RECOVERABILITY OF ECONOMIC LOSS UNDER CONSTRUCTION LAW IN MALAYSIA: A CRITICAL ANALYSIS

BY

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ABSTRACT

The recoverability of economic loss under construction law in Malaysia is still an unsettled area of the law. Economic loss has generally not been recoverable in Malaysia. The concept of pure economic loss draws its origin from English law. Even then, the English common law decisions on pure economic loss, for the past sixty years or so, have been swaying from one end of the equilibrium to the other. The English law established a general principle, the neighbour principle, for determining when a duty of care exists. It imposed a duty of care on manufacturers not to cause personal injury or physical damage to property through defects in their manufactured chattels. However, any defect in the chattel is considered pure economic loss and has traditionally not been recoverable in tort. It is as consequence of the defect in it, the chattel inflicts injury on a person or causes damage to property other than itself, the manufacturer would be liable in negligence. The position in Malaysia appears to be no different. This study will analyze the nature, history, concept and development of pure economic loss; and the development on pure economic loss in England, Malaysia and other Commonwealth jurisdiction. The study will then consider the correct jurisprudential approach on the recoverability of economic loss in Malaysia; whether it is recoverable or not; and whether it should be recoverable or not. In ascertaining the correct jurisprudential approach on the recoverability of economic loss from the Malaysian perspective, this study hopes to offer its own theory on the concept of pure economic loss, and will attempt to offer some suggestions to overcome the problems relating to the application of the law on pure economic loss in the construction industry.

ملخص البحث

تعتبر إمكانية تعويض الخسارة الاقتصادية تحت قانون البناء في ماليزيا قضية قانونية غير مفصول فيها. عموما وإلى حد الآن، لا تبدو الخسارة الاقتصادية آخذة منحى امكانية تعويضها. يستمدمفهوم الخسارة الاقتصادية الخالصة جذوره من القانون الإنجليزي، الذي لم تتمتع قراراته المتعلقة بالخسارة الاقتصادية بالاستقرار على مدى الستين سنة الماضية تقريبا. لقد أنشأ القانون الإنجليزي مبدأ الجار كمبدأ عام، لغرض تحديد الحالات الموجبة لواجب الرعاية. فقد فرض واجب الرعاية على المصنعين بحيث لا يتسببون في الإصابات الشخصية أو الأضرار المادية للممتلكات بسبب عيوب في السلعة المصنعة. ومع ذلك، يعتبر أي خلل في السلعة خسارة اقتصادية خالصة، والتي لم يكن من المعتاد تعويضها في قانون المسؤولية التقصيرية. وكنتيجة للعيب الموجود في السلعة، الذي من شأنه أن يلحق الضرر با للأشخاص، أو التلف للممتلكات، فإن المصنِّع يعتبر مسؤولا قانونيا بسبب الإهمال. ولا يعد موقف ماليزيا في هذا الشأن مختلفا. ستعمد الدراسة الحالية إلى تحليل طبيعة، وتاريخ، ومفهوم، وتطور مفهوم الخسارة الاقتصادية. كما ستتناول دراسة تطورالمفهوم في انجليترا، وماليزيا، وباقي دول الكومنولث. ستعتمد الدراسة بعد ذلك المقاربة التشريعية الصحيحة فيما يخص قانون تعويض الخسارة الاقتصادية في ماليزيا، وذلك من جانبين: مدى قابليتها، ومدى وجوب قالبليتها لتعويض الخسارة الاقتصادية. وتأمل هذه الدراسة من خلال عملية التحقق من المقاربة التشريعية الصحيحة في تعويض الخسارة الاقتصادية من وجهة نظر ماليزية، أن تخرج بنظريتها الخاصة حول مفهوم الخسارة الاقتصادية الخالصة، كما أنها ستحاول تقديم بعض الإقتراحات من أجل التغلب على المشاكل المتعلقة بتطبيقات القانون على مفهوم الخسارة الاقتصادية الخالصة في قطاع الصناعة البنائية.

