MAJLIS PERBANDARAN AMPANG JAYA V STEVEN PHOA CHENG LOON & 81 ORS
Federal Court
17 February 2006
[2006] 2 AMR 563
Federal Court Civil Appeal No 01-4-2004(W)
Steve LK Shim, CJ; Abdul Hamid b Mohamad, Arifin b Zakaria, FCJJ

*Civil procedure — Prerogative writs and orders — Private law claim in negligence for pure economic loss against local authority — Whether remedy ought to have been claimed in public law rather than private law — Whether litigant not barred if, incidentally, determination of issues involved examination of public law issues*

*Tort — Damages — Joint tortfeasors — Liability — Whether multiple defendants committing different acts of negligence would all be considered joint tortfeasors — Whether any tortfeasor whose act has been a proximate cause of injury must compensate for whole injury*

*Tort — Negligence — Damages — Pure economic loss — Claim against local authority — Whether remedy ought to have been claimed in public law rather than private law — Whether litigant not barred if, incidentally, determination of issues involved examination of public law issues*

JUDGMENT
Abdul Hamid Mohamad, FCJ

I have the advantage of reading the judgment of the learned Chief Judge (Sabah & Sarawak). It saves me from having to narrate the background facts as well as having to deal with all the issues raised in the appeal. As I agree with the learned Chief Judge (Sabah & Sarawak) on other issues, I shall only deal with the issue of "post collapse" liability of the appellant (MPAJ).

However, before going any further there is one point that I would like to make and, that is, regarding the provision of s 3(1) of the Civil Law Act 1956 which provides:

> "3 (1). Save so far as other provision has been made or may hereafter be made by any written law in force in Malaysia, the Court shall —
>
> (a) 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;
>
> (b) in Sabah, apply the common law of England and the rules of equity, together with statutes of general application, as administered or in force in England on the 1st day of December 1951;

(c) in Sarawak, apply the common law of England and the rules of equity, together with statutes of general application, as administered or in force in England on the 12th day of December 1949, subject however to subsection (3)(ii):

Provided always that the said common law, rules of equity and statutes of general application shall be applied so far only as the circumstances of the States of Malaysia and their respective inhabitants permit and subject to such qualifications as local circumstances render necessary."

That provision was legislated, if I may so, by the British one year before the then Malaya obtained her independence and has remained the law of this country for half a century now. Whatever our personal views about it, it is the law and no court can ignore it.

That provision says (I am only referring to common law) that the court shall apply the common law of England as administered in England on the given dates provided that no provision has been made or may hereafter be made by any written law in force in Malaysia. Even then, it is further qualified that it is only applicable so far only as the circumstances of the states of Malaysia and their respective inhabitants permit and subject to such qualifications as local circumstances render necessary.

Strictly speaking, when faced with the situation whether a particular principle of common law of England is applicable, first, the court has to determine whether there is any written law in force in Malaysia. If there is, the court does not have to look anywhere else. If there is none, then the court should determine what is the common law as administered in England on April 7, 1956, in the case of West Malaysia. Having done that the court should consider whether "local circumstances" and "local inhabitants" permit its application, as such. If it is "permissible" the court should apply it. If not, in my view, the court is free to reject it totally or adopt any part which is "permissible", with or without qualification. Where the court rejects it totally **** 590*** or in part, then the court is free to formulate Malaysia's own common law. In so doing, the court is at liberty to look at other sources, local or otherwise, including the common law of England *after* April 7, 1956 and principles of common law in other countries.

In practice, lawyers and judges do not usually approach the matter that way. One of the reasons, I believe, is the difficulty in determining the common law of England as administered in England on that date. Another reason which may even be more dominant, is that both lawyers and judges alike do not see the rational of Malaysian courts applying "archaic" common law of England which reason, in law, is difficult to justify. As a result, quite often, most recent developments in the common law of England are followed without any reference to the said provision. However, this is not to say that judges are not aware or, generally speaking, choose to disregard the provision. Some do state clearly in their judgments the effects of that provision. For example, in Syarikat Batu Sinar Sdn Bhd & 2 Ors v UMBC Finance Bhd & 2 Ors [1990] 2 CLJ 691, Peh Swee Chin J (as he then was) referring to the proviso to s 3(1) said:

> We have to develop our own common law just like what Australia has been doing, by directing our mind to the "local circumstances" or "local inhabitants".

