CHAPTER FOUR

Judicial Circumvention of Doctrine of Privity – Promisee's Remedies for Breach of Contract

I. Introduction

As seen in Chapter 3, the introduction of statutory exceptions has brought relief to the difficulties caused by the doctrine of privity. However, the application of these exceptions is limited to certain types of contracts only. To fill the lacuna, the courts have utilised various mechanisms to plug the gaps left by the statutory exceptions. This chapter will examine the various common law mechanisms and their development. It will also be examined whether there is any parallel development in Malaysia and the feasibility of adopting them.

The common law mechanisms discussed in this chapter are the promisee's remedies for breach of contract.[1] Although the privity doctrine prohibits the third party to enforce a contract, the promisee may be able to ensure that the third party will receive his benefit as intended. With the assistance of remedies for breach of contract, the promisee is able to hold the promisor to his promise and to compel him to keep his promise to benefit the third party. This can be achieved by the remedy of specific performance, injunction and stay of proceedings. On the other hand, claims of damages are suitable in situations where these remedies (specific performance, injunction or stay of proceedings) are unavailable. The damages claimed can be used to benefit or compensate the third party for any losses

[1] The common law mechanisms allowing third parties to enforce contracts made for their benefit are covered in Chapter 5.

suffered due to the breach of contract by the promisor. The English position on this area of the law will be first examined followed by the Malaysian position.

II. Specific Performance and Injunction

Specific performance is an order of the court to compel the defendant to perform his part of the contract. Injunction is an order of the court to prevent the defendant from acting in breach of the contract with the plaintiff.

A. Position in England

The utilisation of specific performance to circumvent the harshness created by the doctrine of privity is seen in *Beswick* v *Beswick.*[2] In this case, the deceased transferred his business of a coal merchant to his nephew in return for the nephew's promise that the deceased would be appointed as a consultant to the said business and after his death, the nephew would pay annuity to the deceased's wife. After the death of the deceased, the nephew refused to make payments to the widow after making the first payment. The widow brought an action against the nephew in her capacity as administratrix and also in her personal capacity for specific performance of the agreement. The House of Lords in a unanimous decision held that the widow in her capacity as the administratrix of the deceased was entitled to an order for specific performance to compel the nephew to perform his obligation under the contract with the deceased.

[2] [1968] AC 58.

There were a number of factors which led the Law Lords to reach this conclusion which can serve as a guide for deciding similar claims in the future. Firstly, the House of Lords held that an award of damages was inadequate to achieve justice in this case. This conclusion was reached despite the fact that four of the five House of Lords judges[3] held that the deceased's estate suffered nominal damage only. An award for nominal damages in this case would be unjust. Lord Reid emphasised that:

> If that (nominal damages) were the only remedy available the result would be grossly unjust. It would mean that the appellant keeps the business which he bought and for which he has only paid a small part of the price which he agreed to pay. He would avoid paying the rest of the price, the annuity to the respondent, by paying a mere 40s. damages.[4]

Secondly, it was highly unfair for the nephew to escape from performing the contract as his uncle had fulfilled his obligation under the contract. The principle of mutuality required the nephew to perform his part of the contract as well.

Thirdly, specific performance was granted to avoid multiplicity of proceedings.[5] This consideration is most relevant in relation to contracts where performance of the contract is done periodically. If the contract is specifically enforced, the claimant will not need to take legal action every time the contract is breached.

In relation to contracts made for the benefit of third parties, the above factors are applicable. It is strongly argued that nominal damages are inadequate as it will not give

---

[3] Lord Pearce, at 88 (*Beswick*) was of the opinion that the estate of the deceased suffered substantial damages but damages would be a less appropriate remedy.
[4] At 73 (*Beswick*).
[5] Per Lord UpJohn, at 97 (*Beswick*) applying *Swift* v *Swift* (1841) 3 Ir Eq R 267. A similar principle is found in s.52(3)(e) Specific Relief Act 1950 (Revised 1974) (Act 137) (Malaysia) in relation to the granting of a perpetual injunction.

effect to the promisee's intention to benefit the third party.[6] It is fair to compel the promisor to perform his promise where the promisee has fulfilled his part in exchange for the benefit to the third party.

The remedy of injunction is useful in situations where negative promises are made to benefit third parties.[7] It is submitted that the principles governing the granting of injunctions in relation to contracts made for the benefit of third parties should be similar to the principles governing the granting of specific performance. This should be the legal position as the rationale behind these remedies is similar that is to ensure that the promisor performs the obligation under the contract.

B. Position in Malaysia

Specific performance and injunction are governed by the Specific Relief Act 1950 (hereinafter referred to as 'SRA 1950'). The granting of these orders is at the discretion of judges guided by the provisions in SRA 1950 in exercising their discretion.[8] They have generally adopted a liberal and generous approach in determining this matter.[9] The relevant factors in determining whether this remedy should be granted are not exhaustive.[10]

---

[6] Treitel, G.H., "Specific Performance and Third Parties" (1967) 30 *MLR* 687–693, at 693. In this article, Treitel, at 692, welcomed the liberal approach adopted by the House of Lords in *Beswick* in granting the remedy of specific performance.

[7] Peel, Edwin, *Treitel - The Law of Contract*, 12th Edition, (Sweet & Maxwell, 2007) (hereinafter referred to as '*Law of Contract*'), at 639. There is no reported case where injunction is granted in relation to a contract made for the benefit of third parties. However, injunction is a discretionary remedy where it will be granted if it is just and fair to do so after taking into account all the circumstances; *Cantor Gaming Ltd* v *GameAccount Global Ltd* [2007] EWHC 1914.

[8] Section 21(1) SRA 1950 for specific performance and s.50 SRA 1950 for injunction.

[9] Abdul Malik Ishak J (as he then was) held in *Mawar Awal (M) Sdn Bhd* v *Kepong Management Sdn Bhd* [2005] 6 MLJ 132, at 141 that "The relief of specific performance is liberally and generously granted so long as the circumstances warrant it." Abdul Malek Ahmad FCJ in *Sri Kelangkota-Rakan Engineering JV Sdn Bhd* v *Arab-Malaysian Prima Realty Sdn Bhd* (FC) [2003] 3 MLJ 257, at 272-273 stated that "Being essentially equitable relief (specific performance), there is a **fairly wide discretion** available to the trial judge to

A benevolent approach along the lines of *Beswick* is found in *Ramli bin Shahdan* v *Motor Insurer's Bureau of West Malaysia.*[11] The Court of Appeal in this case unanimously adopted Lord Denning's judgment in *Gurtner* v *Circuit*[12] where the promisee was entitled to specific performance to enforce a contract made for the benefit of third parties.

In *Macon Works & Trading Sdn Bhd* v *Phang Hon Chin,*[13] Hashim Yeop A Sani J (as he then was) referred to *Beswick* where the widow (administratrix) was entitled to claim specific performance despite the fact that the deceased's estate only suffered nominal damages without any disapproval. Hashim Yeop A Sani J went on to state that:

> The present action is for specific performance which is a discretionary remedy exercisable in equity. In equity, all that is required is to show circumstances which would justify the intervention by a Court of equity.[14]

Thus, even if a promisee is suffering from nominal damages, arguably he can still pray for an order of specific performance if it is just for him to do so in light of surrounding circumstances. The court is likely to grant such order if he has "done substantial acts"[15] as required in the contract.

It is submitted that the Malaysian courts are willing to exercise their discretion where necessary to grant specific performance to do justice in cases that come before them. The

---

determine where the balance of justice lies when making up his mind" (emphasis added). The 'balance of justice' consideration is also adopted by the courts in determining whether to grant an interlocutory injunction or in cases involving breach of negative covenant; *Medlux Overseas (Guersey) Ltd* v *Faber Medi-Serve Sdn Bhd* (CA) [2001] 4 CLJ 192.

[10] As per Abdul Malik Ishak J in *Koek Tiang Kung* v *Antara Bumi Sdn Bhd* [2005] 8 CLJ 311.

[11] [2006] 2 MLJ 116. The facts of *Ramli Shahdan* were discussed in Chapter 3 Part III.

[12] [1968] 1 Lloyd's Rep 171, at 176.

[13] [1976] 2 MLJ 177. This case concerned a written option of a piece of land which did not involve any contract made for the benefit of a third party.

[14] At 182 (*Macon Works*).

[15] Section 21(3) SRA 1950 was applied in *Koek Tiang Kung* v *Antara Bumi Sdn Bhd* [2005] 8 CLJ 311 and *Soo Lip Hong* v *Tee Kim Huan* (CA) [2005] 4 CLJ 119.

injustices created by the privity doctrine to contracts made for the benefit of third parties will be taken into account by the courts. Although the cases deal mostly with specific performance, the same approach will be taken in dealing with injunction since the principles governing these two remedies are similar.[16]

III. Stay of Proceedings

Where the promisor agrees to forgo certain legal rights against the third party in return for consideration but later changes his mind and takes a legal action against the third party, the promisee can intervene to stay the proceedings[17] to hold the promisor to his promise. By doing so, the third party is protected.

A. Position in England

In *Gore* v *Van Der Lann,*[18] a pensioner boarded the Liverpool Corporation's bus and was given a free pass which excluded liability of the corporation and its servant. The pensioner sued the bus conductor alleging that she was injured due to the negligence of the bus conductor. The corporation was not named as a defendant in this suit. The corporation applied for a stay of proceedings on the ground that the pensioner had no right to sue due to the exclusion clause. The corporation's application was rejected by the Court of Appeal on

[16] According to s.52(2) SRA 1950, the court shall be guided by the rules and provisions contained in Part II of SRA 1950 (these rules govern the granting of specific performance). There is no reported case which discusses the possibility of the injunction remedy to circumvent the harshness of the privity doctrine.

[17] *Halsbury's Laws of England* (4th Ed) Vol 37, para 437 provides that:

> A stay of proceedings arises under an order of the court which puts a stop or 'stay' on the further conduct of the proceedings in that court at the stage which they have then reached, so that the parties are precluded thereafter from taking any further step in the proceedings. The object of the order is to avoid the trial or hearing of the action taking place where the court thinks it is just and convenient to make the order, to prevent undue prejudice being occasioned to the opposite party or to prevent the abuse of process.