APPROVAL PAGE

The thesis of Seow Hock Peng has been examined and is approved by the following:

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DECLARATION

I hereby declare that this thesis is the result of my investigations, except where otherwise stated. I also declare that it has not been previously or concurrently submitted as a whole for any other degrees at IIUM or other institutions.

Seow Hock Peng

Signature: ..... Date: .....

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Signature Date

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LIST OF ABBREVIATIONS

AC	Appeal Cases
ACTR	Australian Capital Territory Reports
ALR	Australian Law Reports
ALJ	Australian Law Journal
ALJR	Australian Law Journal Reports
All ER	All England Law Reports
AMR	All Malaysian Reports
BCL	Building and Construction Law
BLR	Building Law Reports
CBLJ	Canadian Business Law Journal
CLJ	Current Law Journal
Const LJ	Construction Law Journal
Con LR	Construction Law Reports
DLR	Dominion Law Reports
ER	English Reports
EWHC	High Court of England and Wales
Exch.	Law Reports, Exchequer
HCA	High Court of Australia
ICLR	The International Construction Law Review
IIUM LJ	International Islamic University Malaysia Law Journal
KB	King's Bench
LR	Law Reports
Ll.L.R.	Lloyd's Law Reports
LQR	Law Quarterly Review
M.&W.	Meeson and Welsby's Exchequer Reports
MLJ	Malayan Law Journal
NZLR	New Zealand Law Reports
NZBLC	New Zealand Business Law Cases
OR	Ontario Reports
QB	Queen's Bench
QBD	Queen's Bench Division
QdR	Queensland Reports
SCR	Canadian Law Reports, Supreme Court
SJLS	Singapore Journal of Legal Studies
SLR	Singapore Law Reports
TLJ	Torts Law Journal
Tort L Rev	Tort Law Review
UTLJ	University of Toronto Law Journal
WLR	Weekly Law Reports
WWR	Western Weekly Reports

LIST OF CASES

White v Jones (1995) 2 AC 207
Whittingham v Crease & Co (1978) 88 DLR (3rd) 353
Williams v Mount Eden Borough Council (1986) 1 NZBLC 102
Winnipeg Condominium Corp No. 36 v Bird Construction Co (1992) 91 DLR (4th) 289; (1993) 101 DLR (4th) 699; (1995) 1 SCR 85; (1995) 121 DLR (4th) 193
Winterbottom v Wright (1842) 10 M. & W. 109; 152 E.R. 402
Woolcock Street Investments Pty Ltd v CDG Pty Ltd (2004) 205 ALR 522; (2004) 20 BCL 176; (2004) HCA 16
Yianni v Edwin Evans and Sons (1981) 1 All E.R. 791
Yuen Kun Yeu v Attorney General of Hong Kong (1987) 2 All ER 705; (1987) 3 WLR 776; (1988) AC 175
Young v Tomlinson (1979) 2 NZLR 441
Young & Marten Ltd v MacManus Childs Ltd (1968) 3 WLR 630

LIST OF STATUTES

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Civil Law Act 1956
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Housing Developers (Control and Licensing) Act 1966 (Act 118)
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Housing Developers (Housing Development Account) Regulations 1991
Street, Drainage and Building Act 1974
Town and Country Planning Act 1976 (Act 1972)
Uniform Building By-laws 1984

UNITED KINGDOM
Building Act 1984
Building (Approved Inspectors) Regulations 1985
Defective Premises Act 1972

AUSTRALIA
Trade Practices Act 1974

CHAPTER ONE

INTRODUCTION

1.1 BACKGROUND OF THE RESEARCH

The recoverability of economic loss under construction law in Malaysia is still an unsettled area of the law. This can be seen from the recent case of *Majlis Perbandaran Ampang Jaya v Steven Phoa Cheng Loon & Ors*[1]. Economic loss has generally not been recoverable in Malaysia. However, the High Court[2] in the *Steven Phoa's* case had allowed a claim for pure economic loss, but this was later reversed in the Court of Appeal[3] and the Federal Court.

