RICS COBRA Research Conference, University of Cape Town, 10-11th September 2009.
Asanga Gunawansa, pp 1305-1327

Pure economic loss relating to construction defects - a comparative analysis of four common law jurisdictions

Asanga Gunawansa[1]

[1]Department of Building, School of Design and Environment, National University of Singapore, 4 Architecture Drive, S117566, Singapore

Email: bdgasan@nus.edu.sg

Abstract

The problem of whether pure economic loss should or should not be compensated has been a legal conundrum for many common law jurisdictions. The aim of this paper is to provide a comparative analysis of the state of law on pure economic loss resulting from construction defects in four common law jurisdictions, namely, England, USA (State of California), Australia and Singapore. The paper will show that whilst the English and American courts have regularly found pure economic loss problematic and have had the tendency to reject claims based on the belief that such losses are more difficult to foresee than ordinary losses, or that they would open the flood gates for a series of derivative claims, the courts in Australia and Singapore have taken a different path, showing their willingness to test each case on the merits so as to allow themselves to do justice in individual cases. This paper argues in favour of the liberal approach taken by the Australian and Singapore courts, primarily on the basis that, in claims for pure economic loss, although there is no physical injury to person or property of the victim, the very fact that an economic loss is caused to the victim as a result of the tortfeasor's action should be actionable in law.

Keywords: Pure Economic Loss, Construction Defects, Common Law, Negligence, Tort

I. Introduction

Most construction projects are complex and involve a multitude of parties with diverse interests. Not all relationships and interests of these parties are connected through and protected by way of contracts. For example, in a traditional contract procurement model, there is no contractual relationship between an architect or an engineer appointed by the client and the contractor who constructs the project. However, the actions of such an architect and/or the engineer in connection with the project will definitely have an impact on the performance of the contractor. Likewise, a contractor who builds a project or an architect who designs a project may not have any contractual relationship with a subsequent owner or user of a project, except in the case of express and implied undertakings or warranties. Irrespective of the fact that there may not be any relevant contractual relationships between the parties who are directly or indirectly involved in a

construction project, the possibility that physical injury (to person or property) or economic harm may be caused to one or more of them as a result of negligent action of another cannot be ruled out. Construction defects are a particularly pronounced example of this possibility. As a result, construction projects usually provide a healthy breeding ground for disputes.

A popular and an easily acceptable theory of law is that, for every wrong done there should be a remedy. The very development of equity in common law supports this theory. As Lord Chancellor Cottenham observed in *Wallworth v. Holt*[1]:

> *"It is the duty of this court to adopt its practice and course of proceedings to the existing state of society and not, by a strict adherence to form and rule, under different circumstances, to decline to administer justice and enforce rights for which there is no other remedy… If it were necessary to go much further than it is, in opposition to some sanctioned opinions, in order to open the doors of this court to those who could not obtain it (justice) elsewhere, I should not shrink from the responsibility of doing so."*

However, in reality, it has not been possible for the legal systems to find remedies for each and every wrong. One specific area particularly relevant to construction projects is "pure economic loss". On grounds such as public policy and the "floodgates" argument, which are briefly discussed later, courts in common law jurisdictions have consistently struggled to find a satisfactory and common response to tort claims for pure economic loss. As a result, there has been a division of opinion with courts in some jurisdictions taking a restrictive approach and the others a liberal approach.

The paper will briefly trace the manner in which claims for pure economic loss have been considered by the English Courts and courts in three other common law jurisdictions, USA (State of California)., Australia and Singapore, presenting a comparative analysis of the current state of the law. Further, this paper will support the argument that courts should adopt a liberal approach in treating tort claims for pure economic loss, with the ultimate aim being to provide remedies to those who have suffered losses, including economic losses, due to the negligent acts of others, subject to the established tests applied in common law jurisdictions to determine liability.

2. What is Pure Economic Loss?

Those who are not legally trained may find the term "economic loss" misleading, as usually, the remedy for all successful tort claims is damages, which results in a monetary award when the physical harm suffered is translated into monetary terms, the universally acceptable measure of loss. Such a loss should not be mistaken as a purely economic loss.

A pure economic loss is one that is not consequent upon personal injury or physical damage to property belonging to the victim. In the case of *RSP Architects & Engineers v.*

[1] 4 Myl. & C. 619; 41 Eng. Rep. 238.

Ocean Front Pte Ltd[2], the term "economic loss" was defined by LP Thean JA of the Court of Appeal of Singapore as, "by the term 'economic loss' we mean only mere economic loss not consequent on any injury to persons or damage to property."[3] In other words, losses that are not accompanied by physical damages to property or personal injury fall under the category of pure economic loss.

However, it should be pointed out that sometimes, the division of losses into two categories, pure economic and others (physical damages to property or personal injury), is not always clear cut. Trying to justify why one category would be compensated and the other not is even more complex. For example, in *Spartan Steel and Alloys Ltd v. Martin & Co. Ltd* [4], the claim was based on a power failure which disrupted the work in plaintiff's stainless steel factory, which caused physical damage to the factory's furnaces and metal. The plaintiffs also lost profit on the damaged metal and the metal that was not melted during the time the electricity was off. The Court of Appeal delivered a majority judgment (Edmund-Davies LJ dissenting), that the plaintiffs could only recover the damages to their furnaces, the metal they had to discard and the profit lost on the discarded metal. It was held that plaintiffs could not recover the profits lost due to the factory not being operational for 15 hours. The main reasoning for this was that while the damage to the metal was considered a "physical damage" and the lost profits on the metal was "directly consequential" upon it, the profits lost due to the blackout was considered as constituting a "pure economic loss"[5]. In his dissent, Edmund-Davies J. found that the loss was both direct and foreseeable consequence of the defendant's negligence and should therefore be recovered. Thus, in his dissenting opinion, Edmund-Davies J. did not see any logical basis for the division of the losses into two categories in Spartan Steel.

3. Pure Economic Loss in England

3.1. The applicable tests

Since the English courts considered the liability of a manufacturer towards an end-user with whom the former did not have a contractual relationship in the case of *Donoghue v. Stevenson*[6] way back in 1932, the English law of negligence has seen many developments. The other common law jurisdictions have keenly followed these developments, sometimes differing, but mostly, faithfully following and adopting them. One area in which the courts in common law jurisdictions such as Australia and Singapore have decided to take a more liberal approach compared to the English courts is pure economic loss[7].

[2] [1996] 1 SLR 113.
[3] [1996] 1 SLR 113, at 125.
[4] [1973] 1 QB 27.
[5] The effect of the above judgment was that it outlined that there are two types of economic loss, namely, (1) economic loss consequential on physical damage and (2) "pure" economic loss. Only the first is in principle recoverable.
[6] 1932 SC (HL) 31.
[7] The courts in other common law jurisdictions such as Canada and New Zealand have also not followed the English Courts on pure economic loss.