[18] [1966] 2 QB 31.

two grounds. Firstly, there was no agreement between the pensioner and the Corporation that the former promised not to sue the latter's employees. It was held that such agreement cannot be implied.[19] Secondly, the Corporation had no 'sufficient interest'[20] entitling them to stay the proceedings as there was no obligation on its part to indemnify the employee for any liability incurred in the performance of any duties by the employee. [21]

In contrast, the court took a more liberal approach in *Snelling* v *John G Snelling Ltd.*[22] In this case, the plaintiff and the second and third defendants were brothers and co-directors of the first defendant ('the company'). The company had been financed by loans from each of the brothers. They entered into a contract which stipulated that in the event of any director voluntarily resigning, he would immediately forfeit all money due to him from the company by way of his loan account. Subsequently, the plaintiff voluntarily resigned as a director and claimed payment from the defendant company of the sum in his loan account. The company denied that the plaintiff was entitled to the relief claimed and joined the co-director brothers as defendants. They claimed that the sum due to the plaintiff on the loan account had been forfeited.

The company would not have been entitled to rely on the contract entered into by the brothers as it was not privy to the agreement. Yet, if the plaintiff was entitled to sue the company, this would amount to a breach of contract and his brothers would be able to sue him. In order to avoid circuity of actions, Ormrod J decided in favour of the defendants.

---

[19] As per Salmon LJ in *Gore*.
[20] 'Sufficient interest' refers to any detriment (usually financial) that the applicant will be subject to if the plaintiff wins the case. The requirement of 'sufficient interest' was followed in *The Elbe Maru* [1978] 1 Lloyd's Rep 206.
[21] As per Harman LJ, at 44 (*Gore*).
[22] [1972] 1 All ER 79.

Ormrod J was of the view that the Court of Appeal in *Gore* did not intend to lay down the proposition of law that the court would not stay proceedings unless the plaintiff had expressly undertaken not to sue. Rather, it is sufficient if the promise to be enforced is clear and unambiguous.[23] Ormrod J did not clarify what was meant by a clear and unambiguous promise.[24] His Lordship was of the view that the right to forfeit necessarily implied a right not to sue. This was difficult to reconcile with *Gore*. Moreover, his Lordship did not refer to the requirement of 'sufficient interest' as stated in *Gore*. Instead, the factors considered by Ormrod J in reaching his conclusion were similar to the factors taken into account in an application for a specific performance or injunction. The bargain made between contracting parties should be given effect to as far as possible to achieve fairness between them. This is seen in the following quotation from his judgment:

> To give judgment for the plaintiff against the defendant company for the amount claimed in the statement of claim and judgment for the second and third defendants on the counterclaim would be absurd, unless, which is clearly not the case here, the second and third defendants could be adequately compensated in damages. So far as they are concerned **a judgment against the defendant company would frustrate the very purpose for which their agreement with the plaintiff was made**. (emphasis added)[25]

As such, although the approach taken by Ormrod J seems difficult to reconcile with *Gore*,[26] *Snelling* was more in line with the approach taken by the House of Lords in *Beswick*.[27] It is submitted that the decision in *Snelling* is to be preferred compared to the decision in *Gore* because the availability of specific performance and injunction is limited. For instance, in

---

[23] At 88 (*Snelling*).
[24] Davies, P.J., "Mrs Gore's Legacy to Commerce" (1981) 1 *LS* 287-295, at 291.
[25] At 87-88 (*Snelling*).
[26] It is submitted that the Court of Appeal decision in *Gore* was correct as any restriction to sue in the case would be contrary to s.151 Road Traffic Act 1960 (the legislation applicable in England at the time the decision was decided).
[27] *The Law of Contract*, at 640. It must be noted that *Gore* was decided before the House of Lords decision in *Beswick.*

Snelling, specific performance was not applicable due to negative wording of the promise made by the three brothers.[28] It was too late to apply for a grant of injunction as the plaintiff had already instituted legal proceedings against the company.[29] But it would have been most unfair to allow the plaintiff's legal action to continue. The best remedy was to stay the legal proceedings so that the bargain made by the three brothers could be upheld. Furthermore, the approach in *Snelling* would bring consistency to the law as similar considerations are taken into account in determining the granting of specific performance, injunction and stay of proceedings. This should be encouraged as the nature of the subject matter in these disputes is the same that is to determine whether the agreement made by the contracting parties to benefit third parties should be upheld.

B. Position in Malaysia

The courts' power to stay legal proceedings derives from statutory provisions, Rules of the High Court 1980[30] and the courts' inherent jurisdiction to grant such order. In *Kosma Palm Oil Mill* v *Koperasi Serbausaha Makmur Bhd,*[31] the Federal Court decided unanimously[32] that in an application for stay of execution or proceedings, the onus lies on the applicant to demonstrate the existence of special circumstances to justify the grant of a stay of execution. In this case, Augustine Paul JCA referred[33] to and approved the judgment of Ian Chin JC (as he then was) in *Government of Malaysia* v *Datuk Haji Kadir Mohamad Mastan* who stated that:

---

[28] At 88 (*Snelling*).
[29] At 88 (*Snelling*).
[30] The Subordinate Court Rules 1980 also allows judges to stay legal proceedings.
[31] [2004] 1 MLJ 257. *Kosma Palm Oil* deals with an application of stay of execution.
[32] The judgment was delivered by Augustine Paul JCA and concurred by Mohd Noor Ahmad FCJ and Rahmah Hussain FCJ.
[33] At 266 (*Kosma Palm Oil*).

> An attempt was made to define special circumstances by Raja Azlan Shah (as His Majesty then was) in the case of *Leong Poh Shee v Ng Kat Chong* [1966] 1 MLJ 86, viz:
> 'Special circumstances, as the phrase implies, must be special under the circumstances as distinguished from ordinary circumstances. It must be something exceptional in character, something that exceeds or excels in some way that which is usual or common.'
>
> The definition only serves to emphasise the fact that there are myriad circumstances that could constitute special circumstances with each case depending on its own facts. I am of the opinion that the **list of factors constituting special circumstances is infinite and could grow with time**. Any attempt to limit the list or close a category would be to impose a fetter on the exercise of the discretion of the court whether to grant or stay an execution; making the discretion less of a discretion. This is surely not what discretion is all about. (emphasis added)[34]

Kosma Palm Oil was followed by the Court of Appeal in *Rowstead Systems Sdn Bhd* v *Bumicrystal Technology (M) Sdn Bhd,*[35] a case dealing with stay of proceedings. There is no reported case in Malaysia dealing with the situation found in *Snelling*. However, in view of the fact that the Federal Court did not limit the scope of 'special circumstances' in *Kosma Palm Oil*, it is submitted that Malaysian courts can adopt the considerations taken into account in *Snelling* which can constitute 'special circumstances' to determine whether the legal action should be stayed. To amount to 'special circumstances', two conditions must be met. Firstly, there must be a promise between the contracting parties to the effect that the promisor promises not to sue the third party. Secondly, the courts will look at the relevant factors (similar to the factors taken in relation to the grant for specific performance) to determine whether it is fair to allow an application to stay the legal proceedings.

[34] [1993] 3 MLJ 514, at 521.
[35] [2005] 3 MLJ 132. However, *Rowstead Systems* did not deal with third party claims. In this case, the 'special circumstance' existed which leads to proceedings being stayed was the allegation that the Judicial Commissioner who was hearing the proceedings was bias. Thus, the legal proceedings were stayed until the Court of Appeal decided whether the Judicial Commissioner was fit to hear the case.

IV. Damages

The general principle in relation to recovery of damages for breach of contract (hereinafter referred to as 'general principle') is laid down by Parke B in *Robinson* v *Harman*[36] and Lord Blackburn in *Livingstone* v *Rawyards Coal Co.*[37] A party to a contract can only recover actual losses which he has sustained due to the breach of contract. The meaning of 'actual losses' refer to any harm to the plaintiff, his property or economic position.[38] Damages are compensatory in nature and its purpose is to put the plaintiff in a position as if the contract has been performed.

As a consequence, the plaintiff cannot recover damages suffered by a third party. In relation to any disputes arising from contracts made for the benefit of third parties, the promisee usually does not suffer any actual losses and is entitled to nominal damages only.[39] If the general principle is applied strictly, in construction or renovation contracts, the plaintiff cannot recover damages for cost of repair of defects on a property belonging to a third party. Since the plaintiff is not the owner of the property, he suffers no loss due to the defects to the property caused by the breach of contract. The general principle coupled with the doctrine of privity has created the phenomenon called the 'legal black hole'.[40] Therefore, it is questionable whether the existing principle relating to recovery of damages

[36] (1848) 1 Exch 850, at 855.
[37] (1880) 5 App Cas 25, at 39.
[38] *Law of Contract*, at 1000.
[39] *Beswick*, *Woodar Investment Development Ltd* v *Wimpey Construction UK Ltd* [1980] 1 WLR 277 and *Alfred McAlpine Construction Ltd* v *Panatown Ltd* [2001] 1 AC 518. In *Woodar*, both Lord Scarman and Lord Keith, at 297-298 and 301 respectively in this case were of the opinion that the rule relating to damages in *Beswick* should be reviewed.
[40] This phrase was used by Lord Stewart in *GUS Property Management Ltd* v *Littlewoods Mail Order Stores Ltd*, 1982 SC(HL) 157, at 166. This is discussed in Chapter 2 Part V(C). The 'legal black hole' refers to situations where losses suffered by third parties are not recoverable from the promisor either by the promisee or the third parties. The third party who suffers losses cannot sue due to the doctrine of privity whereas the promisee who does not suffer losses is entitled to sue but will only recover nominal damages.

is adequate. As a result, English judges have developed subsidiary principles in an attempt to resolve the problems in this area. This part examines the (i) judicial development undertaken in England and (ii) position in Malaysia in relation to losses suffered by third parties.

A. Position in England

This part examines the two different legal routes which have been established to overcome the problem of the 'legal black hole', (i) damages for third party's loss and (ii) damages for promisee's own loss, followed by a discussion on the interplay between these two routes.

1. Damages for Third Party's Loss

In England, the courts had created an exception to the general principle by allowing promisee to recover losses suffered by third parties due to breach of contract of the promisor. The promisee has to account for the damages recovered and return it to the third party. If the promisee refuses to hand over the damages, the third party can bring a legal action against the promisee either in an action for money had and received or to hold the promisee as a constructive trustee who holds the amount of damages recovered on his behalf. The development of this exception can be traced to Lord Denning's argument in *Jackson* v *Horizon Holidays*,[41] which was subsequently disapproved and more importantly,

[41] [1975] 3 All ER 92.

