

DIRECT LOSS AND EXPENSE RELATING TO  
REMOTENESS OF DAMAGES

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**A project report submitted in partial fulfilment of the  
requirement for the award of the degree of  
Master of Science (Construction Contract Management)**

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Universiti Teknologi Malaysia**

**JULY 2006**

## ABSTRACT

Direct loss and expense is a very important element in construction contracts. However, due to the imbalance relationship between employer and contractor, direct loss and expense is taken lightly and often treated as a mere “business decision”. Direct loss and expense is closely related to Section 74(1) and (2), Contract Act 1950, which similar to the rule in *Hadley v Baxendale*. This study is aimed at reducing the uncertainty and difficulties in the event of claiming direct loss and expense that is deny under the reason of “remote and indirect loss or damage”. This study is carried out to determine whether direct loss and expense is related to remoteness of damages and which limb of rule of *Hadley v Baxendale*, each head of claims lies under. The head of claims include loss of profit, finance charges, overheads and loss of productivity. This study was carried out mainly through documentary analysis of law journals. It was found that loss of profit falls under both limbs of *Hadley v Baxendale*. loss of profit under special circumstance is claimable, provided there is contemplation at the beginning about such arrangement. The other three head of claims fall under the first limb of *Hadley v Baxendale*, claimable if they are cause by employer’s interruption arising naturally in the course of running a operation. It is hoped that it may provides some rough ideas or guidelines for the parties in the construction industry on direct loss and expense.

## ABSTRAK

Kerugian dan perbelanjaan secara langsung merupakan satu elemen yang sangat penting dalam kontrak pembinaan. Walau bagaimanapun, kerugian dan perbelanjaan secara langsung tidak diambil berat dan sering kali dilayan sebagai “keputusan perdagangan”, disebabkan hubungan yang tidak seimbang antara majikan dan kontraktor. Kerugian dan perbelanjaan secara langsung berkait dengan Section 74(1) and (2), Akta Kontrak 1950, yang hampir sama dengan peraturan dalam *Hadley v Baxendale*. Kajian ini dijangka dapat megurangkan ketidakpastian dan kesusahan dalam tuntutan untuk kerugian dan perbelanjaan secara langsung, yang sering kali ditolak atas alasan bahawa ia adalah “kerosakan yang terpencil dan tidak langsung”. Kajian ini dijalankan untuk memastikan samada kerugian dan perbelanjaan secara langsung boleh dikaitkan dengan “keterpencilan sesuatu kerosakan” dan kedudukan setiap alasan tuntutan di bawah peraturan dalam *Hadley v Baxendale*. Alasan-alasan tuntutan termasuk kehilangan keuntungan, faedah pinjaman, perbelanjaan am dan kehilangan produktiviti. Kajian ini dijalankan menerusi analisis laporan undang-undang. Didapati kehilangan keuntungan terletak di bawah kedua-dua bahagian peraturan dalam *Hadley v Baxendale*, manakala tiga alasan tuntutan yang lain terletak di bawah bahagian pertama peraturan *Hadley v Baxendale*, boleh dituntut sekiranya ia disebabkan oleh majikan, dan berlaku secara semulajadi mengikut aliran sesuatu operasi. Adalah diharapkan bahawa kajian ini dapat memberi sedikit pandangan dan paduan kepada pihak-pihak yang terlibat dalam industri pembinaan berkenaan dengan kerugian dan perbelanjaan secara langsung.

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## LIST OF ABBREVIATIONS

AC	Appeal Cases, House of Lords
All ER	All England Law Reports
BuildLR	Building Law Reports
BLR	Building Law Reports
Ch	Law Reports: Chancery Division 1991-
CLJ	Current Law Journal (Malaysia)
Con LR	Construction Law Reports
CSOH	Outer Hose, Court of Session
ER	Equity Reports
Exch	Exchequer Reports
HL	House of Lords
Hudson	Hudson Law Reports
ICR	Industrial Cases Reports
JCT	Joint Contracts Tribunal
KB	Law Reports: King's Bench Division
Lloyd's Rep	Lloyd's List Reports
LR	Law Reports
MLJ	Malayan Law Journal
PAM	Pertubuhan Arkitek Malaysia
QB	Law Reports: Queen's Bench Division
SC	Session Cases
SCLR	Scottish Council of Law Reporting
SLT	Scots Law Times
WLR	Weekly Law Report



