NEPLINE SDN. BHD v. JONES LANG WOOTTON
HIGH COURT MALAYA, PENANG
DATO' ABDUL HAMID BIN HAJI MOHAMED J
CIVIL APPEAL NO. 12-68-89
11 NOVEMBER 1994
[1995] 1 CLJ 865

***TORT**: Negligent misrepresentation - Duty of care - Whether duty extended to omission - Misstatement incurred pure economic loss - Whether recoverable when definite amount claimed.*

***PRACTICE & PROCEDURE**: Section 3 Civil Law Act - Scope of applicability - Proviso thereof - Whether a guidance to Court to develop Malaysian common law.*

The respondent is a firm of registered real estate agents and chartered valuer. By a letter dated 20 September 1988 the respondent offered to let one-half portion of a premises to the appellant. In the course of the negotiations the respondent, by conduct or impliedly, represented to the appellant that, *inter alia*, the said premises was not subject to any foreclosure proceedings or order for sale. Relying on the representation, the appellant paid a sum of RM15,372 as rental and maintenance deposit. However at that material time, there was a foreclosure proceeding pending in Court in respect of the said premises and the respondent knew about it but did not disclose the fact to the appellant. The said premises was foreclosed and the appellant demanded return of the deposit.

The respondent contented that the duty of care is not applicable in this case as it is merely an omission and not a positive statement. It was further contended the in a case involving pure economic loss such as this the Courts should be strict in granting damages.

Held :

[1] In applying s.3 of the Civil Law Act 1956, the approach the Court should take is first to determine whether there is any written law in force in Malaysia. If there is none, then the Court should determine what is the common law of, and the rules of equity as administered in England on 7 April 1956. 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, 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 or in part, then there being no written law in force in Malaysia, the Court is free to formulate Malaysia's own common law. In so doing, the Court is at liberty to look at any source of law, local or otherwise, be it England after 7 April 1956, principles of common law in other countries, Islamic law of common application or common customs of the people of Malaysia. Under the provision of s.3 of the Civil Law Act 1956, that is the way the Malaysian common law should develop.

[2] This is not a case of a friend telling another friend that there is a horse 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 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 clients yet may charge fees for their expert services.

In the circumstances the defendant in this case owned a duty to the plaintiff to disclose that there was a foreclosure proceeding pending. The provision of s.3 of Civil Law Act 1956, especially the proviso thereto allows the Court to do so.

[3] The claim in the present case is for pure economic loss. It is not for an injury to person or property. Also there is a need to limit recoverability of damages for pure economic loss. However, 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. On the facts of this case, the respondent is liable.

[Appeal allowed]

Case(s) referred to:

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

*Anns v. London Borough of Merton [1977] 2 All ER 492 (HL) (**refd**)*

*Caparo Industries Plc v. Dickman & Ors. [1990] 2 WLR 358 (HL) [1990] 2 WLR 358 (HL) (**refd**)*

*Murphy v. Brentwood District [1990] 2 All ER (**refd**)*

*Pacific Associates Inc. & Anor. v. Baxter & Ors. [1990] 1 QB 993 (CA) @ 1009-1010 (**refd**)*

*Mooney & Ors. v. Peak Marwick, Mitchell & Co. & Anor. [1966] 1 LNS 109 [1967] 1 MLJ 87 (**refd**)*

Bank Bumiputra Malaysia Bhd. v. Yeoh Ho Huat [1977] 1 LNS 11

*Neogh Soo On & Ors. v. G. Rethinasamy 1983 CLJ 663 [1984] 1 MLJ 126 (**refd**)*

*Chin Sin Motor Works Sdn. Bhd. & Anor. v. Arosa Development Sdn. Bhd. & Anor. [1992] 1 CLJ 102;[1992] 1 MLJ 23 (**refd**)*

*Syarikat Batu Sinar Sdn. Bhd. & 2 Ors. v. UMBC Finance Bhd. 2 Ors [1990] 2 CLJ 691 (**foll**)*