Lord Diplock's judgment in *The Albazero*[42] which later becomes known as the 'narrow ground'.[43]

(i) Lord Denning's Argument in Jackson v Horizon Holidays

In *Jackson* v *Horizon Holidays*,[44] a father of two young children entered into a contract with the defendant to supply a holiday package for the whole family. The accommodation and facilities provided by the defendant did not comply with the defendant's brochure. It was held that the father was entitled to claim not only for his own financial losses, personal discomfort and disappointment but also for the discomfort, vexation and disappointment suffered by his wife and children (third parties' loss). This conclusion was reached as he contracted for a family holiday but did not get one.[45]

Lord Denning recognised that contracts made to benefit third parties should be treated differently from an ordinary contract intended to benefit the promisee only. In order to allow the father's claim, Lord Denning relied on the principle stated by Lush LJ in *Lloyd's* v *Harper* where the latter concluded that:

[42] [1977] AC 774.
[43] The phrase 'narrow ground' was used by the House of Lords in *Alfred McAlpine Construction Ltd* v *Panatown Ltd.* It is also sometimes known as the *The Albazero* exception. For consistency purposes, 'narrow ground' will be used throughout this thesis even in the discussion of earlier cases where this phrase had not been introduced. Another ground which is often discussed together with the 'narrow ground' by judges is the 'broad ground' which is discussed in Part IV(A)(2)(ii) of this chapter.
[44] [1975] 3 All ER 92.
[45] Although the Court of Appeal reached a unanimous decision, this was achieved through two different sets of reasoning, one led by Lord Denning and the other led by James LJ. The latter treats the damages as suffered by the promisee. This is discussed in this chapter at Part IV(A)(2).

> . . . I considered it to be an established rule of law that where a contract is made with A, for the benefit of B, A can sue on the contract for the benefit of B and recover all that B could have recovered if the contract had been made with B himself.[46]

Any damages recovered must be accounted for by the promisee to the third party.[47] However, Lord Denning's approach was disapproved by the House of Lords in *Woodar* v *Wimpey Construction*. Lush LJ's statement in *Lloyd's* v *Harper* as quoted above referred to situations where the promisee entered into the contract as an agent for the third party.[48] Thus, this principle cannot be used as an exception to allow promisee to recover damages for third parties. Accordingly, Lord Denning's approach was not followed in subsequent cases.

(ii) 'Narrow Ground'

This part examines the development and the legal issues arising from the 'narrow ground'. In 1977, Lord Diplock in *The Albazero* provided an exception to the general principle known as the 'narrow ground' which allows a promisee to recover losses suffered by a third party. Lord Diplock stated that the 'narrow ground' is applicable to a contract of carriage of goods where no bill of lading is issued[49] if:

> . . . as an application of the principle, accepted also in relation to policies of insurance upon goods, that in a commercial contract concerning goods where **it is in the contemplation of the parties** that the proprietary interests in the goods may be transferred from one owner to another after the contract has been entered into and before the breach which causes loss or damage to the goods, an original party to the contract, **if such is the intention of them both**, is **to be treated in law** as having entered into the

[46] (1880) 16 Ch 290, at 321.
[47] At 96 (*Jackson*).
[48] At 321 (*Lloyd's*).
[49] In relation to contracts where bills of lading are issued, Lord Diplock held that there was no need to resort to the 'narrow ground' as the Bills of Lading Act 1855 was applicable to allow the third party to sue the carrier.

> contract for the benefit of all persons who have or acquire an interest in the goods before they are lost or damaged, and is entitled to recover by way of damages for breach of contract the actual loss sustained by those for whose benefit the contract is entered into. (emphasis added) [50]

The 'narrow ground' is not applicable if it can be contemplated that the third party and the promisor will enter into a separate contract whose terms are identical to the contract between the promisor and the promisee.[51] The former contract will be a replacement of the latter contract in relation to liability arising from loss or damage to the goods.

The rationale for the 'narrow ground' was provided by Lord Diplock where his Lordship stated that:

> . . . and there may still be occasional cases in which the rule would provide a remedy where no other would be available to a person sustaining loss which under a rational legal system ought to be compensated by the person who has caused it.[52]

Lord Diplock stated that the 'narrow ground' originates from *Dunlop* v *Lambert.*[53] In this case, the consignor entered into a contract of carriage with the defendant (carrier) to deliver a puncheon of whisky to the consignee. The puncheon of whisky was thrown overboard and the consignor had replaced at his own expense a puncheon of whisky for the consignee. As such, the consignor sued the defendant to recover the losses suffered due to the latter's breach of contract. The House of Lords decided in favour of the consignor.

[50] As per Lord Diplock, at 847 (*The Albazero*).
[51] As per Lord Diplock, at 848 (*The Albazero*).
[52] At 847 (*The Albazero*).
[53] (1839) 7 ER 824.

It is submitted that there is inconsistency between *Dunlop* v *Lambert* and the 'narrow ground'.[54] The damages that the promisee recovered in *Dunlop* v *Lambert* were the losses that he suffered. By contrast, the 'narrow ground' allows the promisee to recover losses suffered by a third party.[55] However, in light of the endorsement of the 'narrow ground' in two subsequent House of Lords decision discussed below, the validity of this exception seems unquestionable.

Secondly, the rationale provided by Lord Diplock for the 'narrow ground' as stated earlier, is vague and wide. As such, the application and extension of the 'narrow ground' rests on the discretion exercised by the courts as to whether a rational legal system ought to allow recovery of damages for third party losses.

In *St. Martins Property Corporation Ltd.* v *Sir Robert McAlpine Ltd,*[56] applying the rationale of the 'narrow ground', the House of Lords extended the application of this exception to building contracts. In this case, St Martins (first plaintiffs) entered into a contract with McAlpine (defendants) for the multi-purpose development of a site in Hammersmith to build shops, offices and flats. Subsequently, St Martins assigned all interests in the property involved in the development project and benefits under the building contract to the second plaintiffs. This was done in breach of the term in the contract which prohibited assignment without McAlpine's consent. McAlpine refused to give his consent to this assignment. Part of the work of McAlpine was defective and

[54] This has been pointed out by Professor Brian Coote, in his article entitled "Dunlop v Lambert: the Search for a Rationale" (1998) 13 *JCL* 91-102, at 92-98 which was accepted by Lord Clyde in *McAlpine Construction* v *Panatown* [2001] 1 AC 518, at 526.
[55] The 'narrow ground' is consistent with the old cases decided before *Dunlop* v *Lambert*, that is *Davis and Jordan* v *James* (1770) 5 Burr 2680, *Moore* v *Wilson* (1787) 99 ER 1306 and *Joseph* v *Knox* (1813) 170 ER 1397 where the promisee in these cases was entitled to sue to recover damages for losses suffered by third parties. All these contracts were dealing with contracts for carriage of goods by sea.
[56] [1994] 1 AC 85.

remedial works cost about £800,000. Thus, St Martins brought a legal action for breach of contract to recover the cost of repair from McAlpine. McAlpine argued that St Martins were only entitled to nominal damages. St Martins suffered no loss as they had no interest in the property anymore. Although St Martins paid for the cost of repair, they were reimbursed by the second plaintiffs.

The House of Lords allowed St Martin's claim for substantial damages. Four of the House of Lords judges relied on the 'narrow ground'. McAlpine and St Martins knew that the property would be occupied or purchased by third parties. Hence, it was foreseeable that a breach of contract by the building contractors may not cause loss to St Martin but to a later owner or occupier. Although there was a clause prohibiting assignment,[57] suggesting that McAlpine did not want to be bound to a third party, this argument was rejected by the House of Lords. In fact, Lord Browne-Wilkinson treated this term as showing that the parties intended St Martin's to be entitled to sue McAlpine for the losses suffered by the second plaintiffs. In their Lordships' opinion, the facts of this case constituted a situation where a rational legal system ought to compensate the third party.[58] Any damages recovered under the 'narrow ground' were accountable to the second plaintiffs.

In *Darlington Borough Council* v *Wiltshier Northern Ltd,*[59] W, a construction company, entered into two contracts with G, a finance company, to build a recreational centre for Darlington Borough Council ('the council'), which owned the site. Pursuant to an agreement entered into with the council, G assigned to the council all rights and causes of

[57] The existence of such clause will prevent the assignee from bringing a legal action; *Linden Garden Trust Ltd* v *Lenesta Sludge Disposals Ltd* [1994] 1 AC 85. However, the assignor is still entitled to sue the promisor and recover damages on behalf of the assignee.
[58] At 114-115 (*St Martin*).
[59] [1995] 1 WLR 68.

action against W to which G was entitled to under the contracts. The council suffered damages due to defects in the building caused by breach of contract by W and sued W for substantial damages. The problem faced by the council was that as an assignee, it could only recover damages that were suffered by the assignor. Here, G suffered no loss as it did not own the site where the recreational centre was built.

It was held unanimously by the Court of Appeal that the council could claim substantial damages in reliance on the 'narrow ground'.[60] The fact that the property involved belonged to the council all along was not fatal to the council's claim because it was obvious to W that the construction work was for the benefit of the council and on the council's land.[61] This finding shows the evolution of the requirements to invoke the assistance of the 'narrow ground'. In *Darlington*, the 'narrow ground' was applicable even though there was no transfer of ownership of the construction site from G to the council.

In *Alfred McAlpine Construction Ltd* v *Panatown Ltd*, M entered into a contract with P for the construction of an office block and a car park on a site which was owned by another company in the same group of companies as P. In addition to the contract with P, M also entered into a duty of care deed with the owner of the site where the owner acquired a direct remedy against M in respect of any failure by the contractor to exercise reasonable skill, care and attention to any matter within the scope of M's responsibility under the contract. Serious defects were found in the building and P sued M for substantial damages.

[60] Dillon LJ and Waite LJ also relied on the imposition of a constructive trust, applying *Lloyd's* v *Harper* to reach the same conclusion.
[61] As per Dillon LJ, at 75 (*Darlington*).

Similar to *Darlington*, the fact that Panatown was never the owner of the site to be developed was not a barrier to the application of the 'narrow ground'.[62] However, it was held by a 3-2 majority (Lord Browne Wilkinson, Lord Clyde and Lord Jauncey) of the House of Lords that M was not liable for substantial damages. The 'narrow ground' was not applicable in this case because the duty of care deed provided the owner with a direct remedy against M for losses suffered due to the defective performance of M. This rendered P's claim to be outside the class of cases which deserve protection in a rational legal system.[63]

The application of the 'narrow ground' raises two legal issues in relation to the scope of its requirements and its further extension to different types of contract. To apply the 'narrow ground', there are two requirements to be satisfied. Firstly, the defendant must know that the goods or land belonged to a third party. This ensures that the defendant can foresee that any losses incurred in relation to the goods or land will be suffered by the third party. Secondly, there is no arrangement between the contracting parties and the third party to grant a direct right for the third party to sue the promisor to recover losses sustained. These two requirements are discussed in turn.