One of the key aspects of the tort of negligence is the scope it offers for the recovery of pure economic loss. However, traditionally, all common law jurisdictions adopted a restrictive approach towards claims for recovery of pure economic loss because of two main reasons. Firstly, because courts were afraid that allowing claims of such nature would open up floodgates for such claims. Secondly, the belief that economic loss fall within scope of contracts and, therefore, allowing claims of such losses may undermine contract law. In England, the courts only permitted the recovery of pure economic loss in tort, in very limited situations. For example, the decision of *Hedley Byrne v. Heller*[8] recognised the possibility of recovery of pure economic loss where a negligent misrepresentation had been made by bankers regarding the financial standing of a company, which was later found out to be inaccurate, notwithstanding the fact that there was no contractual obligation on the part of the bank to give the reference[9].

The cases that followed established that, where a "special relationship" or proximity between the parties is established where one party is holding itself out as an expert in that particular field and that the other party relies upon that expertise to its detriment, the former would be liable for losses caused, even though they may be categorized as purely economic, thus establishing an exception to the restrictive approach. For example, in *Junior Brooks v. The Veitchi Co. Ltd*[10], a case involving a nominated sub-contractor, who was sued by the plaintiffs for the cost of replacing a defective floor, the issue was whether the defendants who had negligently laid a defective floor but had not caused any injury to person or other property belonging to the plaintiff were liable for the costs of replacing the defective floor. The House of Lords, by a majority, held that they were liable even in the absence of any contractual relationship, as there was a requisite degree of proximity between the defendants and the plaintiffs by virtue of a number of factors including the defendant's knowledge of the plaintiff's requirements, the plaintiff's reliance on the defendants' expertise, the defendant's knowledge that the plaintiffs relied on their skills and expertise. The court concluded that the relationship between the parties were as close as it could be short of actual privity of contract.

In the case of *Anns v. London Merton Borough Council*[11], the House of Lords unanimously held that a local authority might be liable in negligence for pure economic losses suffered by long lessees of maisonettes after the authority negligently failed to discover that the foundations were inadequate. It established a broad test for determining the existence of a duty of care in the tort of negligence, popularly known as the Anns test or sometimes retronymically, the two-stage test. Lord Wilberforce who delivered the judgment with whom the fellow judges concurred laid down the Anns test in following words:

> *"Through the trilogy of cases in this House, Donoghue v Stevenson, Hedley Byrne…and Home Office v Dorset Yacht Co Ltd, the position has now been reached that in order to establish that a duty of care arises in a particular*

[8] Headley Byrne & Company Limited v. Heller & partners Limited [1964] AC 465; [1963] 2 All ER 575.
[9] The plaintiff in this case was unsuccessful in its action as the bank had issued its statement subject to a disclaimer of liability.
[10] 1982 Sc (HL) 244; 1982 SLT 492.
[11] [1978] AC 728.

> *situation, it is not necessary to bring the facts of that situation within those of previous situations in which a duty of care has been held to exist. Rather the question has to be approached in two stages. 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."*

Thus, *Anns* reduced the circumstances under which *Hedley Bryne* recognised the availability of pure economic loss in torts to a mere example of a situation in which a plaintiff may be successful, and established a two stage test that could be applied in cases of tort in determining whether a duty of care existed. The test requires first a "*sufficient relationship of proximity based upon foreseeability"*, and secondly, considerations of reasons why there should *not* be a duty of care. In other words, where there was foreseeability and proximity there should be a duty of care unless there was a policy reason for holding that no duty existed.

In the years that followed, the English courts backed away from *Anns*. In 1990, in *Caparo Industries plc v Dickman*[12], the House of Lords regarded the Anns test as too wide and held that even where there is foreseeability and proximity the court may decide that there should not be a duty of care, because it would not be fair, just or reasonable to impose one. In *Caparo*, the loss claimed was economic and was based on a negligent statement made by the company accountants in published accounts. The House of Lords held that while it is foreseeable that investors may use published accounts to make investment decisions, the accountants who produced them would not be liable for losses as a result of the accounts being wrong, as there is not sufficient proximity between the accountants and, effectively, anyone at all who may rely upon them. The House of Lords developed the following three limbed formula to be applied to determine whether a duty of care existed:

- Was the loss to the claimant foreseeable?
- Was there sufficient proximity between the parties?
- Is it fair, just and reasonable to impose a duty of care?

The last limb above brought in the concept of policy in which the courts have to balance the needs of an injured claimant against that of opening the "floodgates" and creating an indeterminate liability. Disagreeing with the approach taken in *Anns*, Lord Bridge in *Caparo* quoted with approval Brennan J in the Australian case of *Sutherland Shire Council v Heyman*[13]:

[12] [1990] 2 AC 605.
[13] [1985] 60 ALR 1, at 43-44.

> *"it is preferable in my view that the law should develop novel categories of negligence incrementally and by analogy with established categories, rather than by a massive extension of a prima facie duty of care restrained only by 'considerations which ought negative, or reduce or limit the scope of the duty or the class of persons to whom it is owed."*

In the case of Henderson *v. Merrett Syndicates Ltd*[14], the court widened the approach in *Hedley Byrne* on proximity. The "special relationship" or proximity between the parties which was held to exist where one party holds itself out as an expert in that particular field and the other party relies upon that expertise to its detriment was thus stretched to include situations in which the defendant voluntarily assumes responsibility for the economic interests of a plaintiff and where the defendant knows or ought to know that his skills or expertise will be relied upon by the plaintiff.

In *White v. Jones*[15], the issue was whether a solicitor who had carelessly failed to ammend the will of his client, with the effect that the client died before the intended beneficiaries were indicated on it, was liable in an action in negligence brought by the beneficiaries. Here the House of Lords decided, by a bare majority, that they could recover, in spite of the fact that generally a solicitor owes no duty of care to anyone except his client. Thus, *White v. Jones* clearly departed from the previous practice of insisting on a "special relationship" or proximity between the parties which exist where one party holds itself out as an expert in that particular field and the other party relies upon that expertise. Further, it cannot also be said that the basis of the decision in *White v. Jones* was the voluntary assumption of responsibility which formed the basis in Henderson *v. Merrett*. Apart from the rather trite principle that courts will find ways to do the right thing in a particular case, it is difficult to point out what specific principle has been applied in *White v. Jones* by the court in arriving at its conclusion.

In *Customs and Excise Commissioners v Barclays Bank plc*[16], a recent case in which the issue of pure economic loss was considered, an important question raised was whether a bank, notified by a third party of a freezing injunction granted to the third party against one of the bank's customers, affecting an account held by the customer with the bank, owes a duty to the third party to take reasonable care to comply with the terms of the injunction. The House of Lords unanimously disapproved the Court of Appeal's decision, that "assumption of responsibility" was indistinct and subsumed into the law of negligence. Their Lordships held that, because the bank was required by law to comply with the freezing order, there could not be said to have arisen any assumption of responsibility on *Hedley Byrne* grounds. Applying the *Caparo* test, it was held that, in the circumstances, it was not fair, just and reasonable to impose liability on the bank. The bank was therefore not required to reimburse Customs and Excise for the dissipated money.