In order to appreciate the volatility of the law in this area, one would have to draw an analogy with the situation in the United Kingdom. The concept of pure economic loss[4] draws its origin from English law. Even then, the English common law decisions on pure economic loss, for the past sixty years or so, have been swaying from one end of the equilibrium to the other. In many respect, Donoghue *v Stevenson*[5] marked the new phase in the development of tortious negligence. This case was a major landmark because it established a general principle, the neighbour principle, for determining when a duty of care exists. It imposed a duty of care on manufacturers not to cause personal injury or physical damage to property through defects in their manufactured chattels. However, any defect in the chattel is considered pure

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

[2] *Steven Phoa Cheng Loon & Ors v Highland Properties Sdn Bhd* (2004) 4 MLJ 200 – judgement from James Foong J

[3] *Arab-Malaysian Finance Bhd v Steven Phoa Cheng Loon & Ors and Other Appeals* (2003) 1 MLJ 567 – judgement by Gopal Sri Ram JCA)

[4] Vincent Powell-Smith described pure economic loss as "…the financial consequences if products or services turn out to be defective in themselves but cause no physical damage to other property of injury to persons"

[5] *Donoghue v Stevenson* (1932) AC 562

economic loss and has traditionally not been recoverable in tort[6]. It is as consequence of the defect in it, the chattel inflicts injury on a person or causes damage to property other than itself, the manufacturer would be liable in negligence.

Thirty years after *Donoghue v Stevenson*, the law took a new development in *Hedley Byrne v Heller*[7], by creating an exception to the general rule on non-recoverability of pure economic loss. The court held that anybody who suffered financial loss as a result of reliance upon negligent professional advice could claim compensation from the negligent professional, provided there was a relationship of proximity between the advisor and the recipient of his advice. Thus it is now recognized that in special circumstances, pure economic loss caused by negligent misstatements or advice could be recoverable in tort[8].

The shift in the English law came about in the series of cases of *Dutton v Bognor Regis UDC*[9], *Anns v London Borough of Merton*[10] and *Junior Books Ltd v Veitchi*[11], all of which allowed claims for pure economic loss. However, the expansion of the law in the trilogy of cases of *Dutton*, *Anns* and *Junior Books* ended with *D&F Estates Ltd v Church Commissioner of England*[12], where the House of Lords decided that a builder owes no duty of care in tort towards subsequent owners or occupiers of a building which he has erected in respect of pure economic loss. This decision in *D&F*

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[6] "Pure economic loss is irrecoverable" due to the need to "avoid the creation of liability for an indeterminate amount for an indeterminate time to an indeterminate class"- Cardozo CJ in *Ultramares v Touche*

[7] *Hedley Byrne v Heller* (1964) AC 465

[8] The *Hedley Byrne v Heller* principle was applied in the construction industry in various jurisdictions - see the Australian case of *Dillingham Construction Pty Ltd v Downs* (1972) 13 BLR 97: where the court held that there was no special relationship between parties in the pre-contract period to take reasonable care in the assembling of all material relevant to special site conditions; and the Canadian case of *Walter Cabott Construction Ltd v The Queen* (1974) 44 DLR (3d) 82: where the court held that there is no special relationship between the person who invites tenders and those who accepts that invitation.

[9] *Dutton v Bognor Regis UDC* (1971) 3 BLR 11

[10] *Anns v London Borough of Merton* (1977) A.C. 728

[11] *Junior Books Ltd v Veitchi* (1982) 3 AER 201

[12] *D&F Estates Ltd v Church Commissioner of England* (1988) 2 WLR 368

Estates raises doubts as to the correctness of the law laid down in *Dutton* and *Anns.* This uncertainty was duly laid to rest by the subsequent House of Lords' decision in *Murphy v Brentwood D.C*[13], in which *D&F Estates* was cited in approval.

