SA (France)* [2008] EWCA Civ 1086, [2009] Ch 390 [104] (Arden LJ).
[257] *Attorney General v Blake* [2001] 1 AC 268 (HL) 284 (Lord Nicholls).
[258] *Attorney General v Blake* [2001] 1 AC 268 (HL) 279.

that the defendant should retain no benefit from his breach of contract.[259] Lord Nicholls said:

> With the established authorities going thus far, I consider it would be only a modest step for the law to recognise openly that, exceptionally, an account of profits may be the most appropriate remedy for breach of contract. It is not as though this step would contradict some recognised principle applied consistently throughout the law to the grant or withholding of the remedy of an account of profits. No such principle is discernible.[260]

In relation to interference with rights of property, for wrongs like passing off, infringement of trade marks, copyrights and patents, and breach of confidence, courts of equity required the wrongdoer to yield up all his gains.[261] The common law's response was to merely make a wrongdoer pay a reasonable fee for use of another's land or goods.[262] This difference in remedial response appears to be simply an accident of history.[263]

The court in *Wrotham Park* awarded only 5% of the profit which the defendants conceded they made from the development. That the damages awarded were only such a small percentage could have been compelled by a few case-sensitive factors which tended to moderate the court's assessment of the hypothetical reasonable price and the amount of damages to be awarded. The court found that by their inaction, the plaintiffs had acquiesced in significant expenditure by the defendants. The plaintiffs did nothing while the land was auctioned as land fit for development. Furthermore, the estate owner had never thought that the covenant was an asset which he would have either the opportunity or the desire to turn to account.

[259] *Attorney General v Blake* [2001] 1 AC 268 (HL) 284-285 (Lord Nicholls).
[260] *Attorney General v Blake* [2001] 1 AC 268 (HL) 285 (Lord Nicholls).
[261] *Attorney General v Blake* [2001] 1 AC 268 (HL) 278-280 (Lord Nicholls).
[262] *Attorney General v Blake* [2001] 1 AC 268 (HL) 280 (Lord Nicholls).
[263] ibid.

(c) Factors to be Considered

Reference should be made to the strength of the plaintiff's interest in the performance of the contractual obligation, judged objectively, and comparing that with the countervailing legitimate interests of the defendant so that the remedy awarded is not oppressive and is properly proportionate to the wrong done.[264] In *Vercoe v Rutland Fund Management Ltd*,[265] the judge took the view that the protection afforded by the law should be lesser in an ordinary commercial context than where there is a fiduciary relationship. The Privy Council in *Pell Frischmann* said that the court should bear in mind the information available to the parties and the commercial context at the time that notional negotiation should have taken place.[266]

4.6 Specific Performance as a Remedy for Construction Defects

The employer in a construction contract may want the contractor to fully perform his obligations under the contract rather than be paid monetary compensation for defects. In other words, the employer wants the contractor to specifically perform the terms of the contract. There may be a variety of situations where only that contractor may be able to do a proper repair job. For instance, possibly only that contractor has access to adjoining premises, has the necessary competency, is able to procure the necessary goods and materials or knows what has already been done earlier.

The remedy of specific performance is a recognition by the law that damages based strictly on financial criteria may not fully recompense the innocent party to a contract in certain situations. The difference between specific performance and damages can broadly be said to be between 'compulsion' and 'relief'.[267]

---

[264] *Vercoe v Rutland Fund Management Ltd* [2010] EWHC 424 (Ch), [2010] Bus LR D141 [340] (Sales J).
[265] [2010] EWHC 424 (Ch), [2010] Bus LR D141 [343] (Sales J).
[266] *Pell Frischmann Engineering Ltd v Bow Valley Iran Ltd* [2009] UKPC 45, [2011] 1 WLR 2370 [50]-[53] (Lord Walker).
[267] Allan Farnsworth, 'Legal Remedies for Breach of Contract' Columbia L Rev (1970) 1145.

4.6.1 Nature of the Remedy of Specific Performance

Traditionally, specific performance is regarded in English law as an exceptional remedy compared to the common law remedy of damages to which a successful plaintiff is entitled as of right. This is the reason for the general principle that specific performance will not be decreed if damages are an adequate remedy. In contrast, in civil law jurisdictions like Scotland, France and Germany, a successful plaintiff is prima facie entitled to specific performance. It will only be in exceptional circumstances that he will be restricted to damages.

An order for specific performance is a discretionary remedy. The exercise of such discretion is governed by well-established principles but which, in line with all equitable principles, are flexible and adaptable to fulfil the ends of equity.[268] The purpose of equity as Lord Selborne LC put it in *Wilson v Northampton and Banbury Junction Railway Co*[269] is 'do more perfect and complete justice' than would be possible with remedies at common law. As such, specific performance is a very fact-sensitive remedy.

Mayor, Aldermen, and Burgesses of Wolverhampton v Emmons[270] is illustrative of the circumstances where specific performance is the appropriate remedy. There, the claimant Corporation sold to the defendant a piece of land that it had acquired by compulsory purchase. The defendant had contracted to demolish the existing buildings and to build new houses on the land by a certain date. Under this slum clearance scheme, the Corporation wanted no unbuilt gap in that area. The main purpose of the scheme was not to make a profit but to have houses built on the land. As the land had already been transferred to the defendant, the Corporation would not be able to realise

[268] *Co-operative Insurance Society Ltd v Argyll Stores (Holdings) Ltd* [1998] AC 1 (HL) 9.
[269] (1874) LR 9 Ch App 279 (CA) 284.
[270] [1901] 1 QB 515 (CA).

this intention if only damages were awarded to it. Will J's order granting specific performance to the Corporation was affirmed by the Court of Appeal.

As specific performance is an equitable remedy, a plaintiff will be disentitled to it if he is in serious breach of his own obligations under the contract or if he is unable to show that he is able to perform his remaining obligations.[271]

4.6.2 Reasons for Declining a Plea for Specific Performance

Mostly, the reason given for declining a claim for specific performance is that it would require continued supervision by the court.[272] Continued superintendence seems to imply that the judge or some other judicial officer would personally have to constantly supervise the execution of the order. Normally this is not what happens in reality. Performance is usually secured by the person so ordered realising that contempt of court might be imposed on him if he disobeys the order.[273]

Constant supervision in fact would be in the form of frequent applications to the court made by the parties as to whether the order has been complied with. The possibility of the court having to indefinitely hear and decide on such applications is regarded as undesirable.[274] However, in *Mayor, Aldermen, and Burgesses of Wolverhampton v Emmons*,[275] AL Smith LJ said 'of [this] objection I have never seen the force'.

In *Shiloh Spinners Ltd v Harding*,[276] Lord Wilberforce said, 'Where it is necessary, and, in my opinion, right, to move away from some 19th century authorities,

[271] *Price v Strange* [1978] Ch 337 (CA) 357.
[272] See, for example, *Ryan v Mutual Tontine Westminster Chambers Association* [1893] 1 Ch 116 (CA) 128 (Kay LJ); *JC Williamson Ltd v Lukey & Mulholland* [1931] HCA 15, 45 CLR 282 (High Court, Australia) 297-298 (Dixon J).
[273] *CH Giles & Co Ltd v Morris* [1972] 1 WLR 307 (Ch D) 318 (Megarry J).
[274] *Co-operative Insurance Society Ltd v Argyll Stores (Holdings) Ltd* [1998] AC 1 (HL) 12 (Lord Hoffmann).
[275] [1901] 1 QB 515 (CA) 523.
[276] [1973] AC 691 (HL) 724.

is to reject as a reason against granting relief, the impossibility for the courts to supervise the doing of work.' In *Tito v Waddell (No 2)*,[277] Sir Robert Megarry VC construed this as a general statement on specific performance and a rejection of difficulty of supervision as a valid objection, even for orders to carry on an activity. He took this as an adoption of his own views in *CH Giles & Co Ltd v Morris*.[278]

Lord Hoffmann in *Co-operative Insurance Society* looked at *Shiloh Spinners* quite differently when he said that he thought that Lord Wilberforce was trying to bring attention to the fact that the various reasons that the courts have in consideration when making reference to the difficulty of supervision 'apply with much greater force to orders for specific performance, giving rise to the possibility of committal for contempt, than they do to conditions for relief against forfeiture'.[279] He thought that Lord Wilberforce's remarks in *Shiloh Spinners* do not support the proposition that constant supervision is outmoded as regards specific performance of a duty to carry on an activity.[280] He added that the difficulty of supervision remains a powerful consideration.[281]

The quasi-criminal sanction of contempt of court is the only means to compel a decree of specific performance and this gives rise to two implications as pointed out by Lord Hoffmann in *Co-operative Insurance Society*.[282] First, the threat of a committal or even a fine to the defendant for non-compliance with the order for specific performance may force him to do things which are not in his self-interest. Secondly, as contempt is a serious matter, any application to enforce the order by such means will probably result in intensive and expensive litigation. This will be very taxing on the resources of the

[277] [1977] Ch 106 (Ch D) 322.
[278] *CH Giles & Co Ltd v Morris* [1972] 1 WLR 307 (Ch D) 318.
[279] *Co-operative Insurance Society Ltd v Argyll Stores (Holdings) Ltd* [1998] AC 1 (HL) 15.
[280] *Co-operative Insurance Society Ltd v Argyll Stores (Holdings) Ltd* [1998] AC 1 (HL) 16.
[281] *Co-operative Insurance Society Ltd v Argyll Stores (Holdings) Ltd* [1998] AC 1 (HL) 16 (Lord Hoffmann).
[282] *Co-operative Insurance Society Ltd v Argyll Stores (Holdings) Ltd* [1998] AC 1 (HL) 13.

parties as well as the judicial system. The problem is compounded by the possibility of multiple applications over an indefinite period of time.

4.6.3 Distinction between Orders to Perform an Activity and Orders to Achieve a Certain Result

A distinction can be made between an order requiring a defendant to perform an activity over an extended period of time and an order requiring him to achieve a certain result. The former may result in repeated applications to the court, a consequence not found in the latter. Lord Wilberforce held that difficulty of supervision was not an impediment as 'what the court has to do is to satisfy itself, ex post facto, that the covenanted work has been done, and it has ample machinery, through certificates, or by inquiry, to do precisely this'.[283]

Even if the achievement of the result is a complicated task which takes some time, the court, when asked to rule, only has to examine the finished work and say whether it complies with the order'.[284] This difference between orders to perform activities and orders to achieve results provides the basis for the courts, in appropriate circumstances, to order specific performance of building contracts and repairing covenants.[285]

4.6.4 Whether the Order for Specific Performance can be Drawn up with Precision

Another consideration is whether the order for specific performance can be drawn up with precision. If it cannot be made with sufficient precision, then it leaves open the possibility of the parties challenging whether the defendant has duly complied

[283] *Shiloh Spinners Ltd v Harding* [1973] AC 691 (HL) 724.
[284] *Co-operative Insurance Society Ltd v Argyll Stores (Holdings) Ltd* [1998] AC 1 (HL) 13 (Lord Hoffmann).
[285] See *Mayor, Aldermen, and Burgesses of Wolverhampton v Emmons* [1901] 1 QB 515 (CA) (building contract); *Jeune v Queens Cross Properties Ltd* [1974] Ch 97 (Ch D) (repairing covenant).

with his obligations. The possibility of wasteful litigation and 'the oppression caused by the defendant having to do things under threat of proceedings for contempt' will be greater.[286] Even if the terms of the contractual obligation are definite enough to avoid being void for uncertainly, or to found a claim for damages, this does not invariably translate to them being sufficiently precise for specific performance.[287]

Romer LJ took the view in *Emmons* that the first condition for specific enforcement of a building contract was whether 'the particulars of the work are so far definitely ascertained that the court can sufficiently see what is the exact nature of the work of which it is asked to order the performance'.[288]

This sentiment was echoed in *Redland Bricks Ltd v Morris*[289] where Lord Upjohn said that the general principle for the grant of mandatory injunctions to carry out building works is that 'the court must be careful to see that the defendant knows exactly in fact what he has to do and this means not as a matter of law but as a matter of fact, so that in carrying out an order he can give his contractors the proper instructions'.

In appropriate circumstances where the plaintiff's merits are strong, the courts may be willing to accommodate a certain degree of imprecision but this is merely a discretionary matter to be considered along with others.[290]

4.6.5 Whether the Costs of Compliance is Relatively Excessive

Another factor to be considered is whether the loss which the defendant will incur in complying with the order for specific performance far exceeds the loss which

[286] *Co-operative Insurance Society Ltd v Argyll Stores (Holdings) Ltd* [1998] AC 1 (HL) 13-14 (Lord Hoffmann).
[287] *Co-operative Insurance Society Ltd v Argyll Stores (Holdings) Ltd* [1998] AC 1 (HL) 14 (Lord Hoffmann).
[288] *Mayor, Aldermen, and Burgesses of Wolverhampton v Emmons* [1901] 1 QB 515 (CA) 525.
[289] [1970] AC 652 (HL) 666.
[290] See CF Spry, *Equitable Remedies* (4th edn, Thomson Reuters 1990) 112.

the plaintiff sustains from the breach.[291] Lord Westbury LC in *Isenberg v East India House Estate Co Ltd*[292] applied this ground to reject an application for a mandatory injunction to force the defendant to demolish part of a new building which obstructed the plaintiff's light and instead ordered damages.

4.6.6 Whether Order can be Varied if Proved Oppressive

It was contended by counsel in *Co-operative Insurance Society* that if the order proved to be oppressive or difficult to enforce, application could be made to vary or discharge it. To this, Lord Hoffmann's response was that since the order would be a final order, no jurisdiction existed to vary or discharge it.[293]

Lord Hoffmann added that even if such a jurisdiction existed where circumstances were drastically changed, it was inconceivable how this could be applied.[294] He pointed out that difficulties of enforcement would not amount to a change of circumstances as they would be completely predictable when the order was made.[295]

By the doctrine of functus officio, the court has no jurisdiction to vary or amend a judgment made and perfected by it.[296] The general rule with respect to amendment of a court order which has been perfected is that no court or judge has the power to make such amendment whether such amendment is sought in the original action or matter, or in a fresh action filed for its review.[297] This general rule is not inflexible and to accommodate the interests of justice, the court is vested with the necessary power to correct any clerical mistake arising from accidental slips or omissions, and to vary the

[291] *Co-operative Insurance Society Ltd v Argyll Stores (Holdings) Ltd* [1998] AC 1 (HL) 16 (Lord Hoffmann).
[292] (1863) 3 De GJ & S 263, 273.
[293] *Co-operative Insurance Society Ltd v Argyll Stores (Holdings) Ltd* [1998] AC 1 (HL) 18.
[294] ibid.
[295] *Co-operative Insurance Society Ltd v Argyll Stores (Holdings) Ltd* [1998] AC 1 (HL) 18 (Lord Hoffmann).
[296] See, for example, *Hock Hua Bank Bhd v Sahari Bin Murid* [1981] 1 MLJ 143 (FC).
[297] *Khoo Cheng Tat v Lim Soon Teik & Anor* [1982] 1 MLJ 289 (HC) 290.

order in order to give effect to its meaning and intention.[298]

In *Leong Ah Weng v Neoh Thean Soo & Anor*,[299] the Federal Court held that all orders of court carry impliedly with them liberty to apply to the court even if this is not expressly stated. The meaning of 'liberty to apply' has been eloquently defined by Jenky J in the Supreme Court of New South Wales, Family Law division in the exercise of Federal jurisdiction in the case of *Nicholson v Nicholson*[300] where his Lordship defined the phrase as 'simply a device by which further orders may be made when necessary for the purpose of implementing and giving effect to the principal relief already pronounced'. The words can also be construed as the working out of the actual terms of the order.[301]

In *Chew Hon Keong v Betterproducts Industries Sdn Bhd & Ors*,[302] the court, after trawling thoroughly through the local authorities on amendments to perfected court orders, arrived at the conclusion that neither the Federal Court nor the Court of Appeal has ever held that orders can never be revisited. The court held that even if a 'liberty to apply' provision is absent in an order, nevertheless it is implied into the order.

In *Oriental Bank Bhd v Syarikat Zahidi Sdn Bhd*,[303] the court cited and adopted the principle enunciated by Robert Goff LJ in *Mutual Shipping Corpn v Bayshore*

---

[298] See *Re Swire Mellor v Swire* (1885) 30 Ch D 239 (CA); *Khoo Cheng Tat v Lim Soon Teik & Anor* [1982] 1 MLJ 289 (HC) 290. Amendments of judgments and orders due to clerical mistakes are allowed under Order 20 rule 11 of the Rules of Court 2012 which is as follows:

> Clerical mistakes in judgments or orders, or errors arising therein from any accidental slip or omission, may at any time be corrected by the Court by a notice of application without an appeal.

The inherent jurisdiction of the court is captured by Order 92 rule 4, Rules of Court 2012 which provides that:

> For the removal of doubt it is hereby declared that nothing in these Rules shall be deemed to limit or affect the inherent powers of the Court to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the Court.

[299] [1983] 2 MLJ 119 (FC).
[300] [1974] 4 ALR 212 (Supreme Court, New South Wales) 216.
[301] *Cristel v Cristel* [1951] 2 KB 725 (CA) 730 (Sommerville LJ).
[302] [2013] 7 MLJ 196 (HC) [21].
[303] [1998] 7 MLJ 81 (HC) 86.

Shipping Co, The Montan[304] that the court has the inherent jurisdiction to rectify a perfected order so as to give effect to the intention of the court at the time that the order was made. Pursuant to the provision of section 3 of the Civil Law Act 1956, the court held that the common law jurisdiction referred to in *The Montan* would similarly be applied here.

A neat summation of the present state of the authorities is afforded by *Chew Hon Keong*[305] where it was said:

> From all these decisions, it can be safely concluded that the courts do not decline revisits to an earlier order made, especially one made by itself, simply on the basis of no jurisdiction. The first rule, of course, is that once perfected, a proper order is not to be varied, altered or amended. It remains closed unless, of course, 'in the circumstances the jurisdiction exercised by the court is justified' - per Raja Azlan Shah CJ (as His Highness then was) in *Ganapathy Chettiar*.[306]

4.6.7 Specific Performance for Rectification of Defects

Co-operative Insurance Society renders possible an order for specific performance to rectify construction defects. *Emmons* is a case where construction has not started.[307] As regards specific performance, should the law be different for situations where construction has started but defects are evident due to non-compliance of the requirements and specifications? There does not seem to be any significant difference to necessitate a change in the legal implications. That appeared to be the view of Goff LJ in *Price v Strange*[308] where he said:

> Although the court does not often order specific performance of a contract *to build or do repairs*, either because of difficulty in ascertaining precisely what has to be done, or more usually because of the difficulty of supervising performance, still it has jurisdiction to do so, and sometimes does.[309]

[304] [1985] 1 WLR 625 (CA).
[305] [2013] 7 MLJ 196 (HC) [36].
[306] *Ganapathy Chettiar v Lum Kum Chum & Ors* [1981] 2 MLJ 145 (FC) 146.
[307] See also *North East Lincolnshire BC v Millennium Park (Grimsby) Ltd* [2002] EWCA Civ 1719; *Mayor and Burgess of the London Borough of Waltham Forest v Oakmesh Ltd* [2009] EWHC 1688 (Ch).
[308] [1978] Ch 337 (CA).
[309] *Price v Strange* [1978] Ch 337 (CA) 359 (Goff LJ) (emphasis added).

Jeune v Queens Cross Properties Ltd[310] was a case where the dispute revolved around whether specific performance involving construction defects ought to be granted for a repairing covenant in a lease. Besides that case, there is a lack of reported authorities featuring specific performance and defects arising from construction. A reason for such paucity could be that if the plaintiff seeks specific performance for rectification of defects, the defendant would readily agree as this alternative might be more appealing than having to pay damages and as such, whether specific performance could or should be ordered in defect cases would rarely be in issue.[311]

In *Fong Wan Realty Sdn Bhd v PJ Condominium Sdn Bhd*,[312] a purchaser of a condominium unit sued the developer as regards the defects in the piping system due to poor workmanship and which was causing water leakages. The purchaser sought an order for the developer to rectify the piping system which essentially was for specific performance of the sale and purchase agreement together with the sum of RM1,800 which the purchaser had already expended to rectify the defects.

The developer sought refuge under clause 26 of the sale and purchase agreement which prescribed the mechanism for the purchaser to refer defects to the developer for rectification.[313] The developer argued that the purchaser had not utilised that clause and therefore, the plaintiff's claims must fail.