In Chung Khiaw Bank Ltd v Hotel Rasa Sayang [1990] 1 MLJ 356 the Supreme Court, inter alia, held:

> "(4) Because the principle of common law has been incorporated into statutory law as contained in s 24 of the Contracts Act 1950, the trend on any change in the common law elsewhere is not relevant. Any change in the common law after April 7, 1956 shall be made by our own courts."

In the judgment of the court in that case, delivered by Hashim Yeop A Sani CJ (Malaya), the learned Chief Justice (Malaya), said, at pp 361-362:

> "Section 3 of the Civil Law Act 1956 directs the courts to apply the common law of England only in so far as the circumstances permit and save where no provision has been made by statute law. The development of the common law after April 7, 1956 (for the States of Malaya) is entirely in the hands of the courts of this country. We cannot just accept the development of the common law in England. See also the majority judgments in Government of Malaysia v Lim Kit Siang" [1988] 2 MLJ 12 — added].

That case is an example where our statute has made specific provisions incorporating the principles of common law of England. However, it shows the effect on the application of the common law in England. In the instant appeal, we are dealing with a situation where no statutory provisions have been made.

In Jamal b Harun v Yang Kamsiah & Anor [1984] 1 MLJ 217 (PC) a "running down" case in which the issue of itemisation of damages was in question, Lord Scarman, delivering the judgment of the board, inter alia, said:

> "Their Lordships do not doubt that it is for the courts of Malaysia to decide, subject always to the statute law of the Federation, whether to follow English case law. Modern English authorities may be persuasive, but are not binding. In determining whether to accept their guidance 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."

As early as 1963, this provision had been criticised. Professor LC Green, in an article "*Filling Lacunae in the Law*" (1963) MLJ xxviii, commented:

> "Apart from any problem that might arise from the fact that this legislation attempts, to some extent at least, to introduce a supplementary English common law or equity which may have become out of date and which may no longer be applicable in England, the situation in Malaysia and Singapore is today different from what it was at the time of the enactment of the Ordinances. In view of the increased political stature of the two territories, an

> in anticipation of further changes likely to be effected with the establishment of Malaysia, it is now perhaps evidence of an out of date attitude as well as contrary to national prestige to make provisions for the supplementation of the local law in the event of lacunae by means of reference to any "alien" system, whether it be that of the former imperial power or not."

It is not the function of the court to enter into arguments regarding the desirability or otherwise of the provision. That is a matter for Parliament to decide. As far as the court is concerned, until now, that is the law and the court is duty bound to apply it. In so doing, the provision is clear that even the application of common law of England as administered in England on April 7, 1956 is subject to the conditions that no provision has been made by statute law and that it is "permissible" considering the "circumstances of the States of Malaysia" and their "respective inhabitants". That is not to say that post April 7, 1956 developments are totally irrelevant and must be ignored altogether. If the court finds that the common law of England as at April 7, 1956, is not "permissible", it is open to the court to consider post April 7, 1956 developments or even the law in other jurisdictions or sources.

The point I am making, if I may borrow the words of Hashim Yeop A Sani, Chief Justice (Malaya) in Chung Khiaw Bank Ltd, *supra*, is that "We cannot just accept the development of the common law of England". We have to "direct our mind to the "local circumstances" or "local inhabitants"," to quote the words of Peh Swee Chin J in Syarikat Batu Sinar Sdn Bhd & 2 Ors, *supra*.

**Claim for post-collapse economic loss**

As I agree with the Chief Judge (Sabah & Sarawak) that s 95(2) protects MPAJ from claims for pre-collapse period, it is not necessary for me to discuss the issue. So, I shall confine myself to the post-collapse period.