[14] [1995] 2AC 145.
[15] [1995] 2 AC 207 (HL).
[16] [2007] 1 AC 171.

The examination of the above cases show that whilst it is easy to accept that pure economic losses should be treated differently from claims based on physical harm or damage to property, the specific boundaries for this distinction have not been clearly established in England. Further, the concepts such as "voluntary assumption of responsibility" and what is "fair, just and reasonable" give little indication of why recovery should not be allowed for pure economic losses (Giliker, 2001).

3.2. Pure economic loss relating to construction defects and the fear of incursion in to the domain of contracts

As far as pure economic losses based on construction defects were concerned, the application of the above tests to determine liability was finally put to rest with the decisions given in the landmark cases of *D & F Estates v. Church Commissioners for England & Others*[17] and *Murphy v. Brentwood District Council*[18]. In *D&F Estates*, the Church Commissioners owned a block of flats built by a firm of contractors (the third defendants) who had sub-contracted the plastering work. Fifteen years after construction the plaintiffs, the lessees and occupiers of a flat in the block, found that plaster in their flat was loose and brought in an action in tort for the cost of remedial work. The action in tort instead of contract was filed as there was no direct contractual relationship between the plaintiffs and the sub-contractors. The Court of Appeal found that the main contractor had employed a competent sub-contractor and thus there was no duty of care owed to the plaintiffs. Further, the court found that the cost of replacing the defective plaster was a pure economic loss and therefore not recoverable in tort. When the matter went up in appeal before the House of Lords, it was held that damages were not recoverable in tort in respect of the defect in the product itself; as such claims lay only in contract. Their lordships added that damages were recoverable in tort only where a defective product caused damage or injury other than to the defective product itself. Thus, in the absence of a contractual duty or a special relationship of proximity, it was held that a builder owes no duty of care in tort in respect of the quality of his work.

In *Murphy*, the plaintiff had purchased a house from the local council and the house developed several defects including cracks which appeared in the internal walls. The evidence produced in the trial showed that the damages had occurred as the result of the design of a concrete raft being defective and unsuitable for the site. It was argued on behalf of the plaintiff that the council had negligently relied on consulting engineers who had approved the design of the raft as suitable. The House of Lords concluded that if the only complaint was with respect to the physical integrity of the acquired structure, and not to damage to other property, the property owner's loss is properly characterized as purely economic as the loss is the diminution in the value of the building. Their Lordships reasoned that once the danger is detected, the risk of further damage is removed.[19] They added that, if such losses were to be treated as physical damage, a duty of care would arise as a matter of course on the basis of reasonable foreseeability alone.

---

[17] D&F EstatesLimited & Others v. The Church Commissioners for England and Others [1989] AC 177; 41 BLR 12.
[18] [1990] 2 All ER 908; [1991] 1 A.C. 398.
[19] Where the defect poses a risk to persons or property on immediately adjacent lands or the highway, damages may be recoverable according to the duty principles applicable to physical damage. [19] This is an exception left open by the House of Lords. *Murphy v Brentwood* [1991] 1 AC 398 at 475.

The overall effect of that would tantamount to implying into the law of tort a transmissible warranty of quality, in circumstances where no payment was made for the warranty. To do so would be too great an extension of the duty of care, and an unjustifiable incursion into the domain of contract law.[20]

Thus in Murphy, the House of Lords found, based on public policy, that there was no course of action in tort. In the words of Lord Oliver:

> *"The affliction of physical injury to person or property of another universally requires to be justified. The causing of economic loss does not. If it is to be categorized as wrongful it is necessary to find some factor beyond the mere occurrence of the loss and the fact that its occurrence could be foreseen."*[21]

Further, the House of Lords held that pure economic loss may be recoverable against a party who owes the loser a relevant contractual duty. *"But it is not recoverable in tort in the absence of a special relationship of proximity imposing on the tortfeasor a duty of care to safeguard the plaintiff from economic loss."*[22]

It is also useful to note that in *Murphy*, the argument, that imposition of negligence-based liabilities for pure economic losses relating to construction defects would be wider than the obligations imposed by the legislature found favour with their Lordships. In particular, it was noted that the Defective Premises Act 1972, which requires those who take on work in connection with the provision of a dwelling to do that work in a workmanlike or professional manner only obliges them to provide proper materials, so that as regards the work taken on, the dwelling will be fit for habitation. It does not impose a duty on them to provide building works that are defective free.[23]

Thus, as Barlow (2001) points out, the cases of *D & F Estates* and *Murphy* have placed an almost insurmountable obstacle when seeking to recover, in negligence, the cost of repairing defects in their buildings from the contractors and sub-contractors whose negligent acts or omissions had caused the defects. Further, it should be pointed out that cases such as *Murphy* leave several complex and unanswered questions. To give an example, the determination that damage to property it self cannot be recovered in tort as that would tantamount to implying into the law of tort a transmissible warranty of quality, in circumstances where no payment was made for the warranty, will leave many innocent victims of building defects without any remedy against the party who had been directly responsible for the defect.

There is also uncertainty in the distinction between what should be considered "other property" as damages to other property is recoverable according to the decisions in *Murphy* and *D & F Estates*. As most construction works involves structures comprising

---

[20] [1989] AC 177 at 206.
[21] Murphy v. Brentwood District Council [1991] 1 A.C. 398 at 487.
[22] Lord Bridge in Murphy v. Brentwood District Council [1991] 1 A.C. 398 at 475.
[23] In Thompson v Clive Alexander & Partners [1992]59 BLR 81, the scope of the Act was further limited when the court held that it is not sufficient for claimants to complain of bad or unprofessional work, they had to prove the place was uninhabitable.

of distinct units and products, the question is whether the costs relating to removal and restoration of a defect free unit in a structure as a result of having to replace a defective unit could be considered "other property" and therefore recoverable from the party responsible for the defect. No clear answer has been found for this issue from the above cases.

Another question that could be raised is that, since it is accepted that contractors and construction industry professionals such as Architects and Engineers have a duty to take reasonable care in the design, construction and approval of buildings to avoid injury to persons and other property, what is the basis of that duty being treated as non-existent once the danger is detected by the plaintiff. This determination in *Murphy* leads to the contradiction that if someone is injured due to a construction defect, liability attaches to that injury, but if the defect is discovered just in time to avoid the injury, no liability attaches, irrespective of the fact that some one other than the party responsible for the defect has to pay to remedy the defect.

