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Accrual of cause of action in negligence: IPP Financial Advisers Pte v Saimee bin Jumaat

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ACCRUAL OF CAUSE OF ACTION IN NEGLIGENCE

Case Comment: IPP Financial Advisers Pte Ltd v Saimee bin Jumaat

[2020] 2 SLR 272 / [2020] SGCA 47
Court of Appeal of Singapore
Steven Chong JA, Belinda Ang Saw Ean J, Woo Bih Li J
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I. Introduction

1 Damage is the gist of the action in negligence. An action in negligence is said to accrue only when damage arises. The precise timing of the damage is an important factor in an application to strike out a claim in negligence on the ground that it was filed out of time contrary to the Limitation Act. Consequently, the lawsuit may have to be initiated within a specified period from the accrual of the cause of action.

2 Cases of parties entering into transactions based on professional advice or representations are quite common. When a person purchases a property that is below the contracted value or enters into a loss-making contract due to the negligent advice of professionals, has he suffered damage as at the time of the purchase or contract? For example, the purchaser may not have sold the property at a loss or, with respect to the loss-making contract, the counterparty may not have made a demand for payment under the contract. In such instances, can we say that given that the risks of damage or the contingencies have not materialised, there is no damage and therefore the cause of action had not accrued? This was the central issue in *IPP Financial Advisers Pte Ltd v Saimee bin Jumaat*.[1]

3 The case involved Moi and Quek, two financial services consultants from IPP Financial Advisers Pte Ltd ("IPP"), who had advised a client (Saimee) to invest in the foreign exchange market through a trading account with a company known as SMLG Inc. Saimee alleged that Moi and Quek made representations that within a year from

[1] [2020] 2 SLR 272.

the date of investment, SMLG would pay Saimee the principal amount invested with a profit of 40%, the SMLG Investment was safe and capital guaranteed and that Moi and Quek had recommended the same to all of their clients.[2]

4 The plaintiff's case proceeded on the basis that Saimee, relying on those representations, opened a trading account with FX Primus Ltd for the purpose of the SMLG investment and transferred a total of US$620,900 into the bank account held by FX Primus. Later, due to certain glitches in the trading account, Moi and Quek informed Saimee that SMLG required a loan of US$200,000 before SMLG could resume trading and make the repayment to Saimee. However, the loan was not repaid. Moi and Quek then advised Saimee to enter into three separate settlement agreements with SMLG in which the latter would repay Saimee in full and final settlement of all claims relating to the SMLG investment.[3]

5 On 21 July 2018, Saimee commenced the lawsuit to claim the settlement sum from Moi and Quek for fraudulent or negligent representation and against IPP based on vicarious liability. The High Court judge – Choo Han Teck J – ordered Moi and Quek to compensate Saimee the sum of US$620,900 under the tort of negligence.[4]

6 On appeal by the defendants (appellants), the Court of Appeal dismissed the plaintiff's (respondent's) claim on the basis that it was time-barred. This decision was reached based on Chong JA's extensive treatment of case precedents primarily from England, Australia and Singapore on the accrual of an action in negligence under the Limitation Act.[5] It concluded that the cause of action did not accrue from the time of the investment entered into by the respondent but only when SMLG failed to repay the respondent.

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2 [2020] 2 SLR 272, [11].
3 [2020] 2 SLR 272, [18].
4 Choo J dismissed the allegation based on fraudulent representation.
5 (Cap 163, Rev Ed 1996).

II. Burden of Proof in Cases Involving Limitation Periods

7 Before examining the issue of actual versus contingent losses and transactions induced by negligent representations, the court had to first tackle a preliminary point pertaining to the burden of proof. Chong JA put the question succinctly:[6]

> "Once a limitation defence is pleaded, is the burden on the defendant to prove that the claims are time-barred as pleaded or is the burden always on the plaintiff to prove that the claims were brought within the applicable limitation period?"