[310] [1974] Ch 97 (Ch D).
[311] Philip Britton, 'Make the Developer Get the Job Right: Remedies for Defects in Residential Construction' Society of Construction Law Journal, March 2013.
[312] [2009] MLJU 1428 (HC).
[313] This clause 26 was as follows:

> Any defects, shrinkage or other faults in the said Parcel or in the said Building or in the common property which shall become apparent within a period of twelve (12) calendar months after the date of handing over of vacant possession, and which are due to defective workmanship or materials or the said Parcel or the said Building or the common property not having been constructed in accordance with the plans and descriptions specified in the First and Fourth Schedule as approved or amended by the Appropriate Authority shall be repaired and made good by the Vendor at its own costs and expense within thirty (30) days of having received written notice thereof from the Purchaser and if the said defects, shrinkage or other faults in the said Parcel or in the said Building or in the common property have not been made good by the Vendor, the Purchaser shall be entitled to recover from the Vendor the cost of repairing and making good the same and the Purchaser may deduct such costs from any sum which has been held by the Vendor's solicitor as stakeholder for the Vendor.
>
> PROVIDED THAT the Purchaser shall, at any time after the expiry of the said period of thirty (30) days, notify the Vendor of the cost of repairing and making good the said defects, shrinkage and other faults before commencement of the works and shall give the Vendor an opportunity to carry out the works himself within fourteen (14) days from the date the Purchaser has notified the Vendor of his intention to carry out the said works.

The court said that it was established law that the defect liability clause does not take away the right to claim for defects which are not discoverable and that even if the defects are discovered within the defect liability period, the provision of an express remedy for rectification of the defects does not take away the rights of the purchaser at common law for breach of contract. The court reasoned that the sale and purchase agreement, being in the statutory form as prescribed by the Housing Developers (Control and Licensing) Act 1966 and the regulations made thereunder, is for the protection of the purchaser and cannot cut down on the purchaser's common law rights. The court said that the purpose of the statutory sale and purchase agreement is 'to improve and supplement common law remedies'.[314]

The developer contended that it would be difficult to compel and supervise any rectification works if ordered by the court. The court found that the rectification works could only be executed by the developer and not by the purchaser as the piping system involved the entire condominium. The court also found that rectification needed to be done on the piping system only so it could easily be identified and resolved. The court also said that the parties could apply for further directions from the court should there be any uncertainties. Accordingly, the court held that in the circumstances, only specific performance would satisfy the demands of justice. The court also allowed the purchaser's claim for the sum of RM1,800 already spent by the purchaser for rectifying the defects.

[314] The court referred to *City Investment Sdn Bhd v Koperasi Serbaguna Cuepacs Tanggungan Bhd* [1988] 1 MLJ 69 (PC); *Teh Khem On & Anor v Yeoh & Wu Development Sdn Bhd & Ors* [1995] 2 MLJ 663 (HC); *KC Chan Brothers Development Sdn Bhd v Tan Kon Seng & Ors* [2001] 6 MLJ 636 (HC); *Raja Lob Sharuddin bin Raja Ahmad Terzali & Ors v Sri Seltra Sdn Bhd* [2008] 2 MLJ 87 (CA).

4.7 Conclusion

Regarding damages for financial loss, the above analysis seems to lead to the following principles governing the measure of damages for construction defects. The two dominant types of measure of damages that may be available to the employer are the cost of reinstatement and diminution in value. The cost of reinstatement is the normal measure of damages for defective work by the contractor. If it is found to be unreasonable to award the cost of reinstatement, it must be because the loss sustained does not extend to the need to reinstate.

Where the cost of reinstatement is less than the diminution in value, the measure of damages will invariably be the cost of reinstatement. The cost of reinstatement is not the appropriate measure of damages if it is not reasonable in the circumstances, most notably where the expenditure would be out of all proportion to the benefit to be obtained. Where this is so, the appropriate measure of damages is the difference in value, even though it would result in a nominal award. Certain circumstances may justify the cost of reinstatement to be based on the demolition of the defective property and rebuilding especially where the building is structurally unsound and unsafe. An intention to repair the defects is a relevant factor to be considered as to whether it is reasonable for cost of reinstatement to be awarded.

Regarding rights of common law set-off or abatement, in *Multiplex Constructions (UK) Ltd v Cleveland Bridge UK Ltd*,[315] the court, while expressing that there was not a complete harmony of approach in the authorities, set out the following legal principles which might be derived from them:

[315] [2006] EWHC 1341 (TCC), 107 ConLR 1.

(a) In a contract for the provision of labour and materials, where performance has been defective, the employer is entitled at common law to maintain a defence of abatement;

(b) The measure of abatement is the amount by which the product of the contractor's endeavours has been diminished in value as a result of that defective performance;

(c) The method of assessing diminution in value will depend upon the facts and circumstances of each case;

(d) In some cases, diminution in value may be determined by comparing the current market value of that which has been constructed with the market value which it ought to have had. In other cases, diminution in value may be determined by reference to the cost of remedial works. In the latter situation, however, the cost of remedial works does not become the measure of abatement. It is merely a factor which may be used either in isolation or in conjunction with other factors for determining diminution in value;

(e) The measure of abatement can never exceed the sum which would otherwise be due to the contractor as payment;

(f) Abatement is not available as a defence to a claim for payment in respect of professional services; and

(g) Claims for delay, disruption or damage caused to anything other than that which the contractor has constructed cannot feature in a defence of abatement.

As for equitable set-off, a requirement of close connection between the claim and cross-claim is essential. All the modern cases are agreed on that, including *Hanak v Green, The Nanfri, The Domique, Dole Dried Fruit* and *Bim Kemi* although its expression varies. Morris LJ in *Hanak v Green* referred to a 'close relationship between the dealings and transactions which gave rise to the respective claims'. Lord Denning in *The Nanfri* referred to cross-claims which are 'so closely connected with his demands that it would be manifestly unjust to allow him to enforce payment without taking into account the cross-claim'. Lord Hobhouse in *The Domique* adapted the *Newfoundland Railway* test and referred to a cross-claim 'flowing out of and inseparably connected with the dealings and transactions which also give rise to the claim'. Lloyd LJ in *Dole Dried Fruit* while adopting Lord Denning's test in *The Nanfri* also referred to a claim and cross-claim being so 'inseparably connected that the one ought not to be enforced without taking into account the other'. Potter LJ in *Bim Kemi* preferred the test laid down in *The Domique*.

Regarding the effect of settlement by the main contractor with the employer for defects which are actually caused by the sub-contractor, the main contractor can recover from the sub-contractor the settlement sum that he paid to the employer if he can prove that the settlement sum is reasonable and that the settlement was due to the sub-contractor breaching the sub-contract. The settlement sets a maximum limit to such a claim. The settlement is also primary evidence of the main contractor's claim against the sub-contractor.

The main contractor's pre-existing potential liability to the employer and the sub-contractor's consequent potential liability to the main contractor are merged into and replaced by the settlement. Even if the main contractor wishes to prove his loss in some other way, the ceiling created by the settlement is still applicable as the settlement is relevant in the assessment of damages. If the settlement is found to be unreasonable, it would still set a cap to the damages recoverable.

Regarding damages for non-financial loss, the general rule is that breach of contract does not attract damages for distress and loss of amenity. This rule is grounded on policy considerations to discourage litigation. However this rule is not invariable. If the sole or main purpose of the contract is to provide pleasure or peace of mind, then such damages may lie. An exception may also operate if there is an express or implied promise in the contract to provide pleasure, peace of mind or freedom from distress.

Where the breach of contract has caused disappointment, there is no entitlement to damages even if the disappointment has resulted in a complete mental breakdown. However, if the cause of the inconvenience or discomfort is sensory in nature, damages may lie subject to the rules on remoteness. Damages for distress and loss of amenity are usually on the low side.

In Malaysia, it has been held that damages for discomfort and inconvenience are recoverable in tort. Conceivably, such damages are also recoverable in contract as the differences between claims in tort and claims in contract do not seem to hold any application in this area.

Wrotham Park damages are assessed on the basis of a hypothetical sum that the plaintiff might have reasonably demanded from the defendant for not insisting on the due performance of a contractual term. The rationale for *Wrotham Park* damages is justice where the plaintiff's loss cannot be measured or be properly expressed in financial terms. Damages of the *Wrotham Park* variety are available for breach of contract.

The state of the authorities indicates that *Wrotham Park* damages are not precluded by any of the following factors:

(a) that the plaintiff has not advanced any claim for an injunction, or that there would have been no prospect of an injunction being granted;

(b) that damages are not claimed under Lord Cairns' Act in lieu of an injunction;

(c) that the claim is not based on a breach of a restrictive covenant; and

(d) that the claim is not based on an invasion of property rights.[316]

Regarding specific performance, it is an equitable remedy. It is not granted as of right. It is granted where damages are insufficient to redress the harm suffered so as 'to do more perfect and complete justice'. A plaintiff who is in serious breach of his own contractual obligations or who is unable to prove that he is able, ready and willing to perform his remaining contractual obligations will not be entitled to specific performance.

[316] *Giedo Van Der Garde v Force India Formula One Team Ltd* [2010] 1 EWHC 2373 (QB) [533] (Stadlen J).

Traditionally, the reason for declining a claim for specific performance is that it would require continued supervision by the court. It is considered undesirable for the parties to indefinitely come to court to determine whether the order for specific performance has been complied with. The courts are more disposed to grant an order for specific performance if the order requires the defendant to achieve a definite result rather than if the order requires the defendant to perform something over a long period of time. The reason is that the former may not result in repeated applications unlike the latter. Even if the result to be achieved involves complicated and protracted work, the court needs only to examine the end product to rule whether the order has been complied with.

Another factor to be considered is whether the order for specific performance can be precisely drawn up. If this cannot be achieved, then the parties may mount challenges as to whether the order has been properly carried out. Such wasteful litigation is frowned upon. In considering whether specific performance ought to be granted, the court would also look into the matter of whether the loss which the defendant will incur in complying with the order is excessive compared to the loss which the plaintiff has sustained from the breach.

Based on the criteria for ordering specific performance, such an order to rectify construction defects is possible in appropriate circumstance as there is no policy reason for making this area an exception to the general rules.

The above narrative of the law has been done towards fulfilling Research Objectives No. 1 and 2 in respect of selected issues in construction defect claims that fall under the broad category of remedies.

CHAPTER 5: LIMITATION PERIODS

5.1 Introduction

The previous two chapters have dealt with causes of action and remedies as relevant to construction defect claims. This chapter goes to the third category of the trilogy of broad areas which is the limitation periods for construction defect claims. This chapter is in search of the law in Malaysia and other relevant common law jurisdictions to fulfil Research Objectives No. 1 and 2.

The law of limitations fixes a period of time for a plaintiff to commence legal action against another from the date when his right to sue accrues. If he fails to do so, the court cannot entertain his claim. The effect of limitation is fatal, irreversible and beyond salvation.

As regards construction defect claims, patent defects pose few problems whether the claim is made in contract or in tort. It is latent defects which are problematical. The reason is that latent defects may be discovered or discoverable many years later.

5.2 Nature of Limitation Periods

The denial of legal remedies by the imposition of a time limit for the commencement of proceedings is a result of statute. At common law there is no limitation period for actions to be instituted. In 1843, in *Hemp v Garland*,[1] it was held that the cause of action accrues at 'the earliest time at which an action could be brought'. The phrase 'cause of action' comprises those facts which a plaintiff must prove to support his right to

[1] (1843) 4 QB 519.

judgment in court.[2]

In *Nasri v Mesah*,[3] Gill FJ, in adopting what was said by Lord Esher MR in *Read v Brown*,[4] defined 'cause of action' as 'the entire set of facts that gives rise to an enforceable claim; the phrase comprises every fact which, if traversed, the plaintiff must prove in order to obtain judgment'. Gill FJ further held that the expressions 'the right to sue accrues', 'the cause of action accrues' and 'the right of action accrues' are of the same meaning in the context of the time from which the period of limitation as provided by law should run.[5]

In *Credit Corp (M) Bhd v Fong Tak Sin*,[6] Hashim Yeop A Sani CJ (Malaya) held that a cause of action accrues when (a) there is in existence a person who can sue and another who can be sued; and (b) all the facts have happened which are material to be proved to entitle the plaintiff to succeed.

In *London Congregational Union Inc v Harriss & Harriss*,[7] it was impossible to establish clearly when the cause of action accrued. The Court of Appeal held that the defendants were entitled to succeed on that ground.

There are several reasons for the introduction of limitation periods: (a) long dormant claims are more unjust than just; (b) evidence may have been lost to defend an old claim; and (c) persons having good causes of action should act with reasonable diligence.[8] Other reasons include the difficulty of obtaining satisfactory insurance cover for latent damage

[2] See *Central Electricity Generating Board v Halifax Corpn* [1963] AC 785 (HL) 800.
[3] [1971] 1 MLJ 32 (FC) 34.
[4] (1888) 22 QBD 128 (CA) 131.
[5] *Nasri v Mesah* [1971] 1 MLJ 32 (FC) 34.
[6] [1991] 1 MLJ 409 (SC).
[7] [1988] 1 All ER 15 (CA).
[8] *Halsbury's Laws of England* (4th edn, 1979) vol 28, para 805.

and the need for professional people to maintain insurance policies long after their retirement.[9] The doctrine of limitation is based on two broad considerations, namely that a right not exercised for a long time is presumed to be non-existent and that it is desirable that matters of rights in general should not be left too long in a state of uncertainty.[10]

5.3 Limitation Period for Claims in Contract

Section 6(1) of the Limitation Act 1953 provides that the limitation period for actions founded on contract is six years from the date the cause of action accrued. It is trite that in actions founded on contract, time runs from the date of breach.[11]

5.4 Limitation Period for Claims in Tort

Section 6(1) of the Limitation Act 1953 also refers to actions premised on tort and the period of limitation prescribed is six years from the date on which the cause of action accrued. For claims based on tort, the cause of action arises when the plaintiff suffers damage.[12] In actions based on negligence, 'damage is an essential part of the cause of action and thus the relevant period of limitation, in this case six years, runs from the date of the damage and not from the date of the act which causes the damage'.[13]

5.5 Limitation Period where Fraud or Mistake is Involved

Section 29 of the Limitation Act 1953 prescribes the commencement date for the limitation period to run where fraud or mistake is involved. This is the date when the plaintiff discovers the fraud or the mistake, or could with reasonable diligence have

[9] Law Reform Committee, *Twenty-Fourth Report (Latent Damage)* (Comnd 9390, 1984) para 2.6.
[10] *Credit Corp (M) Bhd v Fong Tak Sin* [1991] 1 MLJ 409 (SC) 413-414 (Hashim Yeop A Sani CJ (Malaya)).
[11] See *Gibbs v Guild* (1881) 8 QBD 296 (QBD); *Nasri v Mesah* [1971] 1 MLJ 32 (FC); *Saw Gaik Beow v Cheong Yew Weng & Ors* [1989] 3 MLJ 301 (HC).
[12] See *Cartledge v E Jopling & Sons Ltd* [1963] AC 758 (HL).
[13] *Baker v Ollard and Bentley* (1982) 126 Sol Jo 593 (CA) (Templeman LJ).

discovered it. The Court of Appeal in *AmBank (M) Bhd v Abdul Aziz bin Hassan & Ors*[14] said that section 29 of the Limitation Act 1953 is the sole provision which postpones the limitation period by reason that the facts are not known to the plaintiff. As for the meaning of 'fraud', in *ELBA SpA v Fiamma Sdn Bhd*,[15] Ramly Ali J said, 'The ordinary meaning of fraud involves "dishonesty or grave moral culpability". It means "actual fraud, dishonesty of some sort."'

5.6 Limitation Period for Latent Defect Claims

Nothing in the limitation legislation of most jurisdictions, including England and Malaysia, gives the circumstances when the cause of action in tort accrues. This must come from the common law. In contract, a cause of action accrues upon breach irrespective of whether the plaintiff knows of it or has suffered loss. In tort, it accrues when relevant damage which is more than negligible has happened. In most cases, physical damage occurs at the same time as the tortious act. This is not so for latent defects.

There are two possible approaches in establishing liability in latent defect cases:

(a) By focusing on the physical damage to property as an element of the cause of action. This was exemplified by *Pirelli General Cable Works Ltd v Oscar Faber & Partners*[16] where the House of Lords held that the same principle applies for claims for injury to the person and for damage to property, effectively treating such claims as being an extension of *Donoghue v Stevenson*; and

[14] [2010] 3 MLJ 784 (CA) [16].
[15] [2008] 3 MLJ 713 (HC) [34].
[16] [1983] 2 AC 1 (HL) 14.

(b) By viewing such claims as instances of people professing special skills undertaking to provide professional services which the plaintiff relies to his detriment. This is applying the principles laid down in *Hedley Byrne & Co Ltd v Heller & Partners Ltd*[17] as extended in cases like *Henderson v Merrett Syndicates Ltd*.[18] This perspective classifies claims for damages for latent defects as ones for negligent mis-statements.

5.6.1 *The Darley Main Colliery Co v Mitchell*[19]

As regards damage which is neither discovered nor discoverable, in this case, the mining operations of lessees of coal were the cause of subsidence under the plaintiff's land. Compensation was paid. After the lessees had ceased their operations for several years, subsequent works by others on land adjacent to that of the lessees caused a further subsidence. This would not have occurred if not for the earlier removal of support. The House of Lords held that the second subsidence formed a new cause of action and the action was not time-barred, thus giving a nod to the principle of discoverability in tortious claims.

5.6.2 *Cartledge v E Jopling & Sons Ltd*[20]

In this case, steel dressers sued their former employer for wrongfully exposing them to dust for periods from 1939 to 1950 during their employment. The plaintiffs alleged that such exposure resulted in them contracting pneumoconiosis. The evidence showed that pneumoconiosis was a disease which slowly accrued and progressively damaged the lungs without the person's knowledge. Thus, a person susceptible to pneumoconiosis who was

[17] [1964] AC 465 (HL).
[18] [1995] 2 AC 145 (HL).
[19] (1886) 11 App Cas 127 (HL).
[20] [1963] AC 758 (HL).

exposed to noxious dust over several years would have suffered substantial injury before the injury could be discovered. The facts showed that the cause of action arose before October 1950 when the plaintiffs suffered damage although they were not aware of the damage.

The House of Lords held that a cause of action accrued the moment the plaintiffs suffered harm even though they showed no symptoms and were unaware of the onset of the disease. The action was held to be statute-barred even before the plaintiffs became aware they had a cause of action. Lord Reid, in lamenting the result, said that it is unreasonable and unjustifiable in principle that this be so.[21] He said that a cause of action ought not to accrue until the injured person has discovered the injury or it would be possible for him to discover it.[22] But the issue was governed by statute and not by common law.[23] The desired result just could not be reached.[24]

The House of Lords' conclusion that discovery or discoverability is of no relevance was driven by section 26 of the Limitation Act 1939 which prescribes that where (a) an action is based on the fraud of the defendant; or (b) any fact relevant to the plaintiff's right of action has been deliberately concealed from him by the defendant; or (c) the action is for relief from the consequences of a mistake, then time does not begin to run until the plaintiff has discovered or could with reasonable diligence have discovered the fraud, concealment or mistake, as the case may be.

[21] *Cartledge v E Jopling & Sons Ltd* [1963] AC 758 (HL) 772.
[22] *Cartledge v E Jopling & Sons Ltd* [1963] AC 758 (HL) 772 (Lord Reid).
[23] ibid.
[24] ibid.

Fraud, concealment and mistake were conditions expressly stated in section 26 to extend the time for bringing proceedings. That section assumes that a cause of action has in fact accrued in the circumstances stated. It does not postpone the date of accrual of the cause of action. It postpones only the date from which time begins to run for limitation purposes.

Lord Evershed in *Cartledge*[25] said that to postpone the date would 'necessarily require the insertion of some words qualifying the statutory formula' but that such insertion is precluded by the well-established principles of the interpretation of statutes. The House of Lords held that the cause of action accrued when more than minimal damage was done even though the plaintiffs did not know and could not reasonably have discovered it. All of the Law Lords arrived at this decision with clear reluctance.

The discovery of damage is not the same as the occurrence of damage. This was demonstrated by Lord Pearce in *Cartledge*[26] where he rejected the notion that a plaintiff's knowledge of the condition of his lungs was the deciding factor when he said that it could not be held that while the plaintiff's X-ray photographs were being taken, he could not have suffered any damage yet to his body, but when he was informed of the result, he had from that moment suffered damage. This view means that the discovery of damage merely provides the evidence for the plaintiff to prove his damage. It does not amount to or cause damage.