*Commonwealth of Australia v. Mindford (Malaysia) Sdn. Bhd. & Anor. [1990] 1 CLJ 77 [1990] 1 MLJ 878 (**foll**)*

*The Philippine Admiral [1977] AC 373 (**refd**)*

*Khalid Panjang & Ors. v. PP (No. 2) [1963] 1 LNS 53 [1964] MLJ 108 FC (**refd**)*

*The Parlement Belge [1880] (5) PD 197 (**refd**)*

*Trendex Trading Corporation v. Central Bank of Nigeria [1977] 2 WLR 356 (**refd**)*

*The I. Congreso Del Partido [1983] AC 244 (**refd**)*

*Nocton v. Lord Ashburton [1914] AC 932 (**refd**)*

*Girardy v. Richardson [1793] 1 Esp. 24 (**refd**)*

Legislation referred to:

Civil Law Act, s. 3

Other source(s) referred to:

Law of Torts, R.P Balkin & J.L.R Davis, pp. 421 to 424

Clerk & Lindsel on Torts, 14th Edit, (1975), para. 866, p. 481

Counsel:

For the appellant - Tan Beng Hong; M/s. Lim Gim Leong & Co.

For the respondent - Logan B. Sabapathy (later Charanjeet Kaur Kang); M/s. Skrine & Co.

JUDGMENT

Abdul Hamid bin Hj. Mohamed J:

This is an appeal from a judgment of the Sessions Court. According to the Statement of Claim of the appellant/plaintiff, during all the material time, the respondent/defendant was a firm of registered real estate agents and chartered valuer. By a letter dated 20 September 1988 the respondent offered to let one-half portion of the premises in question to the appellant at a monthly rent of RM3,343. According to the appellant, in the course of the negotiations the respondent, by conduct or impliedly represented to the appellant that:

(a) the landlord and/or owner had a good title to the premises; (b) that the said premises was not subject to any foreclosure proceedings or order for sale; and

(c) that the appellant could have a quiet and peaceful possession of the premises.

Relying on the said representations, the appellant said that they:

(a) entered into a tenancy agreement with the landlord for a period of two years from 1 March 1989;

(b) paid to the landlord through the respondent a sum of RM15,372 as rental and maintenance deposit; and

(c) renovated the said premises at the cost of RM67,480.

The appellant alleged that the respondent had acted negligently in:

(a) failing to exercise any or proper care in ascertaining that the landlord or owner had a good right or title to the said premises;

(b) failing to exercise any or proper care in ascertaining that at all material times the said premises was not subject to any foreclosure proceedings and/or order for sale;

(c) failing to exercise any or proper care in ascertaining that the appellant could have quiet and peaceful possession of the said premises.

To give a clearer picture I should interject here to say that it was not disputed that during the material time there was a foreclosure proceeding in Court in respect of the said premises and that the respondent knew about it but did not disclose the fact to the appellant. The appellant executed the tenancy agreement on 31 January 1989, paid rental for March 1989 and rental deposit for three months to the respondent. Keys were handed to the appellant on 1 February 1989. Renovation work commenced on 20 February 1989. However on 25 February 1989 a proclamation for sale was put up on the premises. (It should be noted here that the tenancy was to commence from March 1989)

Going back to the Statement of Claim, on 1 March 1989, (upon becoming aware of the pending auction) the appellant through their solicitors sent a notice to the respondent rescinding the said tenancy agreement and demanding the refund of the rental, rental deposit and maintenance deposit amounting to RM15,372, costs of renovation, cost of advertising the appellant's premises and travelling expenses "and inconvenience caused".

As the respondent failed to pay the amount claimed the appellant filed this action.

The material defence raised by the respondent was that the respondent, in its capacity as an estate agent appointed by the landlord, was under no obligation whatsoever to carry out the investigations, inspections and searches. The respondent also denied that it owed a duty to the appellant to exercise proper care in ascertaining the matters that the appellant alleged the respondent was negligent of. Indeed the whole case finally turned on the question whether the respondent owed a duty of care to the appellant, in particular, to inform the appellant that there was a foreclosure proceeding pending during the negotiation, a fact which was admittedly known to the respondent.

