Tembusu Growth Fund Ltd
v
ACTAtek, Inc and others

[2017] SGHC 251

High Court — Suit No 642 of 2012
Vinodh Coomaraswamy J
20, 27 January; 24 April 2017

Contract — Discharge — Anticipatory breach

Contract — Remedies — Damages — Causation

Contract — Remedies — Damages — Loss of chance

19 October 2017

Vinodh Coomaraswamy J:

Introduction

1 Tembusu Growth Fund Ltd ("Tembusu") is a venture capital fund which invests in technology start-up companies. In January 2012, it invested S$1.5m in ACTAtek, Inc ("AI"), through a convertible loan agreement ("CLA"). In May 2012, Tembusu declared a default under the 2012 CLA. The grounds it relied on were that AI had used the proceeds of the loan extended to it under the 2012 CLA in breach of contract.

2 Three months after declaring the default, Tembusu brought this action against AI, its chief executive officer, Thomas Wan, and three other defendants.

In this action, Tembusu sought damages for breach of the 2012 CLA and for fraudulent misrepresentation in inducing Tembusu to enter into that agreement. In response, AI and Mr Wan brought a counterclaim for damages against Tembusu. In relation to Tembusu's claim in contract, their position was that AI did not breach any of the terms of the 2012 CLA and that it was in fact Tembusu who was in breach of contract.

3 I allowed Tembusu's claim against AI and Mr Wan but dismissed its counterclaim. I also dismissed Tembusu's claim against the three other defendants. The three exonerated defendants are of no further significance in this matter. For convenience, therefore, the term "defendants" in this judgment will be used to refer only to AI and Mr Wan.

4 The defendants appealed against my judgment to the Court of Appeal. Their appeal succeeded. The Court of Appeal held that AI had committed no breach of the 2012 CLA and that it was instead Tembusu who had committed an anticipatory repudiatory breach of that agreement. The Court of Appeal remitted this action to me to assess the damages which Tembusu must pay by reason of that breach.

5 The defendants' principal claim in the assessment is that Tembusu's breach derailed AI's planned initial public offering ("IPO") and thus caused both defendants to lose an opportunity to own shares in a listed company worth some NZ$30.5m. I have rejected the defendants' claim. I have held that Mr Wan is not entitled to any damages whatsoever because he is not a party to the 2012 CLA. He therefore has no standing to claim contractual damages from Tembusu under that agreement. AI was Tembusu's only counterparty to the 2012 CLA. But I have awarded it only nominal damages of S$1,000 for breach of that agreement. I find that it did not suffer any loss as a result of the failed listing.

Even if it did, I find also that Tembusu's breach did not cause the failed listing.

6 In the first tranche before me, both liability and quantum were in issue. The parties therefore agreed to proceed on the assessment of damages without a fresh evidential phase. They rely only on the evidence adduced at that tranche.

7 The defendants have appealed against my decision. I therefore now set out my reasons.

Background

ACTAtek, Inc and Mr Wan

8 AI is a company incorporated in the Cayman Islands. It is the holding company for a group of companies referred to loosely as the ACTAtek Group. Its business is to provide identification management solutions. The group consists of wholly-owned subsidiaries of AI which are incorporated in Singapore, Hong Kong, the UK, the US and Canada.

9 Mr Wan is the chief executive officer and a director of both AI and its Singapore subsidiary. He co-founded the ACTAtek Group in 2007.

Tembusu invests in AI

10 In June 2007, Tembusu and AI entered into a CLA under which Tembusu lent US$1.5m to AI. Towards the end of 2011, Tembusu and AI agreed on a term sheet for Tembusu to extend a further convertible loan of S$1.5m.

11 Around the same time, in November 2011, AI, Mr Wan and Tembusu were introduced to a New Zealand company called Investment Research Group

Limited ("IRG") to discuss AI's planned IPO. IRG is a firm of investment consultants carrying on business in New Zealand. IRG was represented in these discussions by Brent King, its managing director. Mr King explained to the parties the process for listing AI on the New Zealand Alternative Market ("NZAX"), a stock exchange designed for small to medium-sized businesses. A listing on the NZAX must be supported by a sponsor. The purpose of the sponsor is, among other things, to assess the company's credibility and to assist the company with regulatory compliance. IRG had acted as a sponsor for other companies listed on the NZAX and was to be AI's sponsor.

12 In January 2012, Tembusu and AI signed a CLA by which Tembusu agreed to extend a second convertible loan to AI. This time, the amount of the loan was S$1.5m rather than US$1.5m.

13 The key terms of the 2012 CLA were as follows:

(a) By cl 5.1, Tembusu was obliged to convert its loan into shares in AI if an IPO took place before 30 June 2013 and had an option to convert its loan into shares in AI if there was no IPO by that date. In both cases, the conversion price was to be at a 50% discount to the assessed value of AI's shares.

The important point to note here is that Tembusu had an *obligation* to convert its loan into shares upon an IPO rather than an *option* to do so. This point was critical to the Court of Appeal's finding that Tembusu was in anticipatory repudiatory breach of the 2012 CLA (see [70]–[81] below).

(b) By cl 6.2, Tembusu had the right to appoint a non-executive director to AI's board. Tembusu's first nominee to AI's board was one Daniel Lee.

(c) By cl 8.1(e), Tembusu had the right to declare a default if: (i) AI was in material breach of any of its obligations under the 2012 CLA; and (ii) AI failed to remedy that breach within 30 days of committing it, provided that the breach was capable of being remedied.

(d) By cl 8.2, a default made Tembusu's S$1.5m loan to AI immediately repayable together with interest on it at 15% per annum compounded annually.

14 To satisfy a condition precedent of Tembusu's obligation to lend under the 2012 CLA, Mr Wan prepared and delivered to Tembusu a document titled "Use of Proceeds" ("UOP"). That document set out AI's intention as to how it proposed to use the S$1.5m loan which Tembusu was to extend to it under the 2012 CLA. Upon receipt of the UOP, Tembusu disbursed the loan.

15 In February 2012, AI gave IRG its formal mandate to list AI on the NZAX. IRG proceeded to prepare AI for listing. The precise steps to be completed for the listing are set out at [99] below. The important point is that the actual vehicle to be listed was to be a new special purpose vehicle to be incorporated in New Zealand, ACTAtek Ltd ("ACTNZ"). ACTNZ would acquire from AI all of the shares in all of AI's subsidiaries at a value of NZ$30.5m in exchange for ACTNZ issuing and allotting to AI 121.4m new shares in ACTNZ.

Tembusu declares a default

16 In May 2012, Tembusu discovered that AI had used part of the proceeds of the 2012 CLA to repay a loan of US$260,000 which it owed to a shareholder of AI, Hectrix, Inc. Mr Wan is a shareholder of Hectrix, Inc. Although this loan pre-dated the 2012 CLA, AI had failed to disclose it to Tembusu in the negotiations for the 2012 CLA. Further, the UOP (see [14] above) had made no mention of AI's intention to use the proceeds of the 2012 CLA to repay this loan. Tembusu was also alarmed because Mr Wan effected the repayment without approval from AI's board. As a result, Tembusu's nominee on the board (see [13(b)] above) was not alerted to the repayment.

17 Tembusu considered AI's use of the proceeds of the 2012 CLA to repay this loan to be a breach of contract. On 16 May 2012, Tembusu's solicitors wrote to AI declaring a default under the 2012 CLA.[1] The default was said to be: (a) the failure to disclose the Hectrix loan, constituting a breach of warranty under the 2012 CLA; and (b) AI's use of the proceeds of the 2012 CLA to repay the Hectrix loan without Tembusu's consent, the repayment not being a use set out in the UOP. This letter also contained a demand for AI to repay the entire principal advanced under the 2012 CLA by 23 May 2012, failing which Tembusu would commence proceedings.

18 AI did not repay Tembusu as demanded. In August 2012, Tembusu commenced this action.

19 AI's listing on the NZAX did not take place. Whether that was caused by Tembusu is one of the principal disputes in this case and is an issue to which I will return.

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[1] Thomas Wan's Affidavit of Evidence-in-Chief dated 9 May 2014 at pp 1107 to 1108.

The litigation

20 Tembusu's claim which is relevant for present purposes was its claim in contract that AI had breached an express or an implied term of the 2012 CLA which obliged AI to use the proceeds of the 2012 CLA only for the uses set out in the UOP. Tembusu's case was that this breach entitled it to declare a default, and that the default it had declared on 16 May 2012 had accelerated AI's obligation to repay the S$1.5m lent under the 2012 CLA. In addition, Tembusu argued that the default under the 2012 CLA had triggered a cross default under the 2007 CLA and had accelerated AI's obligation to repay the US$1.5m advanced under the earlier CLA as well.

