SPANDECK

SPANDECK ENGINEERING V DEFENCE SCIENCE AND TECHNOLOGY AGENCY

This article focuses on the impact of the case of *Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency (DSTA)*[1] ('Spandeck') on the law of negligence in Singapore.

In Singapore, it is trite law that, in order to mount a claim in negligence, a claimant has to establish the following basic elements:

- the defendant owes the claimant a duty of care
- the defendant has breached that duty of care by acting (or omitting to act) below the standard of care required
- the defendant's breach has caused the claimant damage
- the claimant's losses arising from the defendant's breach are not too remote, and
- such losses can be adequately proved and quantified[2].

The issue with which the Court of Appeal in Spandeck was primarily concerned related to the first of these elements, ie whether or not DSTA (the 'respondent') owed Spandeck Engineering (S) Pte Ltd (the 'appellant') a duty of care.

THE FACTS

Briefly, the facts of Spandeck are as follows. The appellant was the contractor in a building project commissioned by the Singapore Government (the 'employer'), while the respondent was the superintending officer of the project.

As such, the latter's duties included the certification of interim payments in respect of the appellant's work. The dispute arose because the appellant alleged that the respondent had under-certified the appellant's work, leading to underpayment by the employer. The appellant's contract with the employer (the 'Contract') contained an arbitration clause which provided, *inter alia*, that any dispute between the employer and the appellant as to any certificate or valuation by the respondent could be referred by either of the disputing parties to arbitration. The appellant, however, did not commence arbitration proceedings against the employer in order to resolve the dispute because it had, by that time, already novated the Contract to a third party and had thereby lost the right to this line of recourse.

Instead, the appellant claimed against the respondent in negligence on the grounds that: (i) the respondent owed the appellant a duty of care to apply professional skill and judgment in certifying, in a fair and unbiased manner, payment for work carried out by the appellant, so as to avoid causing it any loss due to undervaluation and under-certification of works, and (ii) the respondent had breached this duty by negligently undervaluing and under-certifying the appellant's works.

THE ISSUE WITH WHICH THE COURT OF APPEAL IN SPANDECK WAS PRIMARILY CONCERNED RELATED TO THE FIRST OF THESE ELEMENTS, IE WHETHER OR NOT DSTA (THE 'RESPONDENT') OWED SPANDECK ENGINEERING (S) PTE LTD (THE 'APPELLANT') A DUTY OF CARE.

THE LAW OF NEGLIGENCE PRE-SPANDECK

Before coming to its decision, the Court of Appeal in Spandeck reviewed the existing law of negligence in Singapore as well as in England. It found that one of the more generally accepted tests used to establish duty of care is the three-part test[3] laid down in the case of *Caparo Industries plc v Dickman*[4]. However, the Court of Appeal in Spandeck noted that this test is not applicable to all cases of negligence. In cases of psychiatric harm or negligent misstatement causing pure economic loss[5], for example, different tests are used to establish duty of care[6].

Negligence cases are also differentiated according to the type of loss that the defendant's actions cause the plaintiff to suffer. The general rule in England is that a duty of care would be recognised only where the plaintiff had suffered physical damage[7], and not where the loss suffered was purely economic in nature.

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One of the main reasons for this exclusionary rule[8] against claims involving pure economic loss was the concern of indeterminate liability being imposed on the defendant[9]. In England, cases like Murphy v Brentwood[10] have strongly reaffirmed the applicability of the general exclusionary rule.

However, in Singapore, ever since the cases of *RSP Architects Planners & Engineers v Ocean Front Pte Ltd*[11], and *RSP Architects Planners & Engineers v MCST Plan No 1075*[12], this rule has been less strictly adhered to. The plaintiffs in these two cases were the management corporations of condominium developments who were claiming for pure economic loss. This was suffered as a result of defects in the buildings which were caused, in one case, by the negligence of the defendant developers and, in the other case, by the negligence of the defendant architects. In both cases, the court allowed the claims, even though the loss suffered by the plaintiff was pure economic loss. The test that was used in these cases to establish a duty of care was a two-stage process[13]. Hence, in Singapore, the attitude of the courts is less restrictive than in England and it is possible to recover for pure economic loss in cases other than negligent misstatement cases if the two-stage test is satisfied[14].

BEFORE SPANDECK, THE LAW OF NEGLIGENCE IN SINGAPORE, AS WELL AS IN ENGLAND, REQUIRED DIFFERENT TESTS TO BE USED IN THE DETERMINATION OF DUTY OF CARE, DEPENDING ON THE DIFFERENT SITUATIONS IN WHICH THE DAMAGE AROSE.

THE EFFECT OF SPANDECK ON THE LAW OF NEGLIGENCE

It will be seen from the previous section that before Spandeck, the law of negligence in Singapore, as well as in England, required different tests to be used in the determination of duty of care, depending on the different situations in which the damage arose[15]. The Court of Appeal in Spandeck held that this situation was undesirable and that it was preferable, instead, to use a single test to determine the imposition of a duty of care in all claims arising out of negligence, irrespective of the type of damage claimed, and that this should include claims for pure economic loss, whether they arise from negligent misstatements or from acts and or omissions[16].