[25] *Cartledge v E Jopling & Sons Ltd* [1963] AC 758 (HL) 773 (Lord Evershed).
[26] *Cartledge v E Jopling & Sons Ltd* [1963] AC 758 (HL) 778.

5.6.3 The English Limitation Act 1963

In England, the statutory regime for limitation originated from the Limitation Act of 1623 which continued for over 300 years with some modifications until it was replaced by the Limitation Act of 1939. Section 2(1)(a) of the English Limitation Act 1939, which is similar to section 6(1)(a) of our Limitation Act 1953, provides that the limitation period for actions founded on simple contract or on tort is six years from the date on which the cause of action accrued.

The injustice exposed by *Cartledge* propelled Parliament to enact the Limitation Act 1963 later in the same year that the case was decided. This enlarged the time for bringing proceedings for personal injuries, leaving untouched other tort actions including those in respect of latent damage to buildings. This provides that in any action for negligence, nuisance or breach of duty where the damages claimed by the plaintiff consist of or include damages for personal injury, the limitation period is three years from (a) the date on which the cause of action accrued; or (b) the date (if later) of the plaintiff's knowledge.

The enactment was a validation of *Cartledg*e in that the cause of action still accrues even if the damage was neither discovered nor discoverable but any injustice is overcome by an extension of time of three years from the date of the plaintiff's knowledge if that date is later than the date of accrual of the cause of action. However, the amendment applied only to actions for damages consisting of or including personal injuries. It must, therefore, mean that Parliament deliberately left the law unchanged for actions for other kinds of

damages.[27]

5.6.4 *Dutton v Bognor Regis UDC*[28]

Where latent defects in a building eventually result in a need for repairs, causing financial loss to the owner, the damage done is not solely economic; it is also physical damage to the building. That was the view taken by Lord Denning MR in this case where an inspector of the defendant council had inspected and approved the foundations of a house. The purchaser of the house then sold it to the plaintiff who did not have it surveyed. She obtained a mortgage from a building society which surveyed and passed the house. Later serious defects developed in the internal structure due to the unsound foundations. She issued proceedings against the council for negligence. Lord Denning MR held that the damage occurred when the foundations were badly constructed and the limitation period then started to run.[29]

5.6.5 *Sparham-Souter v Town and Country Developments (Essex) Ltd*[30]

In this case, the council passed the builders' plans and issued certificates that the council had inspected the quality of the work and had no reason to question it. The plaintiff purchased two of the homes where cracks later appeared. The plaintiff sued both the builders and the council for negligence.

The Court of Appeal held that the cause of action in negligence in issuing the certificates accrued when the plaintiff first suffered damage and not at the date of the

[27] *Pirelli General Cable Works Ltd v Oscar Faber & Partners* [1983] 2 AC 1 (HL) 14 (Lord Fraser).
[28] [1972] 1 QB 373 (CA).
[29] *Dutton v Bognor Regis UDC* [1972] 1 QB 373 (CA) 396.
[30] [1976] QB 858 (CA).

negligent act or omission. Geoffrey Lane LJ said in *Sparham-Souter*,[31] in connection with a plaintiff purchaser, 'If the defects in the building had not become apparent during his ownership, he would have suffered no damage. It is the emergence of the faults, not the purchase of the house, which has caused him the damage.'

Lord Denning MR took a different stand from what he held in *Dutton*. He said that the right of action accrued 'not at the time of the negligent making or passing of the foundations, nor at the time when the latest owner bought the house, but at the time when the house began to sink and the cracks appeared'.[32] He said later that for defective building work, 'the cause of action does not accrue, and time does not begin to run, until such time as the plaintiff discovers that it has done damage, or ought, with reasonable diligence, to have discovered it'.[33]

5.6.6 *Anns v Merton London BC*[34]

In this case, the House of Lords approved the views of the Court of Appeal in *Sparham-Souter*. Lord Wilberforce, with whom the others of their Lordships agreed, gave a new twist to the matter when he held that that the cause of action arises 'when the state of the building is such that there is present or imminent danger to the health or safety of persons occupying it'.[35] This could well mean that some considerable time has elapsed since the first substantial crack occurred.

[31] *Sparham-Souter v Town and Country Developments (Essex) Ltd* [1976] QB 858 (CA) 880.
[32] *Sparham-Souter v Town and Country Developments (Essex) Ltd* [1976] QB 858 (CA) 867-868.
[33] *Sparham-Souter v Town and Country Developments (Essex) Ltd* [1976] QB 858 (CA) 868 (Lord Denning MR).
[34] [1978] AC 728 (HL).
[35] *Anns v Merton London BC* [1978] AC 728 (HL) 760.

Lord Salmon said that 'the true view is that the cause of action in negligence accrued at the time when damage was sustained as a result of negligence, ie, when the building began to sink and the cracks appeared'.[36] Lord Salmon added, 'Whether it is possible to prove that damage to the building had occurred four years before it manifested itself is another matter, but it can only be decided by evidence'.[37] It appears that Lord Salmon took the position that where there is damage, the limitation clock starts ticking even though the damage may not have been known. Whether there was damage before it becomes manifest is, as he put it, a matter of evidence.

5.6.7 *Pirelli General Cable Works Ltd v Oscar Faber & Partners*[38]

The principles enunciated in *Cartledge* were extended to latent defects in buildings by the House of Lords in this case. The defendants in *Pirelli* which were not the builders had advised upon and designed a new addition to factory premises including a chimney. Based on that advice, a new material was used to line the chimney. The material was later to prove unsuitable. The chimney was completed in June or July 1967. Evidence showed that damage in the form of cracks must have occurred not later than April 1970 but the cracks were not discovered until November 1977. The plaintiff commenced action in October 1978.

The House of Lords held that the cause of action arose when the cracks came into existence and not when they were discoverable and so the action was out of time. Prior to *Pirelli*, the English position as embodied in *Sparham-Souter* was the discoverability test. In that case, Geoffrey Lane LJ held that no proper analogy exists between a house with

[36] *Anns v Merton London BC* [1978] AC 728 (HL) 770.
[37] ibid.
[38] [1983] 2 AC 1 (HL).

defective foundations and the situation in *Cartledge*. But the House of Lords in *Pirelli* asserted that this was not the case and that the test of when the cause of action accrues is the same for all negligence claims generally.

The House of Lords in following *Cartledge* held that the cause of action accrued when the physical damage occurred, not when the damage was discovered or should have been discoverable with reasonable diligence. The action was held to be time-barred by section 2(1) of the Limitation Act.

Lord Fraser rejected the argument of Geoffrey Lane LJ in *Sparham-Souter*[39] that there was no proper analogy between the position of the building owner in *Sparham-Souter* and that of the injured person in *Cartledge*.[40] Lord Fraser said that a true analogy existed. As regards negligence which has caused unobservable damage, Geoffrey Lane LJ in *Sparham-Souter*[41] distinguished between personal injuries and latent defects in a building by saying that the plaintiff 'can get rid of his house before any damage is suffered. Not so with his body.' In *Pirelli*,[42] Lord Fraser disapproved this differentiation when he said that the man with the injured body may die before the disease becomes apparent and may suffer no financial loss.

The House of Lords held that the cause of action in negligence arose when cracks in the chimney occurred and not when they were discovered or discoverable. Lord Fraser said that the cause of action accrued when damage, in the form of cracks near the top of the

[39] *Sparham-Souter v Town and Country Developments (Essex) Ltd* [1976] QB 858 (CA) 880.
[40] *Pirelli General Cable Works Ltd v Oscar Faber & Partners* [1983] 2 AC 1 (HL) 15-16.
[41] *Sparham-Souter v Town and Country Developments (Essex) Ltd* [1976] QB 858 (CA) 880.
[42] *Pirelli General Cable Works Ltd v Oscar Faber & Partners* [1983] 2 AC 1 (HL) 16.

chimney, must have 'come into existence'.[43] He clarified that he avoided saying that cracks 'appeared' because that 'might seem to imply that they had been observed at that time'.[44]

The analysis in *Pirelli* was directed at physical damage. The court was not concerned with the issue of pure economic loss. It was submitted on behalf of the engineers that their fault in advising on the design of the chimney had similarities with the situation where a solicitor gives negligent advice on law and the client obtains a right of action when he acts on the advice and suffers damage. This *Hedley Byrne* line of argument was expressly rejected by Lord Fraser.[45]

The House of Lords considered building defect cases to be cases of physical damage whereas in the later case of *Invercargill City Council v Hamlin*,[46] the Privy Council treated them as cases of economic loss, following the decision of the House of Lords in *Murphy v Brentwood District Council*.[47] Even prior to *Pirelli*, the courts have applied the same principle in areas other than buildings. For instance, in *SCM (UK) Ltd v WJ Whittall & Son Ltd*,[48] where damage to an electric cable was caused by contractors, Lord Denning MR held that economic loss without damage to person or property due to negligence cannot be recovered as damages except where such loss is the immediate consequence of the negligence. Winn LJ was of the same opinion.[49] *Spartan Steel & Alloys Ltd v Martin & Co (Contractors) Ltd*[50] was similarly decided. In *Pirelli*,[51] Lord Fraser said, 'I am

[43] *Pirelli General Cable Works Ltd v Oscar Faber & Partners* [1983] 2 AC 1 (HL) 19.
[44] ibid.
[45] *Pirelli General Cable Works Ltd v Oscar Faber & Partners* [1983] 2 AC 1 (HL) 18.
[46] [1996] AC 624 (PC).
[47] [1991] 1 AC 398 (HL).
[48] [1971] 1 QB 337 (CA) 344.
[49] *SCM (UK) Ltd v WJ Whittall & Son Ltd* [1971] 1 QB 337 (CA) 352.
[50] [1973] QB 27 (CA).
[51] *Pirelli General Cable Works Ltd v Oscar Faber & Partners* [1983] 2 AC 1 (HL).

respectfully in agreement with Lord Reid's view expressed in *Cartledge v Jopling* that such a result appears to be unreasonable and contrary to principle, but I think the law is now so firmly established that only Parliament can alter it.' Lord Fraser further added, 'I express the hope that Parliament will soon take action to remedy the unsatisfactory state of the law on this subject.'[52]

5.6.8 The English Latent Damage Act 1986

In response to the injustice revealed by *Pirelli* and following the 24th Report in November 1984 of the Law Reform Committee on Latent Damage (Cmnd 9390), the United Kingdom Parliament enacted the Latent Damage Act 1986. This Act has been described by one writer as being 'well-intentioned but over-complex'.[53]

This Act introduced section 14A into the 1980 Act providing an enlarged time limit for actions other than those involving personal injuries for damages for negligence. Under this section, the applicable actions cannot be brought:

(a) more than six years from the date on which the cause of action accrued; or

(b) more than three years from the starting date if that period expires later than the period mentioned in (a).

The starting date for the purpose of (b) above is the earliest date on which the plaintiff or any person in whom the cause of action was vested before him first had both the

[52] The principle laid down in *Pirelli* was followed by many subsequent cases. For example, in *London Congregational Union Inc v Harriss & Harriss* [1988] 1 All ER 15 (CA) where negligently designed drains caused no physical damage until flooding later occurred, the court held that the cause of action accrued when physical damage occurred and that this was so even if the nature of the defect was such that damage would inevitably occur in the ordinary course of events.

[53] Philip Britton, 'Make the Developer Get the Job Right: Remedies for Defects in Residential Construction' Society of Construction Law Journal, March 2013.

knowledge required for bringing an action for damages in respect of the relevant damage and a right to bring such an action.

The Latent Damage Act 1986 strikes a balance between the interests of the plaintiff and defendant in a latent defect action. When the plaintiff has no knowledge of the relevant facts concerning the damage to his property, the limitation clock does not begin to tick against him. However, after the lapse of 15 years, the 'long stop' provision in section 14B applies and his claim is barred.

The English statutory scheme for the limitation of actions in tort is consistent with *Pirelli*, having been modified in accordance with the latter. The scheme is also applicable for all negligence claims. The Latent Damage Act 1986 does not alter the date of accrual of the cause of action. It implies that the cause of action has in fact accrued and has started to run but provides for a possible extension of time where facts relevant to the cause of action are not known at that date.

Parliament must have enacted the Latent Damage Act 1986 on the assumption that the *Pirelli* decision was correct. The issue that follows is whether this legislative assumption prevents development of the common law contrary to such assumption. In *Birmingham Corpn v West Midland Baptist (Trust) Association (Inc)*,[54] Lord Reid said that 'the mere fact that an enactment shows that Parliament must have thought that the law was one thing does not preclude the courts from deciding that the law was in fact something different.' In support, he cited the case of *IRC v Dowdall O'Mahoney & Co Ltd*.[55]

[54] [1970] AC 874 (HL) 898.
[55] [1952] AC 401 (HL).

5.6.9 *Costigan v Ruzicka*[56]

In this case, the Alberta Court of Appeal followed *Pirelli* in a solicitor and client case. The plaintiff in that case sold his farm to a timber company in 1962 subject to him being allowed for life to graze livestock on the land save for a few acres. The defendant solicitor failed to protect the plaintiff by duly registering his interest. A subsequent purchaser of the land barred the plaintiff from grazing animals on the land. Only then did the plaintiff know of the solicitor's failure to register his rights.

The court held that the cause of action in contract accrued a reasonable time after the task had been undertaken and that would not be later than the day the file was closed. The court held that as regards the claim in tort, the court should avoid an ad hoc approach but should follow the principle laid down in *Pirelli* that an action in tort commences from the time damage occurs whether or not it was discoverable by reasonable diligence. As such, the plaintiff's cause of action accrued, both in contract and in tort, in 1962 when the defendant failed to register documents protecting the plaintiff's rights.

5.6.10 *City of Kamloops v Nielsen*[57]

The majority judgment in this Canadian case favoured the discoverability rule. A municipality was sued in negligence for failing to prevent the construction of a house with defective foundations. The Municipal Act provided in section 738(2) that such an action must be commenced within one year 'after the cause of such action shall have arisen'. Section 739 stipulated that notice of the damage must be given to the municipality within

[56] (1984) 13 DLR (4th) 368 (Alberta Court of Appeal, Canada).
[57] (1984) 10 DLR (4th) 641 (Supreme Court, Canada).

two months 'from and after the date on which such damage was sustained'.

The municipality conceded that time started to run for both sections from the date the plaintiff actually discovered the damage or ought to have discovered it by the exercise of reasonable diligence. The question was when this occurred. This view of the law was accepted by the British Columbia Court of Appeal which referred to *Sparham-Souter* as authority for the discoverability rule.

The issue of limitation did not arise when the appeal was heard in the Supreme Court of Canada but after the decision of the House of Lords in *Pirelli*, the court called for written submissions on the issue. The majority did not follow *Cartledge* and *Pirelli* but instead held that the discoverability rule applied to section 738(2) of the Municipal Act. The *Cartledge* and *Pirelli* cases were decided based on the constraints imposed by the then limitation legislation. The court in *Kamloops* did not take the view that the limitation legislation applicable to that case was distinguishable from that faced by the House of Lords in *Cartledge* and *Pirelli*.[58]

The matter of injustice if the law is construed according to *Cartledge* and *Pirelli* weighed heavily on the court in coming to the decision of rejecting the views in these two cases. The court said, 'But perhaps the most serious concern is the injustice of a law which statute-bars a claim before the plaintiff is even aware of its existence.'[59]

[58] The Supreme Court of Canada in *Central Trust Co v Rafuse* [1986] 2 SCR 147 [76], in commenting on *Kamloops*, said that it was questionable whether they were distinguishable on that basis at all.
[59] *City of Kamloops v Nielsen* (1984) 10 DLR (4th) 641 (Supreme Court, Canada) 40.

The majority decision in *Kamloops* was revisited by the Supreme Court of Canada in *Central Trust Co v Rafuse*[60] and was adopted as 'a general rule that a cause of action arises for purposes of a limitation period when the material facts on which it is based have been discovered or ought to have been discovered by the plaintiff by the exercise of reasonable diligence'. The court added that there was no good reason in differentiating between actions for recovery of damages for injury to property and for purely financial loss arising from professional negligence, contrary to the suggestion made in *Forster v Outred & Co*.[61]

5.6.11 *Sutherland Shire Council v Heyman*[62]

In this Australian High Court case where there was damage to a house caused by defective foundations, Deane J considered two possibilities for marking the time when the cause of action accrued: (a) when the plaintiffs acquired the house, paying a higher price in ignorance of the defective foundations, and effectively suffering a loss or detriment at that time; or (b) when the inadequacy of the foundations was first known or became manifest.[63] He thought the latter more correct; only then did economic loss in the nature of actual diminution of the market value of the house occur.[64]

In *Sutherland Shire Council*,[65] Deane J said that 'any loss or injury involved in the actual inadequacy of the foundations is sustained only at the time when that inadequacy is first known or manifest. It is only then that the actual diminution in the market value of the

[60] [1986] 2 SCR 147.
[61] [1982] 2 All ER 753 (CA) 765-766.
[62] [1985] HCA 41, 157 CLR 424 (High Court, Australia).
[63] *Sutherland Shire Council v Heyman* [1985] HCA 41, 157 CLR 424 (High Court, Australia) 503.
[64] *Sutherland Shire Council v Heyman* [1985] HCA 41, 157 CLR 424 (High Court, Australia) 503 (Deane J).
[65] *Sutherland Shire Council v Heyman* [1985] HCA 41, 157 CLR 424 (High Court, Australia) 505.

premises occurs.'[66]

5.6.12 *Ketteman v Hansel Properties Ltd*[67]

The House of Lords reaffirmed the principle laid down in *Pirelli* in this case. The claim was made by owners of houses against architects for breach of duty in the design and siting of the houses after cracks caused by faulty foundations appeared. The architects appealed to the House of Lords and argued that the damage was economic and had occurred when the houses were constructed. Following *Pirelli,* Lord Keith rejected that argument.[68] The court held that time ran from the date the walls started to crack.

5.6.13 *Murphy v Brentwood District Council*[69]

The House of Lords in *Murphy v Brentwood District Council* diverged from *Anns* and held that pure economic loss arising from negligence could only be recoverable under the *Hedley Byrne* principle of reliance. In the course of his judgment in *Murphy,*[70] Lord Keith commented on *Pirelli* that if the plaintiffs there had discovered the defect before any damage had taken place 'there would seem to be no good reason for holding that they would not have had a cause of action in tort at that stage, without having to wait until some damage had occurred' as they would have suffered economic loss in having a defective chimney which required expenditure to remove the defect. He concluded his comments as follows:

> It would seem that in a case such as *Pirelli*, where the tortious liability arose out of a contractual relationship with professional people, the duty extended to take

[66] The passage containing those words was quoted with approval in *Murphy v Brentwood District Council* [1991] 1 AC 398 (HL) 466-468 by Lord Keith in a speech which received the general agreement of the six other Law Lords sitting with him. The same passage was also quoted with approval by Lord Lloyd in *Invercargill City Council v Hamlin* [1996] AC 624 (PC) 647-648 when delivering the advice of their Lordships' Board presided over by Lord Keith.
[67] [1987] AC 189 (HL).
[68] *Ketteman v Hansel Properties Ltd* [1987] AC 189 (HL) 205.
[69] [1991] 1 AC 398 (HL).
[70] *Murphy v Brentwood District Council* [1991] 1 AC 398 (HL) 466.

> reasonable care not to cause economic loss to the client by the advice given. The plaintiffs built the chimney as they did in reliance on that advice. The case would accordingly fall within the principle of *Hedley Byrne & Co Ltd v Heller & Partners Ltd*.[71]

The comments seem to point to latent damage cases being cases of pure economic loss in line with *Hedley Byrne* principles, and physical damage is merely evidence of economic loss which has been caused.

In this case, the Council had approved plans based on the advice of a consulting engineer. There was an error in the calculations of the foundations. The foundations then cracked resulting in damage to the walls and the pipes. Rather than repairing the house at the estimated cost of £45,000, the plaintiff purchaser sold it for £35,000 less than the value it would have had if it had not been damaged. He sued the Council for the diminution in price using the ground that it was negligent in passing the plans in breach of its statutory duties. The House of Lords held that the Council did not owe the relevant duty.

5.6.14 *Invercargill City Council v Hamlin*[72]

This case is consistent with the line of authority developed by the New Zealand courts. In *Mount Albert Borough Council v Johnson,*[73] a latent defect case, the Court of Appeal there held that the cause of action accrued only when the defect became apparent or manifest.

[71] *Murphy v Brentwood District Council* [1991] 1 AC 398 (HL) 466 (Lord Keith).
[72] [1996] AC 624 (PC).
[73] [1979] 2 NZLR 234 (Court of Appeal, New Zealand).