21 The defendants ran a common defence. On Tembusu's breach of contract claim, their principal defence was that there was no express or implied term in the 2012 CLA which restricted how AI could use Tembusu's loan extended under that agreement. Alternatively, even if there were such a term, the breach of that term did not entitle Tembusu to declare a default.

22 The defendants brought a counterclaim against Tembusu for losses suffered as a result of Tembusu's acts and omissions. The counterclaim in contract alleged that Tembusu was in breach of the 2012 CLA and had caused AI's failure to list.

23 The trial of this matter took place before me on both liability and quantum. I found the defendants to be liable to Tembusu. I held that the 2012 CLA contained an implied term limiting AI's right to use the proceeds of Tembusu's loan and that AI's payment to Hectrix was a material breach of that term which entitled Tembusu to declare a default. I therefore entered final judgment for Tembusu for S$1.5m and interest (being its claim under the 2012

CLA), US$1.5m and interest (being its claim under the 2007 CLA) and costs: *Tembusu Growth Fund Ltd v ACTAtek, Inc and others* [2015] SGHC 206 ("*ACTAtek (HC)*"). I dismissed the defendants' counterclaim in its entirety.

24 The defendants' appeal to the Court of Appeal succeeded: *ACTAtek, Inc and another v Tembusu Growth Fund Ltd* [2016] 5 SLR 335 ("*ACTAtek (CA)*"). The Court of Appeal found, amongst other things, that there was no implied term in the 2012 CLA restricting AI's use of its proceeds. That meant that Tembusu had declared a default on 16 May 2012 without any contractual right to do so. The declaration of default amounted to an anticipatory repudiatory breach of the 2012 CLA because Tembusu thereby evinced a present intention not to comply with a future obligation, namely, its obligation under cl 5.1 of the 2012 CLA to convert its loan into equity in ACTNZ upon AI's listing (see [13(a)] above).

25 The task now falls to me to assess the damages, if any, which Tembusu would have to pay to the defendants.

Parties' cases

26 The defendants' case on the assessment of damages is that Tembusu's breach of contract comprises not only the default which it has now been found to have declared without basis on 16 May 2012, but also its course of conduct before and after that declaration, including this very action itself. It is the totality of that conduct, the defendants say, which caused AI's failure to list. As a result, the defendants either lost the benefit of AI's listing or lost the chance to benefit from AI's listing. The defendants refer to this as AI's "loss of capitalisation" claim. They put the value of this claim at NZ$30.5m for AI and NZ$14m for Mr Wan. AI's claim is said to represent the value of AI's subsidiaries which AI

would have sold to ACTNZ for NZ$30.5m in exchange for shares in ACTNZ of equal value. Mr Wan's claim is said to represent the loss which he suffered personally as a result of AI's failure to list. In addition to the loss of capitalisation claim, the defendants also claim damages of approximately NZ$1.5m for wasted costs incurred in preparing AI for listing.

27 Tembusu's case in response is that Tembusu's only breach of contract was declaring a default on 16 May 2012. Given that the Court of Appeal characterised that breach as an anticipatory breach of cl 5.1 of the 2012 CLA, the defendants are entitled to compensation only for the loss which they would have suffered if Tembusu, when the time came, failed to convert its shares into equity as required by cl 5.1. Alternatively, even if the defendants are entitled to compensation for the loss flowing from the declaration of default, the defendants suffered no loss at all. AI still owns its subsidiaries, and there is no evidence that they are worth any less than they were on or around 16 May 2012, *ie*, NZ$30.5m. Even if the defendants did suffer an actual loss, AI has failed to prove that Tembusu's breach caused AI's failure to list because AI has failed to prove that other actors crucial to the listing process, especially IRG, would have fulfilled their role even if Tembusu had not breached the 2012 CLA. Finally, even if Tembusu did cause AI's failure to list, the defendants failed to act reasonably to mitigate their losses.

Issues to be determined

28 I have to determine the following two broad issues:

(a) What is the character of Tembusu's breach of the 2012 CLA?

(b) Did the defendants suffer any loss as a result of Tembusu's breach of the 2012 CLA?

29 I turn now to consider each of these issues.

Issue 1: Character of Tembusu's breach

30 It was initially not disputed that my task on the assessment of damages was to quantify the loss which the defendants suffered as a result of Tembusu's declaration of default on 16 May 2012. Tembusu accepted this point in its final set of written submissions filed in the assessment phase.[2]

31 However, Tembusu changed its position on the second day of oral submissions on the assessment as a result of considering more carefully the submissions made to the Court of Appeal in *ACTAtek (CA)* and the court's decision in that case.[3] Tembusu now submits that its declaration of default on 16 May 2012 was not in itself a breach of contract. Instead, Tembusu says that its only breach of contract is its hypothetical breach of its future obligation under cl 5.1 of the 2012 CLA.[4] Accordingly, the proper goal of the assessment of damages is to quantify the losses which flow from that hypothetical future breach.[5] That requires me to consider the losses, if any, which the defendants would have suffered in the future if Tembusu had, in breach of cl 5.1, refused to convert AI's loan into equity upon AI's successful listing[6] rather than the losses, if any, which flow from the declaration of default.

32 Tembusu relies on two principal grounds for its new submission. First, it relies on what it claims to be the proper interpretation of the Court of Appeal's

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2 Tembusu's Written Submissions dated 6 January 2017 at para 19.

3 Certified Transcript, 27 January 2017, p 33 at lines 17 to 28.

4 Certified Transcript, 27 January 2017, p 28 at line 28 to p 29 at line 8.

5 Certified Transcript, 27 January 2017, p 32 at lines 8 to 11.

6 Thomas Wan's Affidavit of Evidence-in-Chief dated 9 May 2014 p 773 at para 5.1.

decision in *ACTAtek (CA)* ([24] *supra*). In that decision, the Court of Appeal characterised Tembusu's breach as "an anticipatory breach" (at [110]) and as "an *anticipatory repudiatory breach*" [emphasis in original] (at [106]). Second, it relies on the principles underlying the doctrine of anticipatory breach, particularly as set out in the Court of Appeal's decision in *The STX Mumbai and another matter* [2015] 5 SLR 1 ("*The STX Mumbai*").

33 I allowed the defendants an opportunity to respond to Tembusu's new submission.[7] It is therefore not unfair to the defendants for me to consider the merits of that submission. The defendants respond by rejecting Tembusu's characterisation of its breach as being a hypothetical future breach of cl 5.1 of the 2012 CLA. But they go further than merely arguing that Tembusu's breach lies instead in its declaration of default on 16 May 2012. Instead, they return to their principal argument (see [26] above) that Tembusu's breach of contract in fact comprises an "accumulation of events" occurring even before the declaration of default.[8] Accordingly, the defendants argue that, in order to assess causation and quantify damages, I am not only permitted but obliged to consider the totality of Tembusu's conduct, both before and after 16 May 2012 as well as on 16 May 2012.[9]

34 In the usual case of a breach of contract, the proper characterisation of the breach is significant because it affects the reference point for at least four issues. The first is causation. The whole point of the causation inquiry is to consider whether a contract-breaker ought to be liable for a particular head of loss on the basis that his breach of contract caused it: see *Monarch Steamship*

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7 Certified Transcript, 27 January 2017, p 71 at lines 22 to 26.

8 Certified Transcript, 27 January 2017, p 8 at line 24 and p 9 at lines 18 to 20.

9 Certified Transcript, 27 January 2017, p 11 at lines 10 to 12.

Co, Limited v Karlshamns Oljefabriker (A/B) [1949] AC 196 at 226. It is impossible even to undertake, let alone to determine, the causation inquiry without first identifying precisely what that breach is and when it took place. The second is quantification. The quantification inquiry turns on the date on which the plaintiff's loss is to be assessed. The choice of date for the quantification inquiry determines the market conditions against which damages will be quantified: see *Tredegar Iron and Coal Co (Limited) v Hawthorn Brothers and Co* (1902) 18 TLR 716. And the general rule is that damages should be assessed as at the date of breach: *Johnson and Another v Agnew* [1980] AC 367 at 400H. Third is mitigation. What is loosely referred to (see [138] below) as the duty to mitigate arises upon breach. In order for the doctrine of mitigation to fulfil its function, therefore, the inception of the duty to mitigate cannot be divorced from the breach. The final issue is limitation. It is the breach of contract which defines when the limitation period for an action in contract begins.

35 The proper characterisation of Tembusu's breach in this action is therefore of significant importance to the causation and the quantification inquiry which I must undertake on this assessment of damages.