The High Court had found MPAJ liable for the post-collapse period and that s 95(2) of the Street, Drainage and Building Act 1974 ("S, D & B Act 1974") does not cover MPAJ. The Court of Appeal reversed that finding purely on the ground that it is a matter under public law and not private law. The learned Chief Judge (Sabah & Sarawak) disagreed with the Court of Appeal and held that the claim could be made under private law as well. While I agree with his finding of law, in my view, since the Court of Appeal merely "assumes" that MPAJ was liable for post-collapse period, this court should go one step further and decide whether on the facts, MPAJ should be held liable for the pure economic loss suffered by the respondents/plaintiffs. In this respect, I shall confine my discussions to the liability of MPAJ, a local authority, for economic loss suffered by the respondents for its failure to take remedial actions after the collapse of Block 1.

The judgment of the High Court on this point is rather brief. This is what the learned judge said:

> "To consider whether the fourth [MPAJ — added] defendant is liable for the acts and/or omissions committed post-collapse, it is necessary to disclose some events that transpired after the collapse of Block 1. After the Highland

Towers calamity there were efforts by the fourth defendant to stabilize the hill slope on Arab Malaysian land to ensure that no accident of the kind that caused the collapse of Block 1 would occurred (sic) to Block 2 and 3. In January 1995, there was a briefing called by the fourth defendant which was attended by the fifth defendant and some others. They were told by the fourth defendant that a master drainage plan for the entire area to accommodate all landowners in the vicinity of Highland Towers would be prepared. It was announced that the consultant engaged by the fourth defendant, M/s EEC would be ready with the master drainage plan within 3 months from date of the briefing. It was obvious that any master drainage plan for the area must cater for the East stream. It was substantially due to this East stream not properly attended to that Block 1 collapsed. In fact this concern of the East stream, from the chronology of events as set out, was highlighted by JPS from the very beginning of the development of the Highland Towers project. Thus the task to incorporate the East stream into the comprehensive master drainage plan falls upon the fourth defendant who is the body in charge of this watercourse.

But after a period of 1 year there was no sight or news of this plan. After numerous reminders by the fifth defendant of such a plan, the fourth defendant on March 29, 1996 held another briefing. This time, the fourth defendant informed the attendees that a new firm of consultant, by the name of KN Associates, was engaged to replace the previous. Again the fourth defendant gave an assurance that a comprehensive drainage plan of the area would be forthcoming with this replacement of consultant. Sad to say, until the time when all evidence for this case was recorded by this court, no comprehensive master drainage plan for the Highland Towers and its surrounding area was adduced by the fourth defendant. In fact this defendant offered no explanation as to why its promise was not met. These delays had affected the fifth defendant who insists that without a master drainage plan of the area approved and implemented by the fourth defendant, and the retaining walls on their land as well as those on Highland Towers site are corrected or rectified, then very little can be done by anyone to secure the stability of the slope behind Block 2 and 3.

Despite this pressing need and the obvious knowledge of the urgent requirement for a master drainage plan (for otherwise the fourth defendant would not have initiated steps to appoint consultants for this work soon after the collapse of Block 1) to secure the stability of the slope so as to ensure the safety of the 2 apartment blocks, the fourth defendant did nothing after the respective consultants were unable to meet their commitments. The plaintiffs and all other relevant parties are kept waiting because of the fourth defendant. This is certainly inexcusable and definitely a breach of the duty of care owed by the fourth defendant to the plaintiffs for not even fulfilling its obligation towards maintenance of the East stream. For this I find the fourth defendant liable to the plaintiffs for negligence.

Lastly, the plaintiffs have also alleged that the fourth defendant failed to take any action against the Tropic in clearing the fifth defendant's land. I shall be elaborating in detail the acts of Tropic when I analyse the position of the fifth

defendant and Tropic. For the present moment, suffice me to say that I do not consider the fourth defendant liable to the plaintiffs in respect of the action committed by Tropic.

As for the claim of the plaintiffs on the fourth defendant for failing to prevent vandalism and theft to Block 2 and 3, I allow it and my reasons will be intimated in the later part of this judgment."