After *Pirelli* had been decided, the New Zealand Court of Appeal had the opportunity of reconsideration in *Askin v Knox*.[74] The court remained faithful to *Mount Albert Borough Council* though. The Privy Council in deciding *Invercargill* was realistic to the fact that the law in New Zealand had for long evolved in a different path.

The Court of Appeal also suggested that a 'longstop' provision in the mould of the English Latent Damage Act 1986 be introduced by the legislature to bar overly stale claims. The New Zealand Parliament took up the proposal and enacted the Building Act 1991 incorporating a longstop period of 15 years. However there is nothing in the form of a postponement of the accrual of the cause of action or the extension of the limitation period where damage is discovered after it has taken place. This was unnecessary since *Pirelli* was not the law and the New Zealand Parliament must have endorsed that.

In this case, the Court of First Instance in New Zealand found the building inspector in breach of his duty of care and that the damage to the plaintiff occurred only when the defects in the foundations of the house were discovered which led to the value of the house being diminished. That judgment was confirmed by the Privy Council on appeal.

Lord Lloyd was of the view that the approach taken by their Lordships 'is consistent with the underlying principle that a cause of action accrues when, but not before, all the elements necessary to support the plaintiff's claim are in existence'.[75] Applying that principle to a latent defect in a building, he said that 'the element of loss or damage which is necessary to support a claim for economic loss in tort does not exist so long as the market

[74] [1989] 1 NZLR 248 (Court of Appeal, New Zealand).
[75] *Invercargill City Council v Hamlin* [1996] AC 624 (PC) 648.

value of the house is unaffected' and that the market value cannot be affected by an undiscoverable crack.[76]

The Judicial Committee of the Privy Council took the position that in cases of latent building defects, the building owner's cause of action accrues when the latent defects become patent.[77] This is when the defects become so obvious that any reasonable building owner would seek expert evaluation.[78] What would be obvious to a reasonable building owner would similarly be obvious to any reasonable potential purchaser, or his expert. This is the point in time when the economic loss occurs and the cause of action accrues. The measure of the damages will then be the cost of repairs if it is reasonable to repair, or the diminution in the market value if it is not, following *Ruxley Electronics and Construction Ltd v Forsyth*.[79]

Their Lordships emphasized that their advice on the limitation issue is restricted to latent defects in buildings. They declined to consider whether the 'reasonable discoverability' test should be of more general application in the law of tort. The Privy Council said that the approach taken there 'avoids almost all the practical and theoretical difficulties to which the academic commentators have drawn attention'. The Privy Council added, 'Whether or not it is right to describe an undiscoverable crack as damage, it clearly cannot affect the value of the building on the market. The existence of such a crack is thus irrelevant to the cause of action.'

[76] *Invercargill City Council v Hamlin* [1996] AC 624 (PC) 648 (Lord Lloyd).
[77] ibid.
[78] ibid.
[79] ibid.

5.6.15 *Nykredit Mortgage Bank plc v Edward Erdman Group Ltd (No 2)*[80]

The House of Lords decision in this case, although not concerned with limitation, is instructive as to when loss is first suffered. When the loss was first suffered was relevant in this case as entitlement to interest commenced on that date. A loan granted by the plaintiff bank was secured by a property which the defendant valuers had negligently overvalued. The borrower defaulted almost immediately. After realization of the security, there existed a shortfall.

Lord Nicholls said that (a) in one sense a lender on overvalued security undoubtedly suffers loss when the loan transaction is completed; (b) however, in another sense he may suffer no loss at that stage because the borrower may not default.[81] He then posed the question: 'When, then, does the lender first sustain measurable, relevant loss?'[82] Based on this formulation, the cause of action may accrue at the time of the defendant's negligence, or it may accrue later when measurable, relevant loss is first sustained. Lord Hoffmann said, 'Relevant loss is suffered when the lender is financially worse off by reason of a breach of the duty of care than he would otherwise have been.'[83] *Nykredit* shows that the relevance of when loss first occurs, and therefore when the cause of action accrues, cannot be confined to limitation.

5.6.16 *The Bank of East Asia, Ltd v Tsien Wui Marble Factory Ltd*[84]

In this case, a bank instituted action against an architect for damage to a building. Counsel for the architect canvassed the point that the claim by the bank should not be

[80] [1997] 1 WLR 1627 (HL).
[81] *Nykredit Mortgage Bank plc v Edward Erdman Group Ltd (No 2)* [1997] 1 WLR 1627 (HL) 1631.
[82] *Nykredit Mortgage Bank plc v Edward Erdman Group Ltd (No 2)* [1997] 1 WLR 1627 (HL) 1631 (Lord Nicholls).
[83] *Nykredit Mortgage Bank plc v Edward Erdman Group Ltd (No 2)* [1997] 1 WLR 1627 (HL) 1639.
[84] [1999] HKCFA 6, (1999) 2 HKCFAR 349.

focused on physical damage to the building and the cost necessary to repair the damage, but rather on the diminution in the value of the building caused by the negligent design for the cladding. This approach followed *Hedley Byrne* in that the cause of action would arise when the bank relied upon the professional advice given by the architect. This would happen earlier than the physical damage.

No support for such an approach to latent damage to buildings was available from the authorities. However, in cases concerning negligent solicitors, the cause of action accrued the moment the advice was given, and was acted upon by the plaintiff. Can the analogy be applicable?

In *Bank of East Asia*, the trial judge rejected *Pirelli* on the ground that *Pirelli* had been displaced by *Murphy* and *Invercargill*. He held that the cause of action accrued when 'the defects [were] so obvious that any reasonable person would have called in an expert and, having done so, would have been aware of defects and realised that a loss had been suffered'.

In overturning the trial judge's decision, the Court of Appeal held that the bank's cause of action in tort accrued when 'the construction of the building was completed' (per Mayo JA) or when the bank 'acquired and paid for the building with the defective design' (per Rogers JA). Leong JA agreed with both but he did not give any reasons of his own. Although Mayo JA observed that the issue as to whether there was in fact economic loss immediately upon completion of the building had not been satisfactorily ascertained, he thought it unnecessary to resolve that issue before coming to his conclusion as the bank had not got what it had bargained for. This view seems to equate tortious liability with

contractual liability.

The appeal to the Hong Kong Court of Final Appeal was allowed by a 3:2 margin with the minority judges (Bokhary PJ and Lord Nicholls) holding that time started to run upon discovery of the defect whereas the majority judges (Litton PJ, Ching PJ and Nazareth NPJ) followed *Pirelli*. Litton PJ noted that Lord Reid had held in *Cartledge*[85] that a cause of action accrues the moment the wrongful act has caused personal injury which is more than negligible.[86] Clearly, in imposing a limitation period for proceedings, the legislature 'cannot be thought to have required parties to embark upon the redress of wrong before any damage in a real and substantial sense has occurred'.[87] It cannot be legislative policy to encourage speculative law suits.[88]

Ching PJ said that the proposition in *Invercargill* that economic loss in relation to a building is sustained only when its market value is depreciated is not without difficulties.[89] Ching PJ said that such a proposal 'ignores the fact that damage has already occurred and that discovery is not damage of itself and cannot itself cause damage'.[90] It necessarily means, he added, that the owner of the property would be selling it or dealing with it like by way of mortgage.[91] It therefore 'involves realising a loss rather than suffering it, for the loss has been suffered when the damage or defect came into existence'.[92] He continued as follows:

> To my mind it necessarily draws a distinction between the damage necessary or sufficient as one of the bases of a cause of action in negligence between saleable

[85] *Cartledge v E Jopling & Sons Ltd* [1963] AC 758 (HL) 771.
[86] *The Bank of East Asia, Ltd v Tsien Wui Marble Factory Ltd* [1999] HKCFA 6, (1999) 2 HKCFAR 349 [92].
[87] *The Bank of East Asia, Ltd v Tsien Wui Marble Factory Ltd* [1999] HKCFA 6, (1999) 2 HKCFAR 349 [92] (Litton PJ).
[88] ibid.
[89] *The Bank of East Asia, Ltd v Tsien Wui Marble Factory Ltd* [1999] HKCFA 6, (1999) 2 HKCFAR 349 [163].
[90] ibid.
[91] *The Bank of East Asia, Ltd v Tsien Wui Marble Factory Ltd* [1999] HKCFA 6, (1999) 2 HKCFAR 349 [163] (Ching PJ).
[92] ibid.

> objects, such as buildings, on the one hand and objects which are not saleable, such as the human body and, in cases of pure economic loss, cases such as tax, legal and valuation advice on the other. I can see no logical justification for any such distinction. It confuses or equates physical damage with economic damage. In the latter case no physical damage is necessary. It confuses the damage necessary for a cause of action in negligence and the evidence necessary to prove the damage or its quantum.[93]

Ching PJ further said, 'A cause of action factually exists or it does not. The evidence by which those facts are to be proved is quite another matter.'[94]

Bokhary PJ said that 'the economic loss in building defects cases occurs when the market value of the building is diminished upon the defects ceasing to be latent and becoming known to the market as represented by reasonable people in the marketplace'.[95] His reasoning was based on the need to give substance and real meaning to the term 'economic loss' otherwise it is nothing but a mere label.[96] He put it in *Nykredit* terms by saying that 'the depreciation marks the onset of "measurable" loss and when the building owner becomes "financially worse off"'.[97] Bokhary PJ argued that there is no doubt 'that any layman would condemn as an absurdity, injustice and mockery the notion of someone having something which lawyers call a "cause of action" but which secretly comes about and just as secretly goes away before the victim of a legal wrong can go to a court for a remedy'.[98]

It is significant that the English Latent Damage Act 1986 does not define when a cause of action for negligence accrues. That must fall for determination by common law principles. The Act was legislated in response to the common law as decided in *Pirelli*. On

[93] *The Bank of East Asia, Ltd v Tsien Wui Marble Factory Ltd* [1999] HKCFA 6, (1999) 2 HKCFAR 349 [163] (Ching PJ).
[94] *The Bank of East Asia, Ltd v Tsien Wui Marble Factory Ltd* [1999] HKCFA 6, (1999) 2 HKCFAR 349 [172].
[95] *The Bank of East Asia, Ltd v Tsien Wui Marble Factory Ltd* [1999] HKCFA 6, (1999) 2 HKCFAR 349 [239].
[96] *The Bank of East Asia, Ltd v Tsien Wui Marble Factory Ltd* [1999] HKCFA 6, (1999) 2 HKCFAR 349 [239] (Bokhary PJ).
[97] ibid.
[98] *The Bank of East Asia, Ltd v Tsien Wui Marble Factory Ltd* [1999] HKCFA 6, (1999) 2 HKCFAR 349 [244].

this aspect, Lord Nicholls NPJ commented as follows:

> But this legislation cannot be regarded as having frozen the common law as thus enunciated, and *Pirelli* has already been overtaken**.** *Pirelli* treated the onset of physical damage to the building as the relevant damage in cases of claims for negligence in the design or construction of buildings. As already noted, that analysis of the relevant damage is no longer regarded as satisfactory. To treat *Pirelli* as still the guiding principle in this field would be to take a retrograde step for which I can see no justification.[99]

5.7 The Malaysian position

The relevant limitation provisions in Malaysia are prescribed by section 6(1)(a) of the Limitation Act 1953 which reads as follows:

> 6(1) Save as hereinafter provided the following actions shall not be brought after the expiration of six years from the date on which the cause of action accrued, that is to say —
>
> (a) actions founded on a contract or on tort;

5.7.1 *Goh Kiang Heng v Hj Mohd Ali Bin Hj Abd Majid*[100]

This case involved a plaintiff who entered into a sale and purchase agreement in 1984 to purchase land from the owner. The defendant was an advocate and solicitor acting for the plaintiff in that transaction. On 30 November 1984, the plaintiff signed and handed to the defendant a transfer form to be presented to the Registrar of Land Titles to complete the transfer of the land. The defendant failed to present the transfer form for registration. On 27 March 1991, the owner sold the land to a third party.

On 30 March 1994, the plaintiff filed proceedings against the defendant claiming for, inter alia, specific performance of the oral agreement relating to the transfer of the land

[99] *The Bank of East Asia, Ltd v Tsien Wui Marble Factory Ltd* [1999] HKCFA 6, (1999) 2 HKCFAR 349 [276] (Lord Nicholls).
[100] [1998] 1 MLJ 615 (HC).

and damages. The defendant pleaded in his statement of defence that, inter alia, the plaintiff's claim was limitation-barred. The defendant applied to strike out the statement of claim under Order 18 rule 19(1)(a) of the Rules of the High Court 1980.

The issue here was when the plaintiff's cause of action for breach of contract and in tort arising out of the defendant's alleged negligence accrued. The court held that the breach of contract occurred at the time when it was impossible for the defendant to register the transfer which was when the new owner acquired the land in 1991.

As regards the claim in tort, the court held that the cause of action arose when it was too late to register the transfer which would be the time when the plaintiff suffered actual damage. The court said that that would be the time when all the necessary elements to support the plaintiff's claim came into existence.[101] In adopting that position, the court referred to *Credit Corp (M) Bhd v Fong Tak Sin*[102] and *Invercargill*, thus alluding to a rejection of the *Pirelli* principle.

5.7.2 *Kuala Lumpur Finance Bhd v KGV & Associates Sdn Bhd*[103]

In this case, the plaintiff was a licensed finance company and the defendant was a property valuer. A borrower applied for a loan from the plaintiff and as security intended to charge a piece of property to the plaintiff. The borrower engaged the defendant to prepare a valuation report of the property.

[101] *Goh Kiang Heng v Hj Mohd Ali Bin Hj Abd Majid* [1998] 1 MLJ 615 (HC) 634.
[102] [1991] 1 MLJ 409 (SC).
[103] [1995] 1 MLJ 504 (HC).

The defendant submitted a valuation report dated 18 October 1984 which stated that there was a double-storey house built on the property; and that the fair market value and forced sale value of the property were RM260,000 and RM220,000 respectively. The plaintiff relied on the valuation report to grant a loan of RM150,000 to the borrower on the security of a charge of the property.

There was a loan default. The plaintiff called for another valuation report from another firm of valuers which showed that the defendant's report was totally false. The second report showed that at the material time, there was no house at all and the sale value was only RM53,000.

The plaintiff sued the defendant under negligence and fraud, claiming as special damages the loan amount of RM150,000. The plaintiff claimed that it had suffered loss as the loan was never repaid right from the beginning.

The defendant applied under all the four limbs of Order 18 rule 19 of the Rules of the High Court 1980 to strike out the plaintiff's claim for reason that it was out of time. The defendant contended that the cause of action arose on 14 December 1984 when the loan was disbursed and the borrower failed to pay. Since the suit was filed on 31 May 1992, more than six years had elapsed and limitation would have set in.

The learned judge, however, agreed with the plaintiff's argument that the cause of action accrued, not at the time the borrower defaulted, but at the time the plaintiff discovered the negligence and/or fraud of the defendant. He added that the plaintiff's claim had nothing to do with the borrower's default because the plaintiff was not claiming for the

repayment of the loan given to the borrower but was claiming as special damages the amount it lost upon the defendant's negligence and/or fraud.[104] The learned judge held that the cause of action arose on 6 March 1989 when it received the second valuation report and as such, limitation did not apply.

The court sought to distinguish the instant case from *Pirelli* on the facts as 'the House of Lords was considering damage caused by the negligent design or construction but in the present case it is not one based on negligent design or construction'.[105] The court held that the plaintiff's action was not statute-barred and dismissed the defendant's application. It is noted that the defendant also predicated its application on fraud as an alternative. In such a case, it is beyond argument that the limitation clock began to run only upon discovery of the fraud.

5.7.3 *AmBank (M) Bhd v Abdul Aziz bin Hassan & Ors*[106]

This case also involved solicitors. The appellant bank had granted a loan facility to the borrower. The loan was intended to be secured by a third party assignment over a piece of land. The respondents were lawyers practising with a law firm which was instructed by the appellant to prepare and attend to the execution of the loan agreement and the third party assignment of the land. Both these documents were dated 6 April 1999. The appellant then released the loan sum to the borrower. In November 2000, the borrower defaulted in repaying the loan to the appellant.

[104] *Kuala Lumpur Finance Bhd v KGV & Associates Sdn Bhd* [1995] 1 MLJ 504 (HC) 508.
[105] *Kuala Lumpur Finance Bhd v KGV & Associates Sdn Bhd* [1995] 1 MLJ 504 (HC) 509.
[106] [2010] 3 MLJ 784 (CA).

The appellant encountered problems in enforcing the third party assignment. The appellant sued the respondents for being in breach of contract or negligent in failing to advise the appellant that the assignor did not have good title to the land.

The Court of Appeal held that the date of discovery of the cause of action is only relevant if the cause of action is based on fraud or mistake or is concealed by fraud pursuant to section 29 of the Limitation Act 1953.[107] The appellant did not plead as such.

The Court of Appeal was of the view that under section 6(1)(a) of the Limitation Act 1953, a cause of action in contract first accrues from the date of the first clear and unequivocal breach of contract, whereas a cause of action in tort first accrues when the plaintiff suffers damage.[108]

The court considered *Cartledge* and *Pirelli* and adopted their reasoning. However, no similar or equivalent amendment as the English Limitation Act 1963 had been made to our Limitation Act 1953. So the position in Malaysia remained the same as that under the English Limitation Act 1939. Accordingly, the limitation period commenced from the date on which the cause of action accrued whether or not the plaintiff discovered the damage.[109] The Court of Appeal emphatically said, 'There is only one test in Malaysia in order to ascertain limitation. It is housed in s 6(1)(a) of the Limitation Act 1953.'[110]

The court found that the respondents were under a duty as solicitors for the appellant to ensure that the third party assignment was valid and effective. Therefore, the

[107] *AmBank (M) Bhd v Abdul Aziz bin Hassan & Ors* [2010] 3 MLJ 784 (CA) [12].
[108] *AmBank (M) Bhd v Abdul Aziz bin Hassan & Ors* [2010] 3 MLJ 784 (CA) [13].
[109] *AmBank (M) Bhd v Abdul Aziz bin Hassan & Ors* [2010] 3 MLJ 784 (CA) [28].
[110] *AmBank (M) Bhd v Abdul Aziz bin Hassan & Ors* [2010] 3 MLJ 784 (CA) [29].

court held that the alleged breach of contract would have occurred the moment the third party assignment became invalid or ineffective. It was found that the assignor did not have good title to the land. The court held that the third party assignment being void, the breach of duty in contract occurred when the third party assignment was executed on 6 April 1999.

The court also found that the appellant would have suffered damage when the third party assignment was executed because of its invalidity. The court held that for both the action in contract and the action in tort, the cause of action accrued on 6 April 1999 and therefore the claims were out of time.

5.7.4 *AmBank (M) Bhd v Kamariyah bt Hamdan & Anor*[111]

This appeal concerned the striking out of a third party notice taken out by the appellant against the respondents on the ground that whatever claims for contribution, indemnity, relief or other remedy against the respondents was time-barred. The plaintiffs had an agreement with the first defendant to develop the plaintiffs' lands. The third, fourth and fifth defendants were directors of the first defendant.

At the High Court, the plaintiffs claimed that the first, third, fourth and fifth defendants had fraudulently charged the lands to the appellant as security for loans granted by the appellant to the first defendant. The plaintiffs' claim against the appellant which was the second defendant was that it had acted fraudulently or negligently in respect of the charge of the lands.

[111] [2013] 5 MLJ 448 (CA).

The lands were charged to the appellant by way of a power of attorney granted by the plaintiffs to the first defendant. The plaintiffs claimed that the power of attorney was exercised in breach of a condition that the lands could only be charged upon the issuance of separate individual titles. The plaintiffs therefore sued to set aside the charge.

The respondents in this appeal to the Court of Appeal were partners of the firm of solicitors handling the charge and which advised the appellant to release the loan, which the appellant did. The appellant took out a third party notice against the respondents claiming negligence. The High Court struck out the third party notice on the ground that the appellant's alleged loss and damage took place upon release of the loan on 1 September 1997 and consequently, its claim against the respondents was caught by limitation.

Jeffrey Tan JCA, in delivering the judgment of the Court of Appeal, held that the appellant on 1 September 1997 could not have discovered, by the exercise of any reasonable diligence, whatever negligence on the part of the respondents.[112] The judge added that the earliest date on which the appellant could have suspected anything amiss with the charge was when it was served with the writ of summons dated 24 May 2000.[113] The Court of Appeal held that that was the date on which the cause of action arose and since the third party notice was issued within six years from that date, it was not statute-barred. The court opined that on 1 September 1997, the appellant had no notice of any claim against it and whatever possible loss had not been ascertained or was even ascertainable, and as such, it could not have claimed indemnity from the respondents.