8 The court held that it was for the plaintiff to prove that the date of accrual of action was within the six-year limitation period.[7] Chong JA cited[8] McGee on Limitation Periods:[9] when the plea of limitation period is made by the defendant, "*the burden of proof on this point will then normally be transferred to the claimant to show that the action is not time-barred*." This position was also supported by two English Court of Appeal decisions: *London Congregational Union Inc v Harriss & Harriss*[10] and *Cartledge v E Jopling & Sons Ltd*.[11] The House of Lords in *Cartledge v E Jopling & Sons Limited* also stated that when the plaintiff has proved an accrual of action within six years, "*the burden passes to the defendants to show that the apparent accrual of a cause of action is misleading and that in reality the causes of action accrued at an earlier date*."[12]

9 The practical effect of placing the burden of proof on the plaintiff is that if the plaintiff is not able to adduce evidence to show on a balance of probabilities that damage (or a particular category of damage) has occurred within the limitation period, he will be prevented from recovering that (category of) damage.[13]

10 That the plaintiff bears the legal burden of showing that the claim has been made within the limitation period is, in my view, justifiable. The Limitation Act states that an action "shall not be brought

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6 [2020] 2 SLR 272, [4].
7 [2020] 2 SLR 272, [41].
8 [2020] 2 SLR 272, [37].
9 (Sweet & Maxwell, 8th Ed, 2018), [21-002] and [21-014].
10 [1988] 1 All ER 15, 29 – 30, *per* Ralph-Gibson LJ.
11 [1962] 1 QB 189, 202, *per* Harman LJ and 208, *per* Pearson LJ.
12 [1963] AC 758, 784, *per* Lord Pearce.
13 See *London Congregational Union Inc* [1988] 1 All ER 15.

after the expiration of" the specified limitation period.[14] Just as the plaintiff has to file and serve a writ of summons to initiate his claim, he also has to observe the procedural time limits under the Act for making his claim. The latter requirement, albeit procedural in nature, forms part of the plaintiff's overall case for which he shoulders the burden of proof. More specifically, in cases involving the accrual of action in negligence based on damage, placing the burden on the plaintiff to show damage coming into existence within the limitation period is aligned with his overall legal burden of proving the legal elements in negligence (comprising duty of care, breach, causation and remoteness requirements for damage). Though a plea of limitation period specifically made under the Rules of Court[15] is referred to as a defence in the Limitation Act,[16] it is not a substantive defence in negligence to be determined on the merits. Rather, it is a matter of civil procedure in contrast to legal defences such as *ex turpi causa*, *volenti non fit injuria* or contributory negligence where the burden of proof falls on the defendant.

11 It would also be useful to differentiate the plaintiff's *legal* burden to prove accrual of action within the limitation period, from the defendant's *evidential* burden[17] to show the opposite. The legal burden should be treated as remaining with the plaintiff; thus, there is no need to speak of the legal burden being "transferred" to the defendant. In practice, however, once the plaintiff has submitted his case on limitation periods, the court would look to the defendant to discharge his evidential burden by providing evidence that the plaintiff's case on limitation period is misplaced or incorrect.

14 Section 24A (3).
15 Order 18 rule 8.
16 Section 4.
17 The term "evidential burden" was used by Ralph-Gibson LJ in *London Congregational Union Inc* [1988] 1 All ER 15.

III. Accrual of Cause of Action in Tort of Negligence: Actual vs Contingent Loss and the "Transaction" Approach

12 The relevant provision for tort claims in respect of damages (in this case, financial losses) is section 24(3)(a) of the Limitation Act, which refers to a period of six years from the date on which the cause of action accrued (*i.e.*, when damage occurs).[18] On this point, four possible dates of accrual of action were explored by the Court of Appeal:

(a) 21 September 2012, being the date on which the settlement sum was due but not paid;
(b) 24 June 2012, being the date on which the US$200,000 loan was due but not repaid;
(c) 27 April 2011, 17 June 2011 and 3 February 2012, being the dates on which the SMLG investment was made via three tranches of payment; and
(d) 27 April 2012, 17 June 2012 and 3 February 2013, being the dates on which each of the SMLG investment sums became due for repayment.

