Singapore Journal of Legal Studies
[1999] 667 – 673

THE TEST OF DUTY FOR DEFECTS IN PROPERTY CAUSING PURE ECONOMIC LOSS

RSP Architects Planners & Engineers (Raglan Squire & Partners) v *The Management Corporation Strata Title Plan No 1075; Engineering Construction (Pte) Ltd*[1]

I. INTRODUCTION

TWO case notes have already been written on this issue.[2] The present case in the continuing saga addresses some of the points raised in the comments[3] on *RSP Architects Planners & Engineers* v *Ocean Front Pte Ltd and Another Appeal.*[4]

In the High Court in the *Ocean Front* case,[5] Warren Khoo J allowed the claim of the management corporation of Bayshore Park condominium for pure economic losses arising from the defective construction of parts of the common property. On appeal,[6] the defendants raised, *inter alia,* the issue of whether pure economic losses were recoverable in tort. The Court of Appeal affirmed the decision of the High Court, departing from the English position in *Murphy* v *Brentwood District Council*[7] and preferring instead the Australian position in *Bryan* v *Maloney*,[8] which permitted the recovery of pure economic losses arising from defects in property. The most recent case of *Eastern Lagoon II* reinforces this position.

1 [1999] 2 SLR 449 (The case will be referred to as *"Eastern Lagoon II",* after the name of the condominium to which the claim related).

2 Debbie Ong, "Defects in Property Causing Pure Economic Loss; *Management Corp Strata Title Plan No 1272* v *Ocean Front Pte Ltd"* [1995] SJLS 256; Debbie Ong, "Defects in Property Causing Pure Economic Loss: The Resurrection of *Junior Books* and *Anns; RSP Architects Planners & Engineers* v *Ocean Front Pte Ltd and Another Appeal"*[1996] SJLS 257. Some background knowledge on the area of duty of care in tort is assumed. The author strongly recommends the reading of the latter case comment.

3 [1996] SJLS 257 (See *supra,* note 2).

4 [1996] 1 SLR 113 *("Ocean Front").*

5 *Management Corp Strata Title Plan No 1272* v *Ocean Front Pte Ltd* [1995] 1 SLR 751.

6 *RSP Architects Planners & Engineers* v *Ocean Front Pte Ltd, supra,* note 4.

7 [1990] 2 All ER 908 *("Murphy").*

8 (1995) 128 ALR 163.

II. Brief Facts and Decision of *Eastern Lagoon II*

The Management Corporation Strata Title No 1075 (MCST) of Eastern Lagoon II Condominium sued the architects of the development, RSP Architects Planners & Engineers (RSP), for negligence in their design and/or supervision of the construction of the development. Bricks and brick tiles forming part of a gable end wall of one block of apartments fell onto a unit in another block causing damage to the roof and contents of the unit. The bulk of the claim was for the costs and expenses incurred in respect of rectification works to all gable end walls in order to prevent further injury and damage.

RSP argued, *inter alia,* that they owed no duty of care to the MCST in respect of either the design or the supervision because the damage was purely economic loss and they did not stand in such a relationship of proximity to MCST that they should be made responsible for the pure economic loss. Judith Prakash J rejected the argument and held that RSP owed a duty of care to the MCST to avoid the loss sustained. The Court of Appeal affirmed the decision of the High Court, following *Ocean Front*[9] and its two-stage process of determining duty. RSP also claimed indemnity against Engineering Construction Pte Ltd (EC), alleging that the failure of the claddings was contributed to by bad workmanship for which EC were responsible. This case comment examines the issue on the duty of care owed in respect of pure economic losses and is not concerned with the latter issue regarding the third party's liability.

III. Analysis & Comments

A. *On Anns' Test of Duty of Care*

RSP argued that one of the reasons for overruling *Ocean Front*[10] was that, in following *Junior Books Lt*d v *Veitchi Co Ltd,*[11] it in effect adopted the two stage test enunciated by Lord Wilberforce in *Anns* v *Merton London Borough Council.*[12] The Court of Appeal was therefore concerned with the criticism that *Junior Books* was wrong as it applied the test in *Anns,* which has been overrruled by *Murphy*.[13] It thought that what was objectionable

9 *Supra,* note 4.
10 *Ibid.*
11 [1983] AC 520 *("Junior Books").*
12 [1978] AC 728 *("Anns").*
13 *Supra,* note 7.