3.3. Developments after Murphy

As explained above the apparent effect of *Murphy* is that liabilities for defective workmanship in construction projects would be confined to the law of contract, except in circumstances in which the defective work has resulted in physical injury to person or physical damage to other property. Initially, the effect of such confinement was expected to protect the contractors from being sued for defective workmanship by those with whom they had not entered into any contractual relationship. However, the English law has since evolved, enabling third parties to sue the contractors for defective workmanship under "collateral warranty". A collateral warranty gives a third party rights collateral to rights in an existing contract entered into by two separate parties. Provided that such warranties are issued in favour of third parties, it is not now possible for a third party who has an interest in a construction project to sue the contractor or any other service provider for the construction project for construction defects for which they are responsible.

As Lord Millett said in the case of *Alfred McAlpine Construction Limited v. Panatown Limited*[24], a leading authority on collateral warranty:

> *"I agree with the Court of Appeal that the [collateral warranty] was primarily designed to cater for subsequent purchasers. This is also the view expressed by Mr. Duncan Wallace Q.C. in "Third Party Damages: No Legal Black Hole?" (1999) 115 L.Q.R. 394 and is confirmed by an article by Mr. David Lewis in (1997) 13 Const. L.J. 305. He notes that the widespread use of collateral warranties … derives from the change in the law of tort which occurred in 1990 when the House decided Murphy v. Brentwood District Council…and departed from Anns v. Merton London Borough Council"*

Another development in English law came about following the decision in *St. Martin's Property Corporation Ltd. v. Sir Robert McAlpine Ltd.*[25]. In this case, an exception to the

[24] [2001] 1 AC 518 (HL).

English law rule that a person cannot recover substantial damages for breach of contract where he himself has suffered no loss, which was recognised in *Dunlop v. Lambert*[26] in 1839, was extended to construction contracts by the House of Lords. This exception being that, in contracts for carriage of goods, where it was contemplated that one party would transfer property in the goods to another after the contract was entered into, he could recover damages on behalf of the new owner if the goods were lost or damaged.

The decision in *St Martins* case was followed later in *Darlington Borough Council v. Wiltshier Northern Ltd*[27], and in *Alfred McAlpine Construction Limited v. Panatown Limited*[28]. This development dramatically changed English law of contracts relating to construction as it enabled a party to a contract who has suffered no loss to sue and recover substantial damages on behalf of a third party, based on presumed intentions of the parties to the original construction contract.

The Contracts (Rights of Third Parties) Act which came in to existence in 1999 now provides that a third party would have a right to enforce a contract where the contract expressly states that the third party is to be able to do so. It applies to all contracts entered into after 11 May 2000.

4. Pure Economic Loss in the US

4.1. Restrictive Approach

The approach of the U.S. courts is very similar to that of the English courts when dealing with claims for pure economic loss. The U.S. position could be easily summed with the following quote from the judgment in the case of *Aas v. Superior Court*[29] concerning claim for damages resulting from negligent constructing of a residence, where the California Supreme Court held that the plaintiff was not entitled to recover in tort for the costs of repairing and replacing a defective products:

> *"[a]ny construction defect can diminish the value of a house. But the difference between price paid and value received, and deviations from standards of quality that have not resulted in property damage or personal injury, are primarily the domain of contract and warranty law or the law of fraud, rather than of negligence. In actions for negligence, a manufacturer's liability is limited to damages for physical injuries; no recovery is allowed for economic loss alone."*

The court held further that *"(i)n actions for negligence, a manufacturer's liability is limited to damages for physical injuries; no recovery is allowed for economic loss alone."* In other words, under *Aas*, the "economic loss rule" precluded recovery for

[25] [1994] 1 A.C. 85.
[26] [1839] 6 Cl. & F. 600.
[27] [1995] 1 W.L.R. 68.
[28] [2001] 1 AC 518 (HL).
[29] 24 Cal.4th 627 (2000), at 636.

damages such as *"the difference between price paid and value received, and deviations from standards of quality that have not resulted in property damage or personal injury."*

In another case, *Carrau v. Marvin Lumber and Cedar Company*[30], windows installed in a luxury home had been treated with an ineffective preservative, with the result that they were subject to premature rotting within 3-4 years after completion of the house. As a result their were leaks and some minor damage to wallpapers, sheet rock and stucco. The plaintiff determined that all of the windows needed to be replaced. It was undisputed that replacement of the windows would also necessitate the performance of other work, such as removal and restoration of landscaping. Plaintiff obtained bids in the range of $450,000 to replace the windows and perform the related remedial work. However, the defendant refused to pay, although it did furnish the replacement windows. When the plaintiff eventually sold the residence, it was agreed with the buyer that $426,000 will be credited to cover the costs of installing the replacement windows. Subsequently, the plaintiff instituted legal action against the defendant for breach of warranty and strict product liability.

The court rejected the cause of action based on warranty as it was time barred. On the product liability claim, the court held that a plaintiff homeowner could not recover for defective windows against the manufacturer of their windows under a theory of strict liability in tort. The Court found, extending the holding of *Aas*, that the plaintiff could only recover in strict liability for the resultant damage from the defective windows and not for the defective windows themselves. The court broadly characterized *Aas* as holding that *"a plaintiff is not entitled to recover in tort for the costs of repairing and replacing a defective product; recovery for those costs is available only under contract or breach of warranty law."* The court also held that the plaintiff could not recover damages for diminution in value of the residence due to defective windows. In this regard, the court stated *"[W]hen the value of the home was diminished by the use of Marvin's products, [the plaintiff] lost an economic benefit. He is not entitled to recover that benefit on a theory of products liability."*

Thus, *Carrau* appears to hold that no recovery is allowed for the costs of repairing collateral damage necessarily caused in repairing the defects, and suggests that the recovery of the costs of getting to the defects is also barred, at least in the absence of significant resulting damage actually caused by the construction defect. A key weakness *Carrau* is that under the above rationale, it promotes a multiplicity of sequential lawsuit every time resultant damage occurs, because a plaintiff is not entitled to recover for the defective conditions.

4.2. Statutory Relief for Homeowners in California

The legislature's response to the precedence created by *Aas* was the enactment of a statute, the Senate Bill 800, commonly known as the "Right to Repair Act[31], which became effective January 1, 2003. It established a mandatory process prior to the filing of

[30] (2001) 93 Cal.App.4th 281.
[31] Title 7, Part 2 of Division 2 of the California Civil Code.

certain types of construction defect claims. It applies whenever there are defects alleged by a "homeowner"[32] in new residential construction, subject to standards. It is clear that the legislative intent of this law is to afford both Homeowners and homebuilders the opportunity for quick and fair resolution of claims relating to construction defects.

The Act provides that any construction defect action against a builder, subcontractor, product manufacturer, or design professional groups (builders) will be governed by the standards set forth in it on new home construction. It defines construction defects according to standards of how a home and its components should function. These functional standards have different time limitations from the completion of the home to bring a claim for defect depending on the category. If the homeowner notifies the builder of a possible defect after the categorical imposed statute of limitation the defendant has an absolute defense and no duty to repair. Further, if a homeowner fails to file a written claim with builder in advance of filing a petition, the law provides for a legal bar to the action. Subject to these limitations, the Act provides a sound platform for victims of defectively constructed homes to file their claims and get the construction defects remedied, irrespective of the absence of any contractual relationship with the party responsible for the defect.