13 In the lower court, Choo J had held that time only started to run upon default of the settlement agreements indicated in option (a), and accordingly decided that the claims were not time-barred.

14 However, the Court of Appeal instead decided on option (d): that Saimee's cause of action against the appellants accrued on 27 April 2012 when he suffered actual loss on his first tranche of payment. As Saimee failed to file the writ of summons by 27 April 2018, his claim was time-barred.[19]

15 The Court of Appeal rejected the other three options. First, Choo J's decision to base the computation of the limitation period on the settlement agreements did not cohere with the pleaded loss of the claimants. The pleaded loss was allegedly caused by Moi and Quek's negligent misrepresentations regarding the SMLG investment, and was not in connection with the settlement agreements.[20] Thus, option (a) was rejected.

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18 *Lian Kok Hong v Ow Wah Foong* [2008] 4 SLR(R) 165, [24].
19 [2020] 2 SLR 272, [103].
20 [2020] 2 SLR 272, [53].

16 Second, Moi and Quek relied on option (b) based on Saimee's knowledge that SMLG's investment was in jeopardy, or that "something was seriously wrong" with it.[21] The plaintiff's knowledge, however, is irrelevant to the issue of when a cause of action accrued under s 24(3)(a).

17 Third, and this is the most important point, option (c) was rejected on the ground that at the time of the SMLG investment, the loss in question was purely contingent and had not crystallised as actual damage.[22]

18 This distinction between contingent and actual losses generated much controversy. The case precedents generally agree on the need to show actual damage for the purpose of determining the date of accrual of action, but differ on what would be considered as contingent loss in specific situations and/or the precise point in time when actual damage has occurred. In this regard, there are material differences between an English precedent: *Forster v Outred & Co* ("***Forster***"),[23] and an Australian decision: *Wardley Australia Ltd v State of Western Australia* ("***Wardley***").[24] As we will see below, the Court of Appeal in *IPP* ultimately preferred the approach in *Wardley*.

A. Actual versus (Purely) Contingent Losses

19 *Forster* held that the plaintiff's action in negligence against her solicitors accrued from the date she entered into a mortgage deed in 1973, to secure a loan taken out by her son following the solicitors' negligent advice. This was despite the fact that the bank made the demand for her to repay the loan only in 1975. The court therefore dismissed her action, which she commenced in 1980, due to the time-bar. Dunn LJ stated that for economic losses, the damage crystallised and the action accrued at the date on which the plaintiff, in reliance on the negligent advice, acted to her "detriment".[25] According to the learned judge, the difference between holding the property free of encumbrances and holding the property subject to a mortgage constituted a quantifiable loss, and that the action accrued when the mortgage was executed

[21] [2020] 2 SLR 272, [60].
[22] [2020] 2 SLR 272, [95].
[23] [1982] 1 WLR 86.
[24] (1992) 109 ALR 247 (28 October 1992).
[25] [1982] 1 WLR 86, 99 – 100.

without proof of special damages. The *Forster* approach has been followed by English courts.[26]

20 The Singapore High Court in *People's Parkway Development Pte Ltd v Akitek Tenggara*[27] also applied *Forster.* When the plaintiff relied on an erroneous layout plan drawn up by the defendant architects, and the piling works that were carried out encroached on government land, the court stated "the plaintiffs had incurred a contingent liability which was capable of monetary assessment".[28] It also considered a later date when the encroachment had been discovered and the plaintiff chose to accept the requirement of the government authorities to acquire an additional portion of land at a cost.[29] The High Court held that [his/her] claim was time-barred based on either of the two possible dates. However, the High Court did not have the benefit of the *Wardley* decision, which was decided shortly after.