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<i>B Sunley &amp; Co, Ltd v Cunard White Star, Ltd</i> [1940] 66 Ll.L.Rep. 134	46
<i>Balfour Beatty Costruction (Scotland) Ltd v. Scottish Power.</i> [1969] 1 AC 350	19
<i>British Sugar plc v NEI Power Projects Ltd</i> [1997] 87 BLR 42	45
<i>Chatham and Dover Railway Co. v. South Eastern Railway Co.</i> [1893] A.C. 429	52
<i>Compania Naviera Maropan S.A. v. Bowaters Lloyd Pulp And Paper Mills Ltd.</i> [1955] 2 QB 68	8
<i>Deepak Fertilisers and Petrochemical Corporation v ICI Chemicals &amp; Polymers Ltd</i> [1999] 1 Lloyd's Rep 387	49
<i>Department Of The Environment v Farrans (Construction) Ltd.</i> [1982] NI 11	74, 75
<i>Eikobina (M) Sdn Bhd V Mensa Mercantile (Far East) Pte Ltd</i>	23
<i>F.G. Minter Ltd v Welsh Health Technical Services Organization</i> [1980]13 Build LR 1	55, 72
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<i>H Parsons (Livestock) Ltd v Uttley Ingham &amp; Co Ltd</i> [1978] 1 All ER 525	25
<i>Hadley v. Baxendale</i> [1854] 9 Exch. 341	1, 11, 40
<i>Horne And Anor v Midland Railway Company</i> [L R] 8 C P 131	17
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<i>London Borough of Merton v. Stanley Hugh Leach Ltd</i> 32 Build LR 51	31
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<i>Millar's Machinery Co Ltd v David Way and Son</i> [1935] 40 Com Cas 204	43, 44
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<i>Patrick v Russo-British Grain Export.,Ltd</i> [1972] 2 K.B. 535	25
<i>Plenitude Holdings Sdn Bhd V Tan Sri Khoo Teck Puat &amp; Anor.</i> [1994] 2 MLJ 273	3, 14, 64
<i>Property And Land Contractors Ltd v Alfred Mcalpine Homes North Ltd.</i> 47 ConLR 74	75
<i>Rees &amp; Kirby Ltd v Swansea City Council</i> [1985]30 Build LR 1	55
<i>Robertson Group (Construction) Ltd v Amey-Miller (Edinburgh)</i> <i>Joint Venture and Ors</i> [2005] CSOH 60CA80/03	50, 71
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<i>Ruxley Electronics and Construction Ltd v. Forsyth</i> [1996] 1 AC 344	10
<i>Saint Line Limited v Richardsons, Westgarth &amp; Co., Limited</i> [1940] 2 KB 99	41, 44
<i>Semco Salvage and Marine Pte Ltd v Lancer Navigation Co Ltd;</i> <i>The Nagasaki Spirit</i> [1997] 1 All ER 502	50
<i>Seven Seas Properties Ltd v Al-Essa and another</i> [1993] 1 WLR 1083	68
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<i>Tate &amp; Lyle Food and Distribution Ltd v Greater London Council and another.</i> [1982] 1 W.L.R. 149	60,76
<i>The Heron II. Koufos v. C. Czarnikow, Ltd.</i> [1969] 1 AC 350	17, 21, 28
<i>Victoria Laundry (Windsor), Ltd. v. Newman Industries, Ltd.</i> [1949] 1 All ER 997	12
<i>Whittal Builders CO Ltd v Chester-Le-Street District Coucil</i> 40 Build LR 82	60
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## CHAPTER 1

### INTRODUCTION

#### 1.1 Background of Study

The foundation of remoteness of damage is contained in the judgment of Alderson B. in the Court of Exchequer in the case of *Hadley v. Baxendale*<sup>1</sup>:

*“Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as many fairly and reasonably be considered either arising naturally, i.e., according to the usual course of things, from such breach of contract itself, or such as many reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it.”*

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<sup>1</sup> (1854), 9 Exch. 341, p. 354

This statement of the law is generally known as the rule in *Hadley v. Baxandale*, and it will be seen that it consists of two branches of sub-rules.

It lays down that damages are recoverable:

- 1) When they are ‘such as may fairly and reasonably be considered arising naturally, i.e., according to the usual course of things’ from the breach, or
- 2) When they are ‘such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract’, provided that, in both cases, they are probable result of the breach.<sup>2</sup>

Regarding to the second branch of sub-rule, Alderson B. pointed out that, “*But, on the other hand, if these special circumstances were wholly unknown to the party breaking the contract, he, at the most, could only be supposed to have had in his contemplation the amount of injury which would arise generally, and in the great multitude of cases not affected by any special circumstances, from such a breach of contract. For, had the special circumstances been known, the parties might have specially provided for the breach of contract by special terms as to the damages in that case; and of this advantage it would be very unjust to deprive them.*”<sup>3</sup>

From this it will be seen that liability under the second branch of rule will depend upon the special circumstances made known to the party in default at the time he made the contract<sup>4</sup>.

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<sup>2</sup> The final words govern both branches: *Koufos v. C. Czarnikow, Ltd*, [1969] 1A.C. 350

<sup>3</sup> (1854), 9 Exch. 341, p. 355

<sup>4</sup> A.G. Guest, 1975, “Anson’s Law of Contract 24<sup>th</sup> Edition-Chapter XVII. Remedies For Breach of Contract” Oxford University Press, p.533

## 1.2 Problem Statement

Regarding to compensation for loss or damage caused by breach of contract, Section 74, Contracts Act 1950 reads:

1) When contract has been broken, the party who suffers by the breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from the breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it.