36 In brief, it is my view that Tembusu's breach in this action was its declaration of default. Tembusu therefore breached the 2012 CLA on 16 May 2012. That conclusion is, in my view, dictated by both the traditional doctrine of anticipatory breach as conceived in *Hochster v De La Tour* (1853) 2 E & B 678 ("*Hochster*") and the modern doctrine as set out in the Court of Appeal's recent decision in *The STX Mumbai*. More importantly, it is my view that that conclusion is the actual result reached by the Court of Appeal in *ACTAtek (CA)*. I am of course bound by that case both as a matter of precedent but also as setting the parameters in this action for the very assessment which I now

undertake. But Tembusu is correct to say that, because this is a case of anticipatory breach, the starting point is that the defendants' losses should not be quantified as at the date of the breach, as in the usual case, but as at the date fixed for Tembusu's performance of cl 5.1: *Roper v Johnson* (1873) LR 8 CP 167 at 180.

37 I will expand on these propositions below in two main parts, which correspond to Tembusu's two principal submissions on this issue. The first part considers the issue in the light of the general principles governing the doctrine of anticipatory breach. The second part addresses the proper interpretation of the Court of Appeal's decision in *ACTAtek (CA)* in the light of those general principles.

General principles of anticipatory breach

38 The central difficulty in the doctrine of anticipatory breach is that it entitles a plaintiff to a contractual remedy at a time when the defendant has not failed to perform any of its obligations under the contract. The principle contractual remedies in play are the plaintiff's entitlement to free himself of his own future contractual obligations to the defendant by terminating the contract and the remedy of damages to vindicate the plaintiff's economic interest in the contract and in its performance.

39 The doctrine is the common law's pragmatic recognition that it would be commercially impractical, economically inefficient and, above all, unjust to require a plaintiff in certain circumstances to wait until the defendant fails to perform a contractual obligation in order to be entitled to a contractual remedy. Those circumstances are, broadly speaking, where:

(a) the defendant has either:

(i) evinced a "clear" and "absolute" refusal to perform a contractual obligation, which may be inferred from conduct where he has "acted in such a way as to lead a reasonable man to conclude that [he] did not intend to fulfil [his] part of the contract": *Chilean Nitrate Sales Corporation v Marine Transportation Co Ltd and Pansuiza Compania de Navegacion SA (The "Hermosa")* [1982] 1 Lloyd's Rep 570 at 572 col 2 and 580 col 1; *Man Financial (S) Pte Ltd (formerly known as E D & F Man International (S) Pte Ltd) v Wong Bark Chuan David* [2008] 1 SLR(R) 663 ("*Man Financial*") at [155]; or

(ii) disabled himself from performing a contractual obligation: *Hochster* at 690–691 and *Universal Cargo Carriers Corp v Citati* [1957] 2 QB 401 at 441; and

(b) where a failure to perform that contractual obligation when it fell due for performance would entitle the plaintiff to terminate the contract on ordinary contractual principles: see *Man Financial* at [154] and [156]–[157].

Where these circumstances are established, the common law allows the plaintiff to avail himself of an immediate contractual remedy.

40 It is apposite at this time to define certain terms which I use in the following discussion. I use the term "performance breach" to describe a failure by a defendant to *perform* a contractual obligation. Defined in this way, the term by necessity incorporates a requirement that the time for that obligation to be performed has arrived. I use the term "anticipatory breach" to mean the circumstances set out at [39] above which entitle a plaintiff to have immediate access to a contractual remedy even though there is, as yet, no performance

breach by the defendant. I use "repudiation" to mean any conduct which entitles a plaintiff to terminate a contract. Defined in this way, a repudiation can come about either because of an anticipatory breach (when the circumstances set out at [39] above are satisfied) or by reason of a sufficiently serious performance breach. I use "renunciation" to mean the conduct which I describe at [39(a)(i)] above, and which can give rise to an anticipatory breach. In *Man Financial* at [155], the Court of Appeal used the cognate word "renounce" to describe this form of repudiation. I use the term "breach of contract" to encompass both performance breach and anticipatory breach. I do not use the term "actual breach of contract" at all, because "actual" adds nothing to "breach of contract" but the possibility of confusion. I prefer instead to use either "performance breach" or "breach of contract", depending on the sense intended.

41 While there is broad consensus on the justice and pragmatism of the doctrine of anticipatory breach, and perhaps even on the circumstances which trigger its operation, there is an enduring debate as to the conceptual basis underlying it. Correctly identifying the conceptual basis assists in correctly characterising the defendant's breach. That, in turn, has the important practical implications which I have outlined at [34] above. Thus, for example, if the conceptual basis of the doctrine suggests that an anticipatory breach takes place upon repudiation, then Tembusu's declaration of default is a breach of contract and it follows that my task in this assessment is to quantify the loss, if any, which the declaration of default caused to AI. However, if the conceptual basis suggests that the doctrine does no more than create a present right of action for a future and inchoate breach, then that might suggest that AI's damages ought to be assessed by reference to the loss which it would have suffered as a result of Tembusu's hypothetical future breach of cl 5.1 of the 2012 CLA. In the latter case, and by the same token, any conduct by the defendants which unreasonably

increased their loss before Tembusu's hypothetical future breach would be irrelevant to assessing their damages.

42 There are today two competing theories as to the correct conceptual basis for the doctrine of anticipatory breach. The traditional theory posits an implied term in every contract imposing a contractual obligation on each party to do nothing to the prejudice of the other party inconsistent with their contractual relationship while that relationship subsists (*Hochster* at 689, see below at [47]). The traditional theory thus rests the doctrine's conceptual basis on the defendant's repudiation being an immediate performance breach of that implied term. That breach then triggers an immediate right to the usual contractual remedies, including a right to damages assessed on the usual contractual basis.

43 The modern theory of anticipatory breach, on the other hand, accepts that each party to a contract has an interest, which subsists throughout the life of that contract, in the counterparty's continued and ongoing performance of its primary contractual obligations. The modern theory holds that this interest is deserving of legal protection even though it falls short of a contractual right. The modern theory thus treats an anticipatory breach as a *sui generis* contractual wrong necessary to protect that subsisting interest from being defeated by a repudiation.

44 The important point for present purposes is that both theories treat the defendant's repudiation as a breach of contract. That is so even under the modern theory which treats the repudiation as being a breach of contract without being a performance breach. Tembusu's reliance on *The STX Mumbai* to argue otherwise is therefore quite mistaken.

45 The Court of Appeal came to the same conclusion in *The STX Mumbai* after considering and applying both the traditional theory and the modern theory of the doctrine of anticipatory breach. Although the court expressed a clear preference for the modern theory (at [63]), it did not categorically excise the traditional theory from Singapore law. That is no doubt because, on the facts of that case, both theories led the court to the same conclusion. That last point makes it at least arguable that the preference which the Court of Appeal expressed for the modern theory in *The STX Mumbai* is not part of the *ratio* of that case. I therefore analyse Tembusu's new submission (see [31]–[32] above) on both the traditional theory and the modern theory.

46 I begin with the traditional theory.

Traditional theory: Hochster *and* Johnstone v Milling

47 In *Hochster*, the defendant engaged the plaintiff as a courier on a three-month trip to Europe. One month before they were scheduled to leave, the defendant told the plaintiff that he no longer required the plaintiff's services. The defendant thus repudiated the contract by renouncing it. The plaintiff brought a claim for damages for breach of contract. What made this case one of anticipatory breach rather than performance breach is that the plaintiff brought his action ten days before the trip was to begin, and thus ten days before the defendant was due to perform his obligation to accept the plaintiff's services.

48 The Court of Queen's Bench allowed the plaintiff's claim. Its reasoning proceeded by analogy from cases of breach of promise to marry. In those cases, it had been held that a plaintiff was entitled to bring action as soon as the promisor married someone else (*eg*, *Short v Stone* (1846) 8 QB 358): *Hochster* at 688. Those cases could not be explained on the basis that the defendant had,

by marrying someone else, rendered it impossible to perform his promise to marry the plaintiff. After all, the defendant's spouse might die before the date on which the defendant had promised to marry the plaintiff. The cases rested on the defendant's marriage to another being an immediate breach of an implied obligation to the plaintiff: *Hochster* at 688–689. It is the breach of this implied obligation which Lord Campbell CJ held entitled the plaintiff in *Hochster* to sue for damages upon the repudiation, even before a performance breach had occurred. Lord Campbell CJ put it this way (at 689):

> [W]here there is a contract to do an act on a future day, there is a relation constituted between the parties in the meantime by the contract, and … they impliedly promise that in the meantime neither will do anything to the prejudice of the other inconsistent with that relation. As an example, a man and woman engaged to marry are affianced to one another during the period between the time of the engagement and the celebration of the marriage. In this very case, of traveller and courier, from the day of the hiring till the day when the employment was to begin, they were engaged to each other; and it seems to be a breach of an implied contract if either of them renounces the engagement.