21 The Australian precedent *Wardley* took a rather different approach. It concerned an indemnity executed in 1987 by the respondent in favour of a bank against a facility granted by the bank to a company (Rothwell). The respondent executed the indemnity due to the appellant's misleading and deceptive conduct under the Trade Practices Act 1974. The Australian High Court ruled that the cause of action under the statute did not accrue at the time the indemnity was executed by the respondent, as it was construed as creating a liability on the part of the respondent to the bank to make payment *if and when* the bank's net loss was ascertained and quantified, and provided the bank made a demand for payment.[30] This meant the respondent's liability to pay under the indemnity was contingent upon the bank ascertaining it had incurred a

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[26] *D W Moore & Co Ltd and others v Ferrier and others* [1988] 1 All ER 400 (action accrued upon the execution of an agreement containing a limited restrictive covenant against competition since at the moment of execution, the plaintiffs obtained a valueless invalid covenant, as opposed to a valuable valid restrictive covenant); *Bell v Peter Browne & Co* [1990] 3 WLR 510 (action in negligence against solicitors accrued at the time of the transfer of property by the claimant to his wife without the benefit of protection via a trust deed or mortgage); and *Knapp v Ecclesiastical Insurance Group Plc* [1998] PNLR 172 (where the defendant brokers negligently omitted to disclose material facts to insurers when making arrangements for the renewal of insurance for the claimants' outbuildings).

[27] [1992] 2 SLR(R) 469 (4 August 1992). This was not cited by the Court of Appeal in *IPP*.

[28] [1992] 2 SLR(R) 469, [5].

[29] [1992] 2 SLR(R) 469, [15].

[30] (1992) 109 ALR 247, 252, *per* Mason CJ, Dawson, Gaudron and McHugh JJ.

loss and making a demand for repayment. Even the "likelihood, perhaps the virtual certainty, that there would be a loss"[31] did not render it an actual liability.

22 According to the majority in *Wardley*, the plaintiff may have sustained a "detriment" upon entering into the agreement induced by the defendant in that the agreement "subject[ed] the plaintiff to obligations and liabilities which exceed[ed] the value or worth of the rights and benefits which it confer[ed] upon the plaintiff". However, this detriment is not the same as actual loss or damage.[32] Another judge, Deane J, described the "detriment" as "the risk or (in view of the falseness of the representations) greater risk that [the plaintiff] would come under an actual liability to make a payment of money if a possible or (in view of the falseness of the representations) probable factual situation came about."[33] Hence, mere detriment and risks of liability were distinguished from actual liability. The Australian approach in *Wardley* has since been endorsed in subsequent English cases.[34]

23 As mentioned above, the Singapore Court of Appeal in *IPP* preferred the stance in *Wardley*. It also endorsed the approach in the Singapore High Court decision of *Wiltopps (Asia) Ltd v Emmanuel & Barker* ("***Wiltopps***"):[35] that the yardstick is "*actual loss or damage, not future loss or damage, however likely it was that that would occur*". In *Wiltopps*, the defendant lawyers assisted the plaintiff (client) in arresting the vessel of a third party (a corporate entity) which then put up a bail bond in respect of the vessel. The plaintiff alleged that the defendant

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31 (1992) 109 ALR 247, 252, *per* Mason CJ, Dawson, Gaudron and McHugh JJ.

32 (1992) 109 ALR 247, 254, *per* Mason CJ, Dawson, Gaudron and McHugh JJ.

33 (1992) 109 ALR 247, 267.