The Court of Appeal then went on to consider what this single applicable test should be. It held that the test to determine the existence of a duty of care should take the form of a two-stage test based on proximity and policy considerations, together with a preliminary requirement of factual foreseeability. The preliminary requirement of foreseeability was explained by the Court of Appeal as simply meaning that 'the defendant ought to have known that the claimant would suffer damage from his (the defendant's) carelessness'[17].

The court saw this as a threshold question that had to be answered, and this question is therefore essential to the success of any claim in negligence. However, as the question is very wide ranging, and will be satisfied in almost all cases, the court did not see a practical need to include it in a legal formulation of the test[18]. The test itself was therefore formulated to include only two stages, proximity and policy.

Proximity

The first stage of the test for the determination of duty of care requires that there must be sufficient legal proximity between the claimant and the defendant. This stage of the test therefore looks at the closeness of the relationship between the parties[19]. In discussing what this notion of proximity encompassed, the Court of Appeal agreed that 'proximity' embraced:

- physical proximity – (in the sense of space and time) between the person or property of the plaintiff and the person or property of the defendant
- circumstantial proximity – such as an overriding relationship of employer and employee, or of a professional man and his client
- causal proximity – in the sense of the closeness or directness of the causal connection between the defendant's act and the loss sustained by the plaintiff[20].

The Court of Appeal also stated that this analysis of proximity included the twin criteria of:

- the voluntary assumption of responsibility by the defendant to take care to avoid causing loss to the plaintiff and
- the reliance by the plaintiff upon the defendant to take such care in circumstances where the defendant knew or ought to have known of that reliance[21].

The court saw these two criteria as essential factors in establishing proximity[22]. If this stage of the test was passed, and the preliminary requirement of factual foreseeability was also fulfilled, then a *prima facie* duty of care would arise.

Policy

At this point in time, the second stage of the test would then become relevant. This stage requires the court to take policy considerations into account to ascertain whether or not the *prima facie* duty that had been established should be negated. An example of a relevant policy consideration is the existence of a contractual matrix which defines the rights and liabilities of the parties as well as their relative bargaining positions[23].

THE COURT OF APPEAL IN SPANDECK UNANIMOUSLY DISMISSED THE APPEAL AND HELD THAT THE RESPONDENT DID NOT OWE THE APPELLANT A DUTY OF CARE AND ARRIVED AT THIS DECISION AFTER APPLYING THE TWO-STAGE TEST AND CONSIDERING THE THRESHOLD ISSUE OF FACTUAL FORESEEABILITY.

The Court of Appeal stressed that the test it had formulated should be applied incrementally such that, in both stages of the test, decided cases in analogous situations should be referred to in order to see how previous courts had ruled on the matters of proximity and/or policy. However, the Court of Appeal added that in situations where there were no factual precedents, the court could still extend liability where it was just and fair to do so, having taken into account the concern of indeterminate liability[24].

THE DECISION ON THE FACTS

The Court of Appeal in Spandeck unanimously dismissed the appeal and held that the respondent did not owe the appellant a duty of care. It arrived at this decision after applying the two-stage test as set out above and considering the threshold issue of factual foreseeability. Specifically, the court found that the preliminary requirement of factual foreseeability was satisfied because 'it must have been foreseeable to the respondent that any negligence in its certification would directly deprive the appellant of moneys he would otherwise have been entitled to, and that if it had been paid the correct amounts, it might not have got into financial difficulties'[25].

The Court of Appeal then looked at the first stage of the test relating to proximity. It found the facts of *Pacific Associates Inc v Baxter ('Pacific Associates')*[26] to be materially the same as those in the Spandeck case, in that the contract between the claimant contractor and the employer in Pacific Associates had also contained clauses providing that the defendant engineer would not be personally liable for acts under the contract, and providing for arbitration of disputes between the contractor and the employer[27]. In view of these contractual provisions, the court in Pacific Associates had found that the defendant engineer could not be found to have held himself out as accepting a duty of care outside of the contractual framework, or that the claimant contractor had relied on such an assumption of responsibility. As such, there was no voluntary assumption of responsibility by the defendant nor any reliance by the claimant on such an assumption[28]. Following this reasoning in Pacific Associates, the Court of Appeal in Spandeck found that, in view of the arbitration clause in the Contract, there was no legal proximity between the appellant and the respondent[29].

SPANDECK REPRESENTS A VERY IMPORTANT DEVELOPMENT IN THE LAW OF NEGLIGENCE IN SINGAPORE BECAUSE IT CONSOLIDATES, INTO ONE SINGLE TEST, THE DIFFERENT TESTS THAT HAVE TRADITIONALLY BEEN USED TO DETERMINE THE EXISTENCE OF A DUTY OF CARE.