[112] *AmBank (M) Bhd v Kamariyah bt Hamdan & Anor* [2013] 5 MLJ 448 (CA) [21].
[113] *AmBank (M) Bhd v Kamariyah bt Hamdan & Anor* [2013] 5 MLJ 448 (CA) [21] (Jeffrey Tan JCA).

The Court of Appeal also adopted the reasoning of Augustine Paul JC in *Goh Kiang Heng v Hj Mohd Ali Bin Hj Abd Majid* that for an action based on tort, damage is suffered at the time when all the necessary elements supporting the plaintiff's claim are in existence, and that before that time, there is only prospective loss and not actual damage.

The Court of Appeal additionally relied on *Wardley Australia Ltd v Western Australia*[114] where the National Australia Bank granted a banking facility to Rothwells which was secured by an indemnity from the state to the bank. The state alleged that the indemnity was procured by the misleading and deceptive conduct of Wardley, the merchant bankers, about Rothwells. The bank suffered loss from the banking facility and called upon the indemnity which the state settled by making a substantial payment.

The issue that called for determination was the time that the state's cause of action against Wardley accrued - whether it was when the indemnity was granted or when it was called upon. The High Court of Australia held that the indemnity created 'an executory and contingent liability' and that the state 'suffered no loss until that contingency was fulfilled and time did not begin to run until that event'.[115] The High Court of Australia indicated that the contingency crystallised and the state incurred a liability to the bank 'if and when the bank's relevant "net loss" was ascertained and quantified, subject to the making of a demand for payment by the bank'.[116]

[114] [1992] HCA 55, 175 CLR 514 (High Court, Australia).
[115] *Wardley Australia Ltd v Western Australia* [1992] HCA 55, 175 CLR 514 (High Court, Australia) 260.
[116] *Wardley Australia Ltd v Western Australia* [1992] HCA 55, 175 CLR 514 (High Court, Australia) 252.

The Court of Appeal in *AmBank (M) Bhd v Kamariyah bt Hamdan & Anor* also referred to *Law Society v Sephton & Co*[117] where the House of Lords approved *Wardley*. That case involved the defendant firm of accountants negligently certifying that a solicitor had complied with the Solicitors' Account Rules. The fact was that the solicitor had been misappropriating moneys held in his client account. The Law Society maintained the Solicitors' Compensation Fund which could be resorted to for compensating aggrieved parties due to a solicitor's dishonesty. The defendant argued that the Society suffered damage from the defendant's negligence whenever the solicitor had misappropriated client's money after the defendant had delivered a negligent accountant's report as that misappropriation vested the client with a right to make a claim on the compensation fund and liability to such a claim was damage.

The House held that a contingent liability is not actionable until the contingency happens which is the time that actual damage is sustained and prior to that, the loss is merely prospective and may never be incurred. The House said that in accordance with the rules of the compensation fund, the solicitor's misappropriations gave rise to the possibility of a liability to pay compensation out of the fund but damage to the compensation fund only occurred when a claim was actually made. As such, the House held that the Society only had a cause of action when it first received a claim on the fund from one of the solicitor's clients.

The end result was that the Court of Appeal declined to follow the principle made in *AmBank (M) Bhd v Abdul Aziz bin Hassan & Ors* that time would run regardless of whether damage was or could be discovered.

[117] [2006] UKHL 22, [2006] 2 AC 543.

5.8 Burden of Proof

Section 6(1)(a) of our Limitation Act 1953 imposes a time frame for bringing actions founded on tort which is six years from the date on which the cause of action accrued. It does not say who bears the burden of proof. It may be argued that since the plaintiff has to prove only the elements of his cause of action which does not include the date of accrual of the cause of action, then it is for the defendant to prove this point should he wish to rely on it to defeat the plaintiff's claim. This was what the Victorian Full Court held in *Pullen v Gutteridge Haskins and Davey Pty Ltd*.[118]

However, on a practical level, it is usually the plaintiff and not the defendant who has knowledge of when he suffered the actionable harm. It is suggested that initially, the burden is on the defendant to plead limitation, but subsequently, the burden is on the plaintiff to show that his action is within time.[119] If the plaintiff succeeds in showing prima facie that his claim is not time-barred, the burden then shifts to the defendant to show otherwise if his objection is to succeed.[120] It is more correct to say that the burden of proof is nevertheless on the plaintiff.[121] This view was favoured by Lord Pearce in *Cartledge*.[122]

As such, a plaintiff need not plead in the statement of claim that his action has been commenced within time. However if limitation is raised in the defence, the burden rests on the plaintiff to rebut the limitation point.[123]

[118] [1993] VicRp 4, [1993] 1 VR 27 (Supreme Court, Victoria).
[119] Andrew McGee, *Limitation Periods* (3rd edn, Sweet & Maxwell 1998) 349.
[120] ibid.
[121] ibid.
[122] *Cartledge v E Jopling & Sons Ltd* [1963] AC 758 (HL) 784.
[123] See *Cartledge v E Jopling & Sons Ltd* [1963] AC 758 (HL) 784; *London Congregational Union Inc v Harriss & Harriss* [1988] 1 All ER 15 (CA); *Crocker v British Coal Corpn* (1995) 29 BMLR 159 (QBD).

5.9 Conclusion

For latent defect claims arising from the provision of professional services, there are three possible competing times when the cause of action accrues:

(a) the time when the plaintiff relies upon the professional services of the defendant;

(b) the time when the physical damage first occurs; and

(c) the time when the physical damage is discovered.

As regards (a) above, latent damage cases are looked upon as claims for negligent mis-statement under *Hedley Byrne* principles, as enlarged in *Henderson v Merrett Syndicates Ltd*.[124] However, such classification alone will not resolve the issue as to when the cause of action accrues. For the wrong to translate into an actionable claim in tort, damage must have occurred. For latent defect cases, it may be difficult to prove damage if no physical damage has occurred. This is unlike cases of negligent solicitors and valuers.

As for (b), time starts to run when the first physical damage, in a real and substantial sense, occurs, whether the plaintiff knows about it or not. The House of Lords decided in *Pirelli* that the cause of action in tort for physical damage to a building accrues as soon as such damage comes into existence, irrespective of knowledge or means of knowledge. *Pirelli* was decided on the basis of physical damage and not economic loss. However, in *Murphy*, the House of Lords put cases of latent building defects under economic loss rather than physical damage.

[124] [1995] 2 AC 145 (HL).

The common law world seems to have forsaken *Pirelli* and embraced (c) above. Even prior to Invercargill, the same principle was endorsed in New Zealand by *Mount Albert Borough Council v Johnson.*[125] *Pirelli* has also been rejected in Australia (*Sutherland Shire Council v Heyman*)[126] and in Canada (*City of Kamloops v Nielsen*).[127]

In Malaysia, it is unclear which prescription is applicable, given the contrasting positions of our Court of Appeal in *AmBank (M) Bhd v Abdul Aziz bin Hassan & Ors*[128] and *AmBank (M) Bhd v Kamariyah bt Hamdan & Anor*[129] with the former adopting formulation (b) and the latter favouring formulation (c).

However, neither of these two cases was concerned with limitation periods for latent damage claims. They involved the liability of solicitors and the issue of contingent or prospective loss. There is no certainty that such contingent loss will crystallise. In contrast, in latent defect claims, the damage has already occurred prior to its manifestation. The plaintiff has suffered damage; only that he does not know it. The issue of contingency does not arise. There are material differences between these two categories of cases and they should not be treated in the same way. The authorities are not agreed on this point though. Whereas the Supreme Court of Canada said in *Central Trust Co v Rafuse*[130] that there is no difference, the English Court of Appeal in *Forster v Outred & Co*[131] took the opposite view.

[125] [1979] 2 NZLR 234 (Court of Appeal, New Zealand).
[126] [1985] HCA 41, 157 CLR 424 (High Court, Australia).
[127] (1984) 10 DLR (4th) 641 (Supreme Court, Canada)).
[128] [2010] 3 MLJ 784 (CA).
[129] [2013] 5 MLJ 448 (CA).
[130] [1986] 2 SCR 147.
[131] [1982] 2 All ER 753 (CA) 765-766 (Sir David Cairns).

Accordingly, as regards the commencement of the limitation period for latent defect claims in Malaysia, the point is still open as to whether the discoverability principle holds sway.

The above exploration of the law in Malaysia and other relevant jurisdictions has been done to meet Research Objectives No. 1 and 2 in regard to the selected issues in construction defect claims that come within the broad category of limitation periods.

CHAPTER 6: DISCUSSION OF FINDINGS

6.1 Introduction

In Chapters 3, 4 and 5, a study has been made as to the development of the law until its current position in the three broad areas of construction defect claims in general and the Research Issues in particular. This has been done in the Malaysian context with sideway scrutiny of parallel developments in the common law world which may be relevant here. Premised on this knowledge, the law in respect of the Research Issues will be critically analysed in this chapter to explore its strengths and weaknesses, and to address the question of whether there is any possibility for improvement.

6.2 Loss Suffered by the Owner Who is not the Employer in a Building Contract

Where loss is suffered by the owner who is not the employer in a construction contract, the law should prevent the loss from falling into a 'legal black hole'. Sometimes the owner of land, which is a company, may appoint a subsidiary company or associated company to enter into a building contract as the employer with a contractor for tax or other reasons. The liability of the contractor, if in default, to the owner and employer may be elusive as under general contractual principles, the employer cannot recover from the contractor substantial, as opposed to nominal, damages as he has suffered no loss since neither the land nor the building belongs to him. Nor can the owner recover damages because there is no privity of contract.

It is undeniable that there is a need for an exception to the general rule so as to provide a remedy for the loss suffered by the owner who is not the employer in a

building contract to avoid the spectre of the legal black hole.[1] However, to make such an exception fit into the tapestry of the established law is proving to be a very exacting task.

As testimony of the complexities involved, the decision in *Alfred McAlpine Construction Ltd v Panatown Ltd*[2] was reversed at every turn and when the dispute finally reached the House of Lords, it was only by a simple majority that Panatown's claims against McAlpine were defeated. The five Law Lords on the panel were divided in their reasons for their decisions. The overall decision on the principles of transferred loss was inconclusive and tentative. It is difficult to discern many general principles from this case which can be applied to future cases. *McAlpine* seems to lead to the inference that the applications of the narrow and broader grounds are very much dependent on the facts and circumstances of the particular case. *McAlpine* has not resolved all the problems associated with this issue comprehensively and with precision. A holistic solution is clearly missing.

Without the guidance of general principles, every case will have to be resolved on its own facts as the court tries to balance the competing interests of the parties in a sensible way. However, this makes for an uncertain law. Parties will be unable to enter into contractual relations with a clear view of the implications involved. Disputes may also be easily stoked as the parties may be unable to fathom where they stand in law.

There ought to be clear parameters to the utility of the narrow and broader grounds. There should be a clear demarcation between the narrow ground and the broader ground otherwise the continued existence of both will lead to confusion.

[1] See, for example, *Technotrade v Larkstore Ltd* [2006] EWCA Civ 1079, [2007] 1 All ER (Comm) 104 [65] (Rix LJ).
[2] [2001] 1 AC 518 (HL).

As imperfect as they are, it is submitted that the following principles be considered as a starting point in addressing these issues. Take the situation where A enters into a contract with B for the erection of a building by B on land belonging to C. Assume first the simple scenario where C has not entered into any contract with B, such that C acquires an independent cause of action against B if B breaches the contract with A. Upon breach by B, A is entitled to bring an action against B under the narrow ground or the broader ground.

Under the broader ground, A can recover substantial damages, measured by the amount it takes to make good what B has undertaken to perform. As the broader ground rests on the premise that it is to compensate for A's own loss due to his performance interest or expectation interest, A will be precluded from recovering any consequential losses suffered by C, including loss of profits. Such consequential losses have to be pursued by A on the basis of the narrow ground where he may sue on behalf of C for losses sustained by C.

Whether A is obliged to deliver to C the damages he recovers from B or to complete or perfect the performance to C after obtaining the damages will depend on whether he succeeds against B on the narrow ground or the broader ground. The answers would then be yes and no respectively due to the underlying rationale of these two grounds.

If it is an incidence of the broader ground that A has to account to C for the damages that he recovers from B, then there is hardly any difference between the

narrow ground and the broader ground. The rationale for the existence of the broader ground completely evaporates.

Under the narrow ground, does A have to prove that he will actually utilise the damages recovered from B to make good the performance which B had promised? It is submitted that A should not be placed under such a burden. For one, it is difficult to say what kind of proof will suffice. A can say that he intends to complete the work or remedy the defects if that is all that is required of him but that does not seem to have much practical effect. To compel A to prove that he has taken all the necessary steps for performance is unfair as there is no certainty that he will obtain judgment against B, much less that he will be able to enforce such judgment, and also bearing in mind that A will incur expenses in making efforts and taking steps to perfect the performance.

It is possible that A's avowed intention of completing the work turns out to be falsely made or that he does not in fact apply the damages, which he recovers, towards such an end. Who will be able to take action against A? It is difficult to see how C has thus acquired a cause of action against A on such a premise per se. For all intents and purposes, imposing upon A the burden of satisfying the court of his intention to complete the work may not have any tangible significance.

Whether C has a right to the damages recovered by A from B will hinge on the contractual or legal relationship between A and C. If A promises to erect a house on C's land without any consideration from C and if B has even failed to start work on the construction, then C cannot have any recourse to the damages recovered by A from B as there is no valid contract between A and C, and C has not suffered any loss at all.

Certainly the solution is not so simple in other situations. Take for instance where C has not furnished any consideration to A and the building erected on C's land is severely defective. The building cannot be used at all and it is taking up space on the land, which could be put to profitable use. Expenditure needs to be made to rectify the defects or to demolish the building and clear the debris to free the land for other use. In these circumstances, to deprive C from recovering from A damages which A had obtained from B would be most unjustified. To prevent C's claim from being sucked into a legal black hole, the court has to strain to find some kind of contractual or legal relationship between A and C to confer upon C such a right of recovery. The way forward seems to be not to give C an automatic right against A but to determine the contractual or legal relationship between them to see whether such a right exists.

The problem takes on greater complexity where C has his own cause of action against B by way of a separate agreement between B and C. Considering first the position where C's cause of action gives C the same rights as those available to A against B, the first issues that spring into mind are that B should not be put to double jeopardy and that neither A nor C should obtain an uncovenanted profit. These are just as undesirable as the legal black hole. A proper resolution of their competing interests can be easier to achieve if A and C join, in bringing an action against B.

If only A or C commences an action against B, B's liability to both A and C cannot be discharged merely upon the securing of judgment by, say, A against B. Take the situation where A obtains judgment against B. If A does not enforce or fails to successfully enforce the judgment against C within the limitation period of C's claim against B, then C may lose his right of recovery. To say that C's cause of action against B arises only when A fails to recover from B is very problematic as it would be unjust

to stop C from proceeding against B or to postpone this right in favour of A's right. Furthermore, how to define the moment when A cannot enforce his judgment against B will be equally vexing.

Lord Goff's and Lord Millett's suggestion in *McAlpine* that such an action should be stayed to allow the other party to join in the action is a seductive solution. The court may even order that the other party be made a party to the proceedings. A comprehensive resolution of all the issues may then be feasible.

If the other party does not join in or is not made a party to the action for whatever reason, then a possible way out of this quagmire is to allow the action that either A or C takes against B to proceed accordingly. When B discharges his liability to either A or C, B's liability to the other party will also be extinguished. Assuming that A has obtained the judgment sum from B, it would be available to B to set this up as a complete defence should C decide to proceed with an action against B. C can only seek redress by suing A in which case the court will have to unravel all the contractual and other legal issues involved between them before making a decision. This seems to be a possible framework to adopt.

The level of complexity notches up even further where the rights of C against B are different from the rights of A against B as was the case in *McAlpine*. In such a case, there will be a cast of many factors and possible permutations, such that generalisations will be difficult to make. The sprawling issues have to be decided on their own facts. The approach taken will have to be built upon the principles for the simpler scenarios.

Assuming that C's rights against B are inferior compared to those available to A against B, is it possible for C to recover from B and then take action against A to recover the deficit? It is submitted that this is not entirely impossible if there is no impediment against this in the three-party matrix.

It will be a bumpy road ahead to adequately resolve all the difficulties. It will take dexterity and innovation to put the law on this point on a sound basis. As observed by Lord Wilberforce in *Woodar Investment Development Ltd v Wimpey Construction UK Ltd*,[3] 'there are many situations of daily life which do not fit neatly into conceptual analysis, but which require some flexibility in the law of contract'.

The common law will encounter formidable headwinds in resolving the rights of third parties in light of the conceptual and practical issues involved. The better approach is for Parliament to intervene by enacting legislation along the lines of the English Contracts (Rights of Third Parties) Act 1999. This will allow a person who is not a party to a contract to enforce a term of the contract in his own right if the contract expressly provides him that entitlement. He will also have such a right if the term purports to confer a benefit on him unless on a proper construction of the contract, the parties did not intend the term to be enforceable by him. Even with such an Act in place, if the relevant contract does not provide for third party rights or such provision is unclear, reference has still got to be made to the narrow and broader grounds. Such an Act may not be able to cure all ills but at least, it will help to eliminate a lot of uncertainties.

[3] [1980] 1 All ER 571 (HL) 576.

6.3 Claims under Negligence

Where the parties involved in a construction project like the employer, main contractor, sub-contractors and architect have structured their respective liabilities by contract, the court should not superimpose a duty of care which goes beyond the contemplation of the parties at the time of the making of the contracts unless special circumstances exist. Where there exists a web of contractual relationships and the various parties have defined their respective rights and obligations, it may be undesirable to create uncertainty by leaving open a recourse to negligence claims and spawn added litigation. The builder, architect or engineer will owe duties in contract, but should not be required to shoulder responsibility in tort to all the world to ensure that the building has no defects unless the aggrieved party has no other avenue to seek redress for the wrong done to him.

The parties to a contract should not be exempted from liability for negligence to each other unless adequate words are used. An assumption of responsibility coupled with reliance should give rise to a duty of care in tort irrespective of whether there is a contract between the parties, and that unless the contract says otherwise, the innocent party who has available to him concurrent remedies in contract and tort, may opt for the one most advantageous.

There should be no simple formulaic approach to determine whether there is any liability for negligence and much should depend on the facts of the particular case. To produce better justice, liability for negligence should be fact-sensitive. In fact, the various tests laid down for negligence have all taken this position.

Notwithstanding that, it is necessary to have a definite framework for the courts to use and for parties to assess their chances before they plunge into full-blown litigation and which may thus avert litigation. The present formulation applicable in Malaysia, the three-fold *Caparo Industries*[4] test, appears to be appropriate.

6.4 Pure Economic Loss

The contention that claims for pure economic loss cannot be allowed simply because they offend against an incremental approach in the development of new categories of negligence and by analogy with the established categories is not of sufficient merit. After all, most of the jurisdictions have adopted the new paradigm without wreaking much havoc on the law. Such a development does not really make such a massive intrusion into the existing law that it should not be allowed on such a basis alone.

The acceptance of pure economic loss as a remedy is often perceived as raising the spectre of extending liability to 'an indeterminate amount for an indeterminate time to an indeterminate class'.[5] Such a concern does not seem to be justified. The amount of damages is only based on the costs of repairing the defects. The period of time that such a liability exists is well constrained by the statutory limitation period. The categories of persons able to make such claims are restricted to the owners and occupiers of the building at the relevant time.

There should be no policy bar to claims for pure economic loss for defective buildings. This should be the general principle. Lord Atkin's exhortation in *Donoghue*

[4] *Caparo Industries plc v Dickman* [1990] 2 AC 605 (HL).
[5] *Ultramares Corporation v Touche* (1931) 174 NE 441, 444 (Cardozo CJ).

v Stevenson[6] that legal principles should not be so aloof from the ordinary needs of civilized society as to deny a legal remedy where there is an obvious social wrong resonates as much for claims under negligence as for claims for pure economic loss. But whether such damages should be granted in any particular case will depend on the facts of the case as the plaintiff has to first successfully cross the negligence test.

There has been much criticism of the categorisation of the loss as 'material, physical damage' in *Anns v Merton London BC*.[7] It is contended that there is nothing wrong with such characterization. To be entitled to damages the defect must be material and has resulted in actual physical damage and not merely pure economic loss.