The position in Malaysia appears to be no different. The principles in *Murphy v Brentwood* was generously applied in *Kerajaan Malaysia v Cheah Foong Chiew*[14], where the court struck off an action for pure economic loss. The law in *Murphy* was again cited with approval in the later case of *Teh Khem On v Yeoh & Wu Development Sdn Bhd*[15]. However, the law took a drastic turn in *Dr. Abdul Hamid Abdul Rashid v Jurusan Malaysia Consultants*[16], where the court surprisingly allowed a claim for pure economic loss in an action for negligence. A claim relating to a collapse of a house due to a landslide, the High Court took a bold step in not following *Cheah Foong Chiew* and *Teh Khem On*, and distinguishing the English precedents of *D&F Estates* and *Murphy v Brentwood*. Instead, the court relied on the alternative jurisprudence developed in the other Commonwealth jurisdictions[17].

However, as in the shift in the English common law, the legal position enunciated in *Dr. Abdul Hamid Abdul Rashid v Jurusan Malaysia Consultants* was to be overruled by the Court of Appeal in *Arab Malaysian Finance v Steven Phoa Cheng Loon & Ors and other appeals*[18], which was later reaffirmed by the Federal Court in *Majlis Perbandaran Ampang Jaya v Steven Phoa Cheng Loon & Ors*[19]. Therefore, as

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[13] *Murphy v Brentwood D.C.* (1990) 1 AC 398

[14] *Kerajaan Malaysia v Cheah Foong Chiew* (1993) 2 MLJ 439

[15] *Teh Khem On v Yeoh & Wu Development Sdn Bhd* (1995) AMR 1558

[16] *Dr. Abdul Hamid Abdul Rashid v Jurusan Malaysia Consultants* (1997) 3 MLJ 561

[17] See the New Zealand case of *Invercargill City Council v Hamlin* (1996) 1 AER 756, the Canadian case of *Winnipeg Condominium No. 36 v Bird Construction Co Ltd* (1995) 121 DLR (4th Ed) 193, the Australian case of Bryan v Maloney (1995) 28 ALR 163 and the Singaporean case of *RSP Architects Planner & Engineers v Ocean Front Pte Ltd* (1996) 1 SLR 113.

[18] *Arab Malaysian Finance v Steven Phoa Cheng Loon & Ors and other appeals* (2003) 1 MLJ 567

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

the current situation stands, the law remains as the position of *Donoghue v Stevenson*, *D&F Estates* and *Murphy v Brentwood.*

This area of the law in Malaysia is perhaps best described by Abdul Hamid Mohamed FCJ, who, whilst acknowledging the uncertainties in the law, decided against a claim for pure economic loss in *Majlis Perbandaran Ampang Jaya v Steven Phoa Cheng Loon & Ors*: -

> "Now, reflecting on my own judgement in *Nepline Sdn Bhd* delivered ten years ago, I am afraid I am still of the same view regarding the approach that the court has to take in view of s 3(1) of the Civil Law Act 1956, the effect of the provision and the proviso thereto and the decision to accept claims for pure economic loss in negligence in limited cases, considering the local circumstances. However, I shall not venture to say where the line should be drawn. It may be said that this will lead to uncertainty in the law. The answer to that is that this whole area of common law itself is fraught with uncertainty"[20]

The proposed dissertation will cover the following areas / issues: -

a) To critically analyze the nature, history, concept and development of pure economic loss. The thesis will focus on theories, arguments and concepts by academicians[21] and from case-law decisions[22];

b) To critically analyze the development on pure economic loss in England, Malaysia and other Commonwealth jurisdiction[23];

c) To critically analyze the correct jurisprudential approach on the recoverability of economic loss in Malaysia; whether it is recoverable or not; and whether it should be recoverable or not. In ascertaining the correct jurisprudential approach on the recoverability of economic loss from the Malaysian perspective, the thesis hopes to offer its own theory on the concept of pure economic loss, and will attempt to offer some suggestions to overcome the problems relating to the application of the law on pure economic loss in the construction industry, perhaps

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[20] *Ibid.* at p. 421.

[21] There appears to be two opposing camps in the views of the academicians – one group is pro-*Donoghue v Stevenson*, whilst the other pro-*Dutton* and *Anns*. There is also a group of so-called neutrals, preferring to accept both sides of the argument.

[22] Lord Bridge's Complex Structure Theory in *D&F Estates.*

[23] New Zealand, Australia, Canada and Singapore.