The first requirement was discussed in the subsequent case of *Rolls-Royce Power Engineering plc* v *Ricardo Consulting Engineers Ltd.*[64] This case concerned a contract for the development and design of new engines. The parties to this contract were the second claimant (wholly-owned subsidiary of the first claimant (parent company))[65] and the

[62] As per Lord Clyde, at 531 (*Panatown*).
[63] As per Lord Browne-Wilkinson, at 577 (*Panatown*).
[64] [2003] QB 129.
[65] It was intended between the claimants that the subsidiary entered the contract as the parent's agent but this was not known by the defendant.

defendant. Subsequently, the subsidiary's business was transferred to the parent company, with the effect that the subsidiary ceased to have any separate identity. The claimants argued that the defendant had breached the contract and sought to recover damages for the losses incurred due to the breach of contract. The issues which arose from this case were firstly, whether the subsidiary entered into the contract as principal or agent for the parent company. Secondly, in the event that the subsidiary entered into the contract as principal, whether the subsidiary was entitled to recover losses suffered by the parent company as its trustee or in accordance with the rule in *Dunlop* v *Lambert* ('narrow ground').

In relation to the application of the 'narrow ground', it was held by Seymour J that:

> . . . a fundamental condition to be met if the rule in *Dunlop v Lambert* is to be applied in any case is that it should at the time the relevant contract was made have been in actual contemplation of the parties that an identified class would or might suffer damage in the event of breach of the contract.[66]

The learned judge continued:

> . . . there must be **special circumstances** which take a case out of the ambit of the general rule. If the special circumstances which take a case out of the general rule are knowledge that an identified third party or a third party who is a member of the identified class will or might suffer damage if there is a breach of contract, that is something which ought to be capable of being demonstrated, it involves no obvious injustice, as the possibility of loss will have been known at the time the contract was made, and seems to do justice because it gives effect to the contemplation of the contracting parties and provides a means of compensating the third party, whose benefit, at least in part, the relevant contractual obligation was undertaken. (emphasis added)[67]

On the facts of *Rolls-Royce*, the 'narrow ground' was not applicable as the parent company was not an identified party in the contract or a member of an identified class which would benefit from the contract. It was insufficient to show that the defendant knew that the first

[66] At 182 (*Rolls Royce*).
[67] At 182 (*Rolls Royce*).

claimant was the parent company of the second claimant. A parent company will not ordinarily suffer any losses due to a breach of contract entered into by its subsidiary. Accordingly, there were no special circumstances which supported the application of the 'narrow ground' as the defendant did not realise that the parent company was the one who would suffer losses in the event of breach of contract.[68]

In relation to contracts made for the benefit of third parties, there is no difficulty in satisfying this requirement. The contracting parties know that if the contract is breached, it is the third party who suffers losses as the performance of the contract is intended for him.

Secondly, although the promisee's right to recover losses on behalf of the third party is imposed by law, it can be excluded by the intention of the contracting parties. If they have provided a right for the third party to sue the promisor to recover his losses, the 'narrow ground' is not applicable. There is no longer any necessity for the promisee to sue to recover losses on behalf of the third party.[69] The rationale behind the 'narrow ground' does not apply. However, there is disagreement as to the type and scope of rights that the third party must have in order to displace the 'narrow ground'. Lord Diplock in *The Albazero* stated that the 'narrow ground' is displaced if the promisor and the third party enter into a

[68] Such approach was also found in *Sabena Technics SA* v *Singapore Airlines Ltd* [2003] EWHC 1318 (Comm) where it was held that the 'narrow ground' was applicable as the defendant was aware at the time the contract was created that the plaintiff (third party) would suffer losses arising from the breach of contract. In *DRC Distribution Ltd* v *Ulva Ltd* [2007] EWHC 1716 (QB), Flaux J, at para 76, held that the 'narrow ground' applies if the contracting parties intend (expressly or impliedly) to enter into the contract for the benefit of a third party. In *DRC Distribution*, the 'narrow ground' was not applicable as the contract expressly provided that the contract was personal to the contracting parties only. As such, it could not be proven that the contract was made for the benefit of the third party who suffered the losses in *DRC Distribution*.
[69] As per Lord Clyde, at 530 (*Panatown*).

contract which is similar to the original contract between the promisor and the promisee.[70] Yet, Lord Diplock also accepted that:

> . . . there can be no sensible business reason for extending the rule to cases where the contractual rights of the charterer under the charterparty are **not identical** with those of the bill of lading holder whose goods are lost or damaged. (emphasis added)[71]

This quotation had paved the way for a more restrictive approach taken by the majority of the House of Lords in *Panatown*. In *Panatown*, the difference in substance between the remedies available under the contract and under the duty of care deed was irrelevant in determining whether to reject the application of the 'narrow ground'.[72] As long as the third party is granted an independent action against the promisor, the 'narrow ground' is displaced. This is evident from Lord Jauncey's judgment where his Lordship stated that:

> Neither in the speeches of Lord Diplock nor of Lord Browne Wilkinson, to which I have referred, is it suggested that the *Dunlop v Lambert* rule will be displaced by rights vested in a third party which are identical to those of the innocent contracting party, indeed Lord Diplock, *The Albazero* [1977] AC 774, 848c, considered that there were even **stronger grounds for not applying the rule to cases where the two sets of contractual rights were different**. What is important, as I see it, is that the third party should as a result of the main contract have the right to substantial damages for breach under his contract even if those damages may not be identical to those which might have been recovered under the main contract in the same circumstances. (emphasis added)[73]

---

[70] This is the view taken by Brian Coote in his article "The Performance Interest, Panatown, And The Problem of Loss" (2001) 117 *LQR* 81–95, at 89 and Duncan Wallace in "Third Party Damage: No Legal Blackhole?" (1999) 115 *LQR* 394-410, at 409.

[71] At 848 (*The Albazero*).

[72] The difference between the contractual right and the duty of care deed is that the latter covers an action for lack of reasonable care and skill akin to the tort of negligence. Thus, breach of duty of care must be proven compared to the strict liability of breach of contract. Moreover, the duty of care deed was not intended to remedy the defects generally caused by breach of the construction contract but only covered losses caused by want of care.

[73] At 568 (*Panatown*). Lord Browne-Wilkinson, at 377 (*Panatown*) reached the same conclusion.

The justification for the restrictive approach is that the 'narrow ground' is the exception not the general rule in relation to recovery of damages.[74] In the subsequent case of *Catlin Estates Ltd* v *Carter Jonas,*[75] it was held that the 'narrow ground' is not excluded in situations where the third party is entitled to bring a claim under the Defective Premises Act 1972. Toulmin J came to this conclusion on the basis that a claim under the Defective Premises Act 1972 is separate and distinct from a claim based on contract or tort which is provided by the contracting parties.

The second issue arising from the 'narrow ground' deals with its possible extension to apply to different types of contracts. The 'narrow ground' began its application to contracts of carriage and had been extended to building contracts, service contracts,[76] leasing contracts[77] and contracts of sale of goods.[78] The query is whether it will be developed further to cover contracts for payment to a third party. The rationale provided by Lord Diplock in *The Albazero* is sufficiently wide to cover all different types of contract.[79]

The House of Lords in *Panatown* was cautious as to the application of the 'narrow ground'. Yet, it is undeniable that the 'narrow ground' has a striking similarity with Lord Denning's

---

[74] At 568 (*Panatown*).

[75] [2005] EWHC 2315. In the Singaporean case of *Chia Kok Leong v Prosperland Pte Ltd* [2005] 2 SLR 484, at 501, the Court of Appeal held that the right of the third parties to sue the promisor in the law of tort of negligence does not deprive the promisee from relying on the 'narrow ground'. A tortious claim does not amount to a "provision of a direct entitlement" to the third party and the success in proving this claim depends on whether the requirements such as foreseeability, proximity can be proven.

[76] In *Rolls Royce Power Engineering plc* v *Ricardo Consulting Engineers Ltd*, the 'narrow ground' was applied to a service contract in relation to the design of a diesel aero engine.

[77] In *Sabena Technics SA* v *Singapore Airlines Ltd*, the 'narrow ground' was applied in relation to a contract for three leased airliners.

[78] *DRC Distribution Ltd* v *Ulva Ltd* [2007] EWHC 1716 (QB) involved a contract for the supply of Ulvashield, a modular, non metallic insulation cladding system.

[79] The rationale provides that third party loss should be recoverable if a rational legal system ought to compensate the losses. It is noted that the 'narrow ground' is only applicable where valid contracts are created. It is not applicable to a cross-undertaking given to a court to compensate the party which was being imposed with an injunction; *SmithKline Beecham plc* v *Apotex Europe Ltd* [2007] Ch 71.

argument in *Jackson.* The defendant which was aware that the holiday package was for the plaintiff's family had to pay damages for the losses and distress suffered by the plaintiff's family. The damages recovered by the plaintiff were accountable to his family. This similarity is noted by Palmer and Tolhurst who opine that:

> Or rather, come back Lord Denning. When Lord Diplock listed the examples of non-compensatory damages in *The Albazero*, he said nothing about *Jackson v Horizon Holidays Ltd* though the decision was cited to him. That disregard was probably consistent with the largely chilly reception which Jackson or, more specifically, Lord Denning MR's reasoning in Jackson, attracted.[80]

The relaxation of the requirements to prove the 'narrow ground' bridges its differences with *Jackson*. The 'narrow ground' does not require transfer of ownership of property from the contracting party to the third party and it is also applicable to a contract for services. There is not much difference in substance between *Jackson* and the cases which invoked the 'narrow ground'. In fact, the rationale behind the 'narrow ground' is also applicable to *Jackson.* Fairness requires the losses suffered by the plaintiff's family in *Jackson* to be compensated because the defendant was aware that if it breached the contract, they would suffer losses. As a result, the 'narrow ground' can be extended to all different types of contracts but this depends on whether judges are willing to make this extension.

2. Damages for Promisee's Own Loss

It is necessary to discuss the subsidiary principles involving damages that a promisee can recover for his own losses in relation to contracts made for the benefit of third parties. The damages recovered can be used to provide benefits to third parties as originally intended by

[80] Palmer, Norman and Gregory Tolhurst, "Compensatory and Extra-compensatory Damages: Linden Gardens and the 'Lord Griffiths' Principle" (1998) 13 *JCL* 143-155, at 152.

the promisee. This part examines two kinds of losses suffered by a promisee due to breach of contracts made for the benefit of third parties, (i) loss of amenities and (ii) monetary losses.