As additional protection for the homeowners, the Act also requires the builders to provide homeowners with a minimum one-year express warranty covering the "fit and finish" of cabinets, mirrors, flooring, interior and exterior walls, countertops, paint finishes and trim. The bill also permits builders to exceed the warranty standards and provide homeowners with other more extensive warranties, subject to builder choice.

In addition to protecting the interests of a homeowner against construction defects, the Act also sets forth certain positive guards available to the builders. These cover:

- unforeseen acts of nature in excess of the design criteria anticipated by the applicable building codes;
- homeowner's unreasonable failure to minimize or prevent damages;
- homeowner's, or his/her agent's or employee's, failure to follow recommended or commonly accepted maintenance obligations;
- defects caused by alterations, ordinary wear and tear, misuse, abuse, or neglect;
- defects barred by the statute of limitations;
- defects subject to a valid release; and
- the extent that defendant's repair was successful in correcting the defects.

4.3. The Status after the Right to Repair Act

[32] A "Homeowner" includes the owners, whether original or subsequent, of a single-family home or attached dwelling and homeowners associations. It does not apply to commercial buildings.

In the recent case of *Greystone Homes, Inc. v. Midtec, Inc.*[33], the California Court of Appeal ruled on two issues that had not been previously addressed under the Right to Repair Act, namely:

- whether a builder may recover for economic loss caused by a product manufacturer's violation of the Act through a claim for equitable indemnity against that manufacturer; and
- whether that builder may bring a direct action for negligence against the manufacturer to recover its economic losses.

The plaintiff in this case (Greystone) was a builder (not a homeowner) of a housing project. It sued the manufacturer of a defective product (Midtec) after having incurred expenses to repair plumbing related defects in the project. Midtec filed a motion for summary judgment arguing *inter alia* that the Right to Repair Act only permits a homeowner (and not a builder) to bring an action pursuant to the Act and, since the Act does not apply, under *Aas*, the economic loss rule precluded Greystone from recovering additional damages for the cost to replace fittings that had not failed or caused property damage.

Concerning the first issue, the court concluded that a builder may bring an action for equitable indemnity to recover economic loss as a result of a manufacturer's violation of the Act. The court explained that in an action for equitable indemnity under California law, both the builder and the manufacturer may be liable for construction defects that cause physical damage or property damage, so long as there is some basis for tort liability against the proposed indemnitor. The court held that the Act imposes such liability and specifically provides that product manufacturers shall be liable to homeowners "to the extent that the manufacturer caused, in whole or in part, a violation of the Act's standards as the result of negligence or a breach of contract." Thus, the court concluded that a homeowner may recover economic losses from a manufacturer for a violation of the Act's standards that is caused by the manufacturer's negligence or breach of contract. In the circumstances, the court concluded that Greystone's derivative equitable indemnity claim was permissible because it was based on Midtec's joint legal obligation with Greystone to the homeowners (and not Greystone's direct liability to Midtec).

Concerning the second issue, the court ruled Greystone could not pursue an action directly against Midtec for negligence per se based on the alleged violation of the Act. The court explained that the Act does not contain any provision authorizing a direct action by a builder against an entity of any kind. Further, as Greystone did not fall into the class of persons that the Act was intended to protect, and as Greystone and Midtec did not share a "special relationship" to place them within a narrow exception to the economic loss rule, the court concluded that Greystone may not recover its economic losses from Midtec in a claim of negligence per se.

---

[33] 168 Cal.App.4th 1194 (Cal. Ct. App. 2008).

5. Pure Economic Loss in Australia

5.1. Liberal Approach

In 1995 the High Court of Australia clearly departed from the restrictive approach taken by the English Courts with regard to pure economic law, in the case of *Bryan v Maloney*[34]. The High Court imposed a duty of care on a builder in respect of the diminution in the value of a house due to inadequate foundations that caused cracks and other defects a defect, which caused a pure economic loss to the owner. The court found that there was sufficient proximity between the parties, despite the fact that the owner (plaintiff) was a subsequent purchaser who had no contractual relationship with the builder. The court could see little distinction between the position of a first owner and that of a subsequent owner, when considering the question of proximity with the builder.

Distancing it self from the English approach, the High Court of Australia noted the following:

> *"One cannot but be conscious of the fact that the conclusion that Mr Bryan is liable in damages to Mrs Maloney in the present case is contrary to the views expressed by the members of the House of Lords in D & F Estates Limited -V- Church Commissioners and Murphy... Their Lordships' view ... seems to us, however; to have rested upon a narrow view of the scope of the modem law of negligence and a more rigid compartmentalisation of contract and tort that is acceptable under the law of this country".*

In *Bryan v. Maloney*, the existence of a contract between a builder and the original owner gave rise to a relationship of proximity between them that extended to cover the type of loss suffered.[35] An analogy could therefore be drawn between this relationship and the relationship between a builder and a subsequent purchaser. This relationship was similarly characterised by an assumption of responsibility and reliance, which was considered to flow from the fact that 'ordinarily' the builder of a house undertakes the responsibility of erecting a structure on the basis that its footings are adequate to support it for the period during which it is likely that there will be one or more subsequent owners; and a subsequent owner will have no greater but often less opportunity to inspect and test the house than the first owner. Further, being unskilled in building matters and inexperienced in the niceties of real property investment, it was likely that, if the inadequacy has not become manifest, for a subsequent owner to assume that the house has been competently built.[36]

The two considerations based on which the courts have been traditionally reluctant to recognise a duty of care in cases of pure economic loss were held to be inapplicable in *Bryan v. Maloney*. As the builder owed the first owner a duty to take reasonable care in constructing the building so as to avoid pure economic loss, it was held that there could

[34] (1995) 182 CLR 609; [1995] Aust Torts Reports 62,092 (81-320)]
[35] *Bryan* (1995) 182 CLR 609, 622–4 (Mason CJ, Deane and Gaudron JJ), 662–3 (Toohey J).
[36] Ibid, 627–8 (Mason CJ, Gaudron and Deane JJ), 663 (Toohey J).

be no inconsistency between the extension of that duty to subsequent purchasers and the builder's legitimate pursuit of their own financial interests.[37] Further, Toohey J opined that restricting recovery only to an original owner might lead to 'sham' first sales with the purpose of insulating builders from liability.[38]

Bryan v Maloney also held that builders of both residential and commercial buildings can be sued for economic loss arising from defective work, not just by the person who contracted with them to construct the building, but also those who buy the property at a later date, even though they have probably never met or had any form of contact with the builder. On its facts, this case widened the scope of damage for pure economic loss to embrace defects which are both structural and latent. Thus, an affected owner can bring an action under *Bryan v Maloney* at any time within 6 years after the defect becomes apparent.