49 To adapt Lord Campbell CJ's words to the facts of this case, on the traditional theory, Tembusu's declaration of default was to AI's prejudice and was wholly inconsistent with any intention on Tembusu's part to perform its remaining obligations under the 2012 CLA. In fact, Tembusu had only one remaining obligation, which was its obligation to convert its loan into shares in AI upon AI's business being transferred to ACTNZ and listed. The declaration of default was therefore an immediate performance breach by Tembusu of an implied term of the 2012 CLA that Tembusu would not renounce that obligation. Some would say, along these lines, that Tembusu had a contractual duty under an implied term not to repudiate the contract, and that it breached that duty: see J W Carter, *Carter's Breach of Contract* (LexisNexis Butterworths Australia, 3rd Ed, 2011) ("*Carter*") at para 7-20.

50 On the traditional theory, therefore, the court's task in assessing damages for anticipatory breach is the same as its task in assessing damages in the usual case of a performance breach. The court is required to consider the loss, if any, which Tembusu's declaration of default on 16 May 2012 caused AI to suffer. It follows that assessing the damages does not require considering the loss caused by Tembusu's failure to perform the future obligation which it repudiated. This very point was made by Lord Denning MR in *Maredelanto Compania Naviera SA v Bergbau-Handel GmbH, The Mihalis Angelos* [1970] 3 WLR 601 ("*The Mihalis Angelos*") at 612H when he said, "Seeing that the renunciation itself is the breach, the damages must be measured by compensating the injured party for the loss he has suffered *by reason of* the renunciation" [emphasis added].

51 Therefore, Tembusu's new submission fails on a straightforward application of *Hochster*.

52 But *Hochster* contained within it an ambiguity. The ambiguity is to do with whether some conduct on a plaintiff's part is necessary in order to convert the defendant's renunciation into a breach of contract. A narrow reading of *Hochster* is that it does not. On this view, *Hochster* rests liability for anticipatory breach entirely on a defendant's performance breach of an implied term. On that reading, therefore, *Hochster* does not require a plaintiff to "accept" the defendant's renunciation in order for it to give rise to a breach of contract.

53 But Lord Campbell CJ in *Hochster* did accept (at 693) the argument that the plaintiff in the 1831 case of *Planché v Colburn* (1831) 8 Bing 14 had succeeded in recovering compensation for the part-performance he had undertaken before the defendant's renunciation because the plaintiff had "treat[ed] the renunciation of the contract by the defendants as a breach". On

this reading, therefore, the rule in *Hochster* requires some additional conduct by the plaintiff in order to convert a renunciation into a breach of contract.

54 Soon after *Hochster*, the traditional theory explicitly embraced the requirement of acceptance. In *Johnstone v Milling* (1886) 16 QBD 460, Lord Esher MR denied that a defendant's renunciation is a breach of contract in itself and asserted that a renunciation constitutes a breach only when accepted by the plaintiff (at 467):

> [A] renunciation of a contract, or, in other words, a total refusal to perform it by one party before the time for performance arrives, does not, by itself, amount to a breach of contract but may be so acted upon and adopted by the other party as a rescission of the contract as to give an immediate right of action. When one party assumes to renounce the contract, that is, by anticipation refuses to perform it, he thereby, so far as he is concerned, declares his intention then and there to rescind the contract … The other party may adopt such renunciation of the contract by so acting upon it as in effect to declare that he too treats the contract as at an end, except for the purpose of bringing an action upon it for the damages sustained by him in consequence of such renunciation.

55 The requirement for a plaintiff to accept a defendant's repudiation in order for the repudiation to amount to a breach of contract is now part of the traditional theory: see *eg*, *Golding v London & Edinburgh Insurance Company, Ltd* [1932] 43 Lloyd's Rep 487 at 488 col 2. Modern statements of the traditional theory therefore embed acceptance of the repudiation by the promisee, and thereby a termination of the contract, into the definition of anticipatory breach. Thus, Prof J W Carter defines an anticipatory breach as that which occurs when "a promisee validly terminates the performance of a contract for a repudiation prior to the arrival or expiry of the time for performance by the promisor": *Carter* at para 7-08. In his masterly *Anticipatory Breach* (Hart Publishing, 2011) – a monograph which the Court of Appeal described as "brilliant" in *The STX Mumbai* at [40] – Prof Qiao Liu analyses the common law rule which requires

acceptance in order to convert a repudiation into a breach. He calls it the breach-conversion rule and regards it as a rule which ought now to be abandoned (at pp 28–30).

56 As shall be seen (at [78] below), one of the quirks in the facts of this case is that AI has never explicitly accepted Tembusu's declaration of default and terminated the contract. The absence of acceptance in this case means that Tembusu may be right to say, *pace* Lord Esher MR, that its declaration of default was no breach at all, and that the only true breach in this action is Tembusu's hypothetical future breach of cl 5.1 of the 2012 CLA. But even on that analysis, the causation inquiry is to be conducted with the repudiation as its reference point: the court must still assess the damage sustained by AI "in consequence of" (in Lord Esher MR's words) Tembusu's repudiation of the 2012 CLA, namely, its declaration of default on 16 May 2012. This is so even if the repudiation "does not, by itself, amount to a breach of contract" (Lord Esher MR's words again).

57 The reason that the repudiation is treated as the reference point for assessing loss is connected to the reason for the rule in *Hochster* itself. *Hochster* recognised the doctrine of anticipatory breach out of a pragmatic judicial desire to maximise the freedom of labour and capital: Paul Mitchell, "*Hochster v De La Tour* (1853)" in *Landmark Cases in the Law of Contract* (Charles Mitchell and Paul Mitchell eds) (Hart Publishing, 2008) at pp 156 to 157; *Bunge SA v Nidera BV* [2015] 3 All ER 1082 ("*Bunge*") at [12] *per* Lord Sumption. If the law postponed the plaintiff's right to seek a contractual remedy until the time for the defendant's performance arrived, and forced him to be ready to perform his own obligations in the interim in case the defendant ever reversed his repudiation before committing a performance breach, the law would be positively preventing the plaintiff from redeploying his labour or capital in the

meantime by contracting elsewhere. That would be inefficient for the economy as a whole. So the law allows the plaintiff an immediate contractual remedy. But the law allows that benefit to the plaintiff only because the defendant's repudiation means that the plaintiff has lost his original opportunity under his contract with the defendant. The defendant's repudiation and consequent non-performance is therefore the event by which that loss is assessed.

58 Assessing the quantum of that loss, however, is a different question. Tembusu is correct to say that in cases of anticipatory breach, quantum is generally assessed as at the time fixed for performance of the obligation which has been anticipatorily breached.[10] This is the rule laid down in *Roper v Johnson* ([36] *supra*) and affirmed in *The Law of Contract in Singapore* (Andrew Phang Boon Leong gen ed) (Academy Publishing, 2012) ("*The Law of Contract*") at para 22.009, which Tembusu cites. If the assessment is done before the time for performance has arrived, the court will usually be prepared to make an assessment of the loss sustained based on projections and forecasts: *Melachrino and Another v Nickoll and Knight* [1920] 1 KB 693 at 699.

59 In this regard, it may be said that the rule in *Roper v Johnson* supports Tembusu's argument that the breach which triggers compensation in cases of anticipatory breach is the hypothetical future performance breach. The usual rule for assessing loss caused by performance breach is that damages are assessed at the time of the breach (see [34] above). If damages for anticipatory breach are to be assessed as at the date of the hypothetical future performance breach, does that not mean that it is that breach which is the breach of contract for which compensation is awarded? The answer is no. The better view is that the doctrine of anticipatory breach is willing to examine the consequences of

[10] Certified Transcript, 27 January 2017 p 40 at lines 14 to 24.

the repudiation even though the repudiation is not a performance breach. For the point of the doctrine is to permit the plaintiff to turn his labour or capital towards alternative productive endeavours. That is why the plaintiff comes under a duty to mitigate from the time he accepts the repudiatory breach and terminates the contract, not from the time in the future fixed for performance of the obligation which has been repudiated: *Bunge* at [12]. And to achieve a fair assessment of the losses suffered as a result of the repudiation, those losses ought to be assessed as at the time fixed for performance, where the plaintiff would have obtained what he had bargained for: *Robinson v Harman* (1848) 1 Ex Rep 850 at 855. The compensatory principle and the duty to mitigate thus work together justly to give the plaintiff what he bargained for less the losses he could reasonably have avoided.