(i) Loss of Amenities

According to Mindy Chen-Wishart,[81] a promisee should be entitled to claim losses for dissatisfaction suffered due to the third party's failure to receive the benefit under the contract. However, the promisee must prove that that the "non-pecuniary purpose should be distinct, important and communicated to the promisor."[82] The amount of damages recovered depends on the promisee's motive in requesting the performance, whether he still wants the promise to be performed, the proportionality between the cost of repair and the contract price and the proportionality between the benefits that have already been provided and the benefits to be obtained from making good the breach.[83]

In *Jackson* v *Horizon Holidays*, James LJ upheld the decision of the trial judge to allow the father to claim damages. However, unlike Lord Denning who treated the damages recovered as including third party losses, James LJ treated the damages as representing the father's losses only. Lord Wilberforce in *Woodar* v *Wimpey Construction* approved James LJ's decision but confined its application to limited situations by stating that:

[81] *Contract Law*, 2nd Edition (Oxford University Press, 2008) (hereinafter referred to as 'Mindy Chen-Wishart'), at 644.
[82] At 644 (Mindy Chen-Wishart).
[83] At 644 (Mindy Chen-Wishart).

> It may be supported either as a broad decision on the measure of damages (James LJ) or possibly as an example of a type of contract – examples of which are persons contracting for family holidays, ordering meals in restaurants for a party, hiring a taxi for a group calling for special treatment. [84]

James LJ's decision was considered to be a liberal approach as the amount of damages recovered by the father seems a large amount for the discomfort and inconvenience suffered by the father alone. These damages are classified as loss of amenities by the House of Lords in *Ruxley* v *Forsyth.*[85]

(ii) Monetary Losses – 'Broad Ground'

This part examines the judicial development of the 'broad ground'[86] and the legal issues arising from this ground. In *St Martins Property Corpn Ltd* v *Sir Robert McAlpine Ltd,* Lord Griffiths allowed St Martins to claim substantial damages (cost of repair) for breach of contract although St Martins was not the owner of the land which suffered the loss caused by the defective performance of the building contract. His Lordship reached this decision by taking a more liberal approach in determining the damages that can be recovered by a promisee which later became known as the 'broad ground'.[87] According to the 'broad ground', a promisee is entitled to claim for cost of repair of property belonging to a third party due to the defective performance of the promisor if the courts are satisfied that the "repairs have been or likely to be carried out."[88] This had been interpreted as giving

[84] [1980] 1 All ER 571, at 283.
[85] [1996] AC 344. In *Ruxley*, the plaintiff sued the defendant contractor for breach of contract as the swimming pool constructed by the defendant was of six feet depth (at the point of diving) instead of seven feet six inches as stated in the contract. The House of Lords allowed the plaintiff to claim loss of amenity for the loss of enjoyment of a seven feet six inches pool.
[86] This phrase was used in the House of Lords' decision in *Alfred McAlpine Construction Ltd* v *Panatown Ltd.* It is also known as the 'broader ground'.
[87] It must be remembered that if one applies the general principle strictly, St Martins should not be entitled to recover the cost of repair as it did not suffer any losses as the land did not belong to it.
[88] At 97 (*St Martins*).

rise to the requirement that the promisee has to account for the damages recovered to the third party.[89] The right to claim damages does not necessarily rest on the requirement that the plaintiff must have proprietary interest in the subject matter of the contract.

The reason behind the 'broad ground' is that in situations such as *St Martins,* St Martins had in fact "suffered financial loss because he had to spend money to give him the benefit of the bargain which the defendant had promised but failed to deliver."[90] To illustrate the application of the 'broad ground', Lord Griffiths provided an example of a husband (sole earner) who enters into a contract with a contractor to have a new roof to their matrimonial home belonging to his wife. If the work done by the contractor is defective and the husband has to call another contractor to complete the work, the husband is entitled to claim for cost of repair of the roof caused by defective performance of the contractor. According to Lord Griffiths:

> The husband has suffered loss because he did not receive the bargain for which he had contracted with the first builder and the measure of damages is the cost of securing the performance of the bargain by completing the roof repairs properly by the second builder. [91]

Thus, the husband's loss lies in the loss of bargain or performance or expectation interest. The damages recovered under the 'broad ground' are to compensate the promisee's own loss. It is noted that the other members of the House of Lords in *St Martin* preferred to base their decision on the 'narrow ground' as Lord Griffiths' 'broad ground', though attractive, was a novel concept at that time.

[89] As per Lord Browne-Wilkinson in *Panatown,* at 577.
[90] As per Lord Griffiths, at 97 (*St Martins*).
[91] At 97 (*St Martins*).

The 'broad ground' was followed by Steyn LJ in *Darlington Borough Council* v *Wiltshier Northern Ltd.*[92] However, his Lordship disagreed with the view that the promisee is under a duty to account for the damages to the third party. Such requirement is inconsistent with the general law of damages which is not concerned as to how a plaintiff utilises the compensation received from the defendant.[93]

The 'broad ground' had been discussed extensively in *Alfred McAlpine Construction Ltd* v *Panatown Ltd.* There are two approaches taken by the House of Lords in *Panatown* in relation to the application of the 'broad ground', a strict approach (taken by the majority comprised of Lord Browne-Wilkinson, Lord Clyde and Lord Jauncey) and a liberal approach (taken by the minority comprised of Lord Goff and Lord Millet. The liberal approach will be discussed followed by a discussion on the strict approach.

In *Panatown*, Lord Millett and Lord Goff ('the minority') allowed Panatown's claim based on the 'broad ground'. In support of the 'broad ground', Lord Millet stated that:

> It must be wrong to adopt a Procrustean approach which leaves parties without a remedy for breach of contract because their arrangements do not fit nearly into some precast contractual formula. When such arrangements have been freely entered into and are of an everyday character or are commercially advantages to the parties, it is surely time to re-examine the position.[94]

The minority expanded Lord Griffiths' 'broad ground'. The minority held that the failure of performance of the contract itself generates losses which can be recovered by the promisee. It does not matter that the promisee's financial position is not affected by the breach. This is gathered from Lord Goff's decision to allow Panatown to recover damages for delay of

[92] Steyn LJ relied on both 'narrow ground' and 'broad ground' in *Darlington*.
[93] At 80 (*Darlington*).
[94] At 586 (*Panatown*).

completing the construction project despite the fact that it was not the owner of the land under construction. His Lordship stated that:

> I prefer to proceed on the basis of the broader ground in Lord Griffiths's opinion in the St Martins case [1994] 1 AC 85. On that basis, I can see no reason in principle why my conclusion should not apply to damages for delay, as well as to damages for defective works. **The employer has, after all, contracted not only for the work to be performed by the contractor as specified, but also for it to be performed within a specified time, and has given consideration for the contractor's promise to perform his obligations. He has therefore a contractual right to the performance of the work to the contractual specification.** (emphasis added)[95]

In situations where the application of the general principle creates a 'legal black hole', a promisee can rely on the 'broad ground' to claim substantial damages if it is reasonable on the facts of the case to do so.[96] The requirement of 'reasonableness' ensures that no 'uncovenanted benefit' is granted to the promisee. There is no separate requirement that the promisee must intend to carry out remedial work though this will be taken into consideration as to whether it is reasonable for the promisee to claim substantial damages.[97]

Lord Millett further opined that:

> **The broad ground may be more readily applicable where the contracting party had a legitimate interest, though not necessarily a commercial one,** in placing the order for the services to be supplied to the third party. Where there is a family or commercial relationship between them, as in the present case, any such requirement can be satisfied, though it would not be right to limit the application of the principle to cases where such a relationship exists. The charitable donor has a legitimate interest in the object of his charity. (emphasis added)[98]

---

[95] At 554 (*Panatown*).
[96] The minority followed the House of Lords' approach in *Ruxley Electronics & Construction Ltd* v *Forsyth* [1996] AC 344 which created flexibility to the general principle and disallowed the plaintiff to obtain cost to reconstruct the pool to the specified depth in the contract as it was unreasonable to do so.
[97] As per Lord Goff, at 556 (*Panatown*).
[98] At 592 (*Panatown*). Lord Goff also came to the same conclusion, at 556 (*Panatown*).

Nonetheless, Lord Millett provided that the above-mentioned requirement does not constitute a separate requirement to be fulfilled in order to rely on the 'broad ground'. In fact, this requirement is subsumed into the requirement of reasonableness.

By contrast, Lord Clyde and Lord Jauncey ('the majority') adopted a strict approach towards the application of the 'broad ground'. They require the promisee to take steps to remedy the breach of contract or that it is likely that he will take such steps.[99] Lord Browne-Wilkinson's judgment was not very clear on this point. The restrictive approach taken by Lord Clyde and Lord Jauncey is more consistent with the general principle governing damages. If the promisee spends money or is under an obligation to remedy the defects caused by the breach of contract, one could say that he suffers losses due to the breach of contract. Moreover, this restrictive approach ensures that the promisee could not abuse his position in relation to the damages recovered by keeping the damages to himself in situations where the repair works have not been undertaken at the time of judgment.[100]

The danger of abuse of position did not arise in *Darlington* and *St Martin* as the third parties were the ones bringing the action in their capacity of assignees while in *Panatown*, the plaintiff was part of the group companies as the third party. However, this problem may arise in other situations. In the example given by Lord Griffiths, the husband who recovers damages may refuse to renovate the house if the couple falls out after the trial. This is

[99] Alternatively, if the repair has been undertaken by the building's owner, then the promisee must promise to hand over the damages to the building owner; *Bovis Lend Lease Ltd* v *R D Fire Protection* [2003] EWHC 939.

[100] Thus, it was not surprising that Lord Griffiths in *St Martin* decided that the damages recovered must be accounted to the third party. Brian Coote, too in his article "Contract Damages, Ruxley, and the Performance Interest" [1997] *C.L.J*. 537-570, at 552, explained that the solution to avoid double recovery was make the husband a trustee holding the consequential damages in trust for the wife.

unfair as the basis and assessment of the damages granted to him is based on the cost of repair.[101]

Nonetheless, practically, there may not be much difference between the approach taken by the majority and the minority. The minority also considers whether repair has been undertaken and if not, whether the promisee intends or is likely to undertake the repair. If such intention or likelihood is absent, the minority will not allow the promisee to recover damages as it is unreasonable to do so and any damages awarded will amount to an 'uncovenanted benefit' for the promisee.