To complete the narration of facts, the premises was auctioned on 15 March 1989. The

appellant purchased the premises at the auction, and if I may say so, moved in as the owner rather than a tenant.

Learned Sessions Court Judge, in a 25-page judgment made a finding that the respondent was in breach of the duty of care he owed to the appellant, in particular, in not informing the appellant of the impending foreclosure proceeding. However, he did not give judgment for the appellant. This is partly because, at the end of the trial the appellant abandoned their claims under the various heads except

(a) the refund of RM15,372; and

(b) general damages

Even as regards these two heads the learned Sessions Court Judge did not give judgment in favour of the appellant. This was because as regards (a), he was of the view that there was no privity of contract between the appellant and the respondent. The respondent, in his words "merely acted as a conduit pipe for the landlord" The tenancy agreement was signed between the appellant and the landlord. Payments were "promptly handed over" by the respondent to the landlord. The respondent was a mere agent of the landlord. Therefore, the appellant should have proceeded against the landlord.

As regards general damages, he held that there was absolutely no evidence led by the appellant.

Before me, learned Counsel for the appellant made a further concession. He abandoned the prayer for general damages leaving only the refund of the RM15,372 (rental and deposit). He argued that the cause of action against the respondent was in tort not contract. Therefore as the learned Sessions Court Judge had found that the respondent owed a duty of care to the appellant and had acted in breach of it, at the very least the rental and deposit paid by the appellant should be refunded.

The argument of the learned Counsel for the respondent who first argued the appeal was most interesting. He argued that the loss of the appellant was purely an economic loss. He argued that the Courts (in England) had "consistently stressed the need for some control mechanism, narrower than the concept of reasonable foreseeability to limit a person's liability for purely economic loss" The learned Counsel argued that *Hedley Byrne & Co. Ltd. v. Heller & Partners* [1964] AC (HL) 465 was an exception to the irrecoverability of pure economic loss for negligent misstatement. He however argued that the principle enunciated in *Hedley Byrne's* case is not applicable in this case because unlike in that case where there was a positive misstatement, in this case it is merely an omission.

The learned Counsel recognised that *Anns v. London Borough of Merton* [1977] 2 ALL ER 492 (HL) enlarged the recoverability of pure economic loss. However, subsequently, there were a number of cases including *Caparo Industries Plc v. Dickman & Ors.* [1990] 2 WLR 358 (HL) [1990] 2 WLR 358 (HL) and finally in *Murphy v. Brentwood District* [1990] 2 ALL ER the House of Lords overruled *Ann's*. Thus *Murphy*, marked a significant retreat concerning the scope of duty of care in pure economic loss cases. He therefore submitted the two-stage tests in *Ann's* was no longer applicable. The Court should approach the matter as follows:

i) whether the imposition of a duty of care is, in all the circumstances of the case, just and reasonable. (For this proposition learned Counsel referred to *Pacific Associates Inc. & Anor. v. Baxter & Ors.* [1990] 1 QB 993 (CA) @ 1009-1010.

ii) The actual nature of the damage is relevant to the existence and extent of any duty to avoid or prevent the damage. For this proposition he referred to *Caparo's* case.

I asked both learned Counsel about the position of the law in Malaysia. In particular, I wanted to know whether Courts in Malaysia, especially Courts superior to this Court, had occasion to consider *Hedley Byrne's* case or *Ann's* case or the retreat from *Ann's* cases. Even though I gave them time to research, they both come back with the same answer, that there was no decision by Courts in Malaysia on the point.

