

**DALAM MAHKAMAH PERSEKUTUAN MALAYSIA**  
**RAYUAN SIVIL NO. 02-32-2007 (W)**

ANTARA

**UDA HOLDINGS BHD.**

... PERAYU

DAN

**KOPERASI PASARAYA MALAYSIA BERHAD**

... RESPONDEN

**DALAM MAHKAMAH PERSEKUTUAN MALAYSIA**  
**RAYUAN SIVIL NO. 02-33-2007 (W)**

ANTARA

**DATO' BANDAR KUALA LUMPUR**

... PERAYU

DAN

**KOPERASI PASARAYA MALAYSIA BERHAD**

... RESPONDEN

**DALAM MAHKAMAH PERSEKUTUAN MALAYSIA**  
**RAYUAN SIVIL NO. 01-9-2007 (W)**

ANTARA

**KERAJAAN MALAYSIA**

... PERAYU

DAN

**KOPERASI PASARAYA MALAYSIA BERHAD**

... RESPONDEN

Coram: Zaki bin Tun Azmi, CJ  
Abdul Aziz bin Mohamad, FCJ  
Zulkefli bin Ahmad Makinudin, FCJ

## **JUDGMENT OF ZULKEFLI BIN AHMAD MAKINUDIN, FCJ**

### Introduction

These are three related appeals fixed for hearing before us which involved the same subject matter. The first, is the Civil Appeal No. 02-32-2007 (W) in which the appellant is Uda Holdings Sdn. Bhd. ["Uda Holdings"]. The second, is the Civil Appeal No. 02-33-2007 (W) in which the appellant is Dato Bandar Kuala Lumpur ["DBKL"]. The third, is the Civil Appeal No. 01-9-2007 (W) in which the appellant is the Government of Malaysia ["the Government"]. The respondent for all the three appeal cases is Koperasi Pasaraya Malaysia Berhad ["Koperasi Pasaraya"]. Koperasi Pasaraya is the plaintiff before the High Court wherein it had filed action against Uda Holdings as the first defendant, DBKL as the second defendant and the Government of Malaysia as the third defendant respectively. The cause of action as pleaded by Koperasi Pasaraya in its Amended Statement of Claim against Uda Holdings, DBKL and the Government is founded on public nuisance and breaches of statutory duties. I shall refer the parties in these appeals before this Court as they were in the High Court.

## Background Facts

The relevant background facts of the case are as follows:

At the commencement of this action in 1997, the plaintiff was running a supermarket business ["supermarket"] at the ground floor of a nineteen storey building at No. 69, Jalan Haji Hussein, Kuala Lumpur ["the premises"]. The plaintiff had started its business at this premises sometime in 1975. The plaintiff being a cooperative society, enjoyed getting customers mainly from its members consisting of about six thousand individual members and fifty cooperative societies e.g., Police Cooperative Society, the Armed Forces Cooperative Society and Wilayah Persekutuan Government Servants Cooperative Society. The products sold at the supermarket were mainly food stuff and essential household goods. The main entrance to the supermarket was at Lorong Haji Hussein 3 ["LHH3"] where thirty five car parking bays were located. This side road is a thoroughfare and proved to be very convenient to the customers of the plaintiff's supermarket for purposes of loading and unloading passengers and goods to their vehicles.

It is the plaintiff's case that on 20<sup>th</sup> October 1996, the second defendant acting in concert with the first and the third defendants caused the LHH3 to be closed to all traffic. It began with the first defendant declaring and categorizing that part of LHH3 adjacent to the plaintiff's supermarket as a Temporary Occupational Licence (TOL) after an application by the second defendant who also

closed the road to all traffic. Subsequently the first defendant constructed seventy six stalls at LHH3.

The first defendant, who at the relevant time known as Urban Development Authority (UDA), a statutory body, intended to construct two multi-storey building on Lot 2347, situated not far from the plaintiff's supermarket on the same Jalan Haji Hussein. It so happened that during that time UDA's land was occupied by unlicensed hawkers. To commence development on the said land the first defendant had to remove the unlicensed hawkers first. To do that the first defendant sought the assistance of the second defendant to have the said hawkers removed from UDA's land. However it was also necessary for the second defendant to locate a new place for the said hawkers. It was decided that the place would be LHH3, that part of public road adjacent to the entrance to the plaintiff's supermarket. The approval of the Land Administrator for Wilayah Persekutuan Kuala Lumpur, the third defendant, to have the LHH3 converted from a public road to a TOL had also to be obtained. An application to that effect was made by both the first and second defendants. The third defendant granted the application. Once that part of LHH3 was converted into a TOL, the second defendant closed the road to all traffic and the first defendant constructed seventy six stalls with a view to relocate the said hawkers here from UDA's land. Although keys to thirty six stalls had been collected it would appear that only twelve stalls were occupied by the said hawkers. Be that as it may, it was alleged by the plaintiff that its effect on the plaintiff's supermarket

business had been very adverse. The number of customers coming to the plaintiff's supermarket began to dwindle. The main reason was due to access problem by cars and difficulty of parking. The road had been barricaded by the second defendant. The car parking bays had been abolished. That area had been congested with so many people, a completely different situation as that before it was closed.

The closure of the road was supposedly for a period of two years. But it turned out that it was only reopened to public after a period of five years. It was closed from 28 October 1996 to 30 November 2001. Due to the road closure the plaintiff's supermarket business suffered tremendously. Despite experiencing substantial losses in the business caused by the closure of the said road, the plaintiff continued to operate the said supermarket at the said premises until September 2001. Then on 1 December 2003, the plaintiff was forced to sell the said premises for a sum of RM6 million but with a right to rent it back for a period of five years at a monthly rental of RM60,676. An option to renew this tenancy for a further term of five years at a rental based on prevailing market value was also accorded to the plaintiff by the new owner. About 2½ years after they shut down the said supermarket, the plaintiff reopened it in February 2004.

### Findings of the High Court

The High Court, after a full trial, allowed the plaintiff's claim and awarded judgment in the sum of RM23,734,157.00 with interest thereon at the rate of 8% per annum from 11 November 1997 and costs. The learned Judge of the High Court held that the first defendant, the second defendant and the third defendant had jointly acted unreasonably in relocating the unlicensed hawkers to that portion of LHH3, causing public nuisance especially to the plaintiff. The learned trial Judge further held that in doing so, the first defendant, the second defendant and the third defendant failed to consider the hardship caused to a great number of road users and occupiers of that portion of LHH3. As a direct consequence, the plaintiff's supermarket business suffered great loss. The learned trial Judge also ruled that the third defendant had unlawfully issued the TOL over that portion of LHH3, that the second defendant had unlawfully closed the same and that the first defendant had unlawfully constructed seventy six temporary hawker stalls thereon.

Dissatisfied with the decision of the High Court, the first defendant, the second defendant and the third defendant appealed to the Court of Appeal.