A duty which is transmissible is not by that itself repugnant. If the obligor envisages that his duty will be relied on by the successors of the obligee, then there is nothing faintly objectionable to such a scheme. In this country, the prices of houses are relatively very high as compared to the average family income. Most families would only be able to afford to buy a single house in their lifetimes if at all they are able to do so. The opportunity in law for subsequent purchasers to claim for pure economic loss against irresponsible developers, contractors and local authorities will be able to achieve some social justice. As a negligently constructed house has the potential to cause serious damage both to persons and property, the parties involved in the negligence should be held to a reasonable standard of care and be subject to appropriate sanctions including for pure economic loss.

[6] [1932] AC 562 (HL) 583.
[7] [1978] AC 728 (HL).

The judge's suggestion in *Dr Abdul Hamid Abdul Rashid & Anor v Jurusan Malaysia Consultants (sued as a Firm) & Ors*[8] that the scope of claims for pure economic loss should cover not only construction defects but also all analogous situations seems to give overwhelming support to such claims although extending them to all similar situations may be a little rushed as there may be special circumstances in some similar situations where the concept may not be able to operate fairly.

The construction of buildings has the potential to cause serious damage. Allowing claims for pure economic loss in construction will definitely improve the quality of construction. Safety standards will surely rise. Building owners would be more likely to repair dangerous defects if they could claim for pure economic loss.

It is reasonably foreseeable that there may be derivative owners of houses. Giving them the right to claim for pure economic loss against the errant parties therefore cannot be said to be irrational. It may be possible to argue that there is reliance by the purchaser of a building on the local authority in the approval of the building plans and the supervision of the construction works because these are the functions of the local authority such that the local authority owes the purchaser a duty of care. The same argument loses much of its strength against the builder.

Although there is no prohibition to the granting of pure economic loss in Malaysia, yet the efficacy of this remedy may be fettered if the courts view it restrictively. The courts can strew formidable obstacles in the way by imposing a stringent view on whether the plaintiff has satisfied the requirements of proximity and the justice of the case. Unfortunately the present state of the authorities reflects this inclination.

[8] [1997] 3 MLJ 546 (HC).

The local situation cannot be compared to that in England where the Defective Premises Act 1972 provides some measure of protection for subsequent purchasers. If *Murphy v Brentwood District Council*[9] is adopted here, this category of persons will be much disadvantaged.

The blanket immunity accorded to the local authority under section 95(2) of the Street, Drainage and Building Act 1974 should be lifted. The local authority is entrusted by the Government and therefore, indirectly by the public, to ensure that buildings are properly constructed and safe for the purchasers and occupiers. Its funds ultimately come from the public.

In *Majlis Perbandaran Ampang Jaya v Steven Phoa Cheng Loon & Ors*,[10] Abdul Hamid Mohamad FCJ was robust in opposing any liability of the local authority for pure economic loss. The reasons given were that the local authority lacks resources and manpower and as such, the priority should be the provision of basic necessities for the general public. It is the aim of the Government to steer Malaysia towards developed nation status by 2020 which is a mere few years away. The competency and efficiency of the local authority should be at least one benchmark of being a developed nation.

In *UDA Holdings Bhd v Koperasi Pasaraya (M) Bhd and other appeals*,[11] the Federal Court, by a majority, held that the local authority is not liable for pure economic loss for all categories of torts. This conclusion was driven by a scrutiny of the majority view on this issue in *Majlis Perbandaran Ampang Jaya* which gave prominence to section 3 of the Civil Law Act 1956.

[9] [1991] 1 AC 398 (HL).
[10] [2006] 2 MLJ 389 (FC).
[11] [2009] 1 MLJ 737 (FC).

The minority view in *UDA Holdings* seems to be more acceptable. Abdul Aziz Mohamad FCJ's analysis of the *Majlis Perbandaran Ampang Jaya* together with his conclusion that it did not lay down any general rule was more perceptive and incisive. Section 3 of the Civil Law Act 1956 merely requires the court to take into consideration local circumstances in applying the common law of England. It does not, by itself, impel the courts to conclude that the local authority should not be responsible for its acts of negligence. Local circumstances will vary for different torts and different factual situations. It is too sweeping to promulgate a general rule that local authorities are invariably immune from claims under all types of torts for recovery of pure economic loss.

Allowing for a more liberal regime to granting pure economic loss will not only benefit those who suffer loss but will also lead to better safety for the public. Where public safety is concerned, there should be no compromises. If we do not make a start now, the local authority will never improve. If the worry is that the local authorities may be overwhelmed by claims for pure economic loss if their immunity is removed, perhaps as a start, the legislature can impose some form of restricted liability on the local authority which falls short of the principles as advocated in cases like *Anns*.

Lord Wilberforce's formulation in *Anns*[12] that a cause of action arises against the local authority when there is present or imminent danger to the health or safety of the occupiers caused by the defective building would cut off a lot of claims. The commendable aspect of this approach is that damage or injury is prevented rather than waiting to happen. Surely, this is for the public good.

[12] *Anns v Merton London BC* [1978] AC 728 (HL) 759-760.

Lord Keith in *Murphy v Brentwood District Council*[13] took the view that the decision rests with the legislature as to the need for and the manner that purchasers should be given protection from errant builders and local authorities in the public interest. James Foong J in *Dr Abdul Hamid Abdul Rashid & Anor v Jurusan Malaysia Consultants (sued as a Firm) & Ors*[14] disagreed with such a suggestion as 'the principle of negligence itself is founded on common law'. The application of pure economic loss in many jurisdictions does not appear to have produced much injustice in the area of public interest. Unless a certain group is unfairly prejudiced, there is no need for Parliament to intervene. The general law on negligence should be allowed to operate which after all has been developed through the filters of fairness and justice.

The builder will normally be a private limited company. If it is distressed by a deluge of law suits arising from its defective work, then the likelihood is that it will go into liquidation or fall into insolvency. The local authorities may then become the main targets of claims for defects.

When a building is constructed with defective foundations, a time bomb is ticking underneath which may explode many years later, bringing financial hardship to the owner or occupier.[15] It would be unfortunate that relief to the sufferers should depend on the recollection of events which happened many years ago and the uncertainties of litigation.[16] A compulsory insurance scheme for builders of houses might be able to provide better justice than the vagaries of litigation.[17] This is a good idea though the flip side will be that house prices will be pushed up due to the higher overheads of developers.

[13] [1991] 1 AC 398 (HL) 472.
[14] [1997] 3 MLJ 546 (HC) 564.
[15] *Dennis v Charnwood BC* [1983] QB 409 (CA) 423 (Lawton LJ).
[16] *Dennis v Charnwood BC* [1983] QB 409 (CA) 423-424 (Lawton LJ).
[17] *Dennis v Charnwood BC* [1983] QB 409 (CA) 423 (Lawton LJ).

6.5 Damages for Financial Loss

It is right that reinstatement cost should be the first measure of damages to be considered and only if it fails the test of reasonableness should other measures be considered. This is so because it is the contractual objective to deliver to the employer the works as agreed upon. Reinstatement cost should not be awarded if it is disproportionately greater than the benefit to be obtained. This gives effect to the central importance of reasonableness, both to the plaintiff as well as to the defendant.

The employer's intention to reinstate is said to be an indication of the reasonableness of awarding him such cost. The issue arises as to how this intention should be proved. It is humbly suggested that proof should be based on an objective basis, that is, whether a reasonable person in the position of the employer will want to reinstate. How vigorously the employer claims to desire reinstatement should not be the pivotal consideration.

A problematic area is where reinstatement cost has changed since the cause of action accrued. In accordance with general principles, damages ought to be assessed at the time of the accrual of the cause of action. Should the employer take immediate action to reinstate and then take the risk that he would later be awarded damages for diminution in value which could be less than the reinstatement cost? Should the immediate action to reinstate be judged on whether it is reasonable for the employer to have done so? Should this action be deemed to be conclusive of the intention to reinstate and thus validates the employer's claim for reinstatement cost rather than diminution in value? There are no easy answers to these questions. It is humbly

suggested that the general principle that damages are assessed at the time the cause of action accrues ought not to be disturbed.

Foreseeability should be an important factor in considering whether cost of reinstatement or diminution in value should be granted. If the contractor knew at the time the contract was formed that the employer regarded a particular specification as very important, then the contractor ought to have foreseen that the employer would wish to repair any defect arising from not meeting that specification. It would thus be reasonable to award cost of reinstatement even if this is higher than the diminution in value. This approach will also be consistent with general contractual principles.

In certain circumstances, reinstatement cost may extend to the cost of demolishing the built structure and building anew. This drastic remedy should only apply in extreme circumstances as there would be a complete waste of the work already done and the contractor would be put to considerable loss. Examples of such special circumstances are where the building is unsafe, or where the building is entirely or substantially unfit for its intended purpose, or where this is the only way to comply with building laws.

The contractor may have made savings in the performance of the contract which has resulted in defects. Add to that an assumption that such savings are greater than any damages that could be awarded to the employer, whether on the basis of reinstatement cost or diminution in value. In such a scenario, it seems unreasonable and irrational that the contractor is able to reap the benefits of his default. This is more so if the contractor's default was occasioned by intent, and not by mere negligence.

The authorities suggest that for the employer to disgorge the contractor of such gains, the claim must be cast in restitution and not on breach of contract. The problem in Malaysia is that the Federal Court has proclaimed that restitution is only available where there is a total failure of consideration.[18] Construction defects generally do not satisfy that requirement. As such, the contractor's gains lie beyond the reach of the employer. It is humbly suggested that the law of restitution, or the law of unjust enrichment as this branch of the law is being increasingly known as, should be made more malleable to accommodate such a discordant result. For a start, the Malaysian court ought to review the principle that restitution only applies where there is a total failure of consideration.

6.6 Employer's Rights of Set-Off for Defects

For equitable set-off, the test of impeachment of title[19] has seen much criticism.[20] Such outdated language has no easy meaning in the modern world. It is an unhelpful metaphor.[21] The test of inseparable connection[22] is also rather difficult to apply both in single-contract and in two-contract cases. Where separate contracts (or dealings or transactions) are involved, the concept of inseparability does not help.[23]

The requirement of justice of the case also cannot be ignored.[24] All the leading cases[25] placed emphasis on this requirement.[26] It is not possible to have a doctrine of equitable set-off without a consideration of justice and fairness.

---

[18] *Berjaya Times Squares Sdn Bhd v M Concept Sdn Bhd* [2010] 1 MLJ 597 (FC) [17] (Gopal Sri Ram FCJ).
[19] As first laid down in *Rawson v Samuel* (1841) Cr & Ph 161 and retained by Lord Denning in his prescription in *Federal Commerce & Navigation Co Ltd v Molena Alpha Inc, The Nanfri* [1978] QB 927 (CA) although subject to the gloss of 'so closely connected…that it would be manifestly unjust'.
[20] See *Bank of Boston Connecticut v European Grain and Shipping Ltd, The Domique* [1989] AC 1056 (HL); *Bim Kemi AB v Blackburn Chemicals Ltd* [2003] EWCA Civ 889, [2004] 2 Costs LR 201.
[21] *Geldof Metaalconstructie NV v Simon Carves Ltd* [2010] EWCA Civ 667, [2010] 4 All ER 847 [41] (Rix LJ).
[22] As laid down in *Attorney-General for Newfoundland v Newfoundland Railway Co* (1888) 13 App Cas 199 (PC) and approved in *Bank of Boston Connecticut v European Grain and Shipping Ltd, The Domique* [1989] AC 1056 (HL).
[23] *Geldof Metaalconstructie NV v Simon Carves Ltd* [2010] EWCA Civ 667, [2010] 4 All ER 847 (Rix LJ).
[24] Rix LJ in *Geldof Metaalconstructie NV v Simon Carves Ltd* [2010] EWCA Civ 667, [2010] 4 All ER 847 [41] called this the functional requirement whereby it is unjust to enforce the claim without taking into account the cross-claim.
[25] *Bank of Boston Connecticut v European Grain and Shipping Ltd, The Domique* [1989] AC 1056 (HL) seems to be the only exception.
[26] Potter LJ in *Geldof*, while preferring the test in *The Domique* to that of *The Nanfri*, nevertheless did not forego that requirement.

The formulation by Simon Brown LJ in *Esso Petroleum Co Ltd v Milton*[27] seems to be the most appropriate test for equitable set-off. This test prescribes two conditions: (a) the cross-claim is at least closely connected with the same transaction as that giving rise to the claim; and (b) the relationship between the two claims is such that it would be manifestly unjust to allow one to be enforced without regard to the other.

The express enumeration of permitted set-offs in a construction contract should imply that the employer is limited to making such deductions from the amounts claimed as fall strictly within the scope of the permitted set-offs, and nothing else. To displace the ordinary rights of set-off, clear implication is sufficient, rather than clear express words.

The current stand of the courts appears to be that the defence of abatement does not apply to claims for professional services. There is no good reason, whether in principle or in logic, for such exclusivity. Abatement should be available as a defence to a claim for payment in respect of professional services.

6.7 Effect of Settlement by Main Contractor with Employer

The main contractor who settled with the employer for construction defects should be confined to recovering from the sub-contractor the sum so paid, and nothing more, if he can prove that (a) it was reasonable to settle with the employer; (b) the settlement sum was reasonable; and (c) the sub-contractor has caused the loss. This would prevent the main contractor from being unjustly enriched which accords with general legal principles.

[27] [1997] 2 All ER 593 (CA) 604.

Where the main contractor has unreasonably settled with the employer or if the settlement sum was unreasonable, any claim by the main contractor against the sub-contractor should be limited to the settlement sum as the maximum.

6.8 Damages for Non-Financial Loss

An award of damages to the employer for defective work assessed solely by reference to financial loss may not always recompense him properly. An appropriate remedy should be fashioned for all cases of breach of contract. If there is no other way of compensating the injured party to a contract for being denied something of value under the contract, then he should be compensated in damages to the extent of that value.[28]

In *Suwiri Sdn Bhd v Government of the State of Sabah,*[29] the Federal Court held that ultimately the true question for the court is to determine the fair compensation in monetary terms that the plaintiff should receive according to the justice of the case.

Reliance by the employer on damages for loss of amenity, distress and inconvenience suffers from two limitations. Such damages are not readily available and they are modest in quantum. As such, they are not pragmatic in many situations. Loss of amenity, distress and inconvenience should be given greater importance in the modern world. The damages should not invariably be highly restrained. They should be reasonable, though not excessive.

[28] *Farley v Skinner* [2001] UKHL 49, [2002] 2 AC 732 [79] (Lord Scott).
[29] [2008] 1 MLJ 743 (FC) 738 (Gopal Sri Ram JCA).

Damages of the *Wrotham Park*[30] variety may be capable of sufficiently redressing the wrong. It appears that there is no reported case where *Wrotham Park* damages are sought for construction defects. In principle, there is no reason why the model developed in cases such as *Wrotham Park* cannot be applied to this area of breach of contract. It is submitted that this should be the theoretical construct for providing damages for deprivation of a contractual benefit where it is apparent that the injured party has been deprived of something of value but the ordinary means of measuring the recoverable damages are inapplicable.

Lord Nicholls' theme in *Attorney General v Blake*[31] is to ensure, so far as appropriate, that the same remedies are available in the same circumstances for different wrongs. *Wrotham Park* damages satisfy that requirement and also the requirement that any development or extension of the law should be incremental. They do not cause anarchy to the existing law. Such damages have opened up a whole new dimension for breach of contract claims including for construction defect claims where the loss cannot be expressed in strict financial terms.

It is clear that an account of profits can be made in claims for breach of contract.[32] There is no reason why an order that the defendant account for his profit to the plaintiff should necessarily be the full profit.[33] Where an account of profit is granted, and is compensatory in its objective, there is flexibility in the percentage of the profit that is awarded and in its calculation.[34]

[30] *Wrotham Park Estate Co v Parkside Homes Ltd* [1974] 1 WLR 798 (Ch D).
[31] [2001] 1 AC 268 (HL).
[32] *Attorney General v Blake* [2001] 1 AC 268 (HL).
[33] See, for example, *Wrotham Park Estate Co v Parkside Homes Ltd* [1974] 1 WLR 798 (Ch D); *Experience Hendrix LLC v PPX Enterprises Inc* [2003] EWCA Civ 323, [2003] 1 All ER (Comm) 830; *Ministry of Defence v Ashman* [1993] 2 EGLR 102 (CA).
[34] *Devenish Nutrition Ltd v Sanofi-Aventis SA (France)* [2008] EWCA Civ 1086, [2009] Ch 390 [39] (Arden LJ).

The profit generated by an invasion of property rights may be due not purely to the invasion but also to other efforts expended by the wrongdoer. It will be unreasonable to deny the wrongdoer of all his profits in favour of the aggrieved party. In *Experience Hendrix LLC v PPX Enterprises Inc*,[35] the court did not impose a full account of profits as it took into consideration that the defendant had expended time and effort and probably used connections and skill. This may not be so where construction defects are concerned. The saving that may be made by the contractor may be without any additional input by the contractor. The gain by the contractor is the loss by the employer. That is the equation even though the loss by the employer as viewed from another perspective is non-financial in nature. No good reason lies for the employer to be granted just modest damages and the contractor to still keep part of the saving made by his skimped performance. The employer should also not be restricted to the contractor's profit if there are justifiable circumstances.

Any contributory fault by the employer and all other relevant circumstances should also be considered in deciding whether damages to be awarded to the employer should be the full amount saved by the contractor from his misperformance. Where the contractor has not made an unconvenanted profit from his breach, the court should survey all the relevant circumstances in deciding on the amount of damages to be awarded to the employer. After all, there are many circumstances where a judge has nothing but his common sense to guide him in fixing the amount of damages.[36] Again, there is no reason why the employer must always be confined to conservative damages in all circumstances. A simple formulaic approach to measure damages for all occasions is undesirable and dangerous even.

[35] [2003] EWCA Civ 323, [2003] 1 All ER (Comm) 830.
[36] *GW Atkins Ltd v Scott* (1980) 46 ConLR 14 (CA) 23 (Sir David Cairns).

In *Ruxley Electronics and Construction Ltd v Forsyth*,[37] Lord Jauncey said that:

> [I]n taking reasonableness into account in determining the extent of loss it is reasonableness in relation to the particular contract and not at large. Accordingly if I contracted for the erection of a folly in my garden which shortly thereafter suffered a total collapse it would be irrelevant to the determination of my loss to argue that the erection of such a folly which contributed nothing to the value of my house was a crazy thing to do.[38]

In *McGlinn v Waltham Contractors Ltd*,[39] the claimant wanted his new house to have an aged and weathered appearance and to look as if it had stood there since a long time ago. If the contractor had delivered a house in mint condition instead, it ought to be no answer for him to assert that no loss had been occasioned to the claimant. The rights and preferences of the individual must be accorded respect and value. No matter how quirky, eccentric or idiosyncratic his requirements are, if they are contained in the construction contract, any breach of them should light up in damages even though the loss is incapable of financial measurement or precision.

Where conventional compensatory damages are likely to prove an inadequate remedy, then the law must evolve to take care of it. If it means subverting the long established architecture of compensatory damages for breach of contract so be it. Only then will common sense and the common law go hand in hand.[40]

6.9 Specific Performance as a Remedy for Defects

Where the contractor does not dispute his liability for defects in the works, it may be advantageous for both the employer and the contractor for the contractor to do the repair work. The contractor may be better placed to align the repairs to the rest of the works by using the same materials and methods, together with the knowledge and experience gained from carrying out the project. The contractor too may gain by having

[37] [1996] AC 344 (HL).
[38] *Ruxley Electronics and Construction Ltd v Forsyth* [1996] AC 344 (HL) 358 (Lord Jauncey).
[39] [2007] EWHC 149 (TCC), [2008] Bus LR 233.
[40] An expression used in *Ruxley Electronics and Construction Ltd v Forsyth* [1996] AC 344 (HL) 354 (Lord Bridge).

to expend less than if he is ordered to pay damages.

Where the contractor disputes his liability and the matter goes to litigation, the court should exercise its discretion to grant specific performance more liberally. This is especially so if the end result to be achieved by the contractor can be stated with precision in the order. The contractor will then know what he has to do exactly so as to avoid being dragged to court later for contempt of court. The court will also be relieved of being constantly sought to supervise the remedial works by the contractor.

Normally, the costs to be incurred by the contractor in carrying out the repair works himself will be less than the damages if ordered to be paid to the employer. This is in tandem with the court's disposition to award the minimum costs to do justice. As such, even if damages are adequate, it may be desirable that specific performance be ordered in appropriate circumstances.