My own limited research was not much better. However I came across four cases in which *Hedley Byrne's* 465 Lt case was mentioned. They are *Mooney & Ors v. Peat Marwick, Mitchell & Co. & Anor* [1967] 1 MLJ 87; *Bank Bumiputra Malaysia Bhd. v. Yeoh Ho Huat[1977] 1 LNS 11*; *Neogh Soo On & Ors. v. G. Rethinasamy 1983 CLJ 663*[1984] 1 MLJ 126 dan *Chin Sin Motor Works Sdn. Bhd. & Anor. v. Arosa Development Sdn. Bhd. & Anor. [1992] 1 CLJ 102;*[1992] 1 MLJ 23.

However that was not the end of the problem. As I began to prepare my decision, another point crossed my mind, i.e., what is the effect of the provisions of s. 3 of the Civil Law Act 1956? For ease of reference, I reproduce here the relevant part.

> 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 7 April 1956,
> (b).....
> (c).....
> 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

Before going any further I think I should discuss this provision first. Many articles have been written on this provision. Many seminars have discussed this provision. There have been calls for the provision to be amended in order to allow our law to progress with the development of common law in England, or, to enable our Courts to look somewhere else also, including Islamic Law and local customs, for source of law. However, the provision remains in our statute book though rarely referred to by lawyers or judges in their submissions of judgments, respectively. More often than not, and this case is a good example, Counsel refer to English authorities as if the common law of England applies in toto in Malaysia. I must however point out that there is a decision of the High Court in Ipoh in which the learned Judge categorically relied on the proviso to s. 3(1) of the Civil Law Act 1956 in refusing to follow English authorities but instead followed a decision of the High Court of Brunei Darussalam which was reversed on appeal to Brunei's Court of Appeal.

In that case, *Syarikat Batu Sinar Sdn. Bhd. & 2 Ors. v. UMBC Finance Bhd. 2 Ors [1990] 2 CLJ 691* ***(foll)***, Peh Swee Chin J (as he then was) referring to the provsio to s. 3(1) of the

Civil Law Act 1956 had this to say:

> 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"
> I agree entirely with his view and attitude.

I must also mention the decision of our Supreme Court in *Commonwealth of Australia v. Mindford (Malaysia) Sdn. Bhd. & Anor. [1990] 1 CLJ 77*. [1990] 1 MLJ 878. The issue in that case was the question of sovereign immunity and the jurisdiction of the Courts in Malaysia. In the Judgment written by Gunn Chit Tuan, SCJ (as he then was), the learned Judge said, regarding section 3 of the Civil Law Act 1956:

> Section 3 of the Civil Law Act 1956 only requires any Court in West Malaysia to apply the common law and the rules of equity as administered in England on 7 April 1956. That does not mean that the common law and rules of equity as applied in this country must remain static and do not develop. We have not been referred to any cases decided by the former Court of Appeal or the Federal Court after 7 April 1956, on the subject of sovereign immunity nor have we discovered any such cases decided after that date. It is correct, as pointed out, that the law in England on sovereign immunity on 7 April 1956, was as declared in cases such as the *The Parlement Belge* [1880] (5) PD197 *(supra)*. That is, at that time a foreign sovereign could not be sued *in personam* in our Courts. But when the judgment in *The Philippine Admiral* [1977] AC 373 *(supra)* was delivered by the Privy Council in November 1975, it was binding authority in so far as our Courts are concerned. Therefore, by that time the common law position on sovereign immunity in this country would be that the absolute theory applied in all actions *in personam* but the restrictive view applied in actions *in rem*. When the *Trendex (supra)* case was decided by the UK Court of Appeal in 1977 it was of course for us only a persuasive authority, but we see no reason why our Courts ought not to agree with that decision and rule that under the common law in this country the doctrine of restrictive immunity should also apply.
> That is more so in view of the very strong persuasive authority in *The I. Congreso Del Partido* [1983] AC 244 case *(supra)* in which the House of Lords had in July 1981, unanimously held that the restrictive doctrine applied at common law in respect of actions over trading vessels regardless of whether the actions were *in rem* or *in personam*. We are therefore of the view that the restrictive doctrine should apply here although the common law position of this country could well be superseded and changed by an Act of Parliament later on should our Legislature decide to define and embody in a statute the limits and extent of sovereign immunity in this country.