in *Anns'* test was, first, Lord Wilberforce's proposition of a single general rule which is applicable in every situation to determine whether a duty of care exists, and second, the fact that the first stage of the test propounded by his Lordship was based on foreseeability of damage alone. The Court of Appeal in Eastern Lagoon II seemed very concerned, perhaps overly so, with explaining that *Ocean Front* did not apply the test in *Anns.* After examining *Junior Books, D & F Estates Ltd and Others* v *Church Commisioners of England and others*,[14] *Murphy, Bryan* v *Maloney*[15] and *Ocean Front,* it concluded that:

> It is abundantly clear that in *Ocean Front* this court did not follow the broad proposition laid down by Lord Wilberforce in *Anns.* True, the court reached its conclusion by a two stage process. In principle, there is no objection to such an approach. It depends on what is involved and considered in each stage. The Court certainly did not apply the first test in *Anns.*[16]

It should be noted that *Murphy* overruled *Anns*, as *Anns* had proceeded on the basis that the damage was physical damage, and was thus creating a new category of recovery for damage which was really pure economic loss. In *Anns,* defects involving inadequate foundations on which a block of flats had been erected were treated as physical damage. The Court in *Anns* treated the damage as physical damage and focused on how the fact that the defendants were a public body affected the duty of care owed by them. *Murphy*, which involved defects in the form of cracks on the walls, held that *Anns* was wrong in holding that similar defects constituted physical damage. However, *Murphy* did not expressly overrule *Anns* on its test of duty. The closest that *Anns*' test has come to being overrruled is in the House of Lords' explanation of the test of duty in *Caparo Industries plc* v *Dickman.*[17] In *Caparo*, the House of Lords held[18] that in addition to the 'foreseeability' of damage, there should also exist 'proximity' and the situation should be one in which the court considers it 'fair, just and reasonable' that the law should impose a duty (also referred to as the three part test).[19] The House of Lords in *Caparo* endorsed an approach which

[14] [1988] 2 All ER 992.
[15] *Supra*, note 8.
[16] *Supra,* note 1, at 465.
[17] [1990] 1 All ER 568 *("Caparo").*
[18] *Ibid,* at 573-574.
[19] See Tan Keng Feng, "The Three Part Test – Yet another Test of Duty in Negligence" (1989) 31 Mal LR 223.

returns the law to the days when the law developed incrementally:

> the law has now moved in the direction of attaching greater significance to the more traditional categorisation of distinct and recognisable situations as guides to the existence, the scope and the limits of the varied duties of care which the law imposes.[20]

Thus *Anns'* test, in so far as it establishes a universal test, has been superceded, although not expressly overrruled, by *Caparo.* It may well be that *Anns'* references to the terms foreseeability, proximity and policy considerations have been included in *Caparo's* test. Such terms employed in the tests of duty may not be as important as the *approach* to determining duty of care. The real difference between the two tests probably lies in the method of finding duty: *Anns* relies less on precedents since its focus is on a universal test, while *Caparo* relies heavily on previous cases (or analogous ones) to impose liability.

The Court of Appeal took great pains to arrive at the decision that *Ocean Front* did not apply *Anns'* test. It may not have been necessary to take that course if the Court had focused on *Caparo* and justified *Ocean Front* based on *Caparo's* approach. *Ocean Front* had used *Junior Books* and *Bryan* v *Maloney* as precedents and it has already been pointed out that it was possible to read *Ocean Fron*t as employing either *Anns'* or *Caparo's* tests.[21]

B. *The Test of Duty Used in Easter Lagoon II*

The Court of Appeal explained the test used in the following way:

> Stripped of the verbiage, the crux of such approach is no more than this: the court first examines and considers the facts and factors to determine whether there is sufficient degree of proximity in the relationship between the party who has sustained the loss and the party who is said to have caused the loss which would give rise to a duty of care on the part of the latter to avoid the kind of loss sustained by the former.... Next, having found such degree of proximity, the court next considers whether there is any material factor or policy which precludes

[20] *Per* Lord Bridge of Harwich, *supra*, note 17, at 574. It has been argued in the case comments referred to in note 2, *supra,* that *Caparo's* test is in effect a method or approach to determining duty of care.

[21] See Debbie Ong, "Defects in Property Causing Pure Economic Loss: The Resurrection of *Junior Books* and *Anns; RSP Architects Planners & Engineers* v *Ocean Front Pte Ltd and Another Appeal," supra,* note 2, at 265-266.