There may be situations where it is impossible or difficult for the employer to obtain the fruits of the contract if specific performance is not granted. Examples are where only the contractor has the special expertise or knowledge, or the proprietary methods to do the repairs. Another example is where the contractor has control of the surrounding premises which need to be involved if the defects are to be adequately remedied. In such situations where only the contractor can effectively make good the defects, it is only right that the court orders specific performance. This is more so where the defects concern something of importance to the employer.

6.10 Limitation Periods

For latent defect claims in negligence involving the provision of professional services, the time when the cause of action accrues is:

(a) the time when the plaintiff relies upon the professional services of the defendant.

Where the claims do not concern the provision of professional services or where the claims are portrayed from the perspective of physical damage, there are two further possibilities as to the time when the cause of action accrues:

(b) the time when the physical damage first occurs; and

(c) the time when the physical damage is discovered.

The issue of when a cause of action accrues depends on whether it is physical damage or economic loss that has been suffered and when. Physical damage to a building may occur at the same time that the building owner suffers financial loss but this is not invariably so. They are not necessarily linked. A building owner may suffer financial loss by reason of a defect before any physical damage has occurred. To peg the accrual of a cause of action and the running of the limitation period to the presence or absence of physical damage to a building would be contrary to the realities of defectively designed or defectively constructed buildings.[41] Therefore the better test is when the building owner first suffered financial loss or detriment.[42]

[41] IN Duncan Wallace QC, 'Negligence and Defective Buildings: Confusion Confounded?' (1989) 105 LQR 46, 57-59.
[42] See, for example, *Murphy v Brentwood District Council* [1991] 1 AC 398 (HL).

There are two rival alternatives for determining when the building owner first suffers financial loss. The first is when the building owner accepts and pays for the building. At that date the owner acquires a building which is intrinsically defective, whether in design or in construction. Unknown to the owner, the building is inherently not as valuable as it ought to be. When the defect manifests itself, the building owner would have to put his hand into his pocket to remedy the defect. If a defect in design or in construction causes no physical damage, the harm suffered by the plaintiff would be minimal at most.

The rival contention looks to the value of the building. Until the defect is discovered or ought reasonably to have been discovered, whether by the owner or a purchaser, the market value of the building remains unaffected. Until such time, the building owner uses the building as intended and suffers no adverse financial consequences from the existence of the defect. The determining factor therefore is the date when the existence of the defect becomes known or patent.

The discoverability rule in latent defect claims need not necessarily rip apart the Limitation Act 1953. It can be accommodated into the scheme of the Act by taking the position that it does not postpone the commencement of the limitation period unlike the exceptions of fraud and mistake. Rather it affects the construction of what is meant by the accrual of a cause of action for such claims. It is pegged to the time when the defect is discovered or ought to have been discovered.

It seems somewhat strange that a cause of action can be acquired even before the damage has been discovered. Realistically, it is not possible for a plaintiff to bring legal proceedings when he does not know that he has suffered damage. Besides that, it is also

not possible for him to quantity or assess his loss.

Until the fault is discovered, or at the least discoverable, it is not realistic to say that the market value of the building has depreciated, or that reinstatement cost might be incurred. Until the defect shows up, the owners or occupiers of the house do not suffer any expense or inconvenience. Until the defect manifests itself, the owner does not need to carry out any remedial work and he can sell his house at a price which is unaffected by the unknown defect. Limitation should logically commence when the latent defect is discovered or reasonably discoverable.

It is suggested that *Cartledge v E Jopling & Sons Ltd*[43] and *Pirelli General Cable Works Ltd v Oscar Faber & Partners*[44] were wrongly decided and that the limitation provisions at that time could and should have been construed in line with the discoverability rule even though this might cause some tension in the law on the accrual of causes of action in negligence simply because of the good that will be served.

The English Latent Damage Act 1986 is not completely in harmony with the discoverability approach. The Act does not specify what constitutes any given cause of action or when any given cause of action accrues. It has been contended that what matters is not the view of the law taken by the legislature in enacting the amendments, be it mistaken or not.[45] What matters is the effect of the amendments.[46] It has been argued that the amendments are sufficiently inconsistent with the discoverability principle laid down in *Invercargill City Council v Hamlin*[47] that the adoption of this

[43] [1963] AC 758 (HL).
[44] [1983] 2 AC 1 (HL).
[45] *The Bank of East Asia, Ltd v Tsien Wui Marble Factory Ltd* [1999] HKCFA 6, (1999) 2 HKCFAR 349.
[46] ibid.
[47] [1996] AC 624 (PC).

principle, although morally attractive, cannot be justified.[48] If *Invercargill* is precluded, the *Pirelli* approach seems to be the one that best accords with the authorities.[49]

However, it may be argued that even though the Act was enacted in response to *Pirelli*, it does not mean that the courts must assume that *Pirelli* was decided correctly. Merely because Parliament has enacted legislation based on its view of the law does not prevent the courts from taking a contrary view.[50] Moreover, it was incumbent on the United Kingdom Parliament to enact the Act quickly to correct the injustice rather than to wait for the courts to change their minds when the opportunity arose. The law has not been fossilised merely because of the Act.

In Malaysia, our Limitation Act 1953 has not been amended in a fashion similar to the changes brought by the English Latent Damage Act 1986. We are therefore free to interpret our limitation laws in line with the discoverability principle. Formulation (b) is generally agreed to be against the interests of justice. Formulation (c) appears to the most rational and the most desirable. When the plaintiff has no knowledge of the relevant facts concerning the damage to his property, for the limitation clock to begin ticking against him is unjustifiable.

In approving the ruling made in *Sutherland Shire Council Shire Council v Heyman*,[51] the House of Lords in *Murphy v Brentwood District Council*[52] has abandoned *Pirelli*. Elsewhere in most other common law jurisdictions, the same approach is taken. *Cartledge* and *Pirelli* seem now to be relics of a forgotten rule.

[48] *The Bank of East Asia, Ltd v Tsien Wui Marble Factory Ltd* [1999] HKCFA 6, (1999) 2 HKCFAR 349.
[49] ibid.
[50] *Birmingham Corpn v West Midland Baptist (Trust) Association (Inc)* [1970] AC 874 (HL) 898 (Lord Reid).
[51] [1985] HCA 41, 157 CLR 424 (High Court, Australia).
[52] [1991] 1 AC 398 (HL).

Postponement of the accrual of the cause of action until the date the damage is discovered may involve having to investigate facts long after they occurred.[53] It may work unfairness to defendants unless a definite cut-off date is prescribed. To avoid the extreme inconvenience of possible claims extending to an inordinately length of time into the future, there should be a 'long-stop' time when the right of action is extinguished.

In Malaysia, we should follow the stand taken by the major common law jurisdictions in favouring the discoverability rule. This is not so much for merely being in the comfort of the majority. It is more for the reason that the rule works better justice. For the discoverability formulation to be applicable here, it is not necessary that the only mechanism to make that happen is via legislative intervention.

The construction of section 6(1) of the Limitation Act 1953 does not make it impossible to accommodate the discoverability rule. It is sufficiently malleable in that sense. It is universally recognised that the *Pirelli* rule is unjust. Accordingly, it is better for our courts to adopt the discoverability rule immediately rather than to wait for Parliament to intervene especially where the Limitation Act 1953 has stood still since its enactment. The decision in *AmBank (M) Bhd v Kamariyah bt Hamdan & Anor*[54] offers a good template for the way forward.

The New Zealand model seems to be a viable one for Malaysia to adopt. Whilst the common law there upholds the discoverability rule, there is also legislation to provide for a long-stop date. This strikes a sensible balance between the rights of the plaintiff and that of the defendant. The long-stop period of 15 years as adopted in

[53] See, for example, *Dennis v Charnwood BC* [1983] QB 409 (CA), where the complaint was against the local authority for breach of its statutory duties more than 20 years earlier.
[54] [2013] 5 MLJ 448 (CA).

several jurisdictions does not appear to have come under much criticism, whether by the courts or by academic writers. This is a testament to its acceptability.

The law on the limitation period for latent defect claims in negligence should be amended to overcome the injustice exposed by *Pirelli*. There are two possible options. The first is to allow limitation to run from the date when the fault is discovered, or at least discoverable. The second is to amend our Limitation Act 1953 to embrace the material provisions in the English Latent Damage Act 1986 including having a short 'grace period' to bring legal proceedings after the defect is discovered or has become discoverable when this falls outside the six years prescribed for negligence claims, and a long-stop provision without postponing the date of accrual of the cause of action.

The second option appears to be more comprehensive and the better one. This is more so in the present judicial climate when the courts are uncertain as to whether the discoverability principle applies. A relevant party would be free of the uncertainty that a claim could be made against him for an indefinite period. Additionally, there is no need to make an exception to the general principle that a cause of action in negligence accrues on the date that damage occurs. Furthermore, we do not have the legal tradition as in New Zealand that favours the adoption of the discoverability principle there. The second option seems to balance the rights of the parties more fairly. It would also place the law on a more certain and firmer footing. We should follow that in Malaysia.

To succeed in his claim, the plaintiff usually carries the burden of having to prove all the ingredients of his claim. The burden lies on the defendant to prove all the components of his defence. Rightfully, limitation is used to cut down the plaintiff's claim. It is a defence and therefore normally the duty of proving it falls on the

defendant. For latent defect claims in negligence, the burden should be on the plaintiff to prove that his claim is within the limitation period. The plaintiff in such a case usually has more knowledge of the time that he suffered the actionable harm.

6.11 Conclusion

From the preceding discussion, it is plain that the present state of the law as regards the Research Issues is in certain respects far from satisfactory. However, it is heartening to note that it need not be that way. It need not be inevitable. Some of the developments in the major common law jurisdictions have shown the way to a better legal framework. It does disservice to the construction industry to stay in the comfort zone of not doing anything about the current unpleasant state of affairs. This is not a comfort zone really, with its festering problems. It would be better to stand up to the problems and take the necessary proactive action.

CHAPTER 7: CONCLUSION AND RECOMMENDATIONS

7.1 Introduction

In this chapter, the achievement of the research objectives is paraded out. This is done by making reference to the sections of this thesis where this has been accomplished in respect of Research Objectives No. 1 and 2. The analysis conducted in Chapter 6 forms the basis for achieving Research Objective No. 3 whereby recommendations are suggested to deal with some of the live issues in the context of construction defect claims which are uneven, uncertain or unnecessarily complex with a view to their simplification and rationalisation.

The law is always a work in progress. There cannot be any finished product if the law is to remain relevant in changing times and changing circumstances. There are also areas of the law which are still unsettled. Such a state of affairs is undesirable as parties embroiled in a dispute do not know where they stand in the eyes of the law. This will promote litigation. This is unwelcome, whether socially or economically. It is hoped that other researchers will build on this work and hence, areas for future research are suggested.

7.2 Achievement of Research Objective No. 1

This research objective as formulated is that with regard to construction defect dispute law concerning each of the Research Issues, to determine the current law in Malaysia and the manner in which the law has developed. This has been achieved as shown in Table 7.1 with reference being made to the sections of this thesis where such research appears.

Table 7.1: Achievement of Research Objective No. 1

Area	Research Issues	Clarification and Significance	References in this Thesis where Achievement has been made
1. Causes of action	1.1 Where loss is suffered by the owner who is not the employer in a construction contract, whether the owner and the employer have any cause of action against the errant contractor.	The current applicable law seems to preclude both the owner and the employer from staking a claim for substantial damages against the contractor who has caused the loss. The persons who have suffered damage is without a right to claim whereas the person causing the loss is unjustly enriched. This goes against the grain of justice.	Section 3.2
	1.2 Where the parties involved in a construction project like the employer, main contractor, sub-contractors and architect have structured their respective liabilities by contract, whether a duty of care should be imposed which goes beyond the contemplation of the parties at the time of the making of the contracts.	The law is unclear here. The parties will be under a cloud of uncertainty and apprehension if such a duty of care invariably exists in parallel.	Section 3.3

Table 7.1, continued

Area	Research Issues	Clarification and Significance	References in this Thesis where Achievement has been made
1. Causes of action	1.3 Whether a party to a contract should be exempted from liability for negligence at common law.	There is no current case law which decides on this issue decisively. A contracting party may wish to be governed only by the duty of care as prescribed by the contract but not also be exposed to negligence at common law.	Section 3.3
	1.4 What should the test for negligence be?	The test for negligence seems to be settled here. However there are still problems in its implementation. There may still be room for improvement in formulating a test for negligence.	Section 3.3
	1.5 Should claims for pure economic loss for defective buildings be allowed?	The present state of the law is that such claims are possible but the bar seems to be set unreasonably high. Claims for pure economic loss for defective construction appear to be a theoretical possibility but a practical impossibility. The issue is whether this is desirable or not.	Section 3.4

Table 7.1, continued

Area	Research Issues	Clarification and Significance	References in this Thesis where Achievement has been made
1. Causes of action	1.6 Should the local authority be liable for negligence to the original owner and subsequent owners of a building who were put to loss by the defective building?	The current law confers immunity on the local authority against such claims. This seems to work against public interest including public safety. There may be good reasons for this immunity to be removed - especially for purchasers and derivative purchasers of residential properties.	Section 3.4
	1.7 Should builders and others involved in the provision of houses be imposed with the obligations of a transmissible warranty of the quality of their work and of the fitness for occupation of the completed houses?	Purchasers under the Housing Development (Control and Licensing) Act 1966 are protected in contract to a certain degree against the developer. Not so the sub-purchasers. They may seek recourse by claiming against the developer for pure economic loss but this may yet prove impractical or even illusory.	Section 3.4

Table 7.1, continued

Area	Research Issues	Clarification and Significance	References in this Thesis where Achievement has been made
2. Remedies	2.1 What should be the measure of damages for construction defects?	Reinstatement cost is favoured over diminution in value for damages for construction defects. However, there could be situations where this rule ought to be displaced.	Section 4.2
	2.2 What set-offs can the employer make in the face of a claim by the contractor for payments under the construction contract?	Such set-offs will be affected by what is made plain by express language in the construction contract. If the words in the contract are not clear or where there are no such words at all in the contract, the law may have to take a different approach.	Section 4.3
	2.3 Where the main contractor has settled with the employer for defects which were actually caused by the sub-contractor, what are the relevant issues to be considered if the main contractor then proceeds against the sub-contractor for recovery of the sum so paid or for the full measure of the defects?	Such issues do not seem to have come before the Malaysian courts yet. These issues should be dealt with in a manner which ensures fairness for both parties.	Section 4.4

Table 7.1, continued

Area	Research Issues	Clarification and Significance	References in this Thesis where Achievement has been made
2. Remedies	2.4 Should an award of damages to the employer for defective work be assessed solely by reference to financial loss?	In granting damages, the law has evolved to place great emphasis on financial loss. If the loss cannot be expressed in precise financial terms, it is unlikely that substantial damages will be awarded. It may be necessary to check this trajectory of the law especially in modern times when other considerations like loss of amenity, distress and inconvenience have taken greater prominence.	Section 4.5
	2.5 Under what conditions should an order for specific performance to rectify construction defects be appropriately granted?	For construction defects, damages are the normal remedy allowed by the courts. However, specific performance may be the more appropriate remedy in certain circumstances. This aspect of the law is not well developed in Malaysia.	Section 4.6

Table 7.1, continued

Area	Research Issues	Clarification and Significance	References in this Thesis where Achievement has been made
3. Limitation periods	3.1 What should be the limitation period for latent defect claims in negligence?	Latent defects in buildings may manifest themselves long after the normal limitation period of six years to commence legal proceedings has expired. Our Limitation Act 1953 has stood still without any amendments to adequately address latent defects in buildings. The courts' interpretation of the law in this regard is ambiguous and uncertain. This is most undesirable.	Section 5.7

7.3 Achievement of Research Objective No. 2

This research objective concerns each of the Research Issues and that is to determine the law in the major common law jurisdictions - including England, Australia, New Zealand, Canada and Singapore - and the experience encountered in its application which may be of relevance to Malaysia with a view that such law may be usefully adopted here either in its original form or as adapted to suit our local conditions. Table 7.2 indicates the achievement of this research objective with reference being made to the sections of this thesis where such research appears.

Table 7.2: Achievement of Research Objective No. 2

Area	Research Issues	Clarification and Significance	References in this Thesis where Achievement has been made
1. Causes of action	1.1 Where loss is suffered by the owner who is not the employer in a construction contract, whether the owner and the employer have any cause of action against the errant contractor.	The current applicable law seems to preclude both the owner and the employer from staking a claim for substantial damages against the contractor who has caused the loss. The persons who have suffered damage is without a right to claim whereas the person causing the loss is unjustly enriched. This goes against the grain of justice.	Section 3.2
	1.2 Where the parties involved in a construction project like the employer, main contractor, sub-contractors and architect have structured their respective liabilities by contract, whether a duty of care should be imposed which goes beyond the contemplation of the parties at the time of the making of the contracts.	The law is unclear here. The parties will be under a cloud of uncertainty and apprehension if such a duty of care invariably exists in parallel.	Section 3.3

Table 7.2, continued

Area	Research Issues	Clarification and Significance	References in this Thesis where Achievement has been made
1. Causes of action	1.3 Whether a party to a contract should be exempted from liability for negligence at common law.	There is no current case law which decides on this issue decisively. A contracting party may wish to be governed only by the duty of care as prescribed by the contract but not also be exposed to negligence at common law.	Section 3.3
	1.4 What should the test for negligence be?	The test for negligence seems to be settled here. However there are still problems in its implementation. There may still be room for improvement in formulating a test for negligence.	Section 3.3
	1.5 Should claims for pure economic loss for defective buildings be allowed?	The present state of the law is that such claims are possible but the bar seems to be set unreasonably high. Claims for pure economic loss for defective construction appear to be a theoretical possibility but a practical impossibility. The issue is whether this is desirable or not.	Section 3.4

Table 7.2, continued

Area	Research Issues	Clarification and Significance	References in this Thesis where Achievement has been made
1. Causes of action	1.6 Should the local authority be liable for negligence to the original owner and subsequent owners of a building who were put to loss by the defective building?	The current law confers immunity on the local authority against such claims. This seems to work against public interest including public safety. There may be good reasons for this immunity to be removed - especially for purchasers and derivative purchasers of residential properties.	Section 3.4
	1.7 Should builders and others involved in the provision of houses be imposed with the obligations of a transmissible warranty of the quality of their work and of the fitness for occupation of the completed houses?	Purchasers under the Housing Development (Control and Licensing) Act 1966 are protected in contract to a certain degree against the developer. Not so the sub-purchasers. They may seek recourse by claiming against the developer for pure economic loss but this may yet prove impractical or even illusory.	Section 3.4

Table 7.2, continued

Area	Research Issues	Clarification and Significance	References in this Thesis where Achievement has been made
2. Remedies	2.1 What should be the measure of damages for construction defects?	Reinstatement cost is favoured over diminution in value for damages for construction defects. However, there could be situations where this rule ought to be displaced.	Section 4.2
	2.2 What set-offs can the employer make in the face of a claim by the contractor for payments under the construction contract?	Such set-offs will be affected by what is made plain by express language in the construction contract. If the words in the contract are not clear or where there are no such words at all in the contract, the law may have to take a different approach.	Section 4.3
	2.3 Where the main contractor has settled with the employer for defects which were actually caused by the sub-contractor, what are the relevant issues to be considered if the main contractor then proceeds against the sub-contractor for recovery of the sum so paid or for the full measure of the defects?	Such issues do not seem to have come before the Malaysian courts yet. These issues should be dealt with in a manner which ensures fairness for both parties.	Section 4.4

Table 7.2, continued

Area	Research Issues	Clarification and Significance	References in this Thesis where Achievement has been made
2. Remedies	2.4 Should an award of damages to the employer for defective work be assessed solely by reference to financial loss?	In granting damages, the law has evolved to place great emphasis on financial loss. If the loss cannot be expressed in precise financial terms, it is unlikely that substantial damages will be awarded. It may be necessary to check this trajectory of the law especially in modern times when other considerations like loss of amenity, distress and inconvenience have taken greater prominence.	Section 4.5
	2.5 Under what conditions should an order for specific performance to rectify construction defects be appropriately granted?	For construction defects, damages are the normal remedy allowed by the courts. However, specific performance may be the more appropriate remedy in certain circumstances. This aspect of the law is not well developed in Malaysia.	Section 4.6

Table 7.2, continued

Area	Research Issues	Clarification and Significance	References in this Thesis where Achievement has been made
3. Limitation periods	3.1 What should be the limitation period for latent defect claims in negligence?	Latent defects in buildings may manifest themselves long after the normal limitation period of six years to commence legal proceedings has expired. Our Limitation Act 1953 has stood still without any amendments to adequately address latent defects in buildings. The courts' interpretation of the law in this regard is ambiguous and uncertain. This is most undesirable.	Section 5.6

7.4 Achievement of Research Objective No. 3

This third and last research objective is to propose an improved legal framework with regard to Malaysian law on construction defect disputes for each of the Research Issues. Towards realising this research objective, the approaches proposed are set out in Table 7.3 which has direct reference to Table 1.1.