The first two sentences of the paragraphs pose no problem. Indeed that is what it should be. The problem arises with what follows:

First, on the question whether the *The Philippine Admiral* [1977] AC 373 is a "binding authority in so far as our Courts are concerned." *The Philippine Admiral* is a decision of the Privy Council in an appeal from Hong Kong. It does not concern an interpretation of a statute which is in *pari materia* with a Malaysian statute as in the case of *Khalid Panjang & Ors. v. PP (No. 2) [1963] 1 LNS 53*[1964] MLJ 108 FC. Did the Supreme Court intend to extend the principle to cover all decisions of the Privy Council regardless from where the appeal comes? I do not think so because the Privy Council has to decide a case according to the law of the

country from which the appeal comes, which may be different from the law in Malaysia.

Secondly having said that only the common law of England as on 7 April 1956 was applicable to Malaysia, having said that "the law in England on sovereign immunity" on 7 April 1956 was as declared in cases such as *The Parlement Belge* [1880] (5) PD 197), the Court went on to say that the Privy Council decision in *The Philippine Admiral* [1977] AC 373 was binding on Malaysian Courts. Having said all that the Court went on to apply the persuasive authority of UK Court of Appeal in *Trendex Trading Corporation v. Central Bank of Nigeria* [1977] 2 WLR 356) and the "very strong persuasive authority" of the House of Lords decision in the *The I. Congreso Del Partido* [1983] AC 244.

With greatest of respect, I would have thought that if the common law of England on 7 April 1956 was as was declared in *The Parlement Belge*, then by virtue of the provisions of s. 3 of the Civil Law Act, that law applies in Malaysia, unless it falls within the proviso to that section. Secondly, I would have thought that if the Privy Council decision in *The Philippine Admiral's* case was binding on Malaysian Courts, then Malaysian Courts would have no choice but to apply it. If that be the case, then it would not be necessary to consider *Trendex* or *The I. Congreso Del Partido*.

My humble view is that the provision of s. 3 of the Civil Law Act 1956 as it stands today, is the law of Malaysia. Courts in Malaysia have no choice but to apply it.

So, I will have to consider the provision of s. 3(1) of the Civil Law Act 1956. That section says clearly that save so far as other provision has been made prior to or may be made after 7 April 1956 by any written law in force in Malaysia, the Court shall, in West Malaysia or any part thereof, apply the common law of England and the rules of equity as administered in England on 7 April 1956. However, the said common law and the rules of equity 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.

In my view the approach that the Court should take is first to determine whether there is any written law in force in Malaysia. If there is, the Court need not look anywhere else. If there is none, then the Court should determine what is the common law of, and the rules of equity as administered in, England on 7 April 1956. 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, I am of the view that, 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 or in part, then there being no written law in force in Malaysia, the Court is free to formulate Malaysia's own common law. In so doing, the Court is at liberty to look at any source of law, local or otherwise, be it common law of, or the rules of equity as administered in England after 7 April 1956, principles of common law in other countries, Islamic law of common application or common customs of the people of Malaysia. Under the provision of s. 3 of the Civil Law Act, 1956, I think, that it is the way the Malaysian common law should develop.

In taking this approach I find that the most difficult thing to do is to determine what is the common law of England on 7 April 1956 on negligent misstatement or omission.

Take *Hedley Byrne* case as an example. It appears from the report that it was decided in 1963. If we say that that was the day when the principle was "born", it is clearly after 7 April 1956.

But, in deciding *Hedley Bryne* case, their lordships referred to numerous cases including those decided in the 19th century. In fact one of the cases referred to was the case of *Coggs v. Bernard* which was reported in [1703] 2 Ld. Rayon 909 - see [1664] AC @ 526. It appears to me that their lordships in *Hedley Byrne* applied the principle laid down in *Nocton v. Lord Ashburton* [1914] AC 932,), a decision made over 40 years prior to 7 April 1956. Does it mean that we can follow the *Nocton* but not *Hedley Byrne* ?