60 The reason for the difference between the reference point for the causation inquiry and the quantum inquiry in cases of anticipatory breach is perhaps best explained by a line of criticism of *Hochster* in the academic literature. It has been said that *Hochster* could have achieved the goals of the doctrine of anticipatory breach by holding that the defendant's repudiation gave the plaintiff an immediate right to terminate the contract but no right to sue for damages until there was a performance breach, as there is no necessary connection between these two consequences of the repudiation: Edwin Peel, *Treitel: The Law of Contract* (Sweet & Maxwell, 14th Ed, 2015) at para 17-080. But even if making damages available immediately upon repudiation goes beyond the minimum necessary for the doctrine to achieve its purpose, any injustice which accelerating the right to damages creates is ameliorated by assessing those damages as though the plaintiff had been required to wait for the foreshadowed performance breach to eventuate. Therefore, there is nothing incoherent about the doctrine regarding the repudiation as the event which

precipitates the loss on the one hand, and in assessing the quantum of that loss at the time fixed for performance of the repudiated obligation on the other.

61 To sum up, the traditional theory on the doctrine of anticipatory breach offers no assistance to Tembusu's submission that its only breach of contract is its hypothetical future breach of cl 5.1 of the 2012 CLA.

***The modern view:* The STX Mumbai**

62 Tembusu's submission also relies on the modern theory of anticipatory breach as set out by the Court of Appeal in *The STX Mumbai* (see [32] above). Tembusu submits that *The STX Mumbai* signals a "slight shift in focusing on how one actually analyses the anticipatory breach".[11] In fact, the shift in *The STX Mumbai* in conceptualising the doctrine of anticipatory breach is fundamental, not slight. But it remains the case that there is no support in that case for Tembusu's submission.

63 The primary question before the Court of Appeal in the *STX Mumbai* was whether a plaintiff who had performed all of its obligations under a contract – and on whose part, therefore, the contract had become an executed contract – could rely on the doctrine of anticipatory breach to bring an action against a defendant who had evinced an inability to perform an obligation which lay in the future when the action was commenced. The defendant's argument was that the doctrine of anticipatory breach contained within it an exception which prevented a plaintiff who had no obligations left to perform from suing the defendant until the defendant committed a performance breach. One argument for the exception was that, where a contract – either by its terms or by the way in which the plaintiff has on the facts of a particular case rendered performance

[11] Certified Transcript, 27 January 2017, p 39 at lines 8 to 9.

– leaves no obligations resting on the plaintiff in the future, the underlying justification for the doctrine of anticipatory breach is missing, A plaintiff who has performed all of his obligations has, by definition, no future obligations to the defendant to be released from performing. There is therefore no need in a case of this nature for the law to promote the objects of the doctrine (see [32] above) by allowing the plaintiff an accelerated right to terminate the contract. Another way of putting the argument is that the doctrine of anticipatory breach cannot apply where there is no interdependency of future contractual obligations between the plaintiff and the defendant, either because the plaintiff had no obligations at all under the contract to begin with or because the plaintiff has, by the time of the repudiation, performed all that it is obliged to do.

64 In *The STX Mumbai*, the judge at first instance struck out the action, holding that the doctrine of anticipatory breach was not engaged at all because there had been no repudiation by the defendant. However, she accepted *obiter* that the doctrine of anticipatory breach could not apply to a contract which is executed on a plaintiff's part. The Court of Appeal reversed the decision, holding that on both the traditional and the modern theory, it is not plainly and obviously unsustainable to argue that the doctrine of anticipatory breach applies in exactly the same way to both executed and executory contracts.

65 The Court of Appeal in *The STX Mumbai* viewed the modern theory of anticipatory breach as its preferred conceptual basis for the doctrine (at [63]). *The STX Mumbai* therefore deprecates the attempt to conceptualise an anticipatory breach either as a real breach of a fictional implied term or as a fictional breach of a real but future obligation. The preferred view sees anticipatory breach as a species of breach of contract even though there is no performance breach. Viewed that way, an anticipatory breach of a contract can take place whether the contract is unilateral, executed or executory. The court

considered this direct approach to be a less convoluted and less artificial way to explain how the doctrine allows an immediate right of action in the absence of a performance breach. The repudiation is a present breach of contract, albeit notified to the plaintiff in advance of any performance breach of that contract, which justifies the plaintiff in electing to treat the contract as discharged: *The STX Mumbai* at [51].

66 Once it is accepted that an anticipatory breach is just as much a breach of contract as a performance breach, the difficulties (see [38] above) which beset the doctrine of anticipatory breach are said to disappear. For one, allowing the plaintiff to sue for damages at once is perfectly explicable on the basis that the repudiation is in itself deemed to be a breach of contract. Further, the breach-conversion rule disappears (see [55] above), and with it the anomaly of including an element of the *plaintiff's* conduct in defining anticipatory breach.

67 This conception is strictly speaking not new. As I have alluded to at [50] above, Lord Denning MR expressed a similar view in *The Mihalis Angelos* at 612F–H:

> The cause of action is not the future breach. It is the renunciation itself. I venture to quote the notes to *Cutter* v. *Powell* (1795) 6 Term. Rep. 320 in 2 Smith's Leading Cases, 13th ed. (1929), p. 30:
>
> > "… it is of the essence of every contract that each party thereto should have the right to consider it as of binding force from the moment that it is made and should have the right to base his conduct upon the expectation of its being fulfilled by the other party. If, therefore, the other party, by an unqualified refusal to perform his side of the contract, destroys that expectation, he destroys that which is the basis of the contract; and his conduct may be treated by the opposite party as a breach going to the whole of the consideration."
>
> Seeing that the renunciation itself is the breach, the damages must be measured by compensating the injured party for the loss he has suffered by reason of the renunciation. You must

> take into account all contingencies which might have reduced or extinguished the loss.

68 It should therefore be obvious why *The STX Mumbai* does not assist Tembusu. Even on the modern approach preferred in that case, Tembusu is deemed to have committed a breach of contract on 16 May 2012 when it repudiated the contract by declaring a default.

69 My task on the assessment is therefore to assess the loss, if any, which the defendants suffered as a result of Tembusu's declaration of default on 16 May 2012.

ACTAtek (CA)

70 To advance its submission that the only breach of contract relevant in this assessment of damages is its hypothetical future breach of cl 5.1 of the 2012 CLA, Tembusu also relies on the decision of the Court of Appeal in *ACTAtek (CA)*. Tembusu contends that the Court of Appeal viewed Tembusu's declaration of default, not as a breach of contract, but as mere notice of a future breach, *ie*, that Tembusu would not comply with cl 5.1. Thus, Tembusu says, the hypothetical future breach of cl 5.1 is the only breach of contract which the Court of Appeal found in *ACTAtek (CA)*.

71 It is clear to me that the Court of Appeal in *ACTAtek (CA)* considered Tembusu's declaration of default to be a breach of contract. Tembusu's submission to the contrary misunderstands the role which cl 5.1 of the 2012 CLA played in the Court of Appeal's analysis.

72 Tembusu says that its interpretation of *ACTAtek (CA)* is supported by two parts of the Court of Appeal's judgment. The first is at [106], where the

court describes AI's submission that Tembusu's breach is its failure to comply with cl 5.1:

> … The Appellants argue, however, that in the present case, Tembusu's obligations under the 2012 CLA had not yet ceased. They rely on cl 5.1 of the 2012 CLA which provides that in the event that ACTAtek completes an IPO …, Tembusu "shall, immediately … convert the Loan into fully-paid shares … of [ACTAtek] at a fifty per cent. (50%) discount to the Issue Price". According to the Appellants, by calling the event of default wrongfully and asking for the loan amounts to be repaid immediately, Tembusu had evinced an intention not to comply with this continuing obligation under the 2012 CLA. The Appellants therefore seek to rely on an *anticipatory repudiatory breach* of the 2012 CLA.
>
> [emphasis in original]

73 The second part is at [110], where the Court of Appeal held that the "wrongful declaration of the event of default was accompanied by Tembusu's manifestation of its refusal to comply with cl 5.1 of the 2012 CLA", and that "this suffices to constitute an anticipatory breach of the 2012 CLA". Tembusu submits that this describes Tembusu's breach as a combination of: (a) Tembusu's declaration of default; and (b) Tembusu's manifestation thereby of its intention not to comply with cl 5.1 of the 2012 CLA. Given, however, that the Court of Appeal assumed at [107] and [112] that (a) was not in itself a breach of any express or implied term of the CLA, that leaves (b) as the only breach of contract found by the Court of Appeal.