As Hayano (1996) points out, the tort law applicable in Australia for construction defects, as defined by *Bryan v. Maloney*, presents a broader liability for contractors and construction professionals than was previously thought to exist. It raises the possibility of unlimited terms of liability and extends the duty to non-contractual parties (Wallace, 1997). Furthermore, as Hodge (2001) points out, it has the effect of stripping the protection that once was afforded to contractors and construction professionals by a properly constructed agreement.

5.2. Statutory Protection for Homeowners

In some Australian States, the legislative bodies have taken the initiative to introduce statutory provisions to protect the homeowners against construction defects. These initiatives have strengthened the liberal approach taken by the courts. For example, in New South Wales, the Home Building Act[39] has since May 1997 given the extension of liability of builders to remedy construction defects in connection with residential building work, irrespective of contractual undertakings, statutory force[40]. In addition to the statutory protection against building defects, the Act also provides that warranties on workmanship and quality of materials supplied will be implied into every building contract[41]. This Act does not however apply to commercial buildings.

In December 2002 the New South Wales Government announced the creation of the Office of Home Building. One of the functions of the proposed office will be to provide an inspector to conduct an investigation upon receipt of notice of a dispute concerning residential building work. Currently, provisions have been made under the Office of Fair Trading for filing complaints on defective building works, provided that the building is less than 7 yrs old and the builder fails to respond to efforts to resolve a dispute about the alleged defects in the building work. Such complaints are mediated by the Fair Trading

[37] Ibid, 182 CLR 609, 626–7 (Mason CJ, Deane and Gaudron JJ).
[38] Ibid 663.
[39] Act 147 of 1989

[40] Section 48.
[41] Section 18.

staff and can lead to a building inspector visiting the property and deciding whether the builder is responsible for defective work. This can then lead to agreement by the builder to make repairs or to the Fair Trading building inspector issuing a rectification order to the builder[42].

5.3. Current Status in Australia

Recently, in *Woolcock Street Investments Pty Ltd v CDG Pty Ltd*[43], the High Court of Australia refused to extend the liability for pure economic losses to defects in commercial premises. In this case, the Court of Appeal had previously considered that the vulnerability of those who acquired commercial premises was considerably less than that of residential purchasers[44].

Majority of the High Court confirmed that no duty of care was owed, and that '[n]either the principles applied in *Bryan*, nor those principles as developed in subsequent cases' supported Woolcock's claim[45]. In *Bryan*, the duty of care to avoid economic loss owed to the subsequent purchaser depended upon the anterior step of concluding that the builder owed the first owner a duty of care to avoid loss of that kind[46]. Therefore, the case required an equation of the builder's responsibilities to the first owner with those owed to the subsequent owner, where assumption of responsibility and reliance were characteristics of the 'ordinary' relationship with both parties[47].

One of the key reasons for the above conclusion was that, on the facts presented in *Woolcock*'s case, there was no reliance by the original owner on the respondents and no corresponding assumption of responsibility[48]. This was because the trustee company undertaking the development for the original owner had asserted control over the investigations performed for the purpose of constructing the foundations, and thus unlike in *Bryan*, this was not a case where the owner had entrusted the premises' construction to the building professional. Thus, it was concluded that, as there was no duty of care owed by the respondents to the original owner, there could not be a corresponding duty of care owed to the appellant as subsequent owner.

The Court of Appeal's finding that commercial owners were less vulnerable than residential owners found favour with the High Court. Defining vulnerability as a claimant's 'inability to protect itself from the consequences of a defendant's want of reasonable care, either entirely or at least in a way which would cast the consequences of loss on the defendant'[49], the High Court held that the information before them did not show that Woolcock was in this way vulnerable to the economic consequences of the respondents' negligence[50]. Further, the court asserted that there was no evidence that

---

[42] See: http://www.fairtrading.nsw.gov.au for further information.
[43] (2004) 216 CLR 515
[44] *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* [2002] Aust Torts Reports ¶81-660,
[45] Woolcock (2004) 216 CLR 515, 534 (Gleeson CJ, Gummow, Hayne and Heydon JJ).
[46] Bryan (1995), 526–7 (Gleeson CJ, Gummow, Hayne and Heydon JJ).
[47] Bryan (1995) 182 CLR 609, 624–7 (Mason CJ, Deane and Gaudron JJ).
[48] Woolcock (2004) 216 CLR 515, 532 (Gleeson CJ, Gummow, Hayne and Heydon JJ).
[49] Ibid 530 (Gleeson CJ, Gummow, Hayne and Heydon JJ)
[50] Ibid 533 (Gleeson CJ, Gummow, Hayne and Heydon JJ).

Woolcock could not have protected itself from the risk. As measures of protection that could have been taken, the court suggested warranties and pre-purchase inspections[51].

The above case is important as it provides some restriction on the application of *Bryan v Maloney*. It therefore provides an opportunity to re-examine the rationale and policy behind current jurisprudence governing builders' liability for pure economic loss in Australia. It should be said that, although the Australian courts have adopted a more liberal approach than their English counterparts, a clear formula that can be applied in connection with all cases of pure economic loss has not been developed so far by the Australian courts. The closest the Australian courts have come in doing this was in *Woolcock*, when McHugh J (one of the judges who gave the majority opinion) went on to reiterate that the principles he had enunciated in the previous decision in *Perre v. Apand*[52]should be considered in determining whether a duty exists in "all" cases of liability for pure economic loss. He stated:

> *"The principles concerned with reasonable foreseeability of loss, indeterminacy of liability, autonomy of the individual, vulnerability to risk and the defendant's knowledge and its magnitude are, I think, relevant in determining whether a duty exists in all cases of liability for pure economic loss. In particular cases, other policies and principles may guide and even determine the outcome. But I do not think that a duty can be held to exist in any case of pure economic loss without considering the effect of these general principles."*

In a commercial world in which all kinds of protection is available including insurance and warranties against commercial risks, another question that arises from *Woolcock* is that, to what extent is the distinction between commercial and residential properties fair when it concerns pure economic losses arising out of construction defects. If a purchaser of a residence is a multi millionaire, with ample expertise and resources at his disposal to cover any risks, would the court have arrived at a different conclusion, remains unanswered.

6. Pure Economic Loss in Singapore

6.1. Two-stage Test

This is an area of law in which the Singapore courts have also chosen to depart from the principles espoused by the English courts. Under Singapore law, it is possible for a claimant to recover financial loss arising from someone's negligence if the financial loss resulted from physical injury or damage to the claimant's person or property. However, if the financial loss is not a consequence of physical injury or damage to the claimant's person or property, thus a pure economic loss, then the traditional approach has been to deny recovery of compensation unless there are further factors which make it appropriate to allow recovery.

[51] Ibid 523, 533 (Gleeson CJ, Gummow, Hayne and Heydon JJ).
[52] (1999) 198 CLR 180.