34 *UBAF Ltd v European American Banking Corporation* [1984] 2 All ER 226 (plaintiff did not necessarily suffer damage by merely entering into the contract); *First National Commercial Bank plc v Humberts (a firm)* [1995] 2 All ER 673 (value of property was sufficient to secure the loan and hence no damage at the point of loan transaction); *Nykredit Mortgage Bank plc v Edward Erdman Group Ltd (No 2)* [1998] 1 All ER 305 ("*Nykredit*") (accrual date, for the purpose of determining interest payments on damages awarded, was the date on which the lender actually suffered the loss attributable to the valuer's breach of duty in overvaluing the properties); and *Law Society v Sephton & Co (a firm) and others* [2006] UKHL 22 (the Law Society's liability, before it claimed for compensation from the Solicitor's Compensation Fund a sum of money that was paid to the victims of a solicitor's fraud, was purely contingent and did not amount to damage).

35 [1998] 2 SLR(R) 778, [10], citing *Hopkins v Mackenzie* [1994] TLR 546, *per* Saville LJ.

lawyers had negligently[36] advised the plaintiff to accept the bail bond for an inadequate sum for the release of the vessel. After accepting the bail bond and releasing the vessel, the plaintiff could not subsequently obtain repayment from the third party which had been wound up. Chao J in *Wiltopps* held that the bond could be invoked only if two contingencies materialised, namely: (i) the plaintiff obtained a judgment or settlement in its favour, and (ii) the third party was not able to satisfy it.

24 Thus, to the Singapore Court of Appeal in *IPP*, the crucial enquiry was when the claimant suffered actual loss. Its view was that a purely contingent loss was not in itself damage until, and not before, the contingency occurred.[37] The decision was rationalised on the ground that "to compel a plaintiff to institute proceedings before the ascertainable existence of at least some of his loss is unjust". [38] In this regard, the Court of Appeal also endorsed Chao J's test in *Wiltopps*:[39]

> "… as an indicative litmus test to ascertain whether loss has occurred such that a cause of action has accrued – to determine whether a cause of action in tort has accrued is to ask whether a plaintiff would have succeeded if he had sued at any time after the occurrence of the negligent act complained of."

25 We should briefly note two other recent Singapore decisions mentioned by the Singapore Court of Appeal in *IPP*. The first – *Liew Soon Fook Michael v Yi Kai Development Pte Ltd* ("***Liew***")[40] – decided that in relation to the tort of negligent misrepresentation, damage would occur at the point when the purchaser entered into the sale and purchase agreement due to misrepresentations by the defendant developers. In the second case, *Koh Kim Teck v Credit Suisse AG, Singapore Branch*,[41] the limitation period for the plaintiff's claims started to run from the time that the plaintiff purchased financial products, and not when the risks materialised. The approach in these cases, as we shall see in the discussion below, presents problems when attempting to reconcile *IPP* with the previous decisions.

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36 The High Court decided that in any event, the defendant lawyers were not negligent: [54] – [55] and [64].
37 [2020] 2 SLR 272, [90].
38 [2020] 2 SLR 272, [91].
39 [2020] 2 SLR 272, [91] referring to *Wiltopps (Asia) Ltd v Emmanuel & Barker* [1998] 2 SLR(R) 778, [27].
40 [2017] SGHC 88.
41 [2019] SGHC 82.

B. The Transaction Approach

26 In addition to the issue of actual versus contingent losses, *IPP* discussed an alternative approach which relied on the effect of the *transaction* entered into by the plaintiff. To quote Lord Hoffmann in *Sephton*,[42] transaction cases refer to those where the "plaintiff had paid money, transferred property, incurred liabilities or suffered diminution in the value of an asset and in return obtained less than he should have got". An example of a transaction case was *Shore v Sedgwick Financial Services Ltd* ("***Shore***")[43] where the plaintiff was advised to transfer his pension from a particular type of pension scheme to another pension income withdrawal scheme that was inferior due to higher risks. The court held that the plaintiff suffered loss when he invested in the second scheme, thus exposing him to the risk of financial harm.