Anyway, I shall try to ascertain the position of the law in England on careless misstatement. In doing so, I shall rely on **Clerk & Lindsell on Torts,** 14th Edn. [1975] supplied to me by learned Counsel for the respondent. (This Court Library only has the 13th Edn. [1969]. But it does not matter because we are now looking at the earlier period). In paragraph 866 beginning from p. 481, the learned author says:

> Careless false statements. The development of the law as to loss resulting from reliance on careless misstatements is an example of the progressive recognition of wider areas of liability for carelessness. The House of Lords decided in *Derry v. Peek* [1889] 14 App. Cas. 337. (For Deceit, see Chap. 22, especially # 1632) that a careless misstatement of fact resulting in pecuniary loss did not constitute deceit. Their Lordships did not decide the question whether such a statement might be actionable on the alternative ground of negligence. This point was subsequently decided by the Court of Appeal in *Le Lievre v. Gould* [1893] a QB 491, which
> was followed by a majority of the same tribunal in *Candler v. Crane, Christmas & Co.* [1951] 2 KB 164 in both of which it was held that pecuniary loss inflicted by careless misstatements was not suable in negligence either.
> The same point was the basis of the decision in *Old Gate Estates Ltd. v. Toplis* [1939] 3 All ER 209, 216, per Wrottesley J where it was stated that the principle of *Donoghue v. Stevenson* [1972] 3 AC 562 was "confined to negligence which results in danger to life, danger to limb or danger to health"; and in *Heskell v. Continental Express Ltd.,* [1950] 1 All ER 1033, 1042, per Devlin J; but he repudiated his own dictum later in *Hedley Byrne & Co. Ltd. v. Heller & Partners.* [1964] AC 465, 532 where it was stated that "negligent misstatements can never give rise to a cause of action.

However, it was not long after the original decision that modifications were introduced into an apparently wide principle of non-liability, there was, in other words, piecemeal recognition of the infliction of damage, pecuniary and otherwise, by means of careless false statements, Parliament intervened immediately after *Derry v. Peek* to nullify its effect. That case concerned careless misstatements in a Company prospectus, and statute imposed liability in such cases. (See now Companies Act 1948, s. 43(1)). There were also developments in equity that created exceptions.

> Long before *Derry v. Peek* there had developed the rule that negligent statements could found an estoppel though not a right of action, and the rule was continued thereafter. (*Burrowes v. Lock* [1805] 10 Ves. 470, as explained in *Low v. Bouverie* [1891] 3 Ch. 82, 101, 102-103; *Nocton v. Lord Ashburton* [1914] AC 932, 952. *C.f.* the dubious explanations in *Brownlie v. Campbell* [1880] 5 App. Cas 925, 935, 936, 953; *Derry v. Peek* [1889] 14 App. Cas. 337, 360; *Candler v. Crane, Christmas & Co.* [1951] 2 KB 164, 191). Then the House of Lords itself in *Nocton v. Lord Ashburton* ([1914] AC 932. See also *Woods v. Martins Bank Ltd.* [1959] 1 QB 55, 72 (which is preferable to the reports in [1958] 1 WLR 1018, and [1958] 3 All ER 166). The case

> was approved in *Hedley Byrne & Co. Ltd. v. Heller and Partners Ltd.* [1964] AC 465. See also *Boyd v. Ackley* [1962] 32 DLR (2d) 77) recognised the existence in equity of a duty of care in what came to be understood as "fiduciary relations." Where these existed liability for careless misstatements was introduced under the umbrella of "constructive fraud," which was a more extended meaning of "fraud" than that employed at common law. (*Nocton v. Lord Ashburton* [1914] AC 932, 951, 952; *Lancashire Loans Ltd. v. Black Equity*. The word "fraud" in the Limitation Act 1939, s. 26(b) (amended by the Limitation Act 1963, s. 4(3) is likewise wider than at common law; *Beaman v. ARTS* [1949] 1 KB 550; *Kitchen v. RAF Assn.* [1958] 1 WLR 563; *Clark v.Woor* [1965] 1 WLR 650)...