**Analysis — Nuisance**

By the acts and/or omissions of the fourth defendant elaborated above, I also find that the fourth defendant is an unreasonable user of its land in failing to maintain the East stream post collapse which is under its care. Its acts and or omissions are foreseeable to cause a damage to the plaintiffs — its neighbour. For this, I find the fourth defendant is also liable to the plaintiffs for nuisance.

The sum total of it all is the failure of MPAJ to fulfil its promise to come up with and implement the master drainage plan. As found by the learned judge, there were efforts made by MPAJ to stabilise the hill slope on Arab Malaysian land to ensure that no accident of the kind that caused the collapse of Block 1 would occur to Blocks 2 and 3. A consultant was engaged to prepare a master drainage plan. After a year and no such plan was produced, a new consultant was appointed to prepare the same. Yet it never materialised. It is for this reason that the learned judge found MPAJ liable for negligence to the plaintiffs.

It must be clarified that here I am only concerned with the failure or delay on the part of MPAJ to come up with and to implement a master drainage plan in an effort to stabilise the hill slope on the Arab Malaysian land.

The question is, does this failure or delay amount to actionable negligence against a public authority, the MPAJ, for pure economic loss?

Let us now look at cases decided by Malaysian courts on pure economic loss. First the case of Kerajaan Malaysia v Cheah Foong Chiew & Ors [1993] 2 MLJ 439. In that case, the plaintiff claimed damages resulting from the negligence of the defendants in superintending and supervising buildings constructed for the plaintiff by Sri Kinabalu Sdn Bhd. All the defendants were employees or agents of the consultant firm, Sigoh Din Sdn Bhd, which was responsible for superintending and supervising the construction. The plaintiff alleged that all the three defendants had failed to carry out their duties to superintend and supervise the construction, causing the plaintiff to suffer substantial losses in repairing the buildings in order to make them safe for occupation. The third defendant applied to strike out the plaintiff's action under Order 18 r 19 of the Rules of the High Court 1980 (RHC 1980). The senior assistant registrar struck out the action against the third defendant. The plaintiff appealed to the judge in chambers. The learned judge dismissed the appeal. Very interesting arguments were forwarded by learned counsel for both parties including the effect of s 3 of the Civil Law Act 1956, the issue of public policy and exception to Hedley Byrne & Co Ltd v Heller & Partners Ltd [1964] 2 All ER 575.

Unfortunately, the judgment proper is rather brief. On economic loss, the learned judge merely said:

> "(3) Kerugian yang dialami oleh plaintif adalah kerugian atau kehilangan ekonomi tulen (pure economic losses), dan defendan ketiga tidak boleh dikenakan tanggungan (liability) di bawah tort di atas kerugian yang **** 595*** dialami oleh plaintif dalam kes ini oleh kerana tiada siapapun yang cedera atau tiada harta kepunyaan orang lain rosak akibat daripada perbuatan atau salahlaku oleh defendan ketiga. Keputusan yang dibuat oleh Dewan Pertuanan (House of Lords) dalam kes Murphy v Brentwood DC dan lain-lain kes lagi yang membuat keputusan yang sama, adalah sangat munasabah, berpatutan dan sepatutnya diterima sehingga bila-bila masapun. Mahkamah di negara ini menerima keputusan dan pendapat itu dan tiada kemungkinan membuat pendapat yang berlainan, walaupun apa yang dikatakan oleh peguam pihak plaintif bahawa keadaan di Malaysia berlainan dengan keadaan di United Kingdom. Hakim dalam kamar ini juga berpendapat bahawa adalah tidak berpatutan dan tidak munasabah jika pekerja-pekerja, termasuk juga pekerja-pekerja mahir yang bekerja di bawah seseorang atau syarikat pemborong binaan, bertanggungan (liable) kepada tuan ampunya bangunan yang berkenaan di atas kecuaian yang membawa kepada ketidaksempurnaan bangunan yang berkenaan asalkan ianya tidak menyebabkan kecederaan kepada diri seseorang atau harta benda orang lain."