74 Tembusu's submission is wrong for two reasons. First, at [100], the Court of Appeal posed the specific question whether Tembusu's declaration of default could, on its own, amount to a repudiatory breach of contract. The court then went on from [101]–[110] to analyse that question by reference to the two competing submissions before it. Tembusu's submission was that declaring the default could not be a repudiatory breach of contract because there was no express or implied term in the 2012 CLA not to declare a default without

contractual basis (at [101]). In other words, Tembusu's case was that it had committed no performance breach of the 2012 CLA by declaring a default. The defendants did not oppose this submission by arguing the opposite, *ie*, by arguing that Tembusu's declaration of default was indeed a performance breach. Instead, the defendants submitted that the declaration of default was an anticipatory breach (at [106]).

75 The Court of Appeal determined the question it had posed for itself by holding that Tembusu's declaration of default, on the facts of this case, constituted an anticipatory breach and therefore a breach of contract. In reaching this conclusion, the Court of Appeal assumed without deciding that Tembusu was correct that declaring an event of default without contractual basis was not a performance breach (at [107] and [112]). On that assumption, Tembusu's future obligation under cl 5.1 of the 2012 CLA was critical to the court's finding. That future obligation made the CLA an executory contract (at [107]). This meant that Tembusu's submission that the declaration of default did not amount to a performance breach was no defence to the counterclaim. That is because the declaration of default was a repudiation of cl 5.1 and therefore gave rise to an anticipatory breach (at [110]). The Court of Appeal must also have accepted AI's submission that Tembusu's anticipatory breach was an anticipatory *repudiatory* breach. In other words, the Court of Appeal must have accepted that cl 5.1, if it were the subject of a performance breach when it fell due for performance, would entitle AI to terminate the 2012 CLA on the basis either that cl 5.1 was a condition of the contract or that a breach of cl 5.1 would deprive

AI of substantially the whole of benefit which the parties intended that it should obtain from the 2012 CLA: see *The STX Mumbai* at [66]–[67] and [74].

76 This is the reasoning expressed at [110] of *ACTAtek (CA)*:

> We are satisfied that a key premise undergirding [two English authorities cited by Tembusu to argue that its declaration of default was not a performance breach] was that there was no element of non-performance or future non-performance of the contracts when the event of default was wrongfully declared and in that sense, it could not be said that the lender was repudiating the contract simply because there was no obligation under the contract to be repudiated. Because of that, to find a breach of contract, it seems to have been thought that it had to be established that there was either an express or implied term *not* to wrongfully call an event of default. We are not faced with the same constraints on our facts since the wrongful declaration of the event of default was accompanied by Tembusu's manifestation of its refusal to comply with cl 5.1 of the 2012 CLA. In our judgment, this suffices to constitute an anticipatory breach of the 2012 CLA.
>
> [emphasis in original]

77 It appears that Tembusu reads the last two sentences in this passage as meaning that the Court of Appeal did not find Tembusu's declaration of default to be a breach of contract in itself but merely evidence from which it could be inferred that Tembusu intended to refuse to perform its obligation under cl 5.1 of the 2012 CLA when it fell due for performance. It is this possibility which gives scope to Tembusu's new submission. But this possibility ignores the preferred approach in *The STX Mumbai* which treats a repudiation in itself as a breach of contract. It also ignores the fact that the Court of Appeal in *ACTAtek (CA)* consistently and deliberately at [100]–[110] refers to the declaration of default as being wrongful (*ie*, contrary to law), even though the Court of Appeal had assumed it not to be a performance breach.

78 It is necessary at this point to introduce a factual quirk in this action. AI did not accept what it now characterises as Tembusu's anticipatory repudiatory breach. Thus, AI's solicitors responded on 23 May 2012 to Tembusu's solicitors' declaration of default by characterising the declaration as premature and a breach of the 2012 CLA while expressly declining to terminate the 2012 CLA for Tembusu's breach:[12]

> … Our clients deny that the repayment [to Hectrix, Inc.] in any way constitutes a breach of the [2012 CLA] and that an event of default has arisen in this regard. Your clients' purported termination of the [2012 CLA] is pre-mature and wrongful and is in breach of the [2012 CLA]. Our clients do not agree to termination of the [2012 CLA].

AI has adopted this position as part of its pleaded case, reiterating that it did not accept Tembusu's anticipatory breach.[13] Thus, it appears to me that the Court of Appeal has, *sub silentio*, rejected what Professor Qiao Liu has called the breach-conversion rule. That rule is now an essential element of the traditional theory (see [55] above). Instead, *ACTAtek (CA)* appears to have proceeded on the modern theory of anticipatory breach, which sees a breach of contract as being constituted entirely by the defendant's repudiation, with no requirement for the plaintiff to accept the breach. I make this point not to suggest that the defendants have never accepted Tembusu's anticipatory repudiatory breach. They have implicitly done so by mounting a counterclaim for damages in this action. But that counterclaim was put forward only on 4 September 2012.[14] Nobody suggests that Tembusu's anticipatory repudiatory breach took place on that date. The Court of Appeal in *ACTAtek (CA)* proceeded on the basis that Tembusu's breach of contract took place on 16 May 2012, even though AI has never

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12 Thomas Wan's Affidavit of Evidence-in-Chief dated 9 May 2014 at para 14.

13 Defence and Counterclaim (Amendment No 5) dated 8 July 2014 at para 82.

14 Defence and Counterclaim (Amendment No 5) dated 8 July 2014 at para 59.

expressly accepted Tembusu's repudiation and did not impliedly accept Tembusu's repudiation at any time before 4 September 2012.

79 So when the Court of Appeal refers to the declaration of default accompanied by the implicit refusal to comply with cl 5.1 as constituting an anticipatory breach, the Court of Appeal is not inviting me to assess damages for a hypothetical future breach of cl 5.1. Tembusu's breach of contract on the modern theory is its repudiation on 16 May 2012. That is why the Court of Appeal made the express finding that Tembusu "had breached" the 2012 CLA (at [111]) and that "the wrongful declaration of the event of default did amount to a breach of the 2012 CLA" (at [116]). The breach of contract found by the Court of Appeal was a historical breach and not a hypothetical one.

80 Second, the Court of Appeal's example at [114] of an issue which Tembusu was at liberty to take on this assessment demonstrates that my task now is to conduct the causation inquiry in relation to the declaration of default, not in relation to Tembusu's hypothetical future breach of cl 5.1. The Court of Appeal expressly gave Tembusu liberty to raise before me the argument that AI had actually suffered no loss even if Tembusu's declaration of default had caused AI's listing to fail because AI still owns the subsidiaries which the listing process valued at NZ$30.5m. This reference can only make sense if the Court of Appeal viewed Tembusu's declaration of default as a breach of contract and, more specifically, the breach of contract which was to form the causative foundation for the assessment which I now undertake.

81 Therefore, I reject Tembusu's submission that the only breach which the court in *ACTAtek (CA)* identified and which is relevant to the inquiries of causation and quantum before me is a hypothetical future breach of cl 5.1 of the 2012 CLA. The Court of Appeal expressly envisaged my task in this assessment

in exactly the way I have set it out at [69] above. My conclusion is supported not only by the general principles concerning the doctrine of anticipatory breach but also by the Court of Appeal's decision in *ACTAtek (CA)*.

82 I now turn to consider the defendants' characterisation of Tembusu's breach of the 2012 CLA.

Breach as the accumulation of events

83 The defendants put forward quite a different characterisation of Tembusu's breach. They say that the breach comprised a "cumulation [*sic*] of event[s]" [15] or a "series of wrongful conduct"[16] which occurred before and after the declaration of default. This submission is based on the defendants' pleaded case that Tembusu breached the CLA 2012 through its conduct before and after 16 May 2012.[17] The defendants even suggest bizarrely that AI's failure to list is itself a breach of the 2012 CLA on Tembusu's part.[18] It is true that the 2012 CLA envisaged AI being listed. But the 2012 CLA imposed no obligation on any party to bring about that listing. All that it did was, by cl 5.2, to require AI's shareholders to endeavour to list AI without any moratorium on Tembusu's converted shares.

84 I reject the defendant's submission entirely. The Court of Appeal in *ACTAtek (CA)* ([24] *supra*) considered that Tembusu's sole breach of contract was declaring a default on 16 May 2012: *ACTAtek (CA)* at [110] and [116]. The

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15 Certified Transcript, 27 January 2017, p 7 at line 16; see Defendants' Submissions dated 16 December 2016 at paras 9(a) to 9(h) and paras 9(j) to 12(d).

16 Defendants' Closing Submissions dated 16 December 2016 at para 12.

17 Certified Transcript, 27 January 2017, p 9 at line 18; Defence and Counterclaim (Amendment No 5) dated 8 July 2014 at para 85.

18 Certified Transcript, 27 January 2017, p 72 at lines 27 to 28.

declaration of default was an anticipatory breach because Tembusu thereby renounced its obligation under cl 5.1 of the 2012 CLA. It was an anticipatory repudiatory breach because a performance breach of cl 5.1 would have entitled AI to terminate the 2012 CLA.