## Findings of the Court of Appeal

All the three Court of Appeal Judges [**James Foong, Low Hop Bing and Suriyadi Halim Omar, JJCA**] upheld the judgment of the High Court that the first defendant, the second defendant and the third defendant were jointly and severally liable to the plaintiff under public nuisance. The Court of Appeal also ruled that as against the second defendant [DBKL] the claim in economic loss was only recoverable under the head of breach of statutory duty.

His Lordship **James Foong, JCA**, however dissented with the majority decision on the issue of quantum to be awarded to the plaintiff. His lordship held that the trial Judge had made a mistake in allowing the plaintiff's whole claim on the grounds that the defence had failed to call any rebuttal witnesses. His Lordship then set out and dealt with each head of claim made by the plaintiff and awarded the plaintiff RM8,152,804.00 with interest thereon at the rate of 8% per annum from 11 November 1997 and costs.

Dissatisfied with the decision of the Court of Appeal, the first defendant, the second defendant and the third defendant sought leave to appeal to this Court against the whole decision of the Court of Appeal.

## Questions for determination before the Federal Court

Leave to appeal was granted on the following three Questions:

- (1) whether an act done pursuant to a Temporary Occupation Licence [“TOL”] resulting in the closure of a public road is a defence to a claim for public nuisance and/or breach of statutory duty;
- (2) whether the judgment of the Federal Court in **Majlis Perbandaran Ampang Jaya v. Stephen Phoa Cheng Loon & Ors. [2006] 2 MLJ 389** precludes a claim for pure economic loss against a local authority and/or the Government of Malaysia; and
- (3) whether the provisions of sections 12 and 46 of the Street, Drainage and Building Act 1974 [“SDBA”] confer a right of action against a local authority in respect of a road closure undertaken pursuant to the issuance of a TOL under section 65 of the National Land Code 1965 [“NLC”].

## The Appeal

For convenience I shall first deal with Questions 1 and 3 together since they concern solely the issue of liability. Question 2, which is, essentially, a relief question of whether a pure

*economic loss* is recoverable against a local authority on the assumption there is liability.

It is to be noted at the outset that in relation to the location of the supermarket as shown on the lay-out plan of LHH3, it shows that a closure of part of LHH3 did not result in a denial of access to the supermarket, contrary to the contention of the plaintiff. **[See page 1031 of Appeal Record Vol. 4]**. The access from the main road Jalan Hj. Hussein and Lorong Hj. Hussein Satu was at all times available during the period of closure. The supermarket was situated on the ground floor of a multi-storey building in which five floors were reserved for a car park. These facts would rebut the conclusion drawn by the Court of Appeal that as a result of the closure "*the lifeline of the supermarket's business was disconnected*". It may be said that the closure undoubtedly inconvenienced the supermarket but, with respect, in my view the Court of Appeal was placing it too high an evaluation to say that the lifeline of the supermarket was severed or disconnected as a result.

#### Compliance with Statutory Instruments and Orders

It is also to be noted that the various steps taken leading to the closure of LHH3 were undertaken pursuant to statutory powers and the issuance of the relevant statutory orders or instruments whether by DBKL or the Government which can be highlighted as follows:

Firstly, there is the issuance of a TOL to Uda Holdings by the Government under section 67 of the NLC over LHH3. The notation on the TOL document reads: “*Maksud menduduki – Tapak gerai untuk penempatan penjaja*” and the TOL was issued under Form 4A of the NLC.

Secondly, the closure was undertaken by the DBKL under the Road Transport Act 1987 [“RTA”] in which due notice of intended closure was given, and not under section 5(c) of the SDBA where a closure can be effected with the consent of the State Authority. In the result, the Road Transport (Prohibition of Use of Road) (City of Kuala Lumpur) (No. 6) Order 1997 was issued under section 70(2) of the RTA on 18.7.1997 closing LHH3 with effect from 14.8.1997. **[See Gazette Notification No. P.U.(A) 311 at pages 1072-1074 of Appeal Record Vol. 4]**. This was preceded by a call for objections dated 8.5.1997 by DBKL published in Gazette Notification No. 3775. **[See pages 1069-1071 of Appeal Record Vol. 4]**. No objection was received by DBKL against the making of the Order.

Thirdly, the development of LHH3 under the TOL as a hawker centre by the building of seventy six stalls was pursuant to a Development Order dated 29.8.1996 issued by DBKL to Uda Holdings under section 22 of the Federal Territory (Planning) Act 1982 [“FTPA”]. **[See pages 1038-1040 of Appeal Record Vol. 4]**.

### Duties of DBKL Over Public Streets

It is an acknowledged fact that DBKL has no rights of ownership over the public roads within its jurisdiction. The public streets also do not vest in DBKL. In the case of **Syarikat Perniagaan United Aces Sdn. Bhd. v. Majlis Perbandaran Petaling Jaya [1997] 1 MLJ 394**, the Federal Court held that the vesting provision under section 65 of the Local Government Act 1965 ["LGA"] does not apply to "streets". Furthermore, there is no vesting provision in the SDBA. Instead section 12(1) of the SDBA inter alia states that upon a street being declared a public street, it shall "*forever afterwards be maintained by the local authority*". I am of the view section 12(1) of the SDBA on its true reading imposes on DBKL a duty of maintenance of a public street, as meaning upkeep and repairs, and not a duty to maintain the character of the road forever as a public street. The provision does not say the street shall "*forever afterwards be maintained as a public street by the local authority*". In this regard the Court of Appeal wrongly concluded in its majority judgment that DBKL was under a duty to forever maintain the character of the roads as a public street. A reading of section 4 of the SDBA would dispel any confusion in this regard. Section 4 makes it clear that the word "*maintained*" is used in the sense of "*repair*" and not of retention of its character as a private street or public street.

In relation to the usage of a public street or a road falling within its authority, it is to be noted that a local authority may not act of its own. **[See the phrase “other than a Federal road” in section 67(a) of the RTA]**. Further, by section 5(c) of the SDBA it may not without the consent of the State Authority close a public street. I am of the view by section 70(1) read with section 67 of the RTA, a local authority may not without the consent of the Director General of Road Transport prohibit or restrict the use of a road falling within its authority, i.e. “*a road other than a Federal road*”. In the circumstances, it is beyond the capacity of a local authority to forever ensure the maintenance of a road in its character as a public street. I am therefore of the view that the Court of Appeal was wrong in reading section 12(1) of the SDBA as casting a duty on DBKL to forever retain LHH3 as a public street as opposed to a duty to repair and maintain the road.