> such duty from arising. Both on principle and on authority, we do not see why such an approach should not be taken in *Ocean Front* and in a case such as the one before us.[22]

A thin line separates *Ocean Front*'s and *Anns'* tests. The expression of the test in *Eastern Lagoon II* appears much like *Anns'* two-stage test, but the process used in finally determining duty may be an application of *Caparo's* method of determining duty. *Caparo* does not permit a second stage in the process. It does not place policy considerations as a next step in the process once the case fits into a category of established cases. 'Justice and reasonableness' stand on the same footing as 'foreseeability' and 'proximity' in the three part test. Once a case can be characterized as belonging to a distinct and recognizable category of cases, it will have satisfied the requirements of 'foreseeability', 'proximity' and 'justice and reasonableness'. The Court referred to *Caparo* for purposes of deciding whether the present facts were the same as *Caparo's* and concluded that "(i)n our opinion, *Caparo* has no application here".[23] It is noteworthy that the Court did not examine or expressly apply the test of duty in *Caparo,* but by the process of comparing the facts of the two cases, was essentially involved in the use of the incremental approach to finding duty. Herein lies an illustration of the fluidity of the tests of duty. Whether the test is expressed in terms of the two-stage test in *Anns* or the three part test in *Caparo*, the same result can usually be reached. In the present case, the application of *Caparo* involves analogizing its facts to those of *Ocean Front.* It is submitted that the Court of Appeal applied a hybrid or composite test, which involves both processes in *Anns'* and *Caparo's* tests. It relies on precedent cases to find duty but permits a second stage where policy considerations act as the final filter to the determination of duty.

C. *Future Cases of Defects*

It has been argued[24] that the danger of indeterminate liability is real since it opens up the possibility of extending liability to other properties.[25] The Court of Appeal justifies the imposition of liability to cases involving real

[22] *Supra,* note 1, at 466.

[23] *Supra,* note 1, at 469.

[24] See Debbie Ong, "Defects in Property Causing Pure Economic Loss: The Resurrection of *Junior Books* and *Anns; RSP Architects Planners & Engineers* v *Ocean Front Pte Ltd and Another Appeal," supra,* note 2, at 261-262.

[25] The possibility of creating a transmissible warranty of quality of chattels was raised in *Murphy, supra,* note 7. Also see the dissenting judgment in *Junior Books, supra,* note 12.

property invested by individuals:

> The investment in real property is likely to represent a significant, if not the most significant, investment in an individual's lifetime (as opposed to the purchase of a mere chattel). The scale of the investment in money terms is far greater than what is involved in the acquisition of a chattel. Secondly, the permanence of the structure may give rise to a greater expectation than a chattel. We think those arguments apply a fortiori in Singapore, where land is not only scarce but expensive. We think that to treat houses and consumer goods alike would be to ignore simple realities...which to our mind, are instrumental in dictating the expectations and degree of reliance placed upon the persons developing, building or designing the structure which stands upon it.[26]

Unlike Singapore, the Defective Premises Act 1972[27] in England provides statutory redress for owners of defective property. *Eastern Lagoon II* recognizes this gap in our law and provides a remedy for such cases. Will this opening in the law permit future cases on other types of chattels of substantial value to fall within the scope of *Ocean Front* and *Eastern Lagoon II*? Questions such as whether the scope of recovery is confined to residential property may only be answered in the future. What of non-residential properties or properties purchased purely for investment? Is a car, which costs a substantial amount in Singapore, analogous, in terms of money, to an investment in real property in the lower end of the market?

It is comforting that the Court sets out the distinctive facts of the case in order to confine liability to present or similar facts. However, there remains the ever present question: "if one step, why not fifty?".[28] After all, an extension was made between *Ocean Front* and *Eastern Lagoon II.* In *Ocean Front,* the court spelt out the close relationship between the management corporation and the *developers.* In *Eastern Lagoon II,* recovery was extended to a relationship between the management corporation and the *architects* of the

[26] *Supra*, note 1, at 470.

[27] 1972, c 35. See Debbie Ong, "Defects in Property Causing Pure Economic Loss; *Management Corp Strata Title Plan No 1272* v *Ocean Front Pte Ltd", supra,* note 2, at 266-267.

[28] *Per* Lord Buckmaster, in his dissenting speech in *Donoghue* v *Stevenson* [1932] All ER Rep 1.

condominiums.

IV. Conclusion

There is no need to repeat what has already been said in the case comments on *Ocean Front.* This case comment highlights that composite test used by *Eastern Lagoon II.* The decision to provide for redress in cases involving defects in private property is laudable. However, it is somewhat regrettable that the Court passed on the opportunity to examine the latest test of duty in *Caparo.* Perhaps opportunity will arise again soon enough.[29]

Debbie Ong Siew Ling*

[29] After all, there have been opportunities for three case comments on the same issue, including this comment, in a span of four years.

* LLB (NUS); LLM (Cantab); Advocate & Solicitor (Singapore); Assistant Professor, Faculty of Law, National University of Singapore.