27 Another case – *Maharaj v Johnson* ("***Maharaj***")[44] – concerned the distinction between the concepts of "flawed transaction" and "no transaction". The defendants did not warn the purchaser concerning the proper signatory of the deed of conveyance, which meant the legal interest in the land was not transferred to the purchaser. It was regarded as a "flawed transaction" case,[45] as in the absence of the defendants' breach of duty, the claimants would have entered into an analogous transaction in which the land would be conveyed to them. Conversely, in the "no transaction" cases, in the absence of the defendant's breach of duty, the plaintiff would not have entered into any transaction at all. On the facts, the majority[46] decided that the claimants suffered actual damage upon their execution of the deed of conveyance in 1986.[47] This was due to the risks that the rightful vendor could not be located or had died and the additional costs needed to procure the vendor's execution of the deed. The Privy Council regarded the risks as having generated "immediate and (no doubt with difficulty) a quantifiable reduction from the value of the asset which the claimants should have received" rendering their losses not purely contingent.[48]

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42 [2006] 2 AC 543, [22].
43 [2008] EWCA Civ 863.
44 [2015] UKPC 28, [35].
45 [2015] UKPC 28, [22].
46 Lord Wilson (with whom Lady Hale, Lord Carnwath and Lord Hodge agreed).
47 [2015] UKPC 28, [27].
48 [2015] UKPC 28, [28].

28 The Singapore Court of Appeal did not endorse the "transaction" approach, in particular the distinction between "flawed transaction" and "no transaction," due to the different interpretations in *Maharaj*.[49] However, it acknowledged that *Maharaj* was "an obvious "flawed transaction" case since the defendants' duty was to take all reasonable care to ensure that legal and equitable ownership of the land became vested in the plaintiffs".[50]

C. Analysis

(1) Strength of IPP's approach

29 The Court of Appeal's decision in *IPP* has significantly clarified the approach for ascertaining the date when financial damage arises in negligence. Its approach, which is based on whether the loss in question is purely contingent or not, is indeed preferable to the transaction approach.

30 In addition to the ambiguous treatment of "flawed transaction" and "no transaction" cases in *Maharaj*, there are two other reasons for rejecting the transaction approach to determine the existence of damage. First, transaction cases did not always involve contingent liability. Lord Walker in *Sephton*[51] referred to transaction cases where the "claimant has as a result of professional negligence suffered a diminution (sometimes immediately quantifiable, often not yet quantifiable) in the value of an existing asset". Identifying a "transaction case" *per se* does not therefore yield concrete outcomes on the issue of limitation periods. Second, as admitted in *Maharaj*[52] itself, "[t]he fact that the transaction was flawed does not by itself mean that the claimant suffered actual damage on entry into it." Hence, a closer analysis based on the factual matrix is needed.

31 A few remarks may be briefly made regarding the inter-related concepts employed in determining damage for the purpose of limitation periods, namely: equity of redemption; the distinction between actual loss and risks of loss; and the concept of "worse off" for determining when financial damage arises.

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49 [2020] 2 SLR 272, [93].
50 [2020] 2 SLR 272, [93].
51 [2006] 2 AC 543, [48].
52 [2015] UKPC 28, [26].

32 The first concerns the equity of redemption.[53] *Forster* stated that, upon the plaintiff's execution of the mortgage, there was an immediate effect on the value of the plaintiff's equity of redemption. On this point, the Singapore Court of Appeal in *IPP*[54] noted that the House of Lords in *Sephton*[55] treated the effect as "a contingent liability" to be distinguished from damage, and that Chao J in *Wiltopps*[56] considered it "quite artificial" to say that the execution of the mortgage constituted actual loss.

33 In practical terms, the mortgage gave rise to an encumbrance on the mortgagor's property at the time of execution. This may be explained by reference to the detriment versus actual damage distinction, as discussed in *Wardley* above and which was cited by the Court of Appeal in *IPP*.[57] Arguably, the encumbrances on the property at the time of the execution of the mortgage in *Forster* involved the additional obligation to ensure the loan was repaid by the borrower or the mortgagor herself (*i.e.*, mere detriment) that would not have materialised into actual damage unless and until the loan defaulted and the bank made a demand for repayment.