There are a number of legal issues arising from the 'broad ground'.[102] The first issue is in relation to the relevance of the third party's independent legal action against the promisor in displacing the 'broad ground'. In *Panatown,* Lord Browne-Wilkinson held that the application of the 'broad ground' rests on the 'critical factor' whether the third party is provided with the right to sue the promisor in the contractual arrangement of the parties.[103] The 'performance interest' of the promisee in relation to contracts which are beneficial to third parties is satisfied if the latter has the ability to recover damages directly from the promisor. In other words, the promisee suffers no loss of the bargain made as this bargain is enforceable through other means by the third party.[104] In this situation, there is no need to extend the law to allow the promisee to recover substantial damages. The 'critical factor' is intended to prevent fear of creating double liability on the promisor. The imposition of the 'critical factor' is appropriate provided that the third party's claim is largely similar to the

[101] The safest way to solve this problem, according to Lord Clyde, at 535 (*Panatown*) is to rely on the 'narrow ground' where the damages recovered will have to be accounted for to the third party.
[102] For some of these issues, there are different opinions between the majority and minority in *Panatown.*
[103] At 577 (*Panatown*).
[104] Lord Jauncey, at 574 shared the same opinion as Lord Brown-Wilkinson on this matter.

promisee's claim. Otherwise, there may still be some losses of 'performance interest' not compensated.[105]

The minority took a different approach. The promisee will not lose his right to sue the promisor due to the third party's right against the promisor. Since the promisee is suing to recover for his own losses, it seems irrelevant how the third party's right to sue the promisor can deny the promisee from doing so. The minority approach has an added advantage of flexibility compared to the majority approach. If one adopts the majority approach, once the third party is granted the entitlement to sue, the promisee cannot sue the promisor. On the contrary, the minority approach gives choices to the parties involved, either the promisee or the third party or both of them can sue. If both of them wish to sue the promisor, the court may require both of them to be joined in the legal proceedings to avoid double recovery of damages from the promisor. Yet, the minority's argument may not be so convincing as although the promisee is claiming for his own loss, the assessment of losses seems to rest on the amount of losses that the third party has suffered. As such, if the third party can claim those losses directly, it is difficult to see that the promisee has suffered a loss of 'performance interest' unless one is referring to the loss of amenities (loss of enjoyment to benefit the third party).

Overall, it is submitted that the majority approach is preferable compared to the minority approach. The only lament of the majority approach is that the promisee may lose the right to claim substantial damages easily as all the promisor needs to show is that the third party is granted a right against him. It does not matter that the scope of duty owed by the

[105] For eg., in *Panatown*, the types of losses covered under the breach of contract and under the Duty of Care Deed (DCD) were different.

promisor to the third party differs from the scope of duty that he owes to the promisee. This problem can be solved if this approach is changed slightly so that the promisee's right to claim substantial damages is only excluded if the scope of the third party's claim is almost similar as the promisee's claim under breach of contract.

In the subsequent case of *Bovis Lend Lease Ltd* v *R D Fire Protection,*[106] Thornton J followed the strict approach taken by the majority in *Panatown* in applying the 'broad ground'. In this case, Bovis (main contractor) sued the defendant (Bovis' sub-contractors) for breach of a contract to provide fire protection and dry lining works. It sought to recover the cost of remedial work arising from the defective works of the defendant as the loss of 'performance interest' that Bovis suffered as a result of the breach of contract. It was held that the majority's requirements in *Panatown* must be fulfilled in order to invoke the application of the 'broad ground'. Firstly, the claimant should have incurred loss in remedying the defects or should provide an undertaking that the damages recovered would be used to remedy the defects or reimburse the party who has incurred losses.[107] Secondly, the contracting parties must not grant a cause of legal action to the third party against the promisor for the "same or similar loss."[108]

The application of the 'broad ground' failed on the facts of this case as it was contemplated that the sub-contractor would provide a direct warranty to the employer which covered losses suffered due to breach of the sub-contract. Bovis was under the obligation to procure

[106] [2003] EWHC 939.
[107] Para 178 (*Bovis Lend*).
[108] Para 178 (*Bovis Lend*). The court emphasised that the 'broad ground' is only excluded if the third party's right granted by the contracting parties covers the "same or similar loss" as the promisee's claim for breach of contract. This resembles the approach proposed in this thesis. Accordingly, the right of the promisee is not excluded if the third party's right covers different losses.

the direct warranty but it failed to do so. The existence of such contemplation defeated Bovis's claim for substantial damages even though the warranty was not executed.

With due respect, the existence of a mere contemplation that a direct arrangement between the promisor and the third party is to be undertaken should not have defeated the promisee's claim. If the direct arrangement does not take place, the problems created by the doctrine of privity remained. Both the promisee and the third party could not claim substantial damages from the promisor. The loss of the 'performance interest' of the promisee remains as the third party does not have the opportunity to claim the damages suffered.

In *Mirant Asia-Pacific Construction (Hong Kong Ltd)* v *Ove Arup Partners International,*[109] the High Court also stated that the 'broad ground' is not applicable if there is a contractual arrangement providing the third party with a claim against the promisor. However, in contrast with *Bovis Lend,* Toulmin J took the view that mere contemplation that such further contract will be executed is insufficient to deny a claim for substantial damages. If such contract or arrangement does not take place, the 'legal black hole' remains wide open.[110]

In sum, the two cases above are not conclusive in determining whether the contracting parties' contemplation to grant the third party with a right against the promisor can defeat the application of the 'broad ground'. However, these two cases indicated that the English

[109] [2007] EWHC 918. This case involved a claim for breach of contract and negligence in relation to the construction of a power station in Philippines. The contract was entered into by a parent company in favour of its subsidiaries. It therefore sought to recover the losses suffered by the subsidiaries as a result of the breach of contract.

[110] This observation of Toulmin J was merely obiter as in this case, the plaintiff's claim was dismissed on other grounds.

courts prefer the strict approach of the majority in *Panatown* that the 'broad ground' is not applicable if the third party is granted a right to recover damages from the promisor.

The second legal issue arising from the 'broad ground' is whether it will lead to double recovery by the promisee and the third party. This was dismissed by the minority in *Panatown* as this problem can be solved by a joinder of the relevant parties in the legal proceedings to ensure that the claims of both the promisee and the third party are assessed at the same time. [111]

The third issue is whether the promisee is under a duty to account for the damages recovered to the third party. There are two views on this issue. The minority in *Panatown* rejected the requirement to compel the promisee to account the damages to the third party. By contrast, Lord Griffiths in *St Martins*, Lord Clyde and Lord Jauncey in *Panatown* upheld this requirement. Lord Browne-Wilkinson did not provide his view on this issue.

The imposition of a duty to account is to allay the fear that damages recovered under the 'broad ground' will not be used to remedy the defects caused by the breach of contract. Lord Goff dismissed this fear by adding implicit obligations on the part of the promisee to make good the breach of contract. Since the promisee had procured the contract in the first place, he had to ensure that it was duly completed. [112] The existence of an implicit

[111] As per Lord Goff, at 561 (*Panatown*).

[112] This can be seen from Lord Goff's judgment where it was stated, at 559–560 (*Panatown*):

> Suppose that a wealthy philanthropist who lives in a village undertakes as an act of charity to renovate the village hall at his own expense. The trustees who own the hall gladly agree that he should do so. A contract is placed by the philanthropist with a builder, and the work commenced. Unfortunately the work is defective. The builder fails or refuses to rectify the defects; the philanthropist therefore claim damages from him under the building contract, and recovers substantial damages. I cannot believe that, in those circumstances, the philanthropist can simply put the damages in his pocket and leave the building in its defective state. In my opinion, it must be implicit in the licence under which he was

obligation on the promisee replaces the need of his obligation to account.[113] In *Panatown*, Lord Goff held that in the contractual undertaking by Panatown to UIPL to procure a building contract, it was implicit that if the builder's work was defective, Panatown should sue the builder for breach of contract and recover the damages to be used for remedial works.

The need to impose a duty to account arises because some of the damages recovered are actually representing the losses suffered by the third party under the guise of promisee's loss. As such, it is fair for the damages to be given to the third party. However, this conclusion goes against the general principle of damages that courts do not interfere with how the promisee utilises the damages recovered. The solution is therefore to limit the types of damages that can be recovered under the 'broad ground' as discussed in Part IV(A)(3) of this chapter.

In relation to the types of contracts covered by the 'broad ground', Lord Millett restricted the 'broad ground' to claims of defective work, incomplete or delay in completing work in relation to building contracts and other contracts for the supply of work and materials.[114] By contrast, Lord Goff stated that the 'broad ground' has wider application and may extend its application to all types of contracts.[115] This may include contracts involving goods,

---

> permitted to renovate the hall and for that purpose to contract with the builder for the work of renovation that, if the work has begun, he should at least take reasonable steps to procure its satisfactory completion. Accordingly, if he recovers damages from the builder for defective work, he should procure the rectification of the defects by another builder, the damages recovered by him being available to finance that work; though he might, by agreement with the trustees, hand the money over to them to enable them to instruct another builder of their choice.

[113] Unless it is a situation of a promisee who becomes insolvent after receiving damages but before performing its implicit obligation under the contract.

[114] At 591 (*Panatown*). This is followed in *DRC Distribution Ltd* v *Ulva Ltd* [2007] EWHC 1716 (QB), at para 70.

[115] At 553 (*Panatown*). In an earlier case, *White v Jones* [1995] 2 AC 207, Lord Goff refused to apply the 'broad ground' to a contract made between a testator and a solicitor for the drafting of a will. The majority of

contracts providing payment to third parties, other types of contracts providing services and to situations where the promisor fails to perform the contract.[116] It is submitted that the 'broad ground' should apply to all types of contract where the promisee incurs losses in remedying the breach of contract or intends to do so. The rationale in allowing a claim of substantial damages in these types of contract fits into the rationale for the 'broad ground' that is the promisee does not receive the performance which he has bargained for. This provides a 'principled solution' to other difficult cases in this area of law such as *Jackson*.[117]

The fifth issue is in relation to the types of damages can be recovered under the 'broad ground'. There seems to be differing views by the Law Lords in *Panatown* as to the types of damages that the promisee can recover as his own loss. Undoubtedly, cost of repair of the defective work is recoverable. The query is whether other consequential losses especially damage that falls under the second head of *Hadley* v *Baxendale* are recoverable. An example is the loss of rental due to the delay in completing the renovation of building which was intended to be let out by the owner of the building.[118] In *Panatown*, the minority adopted a more benevolent approach and allowed a claim for damages of delay caused by McAlpine's breach of contract under a liquidated damage clause even though Panatown was not the owner of the land. Lord Goff contended that damages for delay can be determined by assessing the land owner's expected profitability as a result of the

---

the House of Lords decided the case in favour of the plaintiffs (beneficiaries) by arguing that the solicitor had breached the duty of care owed to the plaintiffs under the tort of negligence.

[116] At present, the cases applying the 'broad ground' dealt with defective performance only.

[117] At 553 (*Panatown*).