Two years later, as a High Court judge, I had occassion to decide the case of Nepline Sdn Bhd v Jones Lang Wootton [1995] 1 AMR 451; [1995] 1 CLJ 865. In that case, a firm of registered real estate agents and chartered valuer was sued for damages for failure to disclose the fact to the appellant (tenant) that the premises was subject to "a foreclosure proceeding then pending in court". The court made an order for sale of the said premises and the appellant demanded the return of the deposit. The respondent contended that it was a case of mere omission and not a positive statement made by the respondent and that the claim was for pure economic loss. It is in that case that I took the approach mentioned earlier in this judgment. I then tried to determine the common law of England on the subject as on April 7, 1956, and then considered the provision to s 3(1) of the Civil Law Act 1956. This is what I had said then:

> "I therefore ask the question whether local circumstances would require the respondent, an estate agent, a professional who advertised premises for rent, who knew that the premises was a subject matter of a pending foreclosure action, to owe a duty of care to the appellant, who answered to the advertisement and subsequently entered into a tenancy agreement for a period of two years, to disclose the fact that the premises was subject to a pending foreclosure action?
>
> I do not have the slightest doubt that the answer should be in the affirmative.
>
> This is not a case of a friend telling another friend that there is a house for rent. This is a case of a professional firm, holding out to be a professional with

expertise in its field, earning its income as such professional. They know that people like the appellant would act on their advice. Indeed, I have no doubt that they would hold out to be experts in the field and are reliable. It would be a sad day if the law of this country recognises that such a firm, in that kind of relationship, owes no duty of care to its client yet may charge fees for their expert services.

In the circumstances, I think I am fully justified in taking the view that the defendant in this case owed a duty to the plaintiff to disclose that there was a foreclosure proceeding pending. I think the provision of s 3 of the Civil Law Act 1956, especially the proviso thereto, allows me to do so.

Learned counsel for the respondent, referring to numerous texts and authorities, stressed the need for some control mechanism narrower than the concept of reasonable foreseeability to limit a person's liability for pure economic loss. He argued, correctly I must says, that subsequent to Anns's case there are a number of cases, including Caparo which steered clear of it and were termed as the “retreat from Anns's cases.

First, I must say that I agree with him that the claim in the present case (for the refund of the deposit paid) is for pure economic loss. It is not for an injury to person or property.

Secondly, generally speaking, I also agree that there is a need to limit recoverability of damages for pure economic loss.

The reasons for judicial reluctance to impose liability in such cases are conveniently listed by RP Balkin and JLR Davis in the *Law of Torts* from pp 421–424. These are:
(i) the fear of indeterminate liability;
(ii) disproportion between defendant's blameworthiness and the extent of his liability;
(iii) interrelationship between liability in tort and contract;
(iv) the need for certainty; and
(v) the effect of insurance.

Considering these factors, it is a wise policy to limit liability in pure economic loss cases, generally speaking.

However, I am of the view that such fears do not arise in this case. Here the amount claimed is definite. It is a definite amount which had been paid by the appellant. It is that amount only which the appellant now seeks to recover. So, even using the two tests which learned counsel for the respondent urged me to apply, I think, on the facts of this case, the respondent is liable.”

My record shows that appeal to the Court of Appeal (Court of Appeal Civil Appeal No 4-90-95) was dismissed on January 6, 1997. Unfortunately there is no written judgment of the Court of Appeal.

In the same year Teh Khem On & Anor v Yeoh & Wu Development Sdn Bhd & Ors [1995] 2 AMR 1558; [1995] 2 MLJ 663 was decided by Peh Swee Chin J (as he then was). In that case, the plaintiffs claimed against the first defendant ("the builder") in contract for defective works in the construction of the house purchased by the plaintiffs. They also claimed against the second defendant ("the architect") and the third defendant ("the engineer") for damages in negligence. The learned judge found the builder liable for breach of contract but dismissed the claim against the architect and the engineer with whom the plaintiffs had no contractual relationship, the claim being for pure economic loss. The learned judge discussed at length the development in England (and mentioning also the attitude of the courts in Australia and New Zealand) up to Murphy v Brentwood District Council [1990] 2 All ER 908.
In Pilba Trading & Agency v South East Asia Insurance Bhd & Anor [1998] 2 MLJ 53, the appellant ("the insured") sent a damaged car for repair at a workshop appointed by the respondent ("the insurer"). There was a long delay at the workshop. As a result, the insured incurred expenses in hiring an alternative vehicle for which the insured claimed in tort of negligence. Muhammad Kamil J dismissed the claim on the ground, inter alia, that "the alleged loss was pure economic loss. It was a financial or pecuniary loss and did not involve any physical damage or danger of physical damage to the property of the appellant. It was quite distinct from cases of economic loss involving physical damage. The established legal position in regard to this is to preclude such claims even where foreseeable. The courts have always been reluctant to extend the law of negligence to claim of foreseeable economic loss (see pp 61B–D, 62E–H and 64G–H).