34 This brings us to the second conceptual point on the distinction between actual loss and risks of loss. Cases that concerned the plaintiff's mere exposure to risks that have not materialised (*i.e.*, purely contingent liability) such as in *Shore* and *Koh Kim Teck* should not be construed as constituting actual damage; hence, according to the Court of Appeal, they were wrongly decided.[58]

35 Relatedly, how relevant is the third concept of "worse off" for determining when financial damage arises? It has been applied, for instance, in *Wardley*, *Nykredit*,[59] and a recent English case *Holt v*

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53 This refers to the right of the mortgagor to redeem the property when the debt is fully repaid in a classic legal mortgage: Alvin See, Yip Man and Goh Yihan, *Property and Trust Law in Singapore* (Wolters Kluwer, 2019), [580]. The authors preferred to describe it as the "mortgagor's power to discharge the mortgage" for both registered and equitable mortgages in Singapore which only operate as encumbrances on the property.

54 [2020] 2 SLR 272, [69] and [90].

55 [2006] UKHL 22, [30], *per* Lord Hoffmann.

56 [1998] 2 SLR(R) 778, [25].

57 [2020] 2 SLR 272, [69].

58 [2020] 2 SLR 272, [92]. There was, however, no analysis of *Liew*.

59 Damage arises when the lender is financially worse off by reason of a breach of the duty of care than he would otherwise have been: [1998] 1 All ER 305, 312 and 317.

Holley.[60] The Court of Appeal in *IPP*, in reference to *Shore* and *Koh Kim Teck*, stated that the plaintiffs could not be said to be "worse off" at the time they entered into the respective transactions induced by the defendant's negligent representation or advice, "given the advantages enjoyed at that point in time".[61] This suggests that the question of whether and when damage has come into existence requires a balancing between costs or disadvantages and the benefits or advantages at the relevant time. This concept would allow for a nuanced analysis depending on the factual matrices.

(2) Further clarification still required

36 While the *IPP* decision has certainly enhanced our understanding about the concept of damage coming into existence for determining accrual of actions in negligence, the decision has indirectly raised three issues which may require further clarification.

37 First, one might question whether the *Wiltopps* test (*i.e.*, whether a plaintiff would have *succeeded*[62] if he had sued at any time after the occurrence of the negligent act complained of) is too demanding. The compliance with limitation periods is about the procedural, rather than substantive rights of the plaintiff on the merits of the case. Establishing the element of damage, and the task of proving damage for the purpose of successful recovery of substantial damages in the negligence action based on causation and remoteness requirements, are separate matters. The plaintiff may show that damage has taken place but fail to show the damage had occurred but for the defendant's breach or that the type of loss suffered was reasonably foreseeable. Indeed, a narrower test, for example, "whether the plaintiff *would be able to establish that actionable damage as pleaded had occurred for the purpose of the claim in negligence* if he had sued at any time after the occurrence of the negligent act complained of", might be more appropriate.

60 [2020] EWCA Civ 851 (7 July 2020).
61 [2020] 2 SLR 272, [92].
62 Emphasis added by author.

38 Second, can the decision in *IPP* be reconciled with the 2008 case of *Lian Kok Hong v Ow Wah Foong* ("***Lian Kok Hong***")?[63] The Singapore Court of Appeal in *Lian Kok Hong* treated the actual damage as having taken place when the owner of a project (plaintiff/appellant) relied on the termination certificate issued by the architect (defendant/respondent) and terminated the contract with the contractor on 19 March 1999. It stated explicitly that the appellant "suffered injury immediately".[64] On the facts, the contractor had disputed the validity of the termination certificate and wanted to send the dispute for arbitration. The interim award was made in 2003 and the final award in 2006. As the writ was filed shortly after the final award in 2006, the appellant's claim was time-barred under s 24A(3)(a). The Court of Appeal rejected the appellant's argument that the damage occurred only when the arbitral award was made.