[118] Lord Clyde, at 534 (*Panatown*), found that it was difficult for the promisee to recover such consequential losses suffered by the third party which was the reason behind his preference for the 'narrow ground' in this case. Similarly, Duncan Wallace in his article, "Third Party Damage: No Legal Black Hole?" (1999) 115 *LQR* 394-410, at 406, also opines that it is more logical for consequential losses to be recovered under the 'narrow ground'. Professor Beale also shares the same opinion as seen in his article, "Privity of Contract: Judicial and Legislative Reform" (1995) 9 *JCL* 103-124, at 107.

construction project.[119] Lord Browne-Wilkinson did not disapprove this finding in his Lordship's judgment. Thus, on the facts of *Panatown*, but for the Duty of Care Deed, Panatown will be able to claim all losses arising from the breach of contract based on the 'broad ground'.

There is a degree of artificiality in allowing the recovery of damages for delay where the promisee who does not own the building and is not affected by the delay.[120] Although Lord Goff stated that such loss can be assessed objectively, these losses are usually suffered by the third party owner, not the promisee. This must be distinguished from damages for cost of repair as it is understandable that the promisee may himself suffer this loss as he may undertake to hire another contractor to repair the work or provide money to the third party for this purpose. This leads the courts to require that the promisee has incurred losses due to remedial work or intends or is likely to undertake the repair work. Seen in this light, it may be difficult to justify the recovery of damages for delay and other possible consequential losses.

In *Bovis Lend*, Thornton J held that besides remedial cost, any diminution in value of the property or other tangible loss is also recoverable under the 'broad ground'.[121] Seymour J in *Rolls Royce* also shared similar view as loss of diminution in value "is likely to be similar

[119] Lord Goff, at 555 (*Panatown*) also provided an example to strengthen his claim. This example involved a father entering into a contract of renovation on the daughter's house as a gift to her. The contract contained a liquidated damage clause. If the building work was delayed, the father was able to claim damages for delay in accordance to the liquidated damage clause. This was because the whole purpose of the father in entering into the contract was to allow his daughter to enjoy the benefit from the contract. Allowing the father to claim substantial damages will put him in a position so that he can make good the gift by handing over the money to his daughter and there will be no difficulty for the father to prove his intention to do so.

[120] In *Rolls Royce*, at 183, Seymour J accepted the difficulty in relation to the recovery of consequential losses under the 'broad ground' as the nature and amount of the consequential loss are very much dependent on how the building concerned is utilised by its owner. Similar view is also found in Unberath, Hannes, "Third Parties Losses and Black Holes: Another View" (1999) 115 *LQR* 535– 546.

[121] At para 183 (*Bovis*).

no matter who owns it".[122] Arguably, the learned judges approved such damages as the amount of loss could be reasonably ascertained. With due respect, in relation to loss of diminution in value of the property, it is actually suffered by the third party (owner of the building), rather than the promisee. Again, the law will be stretched if the recovery of this type of loss is allowed.

3. Interplay between 'Narrow Ground' and 'Broad Ground'

There is considerable overlap between the 'narrow ground' and the 'broad ground'. The application of these two grounds may yield the same result as seen in *St Martins* and *Darlington* where the assignee in these cases was able to claim the cost of repair for defects caused by the building contractor's breach of contract. In subsequent cases dealing with similar disputes, judges either discussed both grounds or shown preference to one of the grounds. This has led to unpredictability in the law. It is difficult to determine which ground will be relied on by judges. Since there are differences between these two grounds in term of their scope and effect, the outcome of a case may differ depending on which ground is being relied on by the courts. It is therefore necessary to determine the differences between the two grounds and provide a possible solution to ensure that the development of the law in this area is fair, just and certain.

Firstly, in relation to the requirements to be proven, in order to invoke the application of the 'narrow ground', it must be shown that at the time the contract is created, it is foreseeable that the third party will suffer losses if breach of contract occurs. This exception will not be

[122] At 183 (*Rolls Royce*).

applicable if the third party is granted a right to sue the promisor. For the 'broad ground', the promisee's claim must be reasonable.

Secondly, losses recovered under the 'narrow ground' are assessed based on the losses suffered by the third party. Accordingly, the promisee is under a duty to account the damages recovered to the third party. By contrast, damages recovered under the 'broad ground' represent the losses suffered by the promisee. As such, there is no need to account for the damages to the third party but the courts may impose implicit obligations on the promisee to ensure that the damages are used to fulfill the purpose of granting the damages.

Thirdly, the 'narrow ground' applies to more types of contracts than the 'broad ground'. It is submitted that the types of contracts covered by the two grounds are capable to be expanded.

Fourthly, in relation to the types of damages recoverable, the 'narrow ground' allows recovery of consequential losses suffered by the third party. However, for the 'broad ground', there may be a limit as to the types of consequential losses that can be recovered. Moreover, claims for consequential losses under the 'broad ground' are artificial.

The solution to the potential overlap between the two grounds is to decide who is the party suffering the losses, whether the promisee or the third party.[123] Once this is decided, then the destination of the damages will be determined according to the solution proffered by Lord Clyde:

[123] Brian Coote (2001) 117 *LQR* 81-95 (Performance Interest), at 94.

> . . . realistic and practical solution . . . to permit the contracting party to recover damages for the loss which he and a third party has suffered, being duly accountable to them in respect of their actual loss, than to construct a theoretical loss in law on the part of the contracting party, for which he may be under no duty to account to anyone since it is to be seen as his own loss.[124]

The owner of the losses is determined by looking at who has suffered actual losses or likely to suffer the losses. If the promisee has spent money to carry out the remedial work or intends or likely to do so or has undertaken an obligation to repay the third party for the cost of repair undertaken by the third party, the 'broad ground' will be applicable. In relation to other situations (third party incurs cost of repair) and where consequential losses are involved (these losses represent the losses of the third party), the 'narrow ground' should be applicable. This solution brings three benefits. Firstly, it avoids artificiality of recovery of consequential losses under the 'broad ground' and ensures that damages will go to the right party. Secondly, it prevents the possibility of double recovery as the same loss can only be claimed once, either under the 'narrow ground' or the 'broad ground'. The coverage of both grounds will be different. Thirdly, it is not necessary to subject the 'broad ground' to the 'critical factor'[125] as the damages recovered are for the losses suffered by the promisee only.

As such, the scope of recovery of substantial damages in relation to contracts made for the benefit of third parties will have to be determined in light of the circumstances of each case. Both the 'narrow ground' and the 'broad ground' should complement one another in order to ensure that logic and justice are served. These two grounds can be used together in a case as following the solution offered in this thesis, each of the grounds covers different types of losses. Both grounds should be extended to all types of contracts. Thus, in a situation

[124] At 535 (*Panatown*).
[125] The 'critical factor' provides that 'broad ground' is not applicable if the third party is granted a right to sue the promisor for losses suffered.

involving 'group fun', there is no necessity to rely on *Jackson* to allow recovery of damages.

Any fear of double liability can be minimised by the procedure of joinder, imposition of the 'critical factor' (for 'narrow ground' only) and restricting the types of damages recoverable under the 'broad ground'. It is suggested that only cost of remedial work should be recoverable under the 'broad ground'. Furthermore, for the 'broad ground', the requirements to prove its application should include the promisee's undertaking to carry out the necessary remedial work or to hand over the damages claimed to the third party. This requirement is additional to the requirement that damages claimed must be reasonable. This undertaking will do away with the need to impose a duty to account or implicit obligation.

B. Position in Malaysia

The principles governing assessment of damages for breach of contract are found in s.74(1) Contracts Act 1950[126] (hereinafter referred to as 'CA 1950') which is a codification of the English case of *Hadley* v *Baxendale*.[127] Damages become payable to the plaintiff in the following situations:

[126] Section 74(1) provides that:

> When a 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.

[127] (1854) 9 Ex 341. In fact, *Robinson* v *Harman* was applied or referred to in *Tan Sri Khoo Teck Puat* v *Plenitude Holdings Sdn Bhd* [1994] 3 MLJ 777; *Fazarudin bin Ibrahim* v *Parkson Corp Sdn Bhd (No 2)* [2000] 6 MLJ 685; *Travelsight (M) Sdn Bhd & Anor* v *Atlas Corp Sdn Bhd* [2003] 6 MLJ 658. *Livingstone* v *Rawyards Coal Co* was applied or referred to in *Subramanian a/l Paramasivam* v *Malaysian Airlines System Bhd* [2002] 1 MLJ 45; *Yip Shou Shan* v *Sin Heap Lee-Marubeni Sdn Bhd* [2002] 5 MLJ 113; *Solid Gold Publishers Sdn Bhd* v *Chan Wee Ho* [2002] 3 MLJ 310.

(a) Losses that arise in the usual course of events arising from the breach of contract.

(b) Losses that are such that the contracting parties knew at the time the contract was created would occur from the breach of contract.

Section 74(1) was applied by the Federal Court in *Toh Kee Keong* v *Tambun Mining Co Ltd.*[128] Ong Hock Thye FJ stated that:

> The rule lays down the main principles as follows:--
>
> > "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 may fairly and reasonably be considered as either arising naturally, i.e. according to the usual course of things, from such breach of contract itself, or such as may 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."[129]

In *Lim Foo Yong & Sons Realty Sdn Bhd* v *Datuk Eric Taylor,*[130] the deceased agreed to purchase shares in the defendant's company in return for the defendant to obtain a release of a charge on the deceased's land with Bangkok Bank Ltd. The deceased had performed his part in the agreement but the defendant failed to obtain release of the charge. As a result, the deceased suffered embarrassment and losses due to the inability to deal with the land. The action for breach of contract was brought by the administratrix (deceased's wife) of the deceased. She also claimed damages for the losses she suffered as she had to sell their matrimonial home to ease the deceased's financial difficulties caused by the defendant's breach of contract.

---

[128] [1968] 1 MLJ 39. Section 74(1) was also applied by the Federal Court in *Bee Chuan Rubber Factory Sdn Bhd* v *Loo Sam Moi* [1976] 2 MLJ 14.

[129] At 40 (*Toeh Kee Keong*). *Toeh Kee Keong* had been applied by the Supreme Court in *Lim Foo Yong & Sons Realty Sdn Bhd* v *Datuk Eric Taylor,* the Federal Court in *Arkitek Tenggara Sdn Bhd* v *Mid Valley City Sdn Bhd* [2007] 5 MLJ 697 and the Court of Appeal in *Bumiputra-Commerce Bank Bhd, Kuala Terengganu* v *Chendering Development Sdn Bhd* [2004] 1 MLJ 657 and *Ban Chuan Trading Co Sdn Bhd* v *Ng Bak Guan* [2004] 1 MLJ 411.

[130] [1990] 1 MLJ 168.