Even though the Court of Appeal had found that the requirement of proximity had not been satisfied, it nevertheless went on to consider whether, if there had been proximity and a *prima facie* duty of care had been established, there would have been any policy considerations that would have negated this prima facie duty of care. In considering this second stage of the test, the Court of Appeal shared the view of Russell LJ in Pacific Associates[30] that a duty of care should not be superimposed on a contractual framework and, for this reason, held that policy considerations would have, in any case, negated any prima facie duty of care even if the appellant had managed to establish the necessary proximity[31].

Having found against the appellant on the issue of duty of care, the court found it unnecessary to consider whether there had been a breach of duty or causation, as well as remoteness[32].

CONCLUSION

Spandeck represents a very important development in the law of negligence in Singapore because it consolidates, into one single test, the different tests that have traditionally been used to determine the existence of a duty of care. This means that the same test can be used to establish a duty of care regardless of the type of negligent act and regardless of the kind of loss that the negligence has caused the plaintiff to suffer. Hopefully, this bold step taken by the Singapore Court of Appeal will make this rather complicated area of law easier to understand and to apply.

REFERENCES

1 [2007] 4 SLR 100.
2 *Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency* [2007] 4 SLR 100 at [21].
3 The three-part test required that, in addition to the foreseeability of damage, there should also be sufficient proximity in the relationship between the plaintiff and the defendant, and that the situation should be one in which the court considers it fair, just and reasonable that the law should impose a duty of a given scope upon the latter for the benefit of the former (see Para 39).
4 [1990] 2 AC 605.
5 For cases of negligent misstatement causing pure economic loss, the test laid down by *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465 grounds liability for the maker of the statement on an assumption of responsibility towards the recipient of the statement in question and reliance by him on its accuracy (see Para 44). Pure economic loss is where the loss suffered by the plaintiff is purely financial in nature and is not connected to any kind of physical damage.
6 *Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency* [2007] 4 SLR 100 at [44].
7 Physical damage refers to injuries to the plaintiff himself or damage to his property.
8 One important exception to this rule against claiming for pure economic loss was where the pure economic loss had been caused by the defendant negligent misstatement. In such cases, a duty of care would be recognised so long as the plaintiff was able to fulfill the test for determining duty of care in negligent misstatement cases.

9 The fear here is that imposing a duty of care on the defendant would expose him to 'liability in an indeterminate amount for an indeterminate time to an indeterminate class' (*Ultramares Corporation v Touche* (1931) 255 NY 170 at 179, per Cardozo CJ).
10 [1991] 1 AC 398.
11 [1996] 1 SLR 113.
12 [1999] 2 SLR 449.
13 The first stage of this process required the court to examine and consider the facts and factors to determine whether there was a sufficient degree of proximity in the relationship between the plaintiff and the defendant which would give rise to a duty of care on the part of the latter to avoid the kind of loss sustained by the former. If such a degree of proximity was found, the second stage of the process then required the court to consider whether there was any material factor or policy which precluded such duty from arising (*RSP Architects Planners & Engineers v MCST Plan No 1075* at [31], per Thean JA).
14 *Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency* [2007] 4 SLR 100 at [59].
15 *Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency* [2007] 4 SLR 100 at [50].
16 *Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency* [2007] 4 SLR 100 at [71].
17 *Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency* [2007] 4 SLR 100 at [75].
18 *Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency* [2007] 4 SLR 100 at [75-6].
19 *Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency* [2007] 4 SLR 100 at [77].
20 *Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency* [2007] 4 SLR 100 at [78]. In holding this, the Court of Appeal was adopting the view of *Deane J in Sutherland Shire Council v Heyman* (1985) 60 ALR 1.
21 *Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency* [2007] 4 SLR 100 at [78].
22 *Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency* [2007] 4 SLR 100 at [81].
23 *Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency* [2007] 4 SLR 100 at [83].
24 *Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency* [2007] 4 SLR 100 at [73]. For an explanation of the fear of indeterminate liability, see Reference 9.

THE SPANDECK RESULT MEANS THAT THE SAME TEST CAN BE USED TO ESTABLISH A DUTY OF CARE REGARDLESS OF THE TYPE OF NEGLIGENT ACT AND REGARDLESS OF THE KIND OF LOSS THAT THE NEGLIGENCE HAS CAUSED THE PLAINTIFF TO SUFFER.

25 Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency [2007] 4 SLR 100 at [89].
26 [1990] 1 QB 993.
27 This is similar to the arbitration clause in the Contract which provided for arbitration of any dispute between the employer and the appellant as to any certificate or valuation by the respondent.
28 *Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency* [2007] 4 SLR 100 at [99-100].
29 *Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency* [2007] 4 SLR 100 at [108].
30 Russell LJ had held that it was not just and reasonable to impose on the defendant a duty which the claimant had been content not to make contractual because it had sufficient protection in the event of under-certification under the arbitration clause in his contract with the employer.
31 *Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency* [2007] 4 SLR 100 at [114].
32 *Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency* [2007] 4 SLR 100 at [116].

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