39 *Prima facie*, it would appear that *IPP* and *Lian Kok Hong* are not consistent. Moreover, the Court of Appeal in *Lian Kok Hong* did not cite *Wiltopps*. If we were to now apply the test in *Wiltopps*, can it be said that the appellant in *Lian Kok Hong* "would have succeeded if he had sued at any time after the occurrence of the negligent act complained of" (*i.e.*, at any time after the respondent negligently issued the termination certificate)? What damage if any did the appellant suffer when he terminated the contract based on the respondent's termination certificate? After all, if the contractor had duly accepted the termination certificate without protest, there would have been no damage to be claimed.

40 However, as the contractor had in fact disputed the validity of the termination certificate, one consideration is whether the appellant had already suffered damage in having to incur time costs and expenses to meet the contractor's legal challenge via arbitration proceedings. The Court of Appeal in *Lian Kok Hong* did not mention this point. One question here is whether such time costs and expenses in connection with the arbitration can form part of the pleaded damage flowing from the respondent's wrongful advice on the termination certificate.

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63 [2008] 4 SLR(R) 165, [25].
64 [2008] 4 SLR(R) 165, [25].

41 Further, it was a possibility then that the arbitration might ultimately favour the appellant.[65] If so, could the appellant's loss at that time not be regarded as contingent upon the arbitral award against him? If the appellant had sued the respondent based on the termination of contract in reliance of the respondent's negligent advice on the termination certificate, the respondent could have legitimately countered that the claim was premature since the merits of the dispute between the appellant and contractor had not been determined. If so, can the plaintiff's position at that time be analysed as importing a mere risk of liability or that he was not as yet financially worse off as a result of the respondent's negligence? None of the case precedents examined in *IPP*, however, concerned a contingency that is dependent on the resolution of a legal dispute.

42 Thirdly, the decision in *IPP* raises a side question as to how we should treat other types of claims for financial losses,[66] for example, those arising from the purchase of a property with inherent defects due to the architect's negligent design or the builder's negligent construction. It has been said that where a house is designed or built with defects, the purchaser takes the property that is already damaged and suffers pure economic loss (as opposed to property damage) based on the reduced value of the property.[67] This statement may give rise to the notion that financial damage would already have occurred at the time of purchase of the defective property.

43 If we were to apply the *Wiltopps* test, we could counter that there is only a "paper loss" at the time of the transaction based on the reduced market value of property and the plaintiff would not be entitled to recover any damages if he had sued immediately after the purchase. This is distinct from actual damage that may arise only when the purchaser has sold the defective property at a loss or incurred costs to remedy the defects. This would ensure consistency with the approach in *IPP* and *Wiltopps*. Of course, whether such an argument would be accepted remains to be seen.

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[65] We now have the benefit of hindsight that the arbitrator ruled against the appellant, but such an outcome would not have been apparent to the appellant at the time of the contract termination.

[66] See Andrew McGee, "Economic loss and the problem of the running of time" (2000) 19 *Civil Justice Quarterly* 39 – 55.

[67] Simon Deakin, Angus Johnston & Basil Markesinis, *Markesinis and Deakin's Tort Law* (Clarendon Press, 6th Ed, 2008), 126.

IV. Concluding Remarks

44 The *IPP* decision is certainly welcomed for its clarification on a controversial issue as to when damage has come into existence for the purpose of ascertaining limitation periods. By distinguishing actual damage from purely contingent liability, mere detriment or risk of damage, the focus on actual damage provides a clearer benchmark for ascertaining accrual of actions in negligence as compared to the more ambiguous "transaction" approach. However, there remain a few questions relating to the relatively stringent *Wiltopps* test endorsed in *IPP*, the apparently inconsistent *Lian Kok Hong* decision in light of *IPP*, and the applicability of *IPP* to cases of negligent construction or design resulting in defective property purchased by the plaintiff.