#### Whether DBKL has breached Statutory Duty

The Court of Appeal has held DBKL liable on the basis of breach of statutory duty. It should be noted that this finding was made for the first time in the Court of Appeal. This is how the Court of Appeal explained its decision:

*“DBKL’s omission to perform its duty to maintain the Road as a public street under section 12(1) and its failure to exercise the powers under section 46(3)(a) to*

*remove the obstruction are obvious manifestations of DBKL's non-fulfillment of its statutory duties.*

*There can be no doubt that DBKL's breaches of statutory duties under section 12 and section 46 have caused injury to the plaintiff as reflected in the eventual collapse of the business of the supermarket.*

*In the circumstances, I hold that the supermarket has successfully established breaches of statutory duties occasioned by DBKL."*

The Court of Appeal in its judgment relied on the case of **Cutler v. Wandsworth Stadium Ltd. [1949] AC 398** to say that the plaintiff had a right of action although section 12 and section 46 of the SDBA did not impose a civil remedy for breach. The Court of Appeal spoke of a presumption in favour of right of action wherein it inter alia stated as follows:

*"Although sections 12 and 46 do not expressly impose a civil remedy for such breaches, there is a presumption that the supermarket as the party injured thereby will have the right of action: See **Cutler**, supra, per **Lord Simons**."*

It is my judgment that the Court of Appeal fell into error in its analysis because where the breach of statutory duty alleged is an omission to exercise a statutory power, a determination has first to be made whether there was a duty or obligation to exercise the

power in the circumstances or was it a discretion and secondly, if so, whether the failure to exercise the power was an irrational act. The principles were considered and determined by the House of Lords in the case of **Stovin v. Wise (Norfolk CC, third party) [1996] AC 923**. It was a case where the country council as the body in charge of the highway in question was charged with damages by an injured motorist for failure to remove an earth bank blocking the view of motorists. **Lord Hoffmann** for the majority, dealt with the policy of the statute in question whether it gives rise to a private cause of action, and when a failure to exercise a statutory power could be actionable. This is what **Lord Hoffmann** at pages 952 and 953 said in his speech:

1. *“Whether a statutory duty gives rise to a private cause of action is a question of construction: see **Reg. v. Deputy Governor of Parkhurst Prison, Ex parte Hague [1992] 1 AC 58**. It requires an examination of the policy of the statute to decide whether it was intended to confer a right to compensation for breach. Whether it can be relied upon to support the existence of a common law duty of care is not exactly a question of construction, because the cause of action does not arise out of the statute itself. But the policy of the statute is nevertheless a crucial factor in the decision.”*
2. *“In the case of a mere statutory power, there is the further point that the legislature has chosen to*

*confer a discretion rather than create a duty.... But the fact that Parliament has conferred a discretion must be some indication that the policy of the act conferring the power was not to create a right to compensation...*

*In summary, therefore, I think that the minimum preconditions for basing a duty of care upon the existence of a statutory power, if it can be done at all, are, first, that it would in the circumstances have been irrational not to have exercised the power, so that there was in effect a public law duty to act, and secondly, that there are exceptional grounds for holding that the policy of the statute requires compensation to be paid to persons who suffer loss because the power was not exercised.* (emphasis added).

On the question of whether the policy of the statute as an exceptional ground requires compensation to be paid to a person who suffers loss because the power was not exercised, I find there is nothing in the SDBA in specific the provisions dealing with public streets, to suggest that there is a policy to pay compensation to a person who suffers loss as a result of DBKL failing to do something it was empowered to do over streets. For example in the Malaysian Privy Council case of **Tan Chye Choo & Ors. v. Chong Kew Moi [1970] 1 All ER 266**, the Privy Council inter alia held that breach of a Road Transport Regulation

requiring taxis to be kept in a roadworthy condition did not in the absence of negligence give rise to a liability in damages to an individual for its breach; the regulation merely setting a standard of care.

Applying the test as laid out in the case of **Stovin v. Wise** (**Norfolk CC, third party**) (supra) to the present case, it can be seen that no liability for breach of statutory duty could arise against DBKL for failure to act under section 12 or section 46(3)(a) of the SDBA. As regards section 12(1) of the SDBA, I had earlier stated my view that the Court of Appeal has misread the said section 12(1) by misconstruing the word “*maintained*” as requiring an obligation to retain the road forever as a public street and not a duty to maintain the road in terms of repair and up-keep. As regards section 46(3)(a) of the Act, the point to note is that it is couched in discretionary or non-mandatory terms. It reads as follows:

*“The local authority may cause any such obstruction to be removed or may itself through its servants remove the same to a suitable place, there to remain at the risk of the owner or person offending and may detain the same until the expenses of removal and detention are paid.”* (emphasis added).

I am of the view DBKL could not reasonably or legitimately invoke section 46(3)(a) of SDBA to remove the stalls, and thereby the obstruction, because of the TOL and the subsequent legal steps taken to give effect to the TOL by closure of the road and the planning permission. It would have been a different case if the TOL had been quashed by timeous action by the plaintiff. In that event, there might well be an obligation by DBKL to act under section 46(3)(a) and remove the obstacles. In the circumstances of the case, DBKL did not act irrationally in not exercising its discretionary power under section 46(3)(a) and therefore was not in breach of its statutory duties.

#### The Non-Quashing of the TOL, the Road Transport Order and the Development Order

I shall now deal with the issues on the TOL, the Road Transport Order and the Development Order which were not quashed or invalidated and therefore remained in force.

The TOL was issued by the relevant Government authority to Uda Holdings under section 65 of the NLC for the specific purpose of street trading by the construction of seventy six hawker stalls over LHH3. The Road Transport Order No. 6 of 1996 closing the road, and the Development Order issued by DBKL to construct the stalls, were made subsequent to the TOL and to give effect to the manifest purpose of the TOL.

I am of the view that there was an obligation on the part of the plaintiff to quash or invalidate the TOL and the other statutory orders pursuant to which LHH3 was closed if the plaintiff took the view, as it now does, that the TOL was invalid and the road should not have been closed. It is established law that there is no presumption of invalidity over statutory orders or administrative orders made under a statute. As **Lord Radcliffe** said in **Smith v. East Alloe RDC [1956] 1 All ER 855** such orders “*bear no brand of invalidity on its forehead*”. The question in that case was whether a compulsory purchase order could be ignored as a nullity because it was said to be made in bad faith. **Lord Radcliffe**’s full statement is instructive wherein he had this to say at page 871:

*“At one time the argument was shaped into the form of saying that an order made in bad faith was in law a nullity... But this argument is in reality a play on the meaning of the word nullity. An order, even if not made in good faith, is still an act capable of legal consequences. It bears no brand of invalidity upon its forehead. Unless the necessary proceedings are taken at law to establish the cause of invalidity and to get it quashed or otherwise upset, it will remain as effective for its ostensible purpose as the most impeccable of orders...”.* (emphasis added)

In the later case of **F. Hoffmann La-Roche & Co. A.G. and Ors. v. Secretary of State for Trade and Industry [1975] AC 295**, Lord Diplock declared the true legal position in stronger terms at page 365 as follows:

*“Under our legal system, however, the courts as the judicial arm of government do not act on their own initiative. Their jurisdiction to determine that a statutory instrument is ultra vires does not arise until its validity is challenged in proceedings inter partes either brought by one party to enforce the law declared by the instrument against another party or brought by a party whose interests are affected by the law so declared sufficiently directly to give him locus standi to initiate proceedings to challenge the validity of the instrument. Unless there is such challenge and if there is, until it has been upheld by a judgment of the court, the validity of the statutory instrument and the legality of acts done pursuant to the law declared by it are presumed...” (emphasis added).*

It is an established rule of interpretation that statutory instruments or administrative orders are presumed valid until set aside by a court of law. In **Boddington v. British Transport Police [1999] 2 AC 143**, Lord Irvine LC explained the true legal effect of this presumption at page 155 as follows:

*“In my judgment, the true effect of the presumption is that the legislation or act which is impugned is presumed to be good until pronounced to be unlawful, but is then recognized as never having had any legal effect at all. The burden in such a case is on the defendant to establish on a balance of probabilities that the subordinate legislation or the administrative act is invalid: see also Reg. v. Inland Revenue Commissioners, Ex parte T.C. Coombs & Co. v. IRC [1991] 2 AC 283. This is the principle to which Lord Diplock referred in F. Hoffmann La Roche & Co. A.G. v. Secretary of State for Trade and Industry [1975] AC 295.”*

Therefore, in the present case when it came up before both the High Court and the Court of Appeal, the TOL and the two subsequent statutory instruments or orders, namely the Road Transport Order No. 6 of 1996 and the Development Order must be taken to have remained in force. Furthermore, on this point, the Evidence Act 1950 in section 114(e) makes the presumption that all official acts are deemed valid unless proven otherwise.

It is to be noted that there were obiter remarks both in the High Court and the Court of Appeal that the TOL was invalid because it was given over a site used as a public street. If so, that was an objection on which judicial review could have been sought by the plaintiff or an appeal lodged under section 418 of the NLC

by it as an aggrieved party where this argument could have been considered head-on by the court and a decision made whether to uphold the TOL or strike it down. The Court of Appeal in my view was influenced by the decision of the English Court in **Vasiliou v. Secretary of State for Transport [1991] 2 All ER 77** that planning permission should not have been granted closing a public road without considering its adverse effect on the business of traders relying on it. However, the Court of Appeal in the present case failed to appreciate that in **Vasiliou**'s case the aggrieved person had made a challenge to the planning order resulting in a quashing of the planning order.

It is unlike the case here where the Court of Appeal was merely asked to assume or presume that the TOL was invalid. Nevertheless, I find it is somewhat unclear how the Court of Appeal had actually approached this question. Initially this is what the Court of Appeal said:

*“It is pertinent for me to note that the learned trial Judge had, after a full hearing on the action, specifically found the validity of the TOL was a non-issue. That being the case, his lordship view that the TOL had been invalidly issued was, at best, mere obiter dictum and not ratio decidendi. Hence, I do not feel the necessity to delve upon this non-issue any further.”*

But later, the judgment says this:

*“It is clear to me that the TOL was issued in respect of a public road heavily used by members of the public and the occupiers of the buildings along the Road. The TOL could not override or interfere with their daily right or enjoyment in the use of the Road. It cannot simply disregard the hardship caused to users of the Road generally and the Supermarket specially.”*

The separate judgment of **James Foong, JCA** says this to like effect:

*“I am of the view that aside from DBKL, the Government of Malaysia is also liable to the respondent. This was caused by the act of the Land Administrator, Kuala Lumpur, a servant and/or agent of the latter, in issuing the TOL to a public road (Lorong Haji Hussein 3) and for the purpose of erecting the stalls thereon. This is contrary to the National Land Code and Road Transport Act 1987.”*

Although the observations above were obiter they seemed nevertheless to have influenced all the Judges in the Court of Appeal to hold that the TOL was not a defence to the plaintiff's claim in public nuisance or breach of statutory duty. I am of the view two criticisms can be made of the approach taken by the

Court of Appeal. Firstly, the Court of Appeal had ignored the established rule of the presumption of validity of statutory instruments or orders or administrative orders unless quashed or set aside in judicial proceedings brought for that purpose, a point which I had earlier discussed and the case authorities cited in support. Secondly, in both judgments there was a failure to consider the relevant provisions of the NLC under which the TOL was issued or the statutory provisions under which the Road Transport Order No. 6 of 1996 or the Development Order were issued. It is important that these relevant statutory provisions be examined.

It is to be noted section 40 of the NLC vests all state land in the State Authority. By section 65(1) and (2) of the NLC the relevant authority may issue a TOL over state land “*for any purpose*” other than one prohibited by section 42(2) of the NLC (being extraction of the produce of the land). Therefore there is no statutory restriction against issuing a TOL over a public road “*for any purpose*” although like in **Vasiliou**’s case the reasonableness of that decision may be challenged in judicial review proceedings where it impacts adversely on the legal rights of others. However, as seen here the plaintiff had failed to do that. I am of the view, in the circumstances of the case DBKL when faced with a TOL issued by the proper authority in its proper form, and with a clear statement of its purpose, DBKL was therefore obliged to give effect to it. In this respect, section 67(2) of the NLC expressly declares that every TOL “*shall have effect*” subject to the

conditions in Form 4A and the TOL itself. DBKL was therefore obliged by section 67(2) of the NLC to give effect to the TOL.

A reference to section 44(1)(a) of the NLC states inter alia that the TOL holder has “*exclusive use and enjoyment*” of the land. This has judicially been held to mean that he is entitled to assert his rights over all trespassers. [**See the cases of Mohamed Said v. Fatima [1962] MLJ 328** and **Karupannan v. Balakrishnen (Chong Lee Chin & Ors., third parties) [1994] 3 MLJ 584**]. Thus Uda Holdings as the TOL holder, was clothed with all personal rights to exercise exclusive use and enjoyment of LHH3 for the purpose for which it was issued and for the stated duration. It would also mean that it was not opened to DBKL or any other party to interfere with the rights now possessed by Uda Holdings over LHH3.

It is also to be noted by virtue of section 67(2) of the NLC a TOL is issued on conditions. By section 67(4) of the NLC a TOL is issued by way of the statutory Form 4A. The schedule to Form 4A carries certain mandatory conditions one of which is that a right of revocation for breach of condition is reserved by the issuing authority. Thus if Uda Holdings had utilized LHH3 for a purpose other than that stated in the TOL it could lose the TOL by non-renewal the following year under section 67(3) of the NLC or by revocation under Form 4A for breach.

It is my judgment that the sum effect of the above matters, and the statutory provisions referred to is that the TOL was a valid and effective legal document and all parties were obliged to recognize it as valid unless it had been invalidated by a court of law. This, the plaintiff had failed to do.