The learned judge also reviewed judgments of the courts in England right up to Caparo Industries Plc v Dickman & Ors [1990] 1 All ER 568.

In 1996, James Foong J (as he then was) decided the case of Dr Abdul Hamid Abdul Rashid & Anor v Jurusan Malaysia Consultants (sued as a firm) & Ors [1997] 1 AMR 637; [1997] 3 MLJ 546. In that case, the plaintiff had hired the first defendant, an engineering firm, to construct a double storey house. The plans were signed by the fourth defendant, the proprietor of the first defendant who was a registered engineer. The building plans were approved by the second defendant, the local council. About three and a half years after the handing over of the house to the plaintiff the house began to **** 598*** collapse due to landslide and the plaintiff had to evacuate the house. The plaintiffs claims against the first, fourth and fifth defendants were founded on contract and tort. Their claim against the second defendant (the local council) was based on negligence and breach of statutory duties. The cause of action against the third defendant was based on negligence, nuisance and the rule of Rylands v Flether.

The court allowed the plaintiffs' claim against the first, third and fourth defendants but dismissed the claim against the second and fifth defendants. The learned judge, inter alia, held:

> "(3) A claim for pure economic loss can be entertained in an action for negligence. Non-allowance of such claim 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 s 95 of the Street, Drainage and Building Act 1974 which prohibits such authorities to be sued."

The learned judge, in his judgment, reviewed judgments of the courts in England, Australia, New Zealand, Canada and Singapore besides the judgment of Peh Swee Chin J mentioned earlier. The learned judge distinguished Murphy, *supra*, followed the Canadian case of Winnipeg Condominium Corp No 36 v Bird Construction Co Ltd & Ors (1995) 121 DLR (4th) 193, the Australian case Sutherland Shire Council v Heyman & Anor (1985) 157 CLR 424; 60 ALR 1, the Singapore case of RSP Architects Planners & Engineers v Ocean Front Pte Ltd and Another Appeal [1996] 1 SLR 113, but did not follow Pek Swee Chin's judgment in Teh Khem On & Anor, *supra*.

However, this case (Dr Abdul Hamid Abdul Rashid, *supra*) was overruled by the Court of Appeal in the instant case.

So, we see that, so far, there had only been a few judgments of Malaysian courts and all are at High Court level. In three of the cases, Kerajaan Malaysia, *supra*, Teh Khem On, *supra*, and Pilba Trading, *supra*, the learned judges appear to have dismissed the claims for pure economic loss because there were no injuries to person or property. Of the two that allowed the claim, I had in Nepline Sdn Bhd, *supra*, allowed it after resorting to the proviso to s 3(1) of the Civil Law Act 1959, following and indeed extended Hedley Byrne, *supra*, on the basis that there was fiduciary relationship between the parties. James Foong J in Dr Abdul Hamid Abdul Rashid, *supra*, appears to base his decision to allow economic loss on his concern that otherwise "the entire group of subsequent purchases in this country (would be left) without relief against errant builders, architects, engineers and related personnel who are found to have erred." However, this case was overruled by the Court of Appeal in the instant case.

So, it appears that until today Nepline Sdn Bhd, *supra*, is the only case in which the Court of Appeal has confirmed the judgment of the High Court in a claim for economic loss, though without a written judgment.

Now, reflecting on my own judgment in Nepline Sdn Bhd, *supra*, 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 uncertainly in the law. The answer to that is that this whole area of common law itself is fraught with uncertainty.