Until recently the law in Singapore relation to recovery of compensation for pure economic loss was substantially contained in two cases concerned with construction projects, decided in the 1990s. In *RSP Architects Planners & Engineers v Ocean Front Pte Ltd* (Ocean Front)[53], a management corporation (homeowners' association) sued the developers of a condominium project which the members of the management corporation had purchased, for compensation arising out of faulty construction of common property. The court had to decide whether the management corporation had the capacity to maintain a claim against the developers and recover the cost of remedying the defects. The cost incurred in the remedial work was considered a pure economic loss.

In answering the above question, having considered several cases from other common law jurisdictions, the Singapore Court of Appeal concluded that there is no single rule or set of rules for determining whether a duty of care to prevent pure economic loss arises in a particular circumstance, or indeed the scope of that duty, and whether such a scope includes a duty of care to avoid pure economic loss. Thus, all the relevant factors have to be considered so as to determine the proximity of the claimant and the respondent. This would, in turn, inform the court as to whether the respondent owed the claimant a duty of care and whether the scope of that duty included a duty to avoid pure economic loss.

Having considered the relevant factors, the court noted inter alia that the management corporation was an entity conceived and created by the developers who built and developed the condominium, including the common property, and undertook the obligations to construct it in a good, workmanlike manner, and thus were solely responsible for such construction. Further, after completion of the condominium, the management corporation, as successors of the developers, took over the control, management and administration of the common property, and thus had obligations to maintain the common property. The performance of these obligations was dependent on the developers having exercised reasonable care in the construction of the common property. The developers obviously knew or ought to have known that if they were negligent in their construction of the common property, the resulting defects would have to be made good by the management corporation.

Warren Khoo, J who delivered the judgment held that:

> *"Short of actual privity, the relationship between the management corporation and the developer was as akin to contract as any relationship could possibly be. As pointed out earlier, the developer of a condominium knows that the management corporation will come into existence from the moment he conceives of a plan to develop it. He also knows that the management corporation will take over the control management and maintenance of the common property, and that if the common property is not properly constructed and handed over to the management corporation in that state, the management corporation will have to incur cost to rectify the defects. Thus, the entity to which the duty is owed as well as the nature and extent of loss that is likely to be sustained by that entity are well known to the developer..."*

[53] *[1996] 1 SLR 113*

In the circumstances, the court concluded that there was sufficient proximity between the management corporation and the developers which gave rise to a duty on the part of the developers to avoid pure economic loss for the management corporation. Further, the court concluded that were no policy considerations which militated against the view that the developers owed the management corporation a duty to avoid pure economic loss.

The second Singapore case mentioned above, *RSP Architects Planners & Engineers v MCST Plan No. 1075* ("Eastern Lagoon")[54], concerned a dispute in which a management corporation sued the architects of a condominium for the costs of rectifying defectively designed walls, contending that the architects owed the management corporation a duty of care. The Singapore Court of Appeal was asked to question similar to that raised in the *Ocean Front* case, namely, whether an architect (as opposed to a developer) owed the management corporation a duty of care to avoid pure economic loss. In answering the question in the affirmative, the court emphasized that the close relationship between the parties, and the assumption of responsibility by the Architect and the known reliance by the claimant, supported the view that a duty of care existed.

Thus, in the above two cases, the Singapore Court of Appeal used a "two-stage process" to consider, firstly whether there is sufficient degree of proximity to give rise to a duty of care and next, if such degree of proximity was found, whether there is any material factor or policy which precludes such duty from arising, considering whether pure economic loss was recoverable in tort. It is interesting to note that, although this two-stage process is similar to the 'two-stage test' in the English case, *Anns*, In the Eastern Lagoon case, the Singapore Court of Appeal rejected the process adopted by the English courts.

As can be seen from the case of *Sunrise Crane*[55] and *TV Media Pte Ltd v. Andrea De Cruz*[56], although the Singapore courts adopted a two-stage test to determine cases concerning pure economic losses, when it concerns cases involving physical damage, the Singapore courts until recently continued to adopt the three-part test established in the English case, *Caparo*, namely, foreseeability, proximity and fairness, justice and reasonableness.

6.2. Limited application of Ocean Front

After the decision by the Singapore Court of Appeal, some may have thought that floodgates had been opened for cases claiming economic loss. However, this was not to be, due to the judgments given by the Singapore Court of Appeal in a subsequent case, *Man B&W Diesel S E Asia Pte Ltd & anor v. PT Bumi International Tankers & anor*[57].

In this case which involved a claim based on pure economic loss suffered as a consequence of defects in a ship engine, the Court of Appeal held that there was no

[54] [1999] 2 SLR 449
[55] *[2004] 4 SLR 715*
[56] [2004} 3 SLR 543
[57] [2004] 2 SLR 300.

contract between PT Bumi, the ship owner and the defendants who had supplied the ship's engine as PT Bumi's contract was only with MSE, the ship building company, who was not a party to the action. The Court of Appeal held that neither manufacturer nor supplier of the engine owed a duty of care to PT Bumi. In reaching its decision, the Court attached importance special circumstances in *PT Bumi*, i.e., the limited recourse that PT Bumi had been content to accept under its contract with the shipbuilder. The court said that the correct approach was not to ask whether there was any justification for depriving PT Bumi of a remedy or whether the contract had deprived PT Bumi of its right to sue the sub-contractors, but whether there were any compelling reasons to extend the law and afford a separate remedy to PT Bumi. Further, the court added that it was not for the court to help a party, after the event, to improve his commercial bargain.

The Court of Appeal also cautioned against extending the decision of *Ocean Front* to new situations, particularly to a scenario which was essentially contractual. It also highlighted that *Ocean Front* and cases such as *Bryan v Maloney* were primarily concerned with economic losses suffered on account of damage to real property. It was unnecessary to indicate whether the duty of care should be extended to a claim for economic losses in respect of chattels.

6.3. Single test

In the recent Court of Appeal decision of *Spandeck Engineering (S) Pte Ltd v Defence Science Technology Agency*[58], the dispute was between a builder and a certifier in which the former had sued the latter for negligent certification. This case is important as it laid down an important common law principle regulating the duty of care in the tort of negligence. It brought about legal certainty to this area of the law, at least in Singapore.

The court in this case was asked to decide on two principal issues.

- whether the test to determine the existence of a duty of care in a negligence case depended on the nature of the loss suffered by the victim, namely, pure economic loss on the one hand and physical damage, personal injury and death on the other hand; and
- whether a certifier of payment certificates owed a duty of care to the beneficiary of the payment certificates to ensure that the beneficiary does not suffer pure economic loss resulting from an under-certification of the amount due under the payment certificate.