### Whether there could be a Collateral Challenge

A question posed at the stage of the appeal before us is whether the plaintiff could now in the present proceedings collaterally challenge the TOL and the two subsequent Orders when it had failed to directly challenge and invalidate these three statutory instruments in the High Court. The Court of Appeal seems to have thought that it could, and proceeded on the basis that the TOL was bad in law, although no pronouncement was made by it over the vires of Road Transport Order No. 6 or the Development Order.

It is my view that the Court of Appeal was wrong because there is no unqualified right to launch a collateral challenge to a statutory instrument or order that a party adversely affected had failed to challenge earlier in direct proceedings brought for that purpose. An exception lies in criminal proceedings where a defendant may challenge the vires of the subsidiary legislation under which he is charged as part of his defence. **[See Boddington's case (supra)]**. But in all other cases, there are two restrictions in place which can be highlighted as follows:

Firstly, a collateral challenge will only be allowed in limited cases where an act, order or decision was “*Bad On the Face of It.*” This point was considered by the Supreme Court in **Penang Development Corporation v. Teoh Eng Huat & Anor. [1993] 2 MLJ 97**, where the issue arose whether a clause in a housing sale contract was ultra vires the Housing Developers Act 1966. The vendor, a state authority, sought to defend a late delivery claim for damages by a collateral challenge that the compensation clause in the contract was ultra vires the Act. His lordship **Jemuri Serjan, CJ (Borneo)**, in delivering the Judgment of the Court rejected the challenge saying at page 108 as follows:

*“The corporation, after amending the statement of defence, raised the vires defence and this defence inexorably entails making a declaration of invalidity. The normal practice is for an aggrieved party affected by the ultra vires act to challenge its validity by judicial review either under O. 53 r. 1 by way of certiorari or by a declaration under O. 15 r. 16 of the Rules of the High Court 1980, i.e. by direct attack. As a general rule the court will allow the issue of invalidity to be raised in any proceedings where it is relevant. Where some act or order is invalid or void the consequences are followed out logically: See **Wade on Administrative Law (6<sup>th</sup> Ed) at page 333** where he gave instances when direct attack on vires act may be made. By way of illustration he quoted cases where actions for damages were*

*brought against magistrates and judges of inferior courts on account of orders made by them outside their jurisdiction. If the order was bad on its face (emphasis added) the court would treat it as invalid. But if the jurisdictional defect was not visible on the face (emphasis added) as is in our case, the court would require the order first to be quashed in separate proceedings before the action for damages could be examined. Collateral attack was thus allowed in the first case but not in the second.* (emphasis added).

Applying the test of “*Bad on the Face of It*” to the present case, it cannot be said that the TOL was patently bad on its face. It was not, for example, issued by an authority that had no power to issue it nor was it issued over land prohibited under section 42(2) of the NLC. On the contrary, there is every ground to believe that the TOL is a valid document as earlier discussed.

Secondly, a collateral challenge is refused where the statute itself precludes such a challenge. The principle was stated in **Boddington**’s case [supra] at page 160 in these terms:

*“... in every case it will be necessary to examine the particular statutory context to determine whether a court hearing a criminal or civil case has jurisdiction to rule on a defence based upon arguments of invalidity or subordinate legislation or an administrative act*

*under it. There are situations in which Parliament may legislate to preclude such challenges being made...*

(emphasis added)

The Privy Council in **McGuire v. Hastings District Council** [2002] 2 NZLR 577 reiterated that collateral challenges may be precluded by statute wherein at page 590 it had this to say:

*“What counsel for the appellants have invoked are passages in the speeches to the effect that a collateral challenge to the validity of an administrative decision may be raised in civil proceedings... These passages are qualified, however by recognition that a particular statutory context or scheme may exclude such collateral challenges, **R v. Wicks [1998] AC 92** being an example in the planning field.”*

The **Boddington**’s principle was applied recently by the Federal Court in **Selvaraju Ponniah v. Suruhanjaya Perkhidmatan Awam Malaysia & Anor. [2007] 6 CLJ 245**, where a public servant who was dismissed from service because of a detention order made on him was precluded from challenging his dismissal by collaterally questioning the detention order which he had not previously challenged directly. Applying the **Boddington**’s principle to our case, it seems clear that the NLC precludes a collateral challenge to a TOL. By section 67(2) of the NLC it is declared that every TOL “*shall have effect*” subject to its

conditions, which means that a TOL takes effect for its purposes immediately upon its issuance. I am therefore of the view in the circumstances of the present case, the NLC statutorily precludes by way of section 67(2) of the NLC a collateral challenge to the issuance and operation of a TOL.

It is noted that the Court of Appeal in rejecting the notion that the TOL provided a defence to the claim on public nuisance or breach of statutory duties had this to say:

*“The TOL does not and could not clothe the three defendants with a carte blanche, licence or defence to cause, create or bring about public nuisance or breaches of statutory duties.”*

On the above findings made by the Court of Appeal, Dato’ Cyrus Das, learned Counsel for the second defendant submitted that there was no consideration by the Court of Appeal of the legal principles involved in a contest of this sort, namely, where on the one hand a defendant is exercising statutory duties or acting under a statutory order, and on the other the plaintiff complains that the exercise of those functions causes a public nuisance. He further argued that this contest involves a legal concept which the House of Lords in **Department of Transport v. North West Water Authority [1983] 3 All ER 273** had considered in some depth wherein they reversed the decision of **Webster J.** at first instance **[See [1983] 1 All ER 892]** on his conclusion, but adopted the four

propositions that **Webster J.** had tabulated in cases of this sort as follows:

- “(1) *In the absence of negligence, a body is not liable for a nuisance which is attributable to the exercise by it of a duty imposed on it by statute;*
- (2) *It is not liable in those circumstances even if by statute it is expressly made liable, or not exempted from liability, for nuisance;*
- (3) *In the absence of negligence, a body is not liable for a nuisance which is attributable to the exercise by it of a power conferred by statute if, by statute, it is not expressly either made liable, or not exempted from liability, for nuisance;*
- (4) *A body is liable for a nuisance by it attributable to the exercise of a power conferred by statute, even without negligence, if by statute it is expressly either made liable, or not excepted from liability for nuisance.”*

In the said case of **Department of Transport v. North West Water Authority** [supra] the question was whether the Water Authority was liable to the Department of Transport for the cost of repairing a street which was extensively damaged by a burst water main that the Water Authority had laid under the street. The Water Authority was under a statutory duty to supply water to the area where the damaged street was located. The question was

whether the Water Authority was liable in damages for nuisance caused without negligence. The House of Lords held that the Water Authority was exercising a statutory duty and therefore the first proposition applied to exempt liability at common law in the absence of negligence. They further held that even if it was the exercise of a statutory power, inviting the application of the third and fourth propositions, the relevant statutory provision was not explicit enough in imposing liability or exempting liability for damage caused to a street by water works as opposed to damage caused to a bridge or other property of a transport authority.