I shall now return to the issue under discussion in the instant appeal: whether MPAJ is liable for the economic loss suffered by the plaintiffs for failure (so far) to do what it had promised to do to alleviate the loss suffered by the respondents after the

collapse of Block 1 and evacuation of Blocks 2 and 3. We are actually dealing with the failure on the part of MPAJ to promptly and effectively carry out the drainage master plan that it promised to do. And, we are dealing with a local authority. I am confining my judgment to that factual situation alone.

Even the Privy Council, sitting in England hearing an appeal from New Zealand had in mind the "local policy considerations" in applying the common law of England. This can be seen in Invercargill City Council v Hamlin [1996] 1 All ER 756, a case concerning the duty of care of the local authority in New Zealand over the negligence of its inspector in approving defective foundations causing damage to the house in question. The headnote summarises the views of the Privy Council as follows:

"Held — The appeal would be dismissed for the following reasons —

(1) The New Zealand Court of Appeal was entitled to develop the common law of New Zealand according to local policy considerations in areas of the common law which were developing, not settled. The law of negligence in relation to a local authority's liability for the negligence of a building inspector was particularly unsuited to a single solution applicable in all common law jurisdictions regardless of differing local circumstances. The perception in New Zealand was that community standards and expectations demanded the imposition of a duty of care on local authorities and builders alike to ensure compliance with local byelaws and the Court of Appeal had, in common with other common law jurisdictions, built up a line of authority based on the linked concepts of control by the local authority of building works through the enforcement of its byelaws and reliance on that control by purchasers. The present case had been decided in accordance with that line of authority and therefore on the duty of care issue the Board would indorse in relation to New Zealand the approach taken by the New Zealand courts, notwithstanding House of Lords authority to the contrary (see p 764 h to p 765 a, p 766 j to p 767 c f g, p 768 c and p 773 c, post); dictum of Lord Diplock in Cassell & Co Ltd v Broome [1972] 1 All ER 801 at 871 applied; Bowen v Paramount Builders (Hamilton) Ltd [1977] 1 NZLR 394 and Kamloops (City) v Nielsen (1984) 10 DLR (4th) 641 followed; D & F Estates Ltd v Church Comrs for England [1988] 2 All ER 992 and Murphy v Brentwood DC [1990] 2 All ER 908 not followed."

In that case, the court in New Zealand went even further than the courts in England on the issue of duty of care of a local council. Yet, the Privy Council declined to interfere considering the "local policy consideration" and "differing local circumstances" in New Zealand.

We will also remember the views expressed by the Privy Council in relation to Malaysia quoted earlier.

So, it is in this light that I shall consider the issue now under discussion.
I shall not enter into the discussion whether the "categorisation approach" or the "open-ended approach" should be accepted by the courts in this country. That has been sufficiently dealt with by the learned Chief Judge (Sabah & Sarawak). After all,

as correctly stated by learned Chief Judge (Sabah & Sarawak), the two approaches do not exist in strict water tight compartments. It is possible for them to overlap.

Even if we accept that the question is not the nature of the damage itself, whether physical or percuniary, but whether the scope of the duty of care in the circumstances of the case is such as to embrace damage of the kind suffered by the plaintiffs, there is the additional factor to be considered i.e. whether it is fair, just and reasonable to impose such a duty. This is where public policy and local circumstances come into consideration: In Caparo Industries Plc v Dickman [1990] 1 All ER 568 (HL) at pp 573-574, Lord Bride said:

> 'What emerges is that, is addition to the foreseeability of damage, necessary ingredients in any situation giving rise to a duty of care are that there should exist between the party owing the duty and the party to whom it is owed a relationship characterised by the law as one of "proximity" or "neighbourhood" and that the situation should be one in which the council considers it fair, ***601*** just and reasonable that the law *should impose a duty of a given scope on the party for the benefit of the other."* (emphasis added).

The question then is, considering the public policy and local circumstances, is it fair, just and reasonable to impose a liability on MPAJ, a local authority, for pure economic loss to the plaintiffs for its failure (so far) to come up with and implement the promised drainage master plan or to stabilise the hill slop on Arab Malaysian land to ensure that no accident of the kind that caused the collapse of Block 1 would occur to Blocks 2 and 3?