This development towards the wider recognition of liability for careless misstatements was given added momentum by the decision of the House of Lords in *Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd.*, ([1964] AC 465; on which see McKerron, 80 SALJ 483; Stevens, 27 MLR 121; 98 ILT 215; Walker, 3 Osgoode Hall LJ 89; Norton [1964] JBL 231; Goodhart, 74 Yale LJ 286; Honore, 8 JSPTL (NS) 284; Atiyah, 83 LQR 248; Coote, 2 NZULR 263.), upon which the law as to liability for pecuniary loss caused by careless misstatements will in future rest. It has dispelled the idea that *Derry v. Peek* decided not merely that a careless misstatement does not amount to deceit but also, a *silentio,* that it is not actionable negligence either. This last proposition had been the basis of the decision in Le *Lievre v.Gould* and *Candler v. Crane, Christmas & Co.,* and in rejecting it the House of Lords has declared that these two cases were wrongly decided.

> Once liability for careless misstatements is admitted, the question arises as to how far responsibility should extend.

So, it appears to me that prior to 7 April 1956, *Nocton's* case was the highest watermark on the subject. Perhaps I should mention that in *Nocton's* case, a mortgagee brought an action against his solicitor, claiming to be indemnified against the loss which he had sustained by having been improperly advised and induced by the defendant, acting as his confidential solicitor, to release a part of a mortgage security, whereby the security had become insufficient. The statement of claim alleged that the defendant, when he gave the advice, well knew that the security would be merely rendered insufficient and that the advice was not given in good faith, but in the defendant's own interest. It was held, *inter alia*, that the plaintiff was not precluded by the form of his pleadings from claiming relief on the footing of breach of duty arising from fiduciary relationship and that he was entitled to relief on that footing.

And, in the words of the learned author, in *Hedley Byrne* (post 1956), the House of Lords had recognised the existence in equity of a duty of care arising from fiduciary relationship as in the case of a solicitor and his client, for misrepresentation.

However, I must admit that is a far cry from the facts in this case. Because, here, while I have no doubt that a fiduciary relationship between appellant and the respondent did exist, what happened here was not an active misrepresentation, not even a careless misstatement as in *Hedley Byrne* 's case. Here it was non-disclosure.

However, I do not think I should stop there. I think I am entitled to go on and consider whether local circumstances would require some "modification" to extend the concept of the duty of care to an omission as in this case. As I have said, I think the proviso to s. 3 of the

Civil Law Act 1956 allows me to do so if local circumstances so require. Indeed the same thing was done by Peh J in Batu Sinar 's case. In fact it can be said that the Supreme Court in *Commonwealth of Australia's* case did just that when it applied the post 1956 decisions of the English Courts, even though the judgment did not say so. How else could that judgment be justified in the light of the provisions of s. 3 of the Civil Law Act 1956?

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 say, 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 *Ann'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 R.P. Balkin and J.L.R. Davis in the **Law of Torts** from pp. 421 to 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.

As I have stated earlier, the only claim the appellant is seeking now is for the amount RM15,372 which is the amount paid by the appellant. The learned Sessions Court Judge did not allow this claim on the ground that there was no privity of contract between the appellant and the respondent.

With respect, I think he was misconceived there. The action is founded in tort not contract. As he himself had, after a lengthy discussion of authorities, come to the conclusion that the respondent had breached a duty of care owed by them to the appellant, though taking a different approach, and since the payment of that amount was never in dispute, he should have ordered that that amount be paid by the respondent to the appellant as damages. I also do not think that the damage can be said to be too remote.

The appeal is allowed. The respondent is ordered to pay the appellant a sum of RM15,372 with interest at 8% from today till the date of realisation. The respondent shall also pay the appellant costs of this appeal and costs in the Court below. The deposit is to be refunded to the appellant.