85 AI's case appears to be that the totality of Tembusu's conduct before and after 16 May 2012 ought to be taken as the renunciation. That was not the case which the defendants ran before the Court of Appeal: *ACTAtek (CA)* at [106]. Their case then, insofar as it relied on Tembusu's historical acts, rested only on the declaration of default. So it is not surprising that nothing in the Court of Appeal's analysis in *ACTAtek (CA)* suggests that it regarded any other act on Tembusu's part as amounting to a breach of contract. This point, as will be seen, is a crucial premise of the causation inquiry: see [106] below.

Issue 2: Losses suffered due to breach

86 Having established the relevant breach of contract, I will now: (a) set out the heads of loss which the defendants claim; (b) assess whether these losses were in fact suffered by AI; and (c) if so, determine whether they were caused by Tembusu's breach. To do so, I will first explain why Mr Wan has no standing to claim damages from Tembusu. This will leave for specific analysis only those heads of loss claimed by AI. It will be seen that some of these heads are unpleaded. I will nevertheless assess on the merits all of AI's heads of loss.

Mr Wan's standing to claim damages

87 Mr Wan is not a party to the 2012 CLA.[19] Mr Wan has not founded his case at trial or in the Court of Appeal or before me now on the Contracts (Rights

[19] Certified Transcript, 27 January 2017, p 2 at lines 24 to 25.

of Third Parties) Act (Cap 53B, 2002 Rev Ed) or any other exception to the privity rule which would operate to give Mr Wan a direct right of action against Tembusu under the 2012 CLA. It follows that Mr Wan has no legal basis to recover any damages whatsoever from Tembusu for breach of the 2012 CLA.

88 Mr Wan nevertheless points out that his counterclaim against Tembusu was also brought in tort. He claimed that Tembusu had breached a duty of care owed to AI and to him to exercise reasonable care and skill in calling a default[20] so as to enable AI to proceed to listing. He also claimed that Tembusu and its officers had conspired by unlawful means to prevent AI from listing.[21]

89 It is clear to me that Mr Wan's claims in tort are no longer live. In *ACTAtek (HC)*, I dismissed the defendants' counterclaim in its entirety, including Mr Wan's claims in tort (at [133]). In *ACTAtek (CA)*, the Court of Appeal allowed the appeal only in respect of the counterclaim in contract seeking damages for Tembusu's breach of the 2012 CLA. The Court of Appeal held at [111] that, having found that Tembusu had breached the 2012 CLA, it was not necessary to consider the defendants' other heads of counterclaim. The Court of Appeal therefore did not allow the defendants' appeal against my dismissal of the other heads of counterclaim. Mr Wan's counterclaims in tort remain dismissed. They are not live claims for the purposes of this assessment.

90 For this fundamental reason, Mr Wan's submission that he is entitled to recover damages in this assessment on the basis of his counterclaim in tort is entirely misconceived.

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20 Defence and Counterclaim (Amendment No 5) paras 83(c), 84 and 85.

21 Defence and Counterclaim (Amendment No 5) para 86.

91 I now turn to consider AI's claims for damages in contract.

Assessment of losses

92 The losses which AI claims to have suffered as a result of Tembusu's breach of contract may be divided into three heads:

(a) loss of capitalisation, in the form of:

(i) loss of the benefit of obtaining approximately NZ$30.5m worth of shares in a listed company, ACTNZ;[22] or

(ii) loss of the chance to obtain that benefit;[23]

(b) costs incurred by AI in preparing for the listing on the NZAX, totalling approximately NZ$1.6m; [24] and

(c) loss of reputation, credit and future business.[25]

93 A preliminary issue is that some of these losses are unpleaded. The starting point on unpleaded losses is the High Court's decision in *Abdul Latif bin Mohamed Tahiar (trading as Canary Agencies) v Saeed Husain s/o Hakim Gulam Mohiudin (trading as United Limousine)* [2003] 2 SLR(R) 61 ("*Abdul Latif*"). On the basis of this authority, Tembusu urges me to disregard entirely any head of loss which AI has failed to plead.[26] In *Abdul Latif,* the plaintiff succeeded in the District Court in a claim for breach of fiduciary duty. The

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22 Defence and Counterclaim (Amendment No 5) dated 8 July 2014 at para 87.

23 Defendants' Submissions dated 16 December 2016 at para 8(d).

24 Defence and Counterclaim (Amendment No 5) dated 8 July 2014 at para 88; Defendants' Submissions dated 16 December 2016 at para 8(b) and (c).

25 Defence and Counterclaim (Amendment No 5) dated 8 July 2014 at para 89.

26 Plaintiff's Reply Submissions dated 6 January 2017 at paras 10 to 11.

compensation awarded was precisely the sum he claimed in his pleadings. He nonetheless appealed, seeking further compensation based on a higher estimate of his loss set out in an accountant's report tendered in evidence. MPH Rubin J at [7] of his judgment set out the following principle: "It is a settled principle of law that parties stand by their pleaded cases and any defect in the pleadings cannot be cured by any averments in affidavits, let alone an oblique reference in counsel's closing speech". Rubin J then dismissed the appeal on the basis that "[c]ounsel for the plaintiff should have made an application to amend, and having failed to do so it did not lie in his mouth to blame the court to do his homework" (at [9]).

94 I respectfully agree with the statement of principle in *Abdul Latif* as a general rule. I note that it was endorsed by the Court of Appeal in *Yap Son On v Ding Pei Zhen* [2017] 1 SLR 219 at [52]. However, it would be going too far, I suggest, to infer from Rubin J's reasoning that a defect in the pleadings with respect to the loss claimed in itself precludes the court from remedying that loss if loss in a different amount is proven at trial. It must be remembered that "[p]rocedure is not an end in itself, but a means to the end of attaining a fair trial": *V Nithia (co-administratrix of the estate of Ponnusamy Sivapakiam, deceased) v Buthmanaban s/o Vaithilingam and another* [2015] 5 SLR 1422 ("*Nithia*") at [39]. Thus, while the general rule is that a party is bound by its pleadings, the law does permit departure from the general rule, albeit in limited circumstances: where no prejudice is caused to the other party or where it would be clearly unjust for the court not to allow the departure: *Nithia* at [40].

95 In the present case, AI's principal pleaded loss is that it lost the "benefit" of the failed IPO. If the IPO had succeeded, AI would have obtained shares valued at NZ$30.5m in a listed company in exchange for all of AI's shares in

its subsidiaries.[27] AI has now modified its principal claim to a claim for the loss of a "chance" to obtain that benefit, but continues to value that lost chance at NZ$30.5m. That is obviously quite a different way of characterising AI's loss of capitalisation claim. Tembusu's complaint is that AI failed to plead a claim for damages for the loss of a chance and submits that its loss of capitalisation claim should be dismissed on that basis alone. However, I note that the current formulation of its loss of capitalisation claim draws on the same body of evidence adduced at trial in support of its straightforward loss of capitalisation claim. Tembusu's ability to respond to AI's loss of capitalisation claim on the footing of a lost chance was therefore not prejudiced, at least not significantly. I am therefore willing to consider the merits of both ways in which AI puts its alleged loss of capitalisation.

96 Components of AI's alleged loss under [92(b)] above were also unpleaded. Just as in *Abdul Latif* – where the plaintiff's enhanced quantum was derived only from an accountant's report – in the present case, the unpleaded components under this head of claim are taken from IRG's mandate.[28] However, Tembusu was evidently familiar with this document, and was able to respond fully to AI's claims based on IRG's mandate. So once again, I am willing to decide the unpleaded components of this item on the merits. I turn now to assess each of AI's claimed losses in sequence.

Loss of capitalisation I: loss of benefit

97 AI's principal pleaded loss is a loss of the benefit of obtaining shares valued at NZ$30.5m in a listed company, ACTNZ. For this claim to succeed,

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27 Defence and Counterclaim (Amendment No 5) dated 8 July 2014 at para 87.

28 Thomas Wan's Affidavit of Evidence-in-Chief dated 9 May 2014 at pp 909 to 912; Brent King's Affidavit of Evidence-in-Chief dated 12 May 2014 at pp 111 to 112.

AI must persuade me of three things: (a) that it has in fact suffered this loss; (b) that Tembusu's breach of the 2012 CLA caused this loss; and (c) that the quantum of that loss is NZ$30.5m. I find that ACTAtek has failed to prove any of these three things.