In the present case there is no suggestion of any negligence on the part of DBKL. Thus applying the common law test I am of the view DBKL would be exempted from liability in nuisance whether it be for the exercise of a statutory duty or a statutory power. On this same point the relevant provisions of the NLC, the SDBA, the RTA and the FTPA may be examined. It may be said that none of these mentioned statutes impose expressly a liability in nuisance for the exercise of any duty or power under those statutes nor do they expressly exempt liability.

I am of the view on the basis of the exercise of a statutory duty or a statutory power, the first and third proposition as laid down in the case of **Department of Transport v. North West Water Authority** [supra] case will apply to excuse DBKL from the claim in nuisance against it. By the first proposition, DBKL was under a statutory duty to act on the TOL submitted to it by Uda

Holdings and the Government. By section 67(2) of the NLC the TOL is declared to “*have effect*” upon issuance, and DBKL was therefore under a statutory duty to recognize and act on it since the TOL was over a road falling within its authority, i.e. a road “*other than a Federal road*” under section 67(a) of the RTA. By the third proposition, DBKL was obliged consequent to the TOL to exercise its statutory powers under section 70(1) of RTA to close the road. Otherwise, the TOL would be rendered useless and ineffective or, alternatively, any refusal by DBKL to close the road would be to frustrate the TOL.

Likewise, I am of the view DBKL was obliged to exercise its statutory powers to consider the issuance of planning approval vide the Development Order for the construction of the seventy six hawker stalls. The evidence shows that the approval process in terms of lay-out conditions and sanitation conditions were duly met before the Development Order was issued. In this regard I am of the view the Court of Appeal failed to consider the applicable legal principles in cases of this sort, and accordingly its general statement that the TOL is not a defence to the claim in nuisance and breach of statutory duty cannot be defended.

Learned Counsel for the second defendant further argued that a point or feature not considered by the Court of Appeal is the case of “*inevitable nuisance*” to the public caused by the carrying on of certain activities authorized by law or by statute. Learned Counsel referred to us a good example is the vibration caused to

premises adjoining the railway line by operating a railway train or fumes from an electricity generating plant. **[See the case of London & Brighton Railway Co. v. Truman (1885) Vol. XI AC 45]**. The classic statement on “*inevitable nuisance*” which the common law recognizes as not being actionable because of it being a statutory activity or activity authorized by statute is that of **Lord Dunedin** in the case of **Manchester Corporation v. Fanworth [1930] AC 171** wherein his lordship at page 183 had this to say:

*“When Parliament has authorized a certain thing to be made or done in a certain place, there can be no action for nuisance caused by the making or doing of that thing if the nuisance is the inevitable result of the making or doing so authorized. The onus of proving that the result is inevitable is on those who wish to escape liability for nuisance, but the criterion of inevitability is not what is theoretically possible but what is possible according to the state of scientific knowledge at the time, having also in view a certain common sense appreciation, which cannot be rigidly defined, of practical feasibility in view of situation and of expense.”* (emphasis added).

The above principle was adopted by the House of Lords in the more recent case of **Allen v. Gulf Oil Refining Ltd. [1981] AC 1001**. It was a case where an oil refinery was authorized by

statute to be built in an area near a village. The complaint was that the fumes from the refinery constituted a public nuisance. In rejecting liability, the House of Lords held that the statute expressly or by necessary implication authorized the building of the refinery at that site, and that the nuisance was the inevitable result of constructing a refinery on the land. **Lord Wilberforce** said the common law immunity extends to the nuisance that is “*an inevitable result*” and went to state as follows:

*“It is now well settled that where Parliament by express direction or by necessary implication has authorized the construction and use of an undertaking or works, that carries with it an authority to do what is authorized with immunity from any action based on nuisance... (Para F, page 1011)... It confers immunity against proceedings for any nuisance which can be shown (the burden of so showing being upon the appellants) to be the inevitable result of erecting a refinery upon the site - ... To the extent and only to the extent that the actual nuisance (if any) caused by the actual refinery and its operation exceeds that for which immunity is conferred, the plaintiff has a remedy.” (Paras B-C, page 1014)*

Applying this principle to the facts of the present case I am of the view the issuance of the TOL over LHH3 led to the “*inevitable result*” of the road being closed. This in reality is the complaint,

namely, the public nuisance of obstruction of traffic. On the facts of this case the so-called public nuisance was the inevitable result of the coming into force of a statutory instrument in the form of the TOL. The TOL was therefore a statutory defence to the claim in public nuisance.

It is my judgment on the Liability Question that Question 1 should be answered in the affirmative and that of Question 3 should be answered in the negative. To sum up I would state that the TOL for all the reasons already stated provides a valid statutory defence to the claim in public nuisance or breach of statutory duty. Further, that neither section 12 nor section 46 of the SDBA gives rise to a cause of action for breach of statutory duty because it was not obligatory in law for DBKL to have exercised the power under section 46 to remove the so-called obstacles.

#### Question 2: The Economic Loss Question

Finally, I shall deal with Question 2 on the economic loss question. The question posed is whether there could be recovery for pure economic loss against a local authority and/or the Government, and whether the recent judgment of the Federal Court in **MPAJ v. Stephen Phoa [2006] 2 MLJ 389** [“the Highland Towers case”] precludes such recovery.

The question that may be first asked is what is the meaning of “*pure economic loss*”. To put it simply pure economic loss is financial or pecuniary loss that does not arise from any physical damage to the person or property. [See the case of **Philba Trading & Agency v. South East Asia Insurance Bhd. & Anor. [1998] 2 MLJ 53**. The legal position in Malaysia in relation to awards for claim for pure economic loss has been succinctly dealt with in the **Highland Towers** case. His lordship **Abdul Hamid Mohamad, FCJ** [as he then was] in coming to his decision that the Local Authority, MPAJ was not liable on grounds of public policy and local circumstances in that case also dealt with the general position of the law in Malaysia with regard to claims for pure economic loss. His lordship was of the view that Malaysian Courts do not readily award claim for pure economic loss and the Courts recognize the need to limit recoverability for pure economic loss. In his judgment his lordship also referred to several local cases such as the cases of (1) **Philba Trading & Agency v. South East Asia Insurance Bhd. & Anor.** [supra]; (2) **Kerajaan Malaysia v. Cheah Foong Chiew & Ors. [1993] 2 MLJ 439** and (3) **Nepline Sdn. Bhd. v. Jones Lang Wootton [1995] 1 AMR 451**. It is clear from all these cited cases, the position in Malaysia is that our Courts have been inclined to disallow claims for pure economic loss. If at all the court in allowing the claim as in **Nepline**’s case [supra], did so on the ground that the claim was in respect of a definite amount which had already been paid by the appellant and it was that amount only which the appellant then sought to recover.