A local council is establish with a host of duties to perform, from providing and maintaining recreational areas and collecting garbage to providing public transport, homes for the squatters, temporary homes in case of disasters, natural or otherwise, and so on. Indeed, the list is endless. The expectations of residents are even more. These are public duties to all residents or ratepayers within the council's geographical limit. To finance all their activities, local authorities depend mainly on assessment rates and fees for licences. In a democracy as in Malaysia and the kind of attitude of the people, we know too well how difficult it is to increase the rates or the fees even by a few percent. With limited resources and manpower, even if it tries its best (and generally speaking, I say they do) to provide the infrastructure and services, it will not satisfy everybody. People's demands far outweigh their contributions. When services are provided or as a result of infrastructural improvements, the value of their properties goes up, as usually happen, it is taken for granted, as their rights, their good fortune or business acumen. Then there is the attitude of the public from littering and vandalism to resorting to irresponsible means in order to maximise profits, as we see in the facts of this case as narrated by the learned High Court judge.

With limited resources and manpower local councils would have to have their priorities. In my view, the provision of basic necessities for the general public has priority over compensation for pure economic loss of some individuals who are clearly better off than the majority of the residents in the local council area. Indeed, the large sum required to pay for the economic loss, even if a local council has the

means to pay, will certainly deplete whatever resources a local council has for the provision of basic services and infrastructure. Projects will stall. More claims for economic loss will follow. There may be situations where a local council, which may only be minimally negligent, may be held to be a joint tortfeasor with other tortfeasors, which may include irresponsible developers, contractors and professionals. There is no way to execute the judgments against them. Out of necessity or for convenience, the judgment for the full amount may be enforced against the local council. The local council may go bust. Even if it does not, is it fair, just and reasonable that the taxpayers' money be utilised to pay for the “debts” of such people? In my view, the answer is “No”.

I do not think that we can compare the “local circumstances” in New Zealand, for example, with the “local circumstances” in Malaysia now, be it in terms of development (many Malaysians, though it may not in the MPAJ locality, are still without water supply and electricity), civic mindedness of, and compliance with laws and bylaws by the general public or, as we see in this case, even by developers, and others. I do not think that, in the present circumstances, on the facts and in the circumstances of this case, it is fair, just and reasonable to impose such a burden on MPAJ or other local councils in this country in similar situations.

For the same reasons too, the claim for loss due to vandalism and theft by the respondents which was allowed by the learned trial judge should not be allowed. Vandalism follows every disaster, natural or otherwise, in undeveloped, developing or most developed countries. Recent event shows that even the most powerful military and the best equipped police force in the richest and most developed country in the world were also unable to prevent it. Even we ourselves cannot ensure that our own houses will not be broken into. I do not think it is fair, just and reasonable to hold MPAJ liable for it.

The discussion in this judgment covers nuisance as well.

So, while I agree with the answers given by the learned Chief Judge (Sabah & Sarawak) on other questions, on pure economic loss, my answer to question No 3 is as follows:

While economic loss under limited situations may be allowed, Malaysian courts will have to consider the effects of s 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 case.

I would therefore allow MPAJ's appeal with costs here and in the courts below and order that the deposit be refunded. Regarding the cross-appeal by the respondents, even though, as a matter of law, I agree with the learned Chief Judge (Sabah & Sarawak) who disagrees with the Court of Appeal on the question of the dichotomy between public law and private law, in the light of my judgment on the pure economic loss issue, I would dismiss it. However, on the cross-appeal, I would order that each party pays its own costs and that the deposit be refunded to the respondents.

*VS Viswanathan (VS Viswa & Co) for appellant*
*Rajendra Navaratnam, Yatiswara Ramachandran, Marion Qua Li Lian and Toh Chia Hua (Azman Davidson & Co) for respondents No 1 — 73*
*Shamsudin Abdullah (Receiving Officers) for respondent No 74*
*D Bhaskaran and David Soosay (Shearn Delamore & Co) for respondent No 77*