2) Such compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach.<sup>5</sup>

In *Plenitude Holdings Sdn Bhd V Tan Sri Khoo Teck Puat & Anor.*<sup>6</sup> Rumah Nanas Estate Sdn Bhd, the vendor agreed to sell to the plaintiffs, Plenitude Holdings Sdn Bhd a piece of estate land. The land was purchased for the purpose of development and the vendor was aware of this fact. The first defendant promised to obtain a loan for the plaintiffs and gave an undertaking that in the event that he was unable to do so, the defendants would join the plaintiffs in a joint venture to develop the land. The purchasers paid a deposit, but failed to pay the balance sum within the stipulated period. The vendor then terminated the agreement and forfeited the deposit. The trial judge came to the conclusion that the termination of the agreement by the vendor was not valid and ordered specific performance of the agreement for the sale

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<sup>5</sup> Contracts Act 1950 sc.74

<sup>6</sup> [1994] 2 MLJ 273

and purchase of the land, with damages to be assessed for wrongful termination and breach of undertaking. The defendants appealed to the Supreme Court which dismissed the appeal and affirmed the judgment of the High Court. In this application for assessment of damages which was made pursuant to the High Court order, the damages which fell to be assessed were, inter alia, for wrongful termination of the agreement, loss of profits on the development project and interest on the deposit paid by the purchaser to the vendor.

The court held that the defendants were fully aware that the plaintiffs had purchased the land for the purpose of development and that by not honouring their undertakings, the plaintiffs would be unable to proceed with the development and thereby suffer loss of profit on the proposed housing project.

The loss suffered by the plaintiffs was a natural and probable result of the defendant's breach of the contract and any loss of profit normally to be expected which the developer would have earned but for the breach, is an allowable claim under the rule in *Hadley v Baxendale*.

The questions arise including:

- a) Is in what situation and to what extent, damages are considered "remote and indirect loss or damage"?
- b) Is loss of profit, loss of bargain, and loss of opportunity<sup>7</sup> considered as remote and indirect loss or damages?
- c) How efficient local standard forms of contract in claiming the losses under the second branch of sub-rule in *Hadley v. Baxendale*?

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<sup>7</sup> Referred as "the losses"

### **1.3 Objective of Research**

The objectives of the study are:

1. To determine whether direct loss and expense is related to remoteness of damages.
2. To determine which limb of rule of *Hadley v Baxendale*, each head of claims lies under.

### **1.4 Scope of Study**

This research will be focused on following matter:-

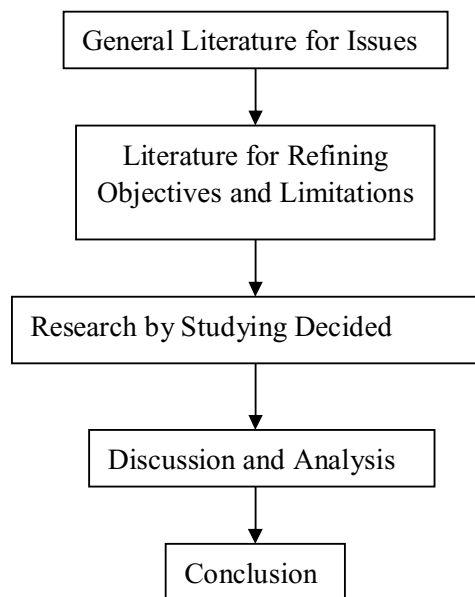
1. The related provisions in the standard forms of contract used in Malaysia, namely, JKR 203A, PAM 98.
2. Court cases related to the issue particularly Malaysian cases. Reference is also made to cases in other countries such as United Kingdom, Brunei, Singapore, Australia, and Hong Kong.



## 1.5 Significance of Study

This study is expected to reduce the uncertainty and difficulties in the event of claiming direct loss and expense that are deny under the reason of “remote and indirect loss or damage”. Construction industry stake holders will be more aware and clear of their position while dealing with remoteness of damages in contracts.

## 1.6 Methodology



**Figure 1.1 Flow of Methodology**

## REFERENCES

- A.G. Guest. (1975) *Anson's Law of Contract 24<sup>th</sup> Edition-Chapter XVII. Remedies For Breach of Contract*. Oxford University Press,
- Connolly J.P. (1999) *Construction Law Greens Concise Scots Law*. W. Green & Son Ltd.
- Keating, D. (1991) *Keating on Building Contracts 5<sup>th</sup> Edition*. London Sweet & Maxwell.
- Murdoch, J and Hughes, W. (1992) *Construction Contracts Law and Management*. E & FN Spon.
- Duncan Wallace, I.N. (1986) *Construction Contracts: Principles and Policies in Tort and Contract*. London Sweet & Maxwell.
- Powell-Smith V. and Stephenson D. (1999) *Civil Engineering Claims Third Edition*. Blackwell Science.
- Powell-Smith, V. and Sims, J. (1983) *Building Contract Claims*. Granada Publishing,