It is to be noted that the Federal Court in the **Highland Towers** case was concerned only with pure economic loss for an action in negligence and nuisance. The majority judgment in that case, decided largely on policy grounds, that there should be no recovery for economic loss against a local authority. In view of the fact that the **Highland Towers** case did not deal with breach of statutory duties, the Court of Appeal in the present case took the view that the restrictions in economic loss recovery stated in that case would not apply to a head of claim under breach of statutory duties. This is what the Court of Appeal said:

*“In my view, DBKL may rely on the majority judgment of the Federal Court to exclude liability from the Supermarket’s claim for pure economic loss based on negligence and nuisance only. With the utmost respect, the majority judgment does not provide DBKL with an insulation or immunization against its liability arising from breaches of statutory duties,”*

However I find that the Court of Appeal failed to comprehensively analyse for itself whether there should be recovery against a local authority for pure economic loss for breaches of statutory duty. The error of the Court of Appeal is two-fold:

- (1) Failing to enquire why the policy considerations applicable to actions in negligence and nuisance as

stated by the Federal Court in the **Highland Towers** case should not also apply to breaches of statutory duty; and

- (2) failing to consider the statutory scheme of the SDBA to ascertain if such claim for economic loss is recoverable.

On the first point of error made by the Court of Appeal I am of the view that although the Federal Court in the **Highland Towers** case expressly referred to negligence and nuisance in its judgment, the policy considerations must necessarily refer and extend to all claims in tort, resulting in economic loss brought against local authorities, as otherwise, the rationale of the Federal Court decision (i.e. to preclude such claims against local authorities), would be lost. In its (majority) judgment, the Federal Court through **Abdul Hamid Mohamad, FCJ** [as he then was] stated the policy considerations at pages 423-424 as follows:

*“A local council is established with a host of duties to perform, from providing and maintaining recreational areas and collecting garbage to providing public transport, homes for the squatters, temporary homes in case of disasters, natural or otherwise, and so on. Indeed, the list is endless. The expectations of residents are even more. These are public duties to all residents or ratepayers within the council’s geographical limit. To finance all their activities, local*

*authorities depend mainly on assessment rates and fees for licences. In a democracy as in Malaysia and the kind of attitude of the people, we know too well how difficult it is to increase the rates or the fees even by a few percent. With limited resources and manpower, even if it tries its best (and generally speaking, I say they do) to provide the infrastructure and services, it will not satisfy everybody. People's demands far outweigh their contributions. When services are provided or as a result of infrastructural improvements, the value of their properties goes up, as usually happen, it is taken for granted, as their rights, their good fortune or business acumen...*

*With limited resources and manpower local councils would have to have their priorities. In my view, the provision of basic necessities for the general public has priority over compensation for pure economic loss of some individuals who are clearly better off than the majority of the residents in the local council area. Indeed, the large sum required to pay for the economic loss, even if a local council has the means to pay, will certainly deplete whatever resources a local council has for the provision of basic services and infrastructure. Projects will stall. More claims for economic loss will follow. There may be situations where a local council, which may only be minimally negligent, may be held to be a joint tortfeasor with*

*other tortfeasors, which may include irresponsible developers, contractors and professionals. There is no way to execute the judgments against them. Out of necessity or for convenience, the judgment for the full amount may be enforced against the local council. The local council may go bust. Even if it does not, is it fair, just and reasonable that the taxpayers' money be utilized to pay for the 'debts' of such people? In my view, the answer is 'No'.* (emphasis added)

The policy considerations behind the phrase “*fair, just and reasonable*” to impose liability at common law is taken from the case of **Caparo Industries Plc. v. Dickman [1990] 2 AC 605**. In **Caparo**'s case, it was held that there is a three question test to determine the issue, i.e.:

- (a) whether the damage suffered by the plaintiff is reasonably foreseeable;
- (b) whether there is relationship of proximity between the plaintiff and defendant; and
- (c) whether it is “*just, fair and reasonable to impose such claim*”.

In the **Highland Towers** case the majority judgment of the Federal Court found that the third test above as matching the requirements of section 3(1) of the Civil Law Act, 1956 [“CLA”] which specifically provides (inter alia) that “*the common law of*

*England shall be applied so far only as the circumstances of the States of Malaysia and their respective inhabitants permit and subject to such qualifications as local circumstances render necessary.”*

On the impact of section 3 of the CLA, the Federal Court in **Highland Towers** case said at page 424 as follows:

*“While economic loss under limited situations may be allowed, Malaysian courts will have to consider the effect of section 3 of the Civil Law Act 1956 and, considering the ‘public policy’ and the ‘local circumstances’, whether it is fair, just and reasonable to allow it on the facts and in the circumstances of the case.”*

On ‘local circumstances’ itself under section 3 of the CLA, the Federal Court in **Highland Towers** case at page 424 said as follows:

*“I do not think that we can compare the ‘local circumstances’ in New Zealand, for example, with the ‘local circumstances’ in Malaysia now, be it in terms of development (many Malaysian, though it may not in the MPAJ locality, are still without water supply and electricity), civic mindedness of, and compliance with laws and bylaws by the general public, or as we see in*

*this case, even by developers, and others. I do not think that, in the present circumstances, on the facts and in the circumstances of this case, it is fair, just and reasonable to impose such a burden on MPAJ or other local councils in this country in similar situations.*”  
(emphasis added).

It is my considered view that the above reasoning of the Federal Court in the **Highland Towers** case would apply across the board to cover all torts. It should be seen that the considerations of ‘*local circumstances*’ and whether a local authority should be burdened with a huge financial liability on account of a single resident suing has nothing to do with the type of tort action on which the resident found his claim. In point of principle, these policy considerations have nothing to do with ‘*negligence*’ or ‘*nuisance*’ but everything to do with a pure economic loss award in tort against a local council, which becomes a financial burden on it. In other words, if it is a pure economic loss in tort, the reasoning of the Federal Court in the **Highland Towers** case is that it should be barred under section 3 of the CLA as non-recoverable for policy reasons. Otherwise, one is left with the anomaly of whether a huge economic loss claim in negligence is barred but an equally large economic loss claim under a “*non-negligence*” head is admissible against a local authority. That in my view would surely defeat the policy considerations stated by the Federal Court in the said **Highland Towers** case.

In the Canadian case of **St. Elizabeth Home Society v. Hamilton City [2005] O.J. 5369**, the Ontario Superior Court concluded there was no distinction in principle between a negligence and non-negligence claim for recovery of pure economic loss. The Court observed at paras 160-162 as follows:

*“I conclude that the special treatment of recovery of pure economic loss by the judiciary should apply to tort law in general when the applicable policy concerns exist and should not be restricted to recovery for pure economic loss resulting solely from negligence.*

*Pure economic loss claims do arise in other areas of tort law such as defamation nuisance and the intentional economic torts (see **Feldthusen, Economic Negligence: the Recovery of Pure Economic Loss**, at page 1). It seems sensible that if policy concerns lead to restrictions on recovery of pure economic loss in negligence, then such restrictions should also exist if the same policy concerns arise in other areas of tort law.*

*There appears to be no authoritative statement in the jurisprudence that restrictions on pure economic loss do not apply to other areas of tort law.”*

On this point of principle I am in agreement with the submission of learned Counsel of the second defendant that there is no good reason to distinguish between negligence and non-

negligence claims to bar a pure economic loss claim against a local authority. The Federal Court was able to say for good reason in the **Highland Towers** case in a single line as this: “*The discussion in this judgment covers nuisance as well.*” I would hold that the same policy considerations will also apply to a claim based on breach of statutory duty. In the result, I am of the view that the Court of Appeal erred in holding that the Federal Court decision in the **Highland Towers** case should only be confined to claims in negligence and nuisance when the overriding policy considerations stated therein make it imperative to be applicable to all actions in tort which result in economic loss claims being brought against a local authority.