Table 7.3: Achievement of Research Objective No. 3

Area	Research Issues	Proposed Judicial and/or Legislative Response
1. Causes of action	1.1 Where loss is suffered by the owner who is not the employer in a construction contract, whether the owner and the employer have any cause of action against the errant contractor.	Where loss is suffered by the owner who is not the employer in a construction contract, the law should prevent the loss from falling into a 'legal black hole'. Parliament should enact legislation to provide rights to third parties to contracts modelled on the English Contracts (Rights of Third Parties) Act 1999.
	1.2 Where the parties involved in a construction project like the employer, main contractor, sub-contractors and architect have structured their respective liabilities by contract, whether a duty of care should be imposed which goes beyond the contemplation of the parties at the time of the making of the contracts.	Where the parties involved in a construction project like the employer, main contractor, sub-contractors and architect have structured their respective liabilities by contract, the court should be slow to superimpose a duty of care which goes beyond the contemplation of the parties at the time of the making of the contracts.
	1.3 Whether a party to a contract should be exempted from liability for negligence at common law.	A party to a contract should not be exempted from liability for negligence unless adequate words are used.
	1.4 What should the test for negligence be?	There should be no simple formula to determine whether there is any liability for negligence and much should depend on the facts of the particular case.

Table 7.3, continued

Area	Research Issues	Proposed Judicial and/or Legislative Response
1. Causes of action	1.5 Should claims for pure economic loss for defective buildings be allowed?	There should be no policy bar to claims for pure economic loss for defective buildings and the threshold for such claims should be reasonable, such as to accord with the level set in the majority of the common law jurisdictions.
	1.6 Should the local authority be liable for negligence to the original owner and subsequent owners of a building who were put to loss by the defective building?	The law should be amended to make the local authority liable for negligence to the original owner and subsequent owners of a building who were put to loss by the defective building.
	1.7 Should builders and others involved in the provision of houses be imposed with the obligations of a transmissible warranty of the quality of their work and of the fitness for occupation of the completed houses?	There should be legislative intervention to impose on builders and others involved in the provision of houses the obligations of a transmissible warranty of the quality of their work and of the fitness for occupation of the completed houses along the lines of the English Defective Premises Act 1972.
2. Remedies	2.1 What should be the measure of damages for construction defects?	Reinstatement cost rather than diminution in value should be the normal measure of damages for construction defects. Reinstatement cost should not be awarded if it is disproportionately greater than the benefit to be obtained.
	2.2 What set-offs can the employer make in the face of a claim by the contractor for payments under the construction contract?	The express enumeration of permitted set-offs in a construction contract should imply that the employer is limited to making such deductions from the amounts claimed as fall strictly within the scope of the permitted set-offs, and nothing else.

Table 7.3, continued

Area	Research Issues	Proposed Judicial and/or Legislative Response
2. Remedies	2.3 Where the main contractor has settled with the employer for defects which were actually caused by the sub-contractor, what are the relevant issues to be considered if the main contractor then proceeds against the sub-contractor for recovery of the sum so paid or for the full measure of the defects?	The main contractor who settled with the employer should be confined to recovering from the sub-contractor the sum so paid, and nothing more, if he can prove that the settlement was reasonable and that the sub-contractor has caused the loss.
	2.4 Should an award of damages to the employer for defective work be assessed solely by reference to financial loss?	An award of damages to the employer for defective work assessed solely by reference to financial loss may not always recompense him properly. Damages for non-financial loss to the employer like loss of amenity, distress and inconvenience should be more readily available and should not invariably be modest in quantum. Under certain circumstances, it may be appropriate to assess damages to the aggrieved employer on the basis of the savings made by the contractor in the misperformance of his work.
	2.5 Under what conditions should an order for specific performance to rectify construction defects be appropriately granted?	An order for specific performance to rectify construction defects ought to be granted in appropriate circumstances including where the end result to be achieved by the contractor can be stated with precision in the order.

Table 7.3, continued

Area	Research Issues	Proposed Judicial and/or Legislative Response
3. Limitation periods	3.1 What should be the limitation period for latent defect claims in negligence?	The law on the limitation period for latent defect claims in negligence should be amended in line with the English Latent Damage Act 1986. For latent defect claims in negligence, the burden should be on the plaintiff to prove that his claim is within the limitation period.

The aim of this research which is to determine the most appropriate approaches the courts and the legislature should make in addressing some of the pressing problem areas in construction defect claims that call for reform has accordingly been achieved.

7.5 Areas for Future Research

The scope for future research abounds. For instance, research can be conducted on the adequacy and efficacy of our present laws in protecting purchasers of residential properties from housing developers in respect of construction defects. The legislation governing the relationship between the housing developer and the purchaser is the Housing Development (Control and Licensing) Act 1966 for Peninsula Malaysia, the Housing Development (Control and Licensing) Enactment 1978 for Sabah and the Housing Developers (Control and Licensing) Ordinance 1993 for Sarawak. Such housing legislation was enacted to provide protection to purchasers coming under its ambit.[1]

[1] See *City Investment Sdn Bhd v Koperasi Serbaguna Cuepacs Tanggungan Bhd* [1988] 1 MLJ 69 (PC); *Teh Khem On & Anor v Yeoh & Wu Development Sdn Bhd & Ors* [1995] 2 MLJ 663 (HC); *KC Chan Brothers Development Sdn Bhd v Tan Kon Seng & Ors* [2001] 6 MLJ 636 (HC); *Raja Lob Sharuddin bin Raja Ahmad Terzali & Ors v Sri Seltra Sdn Bhd* [2008] 2 MLJ 87 (CA); *Fong Wan Realty Sdn Bhd v PJ Condominium Sdn Bhd* [2009] MLJU 1428 (HC); *Expo Holdings Sdn Bhd v Saujana Triangle Sdn Bhd* [2009] MLJU 1600 (HC).

Such purchasers may be lay people who may be ignorant of the law or their legal rights, may not know how to protect themselves or may be dominated upon by the developer. Most people would only be able to afford to buy a single house in their lifetime, if at all. These people are accordingly a very vulnerable segment of society.

The housing development legislation mandates a standard sale and purchase agreement to be executed between the developer, land owner and the purchaser.[2] The terms can be amended in favour of the purchaser but not in favour of the developer.[3] This affords some measure of protection to purchasers.

As far as construction defect claims are concerned, are the existing statutory provisions adequate to protect the purchasers? What about claims for loss arising from latent defects which may take years to manifest? Should subsequent purchasers be given a right of recovery of defect claims against the developer given that claims in contract are not possible because there is lack of privity of contract? In short, are the statutory prescriptions working properly? Are there still problem areas? How should these problem areas be resolved?

The Tribunal for Homebuyer Claims[4] was formed to provide a cheap, quick and easily accessible avenue for purchasers to pursue their claims against housing developers. Can this tribunal be further improved?

[2] Schedules G (Land and Building) and H (Building or Land Intended for Subdivision into Parcels) of the Housing Development (Control and Licensing) Regulations 1989 of Peninsula Malaysia, Schedules G (Land and Building) and H (Building Intended for Subdivision) of the Housing Development (Control and Licensing) Rules 2008 of Sabah, and Forms G (Land and Building) and H (Subdivided Building) of the Housing Developers (Control and Licensing) Regulations1998 of Sarawak.

[3] *SEA Housing Corporation Sdn Bhd v Lee Poh Choo* [1982] 2 MLJ 31 (FC); *Tan Chee Wah lwn Sri Damansara Sdn Bhd* [2006] 6 MLJ 752 (HC).

[4] This is the name of the tribunal as constituted by the Housing Development (Control and Licensing) Act 1966 of Peninsula Malaysia. The parallel legislation in Sabah and Sarawak calls this the Tribunal for Housing Purchaser Claims.

Yet another area that can be productively studied is the role that the Construction Industry Development Board (CIDB)[5] can or should play in minimizing the incidence of construction defects. The CIDB is a statutory body created to promote and stimulate the development, improvement and expansion of the Malaysian construction industry.[6] Amongst its functions are to promote and encourage quality assurance in the construction industry[7] and to regulate the conformance of standards for construction workmanship and materials.[8] No one can carry out construction work or hold himself out as a contractor unless he has a certificate of registration issued by the Board.[9] Should the CIDB be given more bite to police contractors as regards construction defects? What sort of procedural machinery and mechanism will best address this issue?

Even more opportunities for future work beckon in socio-legal research where the social sciences interface with the law on construction defect claims. This may take into consideration the social factors involved and the social implications of the law. This will be where social science research methodologies come into play. For example, research can be conducted on the defect claim provisions in the PWD 203A Contract. How common are such claims? When do employers make such claims? What factors influence such claims? What industry players think should be changes in the contract which will help to minimize such claims?

Another possible area to explore is the limitation period for latent defect claims. How widespread are such claims? When do such defects get discovered? What is the nature of such defects? How best to structure the limitation period to strike a balance

[5] This is formed by the Lembaga Pembangunan Industri Pembinaan Malaysia Act 1994.
[6] Section 4(1)(a) of the Lembaga Pembangunan Industri Pembinaan Malaysia Act 1994.
[7] Section 4(1)(f) of the Lembaga Pembangunan Industri Pembinaan Malaysia Act 1994.
[8] Section 4(1)(g) of the Lembaga Pembangunan Industri Pembinaan Malaysia Act 1994.
[9] Section 25(1) of the Lembaga Pembangunan Industri Pembinaan Malaysia Act 1994.

between the interests of the employer and that of the contractor?

7.6 Conclusion

It is hoped that the ideas in this thesis will travel far, that it will have an effect on the trajectory of the law. Perhaps lawyers may pluck some of these ideas to canvass in court when the opportunity arises. Perhaps judges may find some of these ideas worthy of consideration and even of application. Perhaps those in law revision may have their imagination sparked by these ideas.

It is also hoped that other academic scholars will go further and explore certain areas with more particularity, visit other terrain of construction defect claims, and venture into new landscapes of non-common law jurisdictions to seek fresh ideas and benefit from the experience there so as to nurture the further growth of the law here.[10]

All this legal activism will surely spur changes to mouldy laws and stiffened legal principles which are out of touch with the modern world with all its bewildering complexities. If the law is clear and fair, it must surely make for a better world.

[10] The contribution of academic writers to law reform was recognised in *Alfred McAlpine Construction Ltd v Panatown Ltd* [2001] 1 AC 518 (HL) 577 (Lord Browne-Wilkinson) 588 (Lord Millett).

REFERENCES

Ali MM, 'Claimability of Economic Loss: Malaysia Takes a Stand Amid Inconsistencies' [2003] 4 MLJ clxxviii

Arthurs HW, *Law and Learning: Report to the Social Sciences and Humanities Research Council of Canada by the Consultative Group on Research and Education in Law* (Information Division, Social Sciences and Humanities Research Council of Canada 1983)

Azlan WA and Mohsin H, 'Construction Professionals and Defective Construction Works: A Note on Quantification of Damages' [1997] 3 MLJ ccv

Balkin RP and Davis JLR, *Law of Torts* (LexisNexis)

Beale HG (ed), *Chitty on Contracts* (28th edn, Thomson Professional 1999)
—— *Chitty on Contracts* (30th edn, Sweet & Maxwell 2008) vol 1

Becher T, 'The Disciplinary Shaping of the Profession' in BR Clark (ed), *The Academic Profession* (University of California Press 1987)

Britton P, 'Make the Developer Get the Job Right: Remedies for Defects in Residential Construction' Society of Construction Law Journal, March 2013

Building Research Establishment, *Quality Control on Building Sites* (HMSO 1981) Current Paper 7/81.

Cartwright J, 'Damages, Third Parties and Common Sense' (1996) 10 JCL 244

Chynoweth P, 'The Built Environment Interdiscipline: A Theoretical Model for Decision Makers in Research and Teaching' (International Conference on Building Education and Research (CIB W89 BEAR 2006), Hong Kong Polytechnic University, Hong Kong, People's Republic of China, 10-13 April 2006)
—— 'Legal Research' in A Knight and L Ruddock (eds), *Advanced Research Methods in the Built Environment* (Wiley-Blackwell 2008) 28-38

Creswell JW, *Research Design: Qualitative, Quantitative, and Mixed Methods Approaches* (3rd edn, Thousand Oaks and Sage Publications 2009)

Dennys N, Raeside M and Clay R (general eds), *Hudson's Building and Engineering Contracts* (12th edn, Sweet & Maxwell 2010)

Derham R, *The Law of Set-Off* (3rd edn, OUP)

Dobinson I and Johns F, 'Qualitative Legal Research' in M McConville and WH Chui (eds), *Research Methods for Law* (Edinburgh University Press 2007)

Edwin C, 'Contracts for the Benefit of Third Parties - Will our Common Law See the Demise of Privity of Contract?' [2000] 4 MLJ i

Farnsworth A, 'Legal Remedies for Breach of Contract' Columbia L Rev (1970) 1145

Halsbury's Laws of England (4th edn, 1979) vol 28
—— (4th edn, reissue) vol 42
—— (4th edn, reissue, 2007) vol 12(1)

Hart HLA, *The Concept of Law* (Clarendon Press 1961)

Hogue AR, *Origins of the Common Law* (Liberty Fund 1986)

Holmes OW Jr, *The Common Law* (Revised ed edn, Dover 1991)

Kamal EM and others, 'The Critical Review on the Malaysian Construction Industry' Journal of Economics and Sustainable Development, (2012) 3 (13)

Kelsen H, in M Knight (trs), *The Pure Theory of Law* (University of California Press 1967)

Khan RA, Liew MS and Zulkipli BG, 'Malaysian Construction Sector and Malaysia Vision 2020: Developed Nation Status' Procedia - Social and Behavioral Sciences 109 (2014) 507-513 <www.sciencedirect.com/science/article/pii/S1877042813051306>

Lal H, 'Liquidated Damages' [2009] Const L J 569

Law Commission, *Civil Liability of Vendors and Lessors of Defective Premises* (Law Commission No 40, 1970)

Law Reform Committee, *Twenty-Fourth Report (Latent Damage)* (Comnd 9390, 1984)

Lynch MJ, 'An Impossible Task but Everybody has to do it - Teaching Legal Research in Law Methods' (1997) 89 Law Library Journal 415

McConville M and Chui WH, 'Introduction and Overview' in M McConville and WH Chui (eds), *Research Methods for Law* (Edinburgh University Press 2007) 1-15

McGee A, *Limitation Periods* (3rd edn, Sweet & Maxwell 1998)

Meredith S and Nolan D, *OSCOLA* (4th edn, Faculty of Law, University of Oxford 2012) <www.law.ox.ac.uk/oscola>

Mohaimin AA, 'Building Contract Claims: A Comparative Study' (Scotland, England and Malaysia) (PhD thesis, University of Aberdeen (Faculty of Law) 1992)

Mok O, 'New Buildings could also have Structural Defects' *The Malay Mail Online* (Kuala Lumpur, 25 July 2013) <http://www.themalaymailonline.com/malaysia/article/new-buildings-could-also-have-structural-defects#Z6FyQRFx8qs7Kwco.97>

Neuman WL, *Social Research Methods: Qualitative and Quantitative Approaches* (Allyn & Bacon 2000)

Pearce D, Campbell E and Harding D, *Australian Law Schools: A Discipline Assessment for the Commonwealth Tertiary Education Commission, vol III* (Australian Government Publishing Service (Pearce Report) 1987) vol 2

Pendleton M, 'Non-Empirical Discovery in Legal Scholarship - Choosing, Researching and Writing a Traditional Scholarly Article' in M McConville and WH Chui (eds), *Research Methods for Law* (Edinburgh University Press 2007) 159-180

Phang A, Saw CL and Chan G, 'Of Precedent, Theory and Practice – The Case for a Return to *Anns*' [2006] Singapore Journal of Legal Studies 1-59

Plucknett TFT, *A Concise History of the Common Law* (5th edn, Lawbook Exchange 2001)

Pound R, *The Spirit of the Common Law* (Andesite 2017)

Rajoo S, 'Standard Forms of Contract - The Malaysian Position' (International Bar Association (IBA) Annual Conference, Tokyo, Japan, 20 October 2014)

Rimmer EJ and Wallace IND, *Hudson's Building and Engineering Contracts* (8th edn, Sweet & Maxwell 1959)

Schlegel JH, *American Legal Realism and Empirical Social Science* (University of North Carolina Press 1995)

Schwandt TA, 'Three Epistemological Stances for Qualitative Inquiry: Interpretivism, Hermeneutics and Social Constructionism' in NK Denzin and YS Lincoln (eds), *Handbook of Qualitative Research* (2nd edn, Thousand Oaks and Sage Publications 2000)

Shirke S, 'Professional Negligence in the Construction Industry' [2009] 2 MLJ clxii

Sommerville J, 'Defects and Rework in New Build: An Analysis of the Phenomenon and Drivers' (2007) 25(5) Structural Survey 391

Spry CF, *Equitable Remedies* (4th edn, Thomson Reuters 1990)

Suhaimi MMD, 'The Proper Ways of Assessing Damages for Defective Building Works' Jurnal Undang-Undang dan Masyarakat 10 (2006) 21-35

Tan EYC, 'The Common Law Right of Set-Off in Construction Contracts' [1995] 3 MLJ cxxv

Tan J, 'Construction Sector "Ultimate Beneficiary" of 11th Malaysia Plan - Hong Leong' *The Edge Markets* (Kuala Lumpur, 5 May 2015) <www.theedgemarkets.com/my/article/construction-sector-ultimate-beneficiary-11th-malaysia-plan-hong-leong>

Ter KL, 'Economic Loss - Current Principles of Recovery' [1992] 1 MLJ clxxviii

Vick DW, 'Interdisciplinary and the Discipline of Law' (2004) 31 Journal of Law and Society 164

Vinayak PP, 'The Finality of Final Certificates' [1994] 2 MLJ xc

Wallace ID, 'Negligence and Defective Buildings: Confusion Confounded?' (1989) 105 LQR 46
—— 'Charter for the Construction Professional?' (1990) 6 Const LJ 207

Watt DS, *Building Pathology: Principles and Practice* (2nd edn, Wiley-Blackwell 2007)

Wong WK, 'Pure Economic Loss: *Hedley Byrne* Revisited (Pt I)' [1995] 2 MLJ clxi
—— 'Pure Economic Loss: *Hedley Byrne* Revisited (Pt II)' [1995] 2 MLJ clxxvii

Wood P, *English and International Set-Off* (Sweet & Maxwell 1989)

Xavier G, '*Dr Abdul Hamid Abdul Rashid & Anor v Jurusan Malaysia Consultants (Sued as a Firm) & Ors*: Breakthrough for Recovery in Pure Economic Loss?' [1998] 3 MLJ xxvi
—— '*Donoghue v Stevenson* - A New Facade for the Construction Industry' [2001] 2 MLJ lxv
—— 'Liquidated Damages in Construction Contracts A Watery Grave?' [2009] 2 LR 195

LIST OF PUBLICATIONS AND PAPERS PRESENTED

1. Teng Kam Wah, Rosli Said and Umi Kalsum Zolkafli @ Zulkifly, 'The Employer's Claim against the Contractor for Damages for Defective Work' (6th Asean Postgraduate Seminar, University of Malaya, Kuala Lumpur, 4 December 2012)

2. Teng Kam Wah, 'Construction Defects and Damages for Non-Financial Loss' Construction Law Digest, Issue 1/2013, pp 2-6, being the 1st Prize winning entry in the Vincent Powell-Smith Prize essay competition 2012 organised by the Society of Construction Law, Malaysia

3. Teng Kam Wah, Rosli Said and Mohd Suhaimi Mohd Danuri, 'The Employer's Claim against the Contractor for Damages for Defective Work' International Surveying Research Journal (ISrJ), Vol 4:2, pp 51-59

4. Teng Kam Wah, Dr Rosli Said and Dr Mohd Suhaimi Bin Mohd Danuri, 'Employer's Rights of Set-Off against Payment Claims by Contractor' The Ingenieur, Vol 62 April-June 2015, pp 42-47

5. Teng Kam Wah, Dr Rosli Said and Dr Mohd Suhaimi Bin Mohd Danuri, 'Are Liquidated Damages Clauses Useless?' The Ingenieur, Vol 70 April-June 2017, pp 76-79