The Supreme Court unanimously allowed the administratrix to claim damages suffered by her deceased husband but refused to allow her claim for her own personal damages. Gunn Chit Tuan SCJ stated that:

> We were of the view that the first issue to be considered was who were the parties to the contract of 24 March 1976 because **only a party to the contract or his estate is entitled to compensation for loss of damage caused by a breach of contract under s 74(1) of the Contracts Act 1950**. In our judgment the word 'party' in the said section can only mean a party who was signatory to the contract or his estate. (emphasis added)[131]

Thus, only parties to a contract can sue to recover damages for the losses that he suffers due to a breach of contract. A plaintiff who suffers or is unable to prove any actual damage is only entitled to nominal damages.[132] None of the illustrations to S.74 CA 1950 on the types of damages recoverable deals with a situation of recovery of damages suffered by a third party by the promisee. Thus, a party to a contract cannot claim for losses suffered by a third party.

This part continues to examine whether the similar development in England in relation to recovery of damages in relation to third party loss is found in Malaysia. There is no reported case in Malaysia applying Lord Denning's or James LJ's argument in *Jackson* v *Horizon Holidays,* the 'narrow ground' or the 'broad ground'.

In relation to the 'narrow ground', *Dunlop* v *Lambert* and the Court of Appeal decision in *The Albazero* were referred to with approval by the Federal Court in *The"SS Hwalung."*[133] The Court of Appeal in *The Albazero* applied *Dunlop* v *Lambert* and held that if there is a

[131] At 170 (*Lim Foo Yong*).
[132] *Popular Industries Limited* v *Eastern Garment Manufacturing Sdn Bhd* [1989] 3 MLJ 360.
[133] [1977] 2 MLJ 132.

special contract between the consignor and the carrier that the carrier will deliver the goods to the consignee, this is sufficient to establish legal connection between the consignor and carrier to entitle the consignor to sue the carrier to recover the losses suffered by the consignee. The House of Lords overturned the Court of Appeal decision in *The Albazero* on the ground that there was no necessity to ensure that the consignor was entitled to recover losses suffered by the consignee as the latter was entitled to sue the carrier by virtue of the Bills of Lading Act 1855. The House of Lords' decision in *The Albazero* did not reduce the significance of *Dunlop* v *Lambert* as Lord Diplock relied on it to create the 'narrow ground' which applies to situations where it is rational for the legal system to grant damages for third party loss.

The Federal Court decision of *The "SS Hwa Lung"* itself may be not strong enough to show that Malaysian courts will adopt the 'narrow ground' and its extension to other situations. *The "SS Hwa Lung"* does not deal with the situation where the promisee is recovering damages on behalf of the third party. The dispute in *The "SS Hwa Lung"* was between parties to a contract of carriage where the issue was whether the shipper had the locus standi to sue the carrier for breach of contract. *Dunlop* v *Lambert* and the Court of Appeal decision in *The Albazero* were referred to to show that the rightful person to sue for breach of contract was the contracting party.

The possibility that Malaysian courts may adopt the 'broad ground' is indicated in *Government of the State of Sabah* v *Suwiri Sdn Bhd.*[134] In *Suwiri*, Gopal Sri Ram JCA stated that:

[134] [2005] 4 CLJ 727.

> At the end of the day **the true question for the court is to determine the fair compensation in monetary terms that the plaintiff should receive in accordance with the justice of the case.** That was made clear by Lord Bridge in his speech in *Ruxley Electronics & Construction Ltd v. Forsyth* [1996] AC 344:
>
> > My Lords, damages for breach of contract must reflect, as accurately as the circumstances allow, the loss which the claimant has sustained because he did not get what he bargained for. There is no question of punishing the contract breaker. Given this basic principle, the court, in assessing the measure of the claimant's loss has ultimately to determine a question of fact, although the law has of course developed detailed criteria which are to be applied in ascertaining the appropriate measure of loss in a wide variety of commonly occurring situations. Since the law relating to damages for breach of contract has developed almost exclusively in a commercial context, these criteria normally proceed on the assumption that each contracting party's interest in the bargain was purely commercial and that the loss resulting from a breach of contract is measurable in purely economic terms. But this assumption may not always be appropriate.
>
> In the same case, Lord Jauncey of Tullichettle said:
>
> > Damages are designed to compensate for an established loss and not to provide a gratuitous benefit to the aggrieved party from which it follows that the reasonableness of an award of damages is to be linked directly to the loss sustained.
>
> It follows that the issue of what damages should be awarded for breach of contract in a given case is fact sensitive. (emphasis added)[135]

Gopal Sri Ram JCA adopted a more flexible approach in relation to the principles of recovery of damages for breach of contract along the lines adopted by the House of Lords in *Ruxley* v *Forsyth* which paved the way for the development of the 'broad ground' in *Panatown.*[136] According to Gopal Sri Ram in *Suwiri*, justice plays an important role in determining the amount of damages that a plaintiff can recover. Thus, if the general principle leads to the opening of the 'legal black hole', the courts may adopt the 'broad

[135] At 738 (*Suwiri*).
[136] Lord Goff and Lord Millett agreed with *Ruxley* v *Forsyth* which stated that damages granted to the plaintiff must be reasonable, at 551 and 588-589 respectively (*Panatown*). This is the criteria used in the 'broad ground'.

ground' if it is fair and just to do so. Yet, in *Suwiri,* Gopal Sri Ram JCA was the minority judge. The majority judgment as delivered by Nik Hashim JCA stated that losses suffered due to breach of contract must be strictly proven. In *Suwiri*, the plaintiff's claim was about recovery of loss of profits due to the failure of the defendant to renew timber licence of the plaintiff, rather than a situation in *Ruxley*. Therefore, there was no necessity to adopt a more flexible approach towards the general principle.

V. Inadequacy of Promisee's Remedies for Breach of Contract

Remedies for breach of contract are only useful in situations where the promisee is willing to sue the promisor for breach of contract to obtain specific relief or recover third party loss. The third party cannot compel the promisee to bring legal action against the promisor.

Besides, the remedies available have a limited scope of application. The order of specific performance and injunction is only available in limited circumstances.[137] One of the main limitations[138] is that the courts will not grant these remedies if performance of the contract is so dependent on the expertise and qualifications of the promisor and is to be performed by the promisor only.[139] Furthermore, these remedies are discretionary and will not be granted if this causes unnecessary hardship to the defendant.[140] However, the Malaysian Federal Court had given a strict interpretation as to what caused the unnecessary

[137] See Cheong, May Fong, *Civil Remedies in Malaysia*, (Sweet & Maxwell Asia, 2007), at 186–195 and 251–270 respectively.
[138] There may be many contracts made for the benefit of third parties which require the skill and expertise of the promisor only.
[139] Section 20(1)(b) SRA 1950. For eg., a promisee who enters into a contract with a grasscutter to mow the lawn of his daughter's house cannot specifically enforce the contract against the grasscutter; Illust. (a) of s.20(1)(b) SRA 1950. This section was also applied in *See Teow Chuan* v *Yam Tunku Nadzaruddin Ibni Tuanku Jaafar* (CA) [2007] 2 CLJ 82.
[140] Section 21(2)(b) SRA 1950.

hardship.[141] Stay of proceedings is only applicable in relation to situations involving negative promises to forgo legal rights against third parties.

At present, it is not clear as to whether the 'narrow ground' will be extended to all types of contract. The scope and application of this exception is uncertain and dependent on the scope devised by judges. It has been a number of years since the decision of *Panatown* but the House of Lords had no opportunity to clarify the uncertainties created by the 'narrow ground'. In the lower courts, extension of the 'narrow ground' has received mixed response from the judges.[142]

In relation to the 'broad ground', the types of damages recoverable should be limited to cost of repair or cost to obtain alternative benefit to the third party. Due to issues arising from the application of the 'broad ground' as examined earlier in this chapter, judges may not be persuaded to rely on this ground to determine contractual disputes. The case of *Rolls-Royce* neatly illustrates this point. In this case, Seymour J refused to apply the 'broad ground' due to the following reasons:

> . . . there is a lack of unanimity of judicial utterance as to the appropriateness of the approach of Lord Griffiths to any class of case, and a respectable body of opinion that in some or all classes of case it is contrary to principle and / or difficult of practical application. In these treacherous waters I prefer to

[141] *Sekemas Sdn Bhd* v *Lian Seng Co Sdn Bhd* [1989] 2 MLJ 155.
[142]In *Rolls Royce*, it was held that the 'narrow ground' was applicable to a contract of service. By contrast, in *Bradmount Investments Ltd* v *Williams De Broe plc* [2005] EWHC 2449 (Ch), there was no necessity to make any extension of the 'narrow ground' because the claim was bound to fail due to other reasons. The dispute in this case was related to a contract preparing the flotation of a company in the stock market.

> navigate by already published charts and to seek to apply the law as it has already clearly developed, rather than to speculate as to how it may develop in future.[143]

In conclusion, promisee's remedies for breach of contract apply to limited situations only. These remedies do not afford sufficient relief for all contracts made for benefit of third parties.

VI. Conclusion

This chapter has examined the promisee's remedies for breach of contract deployed by judges to avoid the harshness created by the doctrine of privity. In England, the recent development to avoid the 'legal black hole' includes the 'narrow ground' and the 'broad ground'. Malaysian courts are yet to have the opportunity to determine cases involving contracts made for the benefit of third parties where the promisee applies to stay the legal proceedings brought by the promisor against the third party or where the promisee seeks to recover third party loss. Accordingly, Malaysian courts have much room for development of the law in this area, particularly on damages. However, the courts should clarify the legal issues examined in this chapter relating to the application of the 'narrow ground' and the 'broad ground'.

Despite the possible development on promisee's remedies for breach of contract, the problems created by the doctrine of privity cannot be resolved satisfactorily. The

[143] At 184 (*Rolls Royce*). Similarly in *Sabena Technics SA* v *Singapore Airlines Ltd*, Colman J preferred the 'narrow ground' compared to the 'broad ground' in dealing with claims of damages suffered by a third party. Such preference was due to the fact that the application of the 'narrow ground' is more certain than the application of the 'broad ground'. In *DRC Distribution Ltd* v *Ulva Ltd,* Flaux J, at para 69, doubted whether the 'broad ground' is valid due to the criticisms offered by the majority, particularly Lord Clyde in *Panatown*.

inadequacies of these remedies are examined in Part V of this chapter. More importantly, the intention of the contracting parties to create enforceable rights for third party is not given effect to. As such, a more determined and effective solution to the problems created by the doctrine is to provide the third party with a right to enforce the contract against the promisor. This is discussed in the following chapter.