On the second point of error made by the Court of Appeal, I find that the Court of Appeal failed to consider the statutory scheme of the SDBA on whether claims for economic loss are maintainable. For example, in **Rowley and others v. Secretary of State for Department of Works and Pensions [2007] 3 FCR 431**, the Court of Appeal therein, in asking itself the question whether a public authority owes a common law duty of care not to cause economic loss, on a claim for breach of statutory duty, held that it would be necessary, in addition to the tests referred to in **Caparo**'s case to consider the following issues:

- (a) whether to impose a duty of care would be inconsistent with the statutory scheme it is acting; and

- (b) the relevance of the fact of whether the statute confers no private law right of action for breach of statutory duty.

It is my judgment that the Court of Appeal in the present case in coming to its conclusion on this issue in holding DBKL liable, failed to have regard to the overall statutory scheme and framework of the SDBA. In determining whether a claim for recovery of economic loss is recoverable from an alleged breach of statutory duty, it is important for the Court to have regard to the overall scheme of the relevant statute. This was the approach taken by the House of Lords in **Murphy v. Brentwood District Council [1990] 2 All ER 908**, where it was held inter alia that there was “*nothing in the statutory provisions which even suggest the purpose of the statute was to protect owners of buildings from economic loss*”.

It is also imperative to determine the primary purpose or concern of the relevant statutory scheme and in that context, ascertain whether it was intended for the protection of economic interests of a particular class of persons. **[See the case of Three Meade Street Ltd. v. Rotorua District Council [2005] 1 NZLR 504]**. It would be noted, in this regard, that the preamble to the SDBA states as follows: “*An Act to amend and consolidate the laws relating to street, drainage and building in local authorities in Malaysia and purposes connected therewith*”. Based on the above preamble there is nothing to suggest that it is intended to

provide compensation for financial loss in the manner sought by the plaintiff.

Learned Counsel for the second defendant submitted that the considerations in Question 3 as to whether the relevant provisions of sections 12 and 46 of the SDBA confer a private right of action are equally relevant in the context of whether economic loss is recoverable for a purported breach of statutory provisions. I am of the view looking at the terms of the provisions in section 12 and section 46 of the SDBA, it would show that it precludes any construction that any breach thereof would result in a party being able to claim financial loss arising there from. In the English Court of Appeal case of **Wentworth v. Wiltshire County Council [1993] 2 All ER 256**, **Parker LJ** inter alia held that in relation to the Highways (Miscellaneous) Provisions Act, 1961, the right to recover damages from a highway authority was limited to personal injury or damage loss of non-repair of the highway and not a claim for loss of profits (i.e. economic loss). The facts are relevant to the present case because there a dairy farmer claimed against the local council in pure financial loss for failing to upkeep the access road to his farm so much so that the dairy lorries refused to use the road to collect milk from his farm. He claimed financial loss as a result. The approach taken to see whether there could be recovery for financial loss as a matter of statutory policy is seen in this extract from the judgment of **Parker, LJ** wherein at page 262 he had this to say:

*“Mr. Reid QC for the respondent submits however that the action lies because here there is a public duty and the respondent has, by its breach, suffered direct damage over and above that suffered by ordinary members of the public. On principle, therefore, he should be able to recover. Moreover, he points out that, where a highway through neglect has become impassable to traffic, the position is in essence the same as it would be if the highway were obstructed and there is no doubt that economic damage resulting from obstruction is recoverable. Whilst I appreciate the force of his arguments the matter is in the end one of statutory construction and in my judgment the intention of Parliament, to be gathered from wording of the two Acts and the pre-existing state of the law, is clear.”*

The approach and the consideration made in the above mentioned case in my view would equally apply to any purported breach of section 12 of the SDBA which are clearly not intended to extend protection nor provide rights to owners of adjoining premises of a street to claim financial losses by reason of any closure thereof. Similarly, in respect of any purported breach of section 46 of the SDBA, it is clear that where a statutory provision confers a discretion on a local authority that is an indication that the policy of the act conferring the power was not a right to compensation. **[See the case of Stovin v. Wise Norfolk CC, third party (supra)].**

In the result it is my judgment that the Court of Appeal was in error in holding that DBKL was liable for pure economic loss by reasons of alleged breach of statutory duty and the question must be answered in favour of DBKL. Question 2 should therefore be answered affirmatively to cover all tort claims against a local authority and/or the Government based on pure economic loss.

### Conclusion

For the reasons already stated I would allow all the three appeals by the first defendant, the second defendant and the third defendant with costs. All orders made by the Court of Appeal are hereby set aside. Consequently, it follows that all orders made by the learned trial Judge of the High Court on liability and quantum are also set aside. All deposits paid are to be refunded to all the three defendants.

(DATO' ZULKEFLI BIN AHMAD MAKINUDIN)  
Judge  
Federal Court

Dated: 9<sup>th</sup> December 2008.

Civil Appeal No. 02-32-2007 (W)

### **Counsel for the Appellant**

Encik Zainur Zakaria

### **Solicitors for the Appellant:**

Messrs. Zulkifli Nordin & Associates.

**Counsel for the Respondent:**

Encik A. Kanesalingam (Encik V. Jeya Kumar and Encik K. Shanmuga with him).

**Solicitors for the Respondent:**

Messrs. Kanesalingam & Co.

Civil Appeal No. 02-33-2007 (W)

**Counsel for the Appellant**

Dato' Cyrus Das (Mr. Romesh Abraham, Mr. T. Sudhar and Ms. B. Mathevi with him).

**Solicitors for the Appellant:**

Messrs. Shook Lin & Bok.

**Counsel for the Respondent:**

Encik A. Kanesalingam (Encik V. Jeya Kumar and Encik K. Shanmuga with him).

**Solicitors for the Respondent:**

Messrs. Kanesalingam & Co.

Civil Appeal No. 01-9-2007 (W)

Senior Federal Counsel Encik Pretam Singah and Puan Narkunavathy

Of Attorney General's Chambers for the Appellant.

**Counsel for the Respondent:**

Encik A. Kanesalingam (Encik V. Jeya Kumar and Encik K. Shanmuga with him).

**Solicitors for the Respondent:**

Messrs. Kanesalingam & Co.