Having reviewed the law on duty of care, the court determined that rather than having different tests for physical losses and pure economic losses, it was preferable to have a single test in order to determine the imposition of a duty of care in all claims arising out of negligence. The court concluded that it was necessary to consider foreseeability of damage as part of the single test because it was a threshold question that has to be satisfied in any event in tort actions. Thus the court commented:

[58] [2007] SGCA 37

> *"In our view, a coherent and workable test can be fashioned out of the basic two-stage test premised on proximity and policy considerations, if its application is preceded by a preliminary requirement of factual foreseeability. We would add that this test is to be applied incrementally, in the sense that when applying the test in each stage, it would be desirable to refer to decided cases in analogous situations to see how the courts have reached their conclusions in terms of proximity and/or policy."*[59]

The court added that, if the answer to the question is negative, then there was no necessity to proceed further with the case. However, if the answer is positive, the court held that the single test that should be applied in determining whether the defendant is liable to the plaintiff in any tort action (both, physical damage claims and pure economic claims) has two parts:

1. Existence of a duty of care towards the defendant.

In connection with this part the court held that there should be sufficient legal proximity between the plaintiff and defendant for a duty of care to arise. Proximity includes physical, circumstantial as well as causal proximity. The court commented that, assuming a positive answer to the threshold question of factual foreseeability and the first stage of the single test (legal proximity test), a prima facie duty of care arises.

2. Policy Considerations

If the first part of the test is satisfied, policy considerations should then be applied to the factual matrix to determine whether or not to negate this duty. Relevant policy considerations would include the presence of a contractual matrix which has clearly defined the rights and liabilities of the parties, and the relative bargaining position of the parties[60]. In this regard, in deciding on a claim based on negligence where the relationship of the parties is also connected by a contract, the court placed importance on the commercial outcome of the claim by stating effectively that if the parties have already regulated their rights and responsibilities by the contract, the claimant should not be allowed to avoid the contractual limitations put on his claim by having a go in a claim under negligence. Therefore, the court concluded that it would have to examine the contractual matrix closely before deciding whether it would be in the interest of the commerce at large to send a signal that contractual arrangements can be side-stepped by a claim under negligence[61]. The Court also held that the two stages of the single test are to be approached with reference to the facts of decided cases, although the absence of such cases is not an absolute bar against the finding of duty.

Having developed the single test, the court considered the issue of the certifier's liability. The court concluded that although the case passed the threshold test of foreseeability, the fact that the relevant building contract provided a dispute resolution mechanism for the contractor to resolve disputes between the contractor and the employer through

[59] Paragraph 73 of the judgment.
[60] Paragraph 83 of the judgment.
[61] See paragraph 83.

arbitration was an important point in the whole factual matrix of the situation. The Court concluded that the requirement of proximity was not satisfied since the certifier could not be regarded as having assumed responsibility towards the contractor as the latter was free to claim the amounts under-certified by arbitration proceedings, as was stipulated in the contract[62].

7. Conclusion

This paper has argued that the restrictive approach taken by the English and US courts concerning claims for pure economic loss is unwarranted and unjustified, especially, given that like in any other tort case, pure economic loss results in a loss suffered by an unsuspecting innocent party due to some tortuous act of another. Thus, as concluded by the Australian and Singapore courts, there is no justification for allowing a tortfeasor to go free due to the fear that entertaining such legal actions might open the flood gates for some frivolous actions. Such excuses for denying claims by victims of construction defects for pure economic losses seems unjust and fails any rigorous and testable logic. A case by case approach in which each case is considered on its merit as the Australian courts do could be recommended as a better approach.

One significant weakness of the preference by some jurisdictions to entertain cases relating to pure economic loss in connection with construction defects only under contractual remedies is that, the victim of the contractual breach may be often left under compensated. This is because due to the precedence created in judgments such as *Hadley v. Baxendale*[63], courts might take the view that damages such as business losses due to closure of operations during repair works to correct the construction defects might be considered as too far afield from those reasonably in the contemplation of the contracting parties at the time of the construction[64]. In other words if the victim of a construction defect sues the party responsible for the defect for contractual breach, the recoverability of consequential damages would hinge on whether the harm incurred was foreseeable to the defendant builder. Such limitations may not be imposed if legal actions are allowed under tort.

Even in the Australian and Singapore jurisdictions, it cannot be said that the doubts concerning the division between compensable claims of pure economic loss and non compensable claims of pure economic loss have been satisfactorily cleared. For example, as pointed out in this paper, in Australia, the distinction drawn between commercial properties and residential properties is not based on any sound legal reasoning. In Singapore, although the courts have now developed a single test, the room left for application of policy consideration in deciding the compensability of a claim is likely to attract issues such as how can tort law strike a balance between no compensation and too

[62] See the discussion in Chan and Gunawansa, Asia Pacific Construction Law Casebook 2007, Chapter 6.
[63] 9 Ex. 341, 156 Eng. Rep. 1458 (Ex. Ct. 1854).

[64] In *Hadley v. Baxendale* the court concluded that the maker of a defective mill shaft was not responsible for the mill's lost revenues while it was shut down awaiting delivery of a new mill.

much compensation; and how should the legal systems resist the feared flood of claims, which leaves some uncertainty over the current status of the law applicable to pure economic loss.

References

Barlow, M. J. (2001), Pure Economic Loss for Defective Buildings After Henderson v. Merrett Syndicates: When is a Bilding Contract not an Ordinary Building Contract?, Society of Construction Law, UK.

Chan, P. and Gunawansa, A. (2008), Asia Pacific Construction Case Law Book, LexisNexis.

Christian, W. (2002), The Three-Stage Test Abandoned in Australia or Not? 118 LQR 214.)

Craver, T. (2005), Beyond Bryan: Builders' Liability and Pure Economic Loss, [2005] MULR 8

Dari-Mattiacci, G. and Schäfer, H. (2005), The core of pure economic loss, International Review of Law and Economics, Volume 27, Issue 1, pp 8-28.

Giliker, P (2005), Revisiting pure economic loss: lessons to be learnt from the Supreme Court of Canada?, Legal Studies, Volume 25 Issue 1, Pages 49 - 71

Hayano, L (1996), "Property Damage or Economic Loss?" 11 Tort Law Review 177

Hodge, J.A.M. (2000), Constructing a Liability: Bryan v Maloney, Torts Australia, Vol. 7 No. 1 (March 2000)

Partlett, D. F. (2007), Defective Structures and Economic Loss in the United States: Law and Policy, Emerging Issues in Tort Law, Neyers, J., ed., Hart Publications.

Perry, R. (2004), Relational Economic Loss: An Integrated Economic Justification for the Exclusionary Rule, 56 Rutgers Law Review, 711-789.

Schäfer, H. (2002), Liability of Experts and the Boundary between Tort and Contract. Theoretical Inquiries in Law 3, 453-473.

Siew, L. O. (1996), Defects in Property Causing Pure Economic Loss: The Resurrection of Junior Books and Anns, Singapore Journal of Legal Studies, pp. 257–266.

Wallace, I (1997), "Bryan v Maloney Revisited in Victoria" 1997) 3 Tort Law Review 154.

Wallace, I. (1997), "The Murphy Saga in Australia: Bryan in Difficulties", LQR, Vol. 113, P. 355.