(1) Fact of loss

98 It is well-established that a party claiming damages as compensation for loss must prove that he has suffered loss: Harvey McGregor, *McGregor on Damages* (Sweet & Maxwell, 19th Ed, 2014) ("*McGregor*") at para 10-001; *Robertson Quay Investment Pte Ltd v Steen Consultants Pte Ltd and another* [2008] 2 SLR(R) 623 at [27]. However, AI has not attempted to prove a loss of NZ$30.5m. Instead, as I have said, AI now argues that it lost a chance of obtaining NZ$30.5m worth of shares in a listed company in exchange for all the shares in its subsidiaries.[29]

99 On the other hand, Tembusu argues that AI has in fact suffered no loss at all. Tembusu's submission is based on the mechanism of the listing process, which consisted of the following four principal steps:[30]

(a) First, a company with no assets and liabilities would be incorporated in New Zealand by IRG and named ACTAtek Limited (*ie*, ACTNZ).

(b) Second, AI would sell all its subsidiaries to ACTNZ for a total consideration of NZ$30.5m.

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29 Defendants' Submissions dated 6 January 2017 at para 5(b).

30 Brent King's Affidavit of Evidence-in-Chief dated 12 May 2014 at p 246 at para 2.2.

(c) Third, ACTNZ would pay for AI's subsidiaries by issuing 121.4m shares in ACTNZ to AI and paying BT$198,000 to AI. BT$ are Bartercard Trade Dollars, a notional currency equivalent to the New Zealand dollar which is apparently commonly used in NZAX listings.

(d) Fourth, ACTNZ, now with putative assets of NZ$30.5m, would be listed on the NZAX.

100 It is not disputed that the defendants, to this date, have completed only the first step. Tembusu thus says that AI has suffered no loss because it continues to own its subsidiaries, which are presumably worth today what they were worth at the time of the listing.[31] AI's decision now to claim damages on the footing of a lost chance rather than an outright loss is no answer to this submission. Even on the loss of a chance analysis, AI continues to own its subsidiaries.

101 Next, Tembusu also disputes the value of AI's subsidiaries.[32] Tembusu points out that it is Mr Wan who ascribed the NZ$30.5m value to AI's subsidiaries. The NZ$30.5m figure is not the result of an arm's length objective valuation. Further, out of the NZ$30.5m in value, NZ$22m is attributed to goodwill. This goodwill arises only because ACTNZ was ostensibly willing to accept NZ$30.5m as the value of the subsidiaries in the second and third steps of the listing process: see [98] above. The value of NZ$30.5m ascribed to AI's subsidiaries is therefore self-generated, circular and unreliable. NZ$30.5m therefore represents neither the true value of AI's subsidiaries nor the true extent

31 Plaintiff's Submissions dated 16 December 2016 at para 18.

32 Plaintiff's Submissions dated 6 January 2017 at paras 16 to 18.

of AI's loss of capitalisation, assuming that that loss was sustained in the first place.

102 In response, AI says that there is some objective basis – found in Brent King's testimony – to value the subsidiaries at NZ$30.5m.[33] I do not agree. Mr King admitted in cross-examination that the figure of NZ$30.5m was not a figure he arrived at independently. AI put the figure to him and he was comfortable with it.[34] AI's other argument is that Tembusu is now estopped from denying that the subsidiaries were worth NS$30.5m because it had previously indicated in an Investment Memorandum that it accepted that valuation.[35] But this argument relies on no known principle of estoppel. In any event, in that memorandum, Tembusu said only that "ACTAtek expect[ed] the pre-money market capitalisation of [ACTNZ] to be approximately US$30 million" – not that Tembusu agreed with that estimate or its basis.[36] So on the facts, Tembusu did not commit itself to any position on the value of AI's subsidiaries independently of AI's assurance.

103 In my judgment, AI has no logical basis to assert that it has suffered a loss of NZ$30.5m. This is because it still owns all of its subsidiaries. They are presumably still worth today what they were worth at the time of the failed listing. Neither party has produced any evidence to prove otherwise. In this regard, one might have expected AI to argue – and to prove – that the value of its subsidiaries fell to zero or near zero as a result of Tembusu's breach, such that AI is now entitled to take the entire value of those subsidiaries on 16 May

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33 Defendant's Reply Submissions dated 6 January 2017 at para 5(e).

34 Defendant's Submissions dated 16 December 2016 at para 35; Certified Transcript, 12 August 2014, p 36 at lines 28 to 31.

35 Defendant's Reply Submissions dated 6 January 2017 at para 5(e).

36 Andy Lim's Affidavit of Evidence-in-Chief dated 23 December 2013 p 179 at para 3.

2012 as its starting point on damages. But that is not AI's case. Even if it were, it would have been unreasonable for AI not to mitigate its loss by making a new attempt to list. It made no such attempt, as I will explain at [138]–[146] below. While this point goes more directly to the issue of mitigation, AI's inaction reduces the credibility of the value of its subsidiaries because it suggests that no one but ACTNZ would have been willing to accept NZ$30.5m as the value of these subsidiaries. This supports Tembusu's argument on the circularity and unreliability of the NZ$30.5m valuation.

104 It is also significant to me that the structure of the listing was not for the public to be invited to subscribe for new shares in AI. A listing of that nature, if successful, would have resulted in AI enlarging its capital base. That in turn would have given AI more working capital or funds for expanding its business: an opportunity which it has lost. Instead, the structure of the listing was for AI to be allotted shares in ACTNZ and for AI to sell its shares in ACTNZ to the public as vendor shares. The listing was therefore simply a means for AI's shareholders to exit their investment in AI's business, and would not have brought additional capital into AI.

105 In the premises, I find that AI has failed to satisfy me on the balance of probabilities that it suffered a loss of NZ$30.5m. Nevertheless, I turn to address causation, assuming that AI did suffer such a loss.

(2) Causation

106 The question whether a loss would have occurred "but for" the wrong committed has gained nearly universal acceptance as the test for determining causation in fact. The "but for" test, as it is called, was adopted into the law of contract by the Court of Appeal in *Sunny Metal & Engineering Pte Ltd v Ng*

Khim Ming Eric [2007] 3 SLR(R) 782 ("*Sunny Metal*") at [63], where it endorsed the view expressed in *The Cherry and others* [2003] 1 SLR(R) 471 at [68] that the "but for" test was synonymous with the test of "effective" or "dominant" cause adopted in some English cases for determining whether a breach of contract had caused a plaintiff's loss: see *eg*, *Galoo Ltd v Bright Grahame Murray* [1994] 1 WLR 1360 at 1374G.

107 Importantly, the "but for" test does not require the breach of contract to be the sole cause of the loss: *Anti-Corrosion Pte Ltd v Berger Paints Singapore Pte Ltd and another appeal* [2012] 1 SLR 427 at [40]. As Devlin J has said, "[I]f a breach of contract is one of two causes … it is sufficient to carry a judgment for damages": *Heskell v Continental Express Ltd and Another* [1950] 1 All ER 1033 at 1048, disapproved on another point in *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465 at 532. Therefore, for the purposes of the causation inquiry, I leave aside for the moment the fact that the success of AI's listing depended in part on AI's own efforts through IRG to be listed on the NZAX. That fact is relevant to whether the loss of capitalisation is a contingent loss, *ie*, a loss whose certainty is contingent on actions other than those of the defendant: see *The Law of Contract* at paras 21.022–21.031. I address this issue fully at [114]–[119] below. What matters here is whether AI's hypothetical compliance with the 2012 CLA was a necessary element of the success of AI's listing, such that Tembusu's breach of the 2012 CLA may be regarded as a "but for" cause of the listing's failure.

108 Accordingly, the specific issue is whether the listing would have proceeded if Tembusu did not breach the 2012 CLA. The burden of proving this counterfactual on a balance of probabilities lies on AI. AI in turn argues that the

burden lies on Tembusu.[37] I reject this argument summarily. It is well-established that the party claiming damages is the party who bears the burden of proving causation on the balance of probabilities: *Sunny Metal* at [71].

109 In this regard, I emphasise that I have rejected the defendants' characterisation of Tembusu's breach of contract as an "accumulation of events": see [83]–[84] above. So the only act which is relevant to the causation inquiry as being the event which precipitated AI's compensable loss is Tembusu's manifestation of its intention, through its declaration of default on 16 May 2012, not to comply with cl 5.1 of the 2012 CLA in the future.

110 I therefore disregard all other acts which the defendants say contributed to AI's failure to list, including Tembusu's refusal to resolve its dispute with AI, Tembusu's commencing suit against AI in August 2012, and Daniel Lee's refusal to sign the necessary pre-listing documents.[38] These acts are distinct from Tembusu's legally wrongful conduct. None of these acts have been held by any court to amount to a breach of the 2012 CLA on Tembusu's part: see *ACTAtek (CA)* ([24] *supra*) at [110]. Indeed, for the reasons set out at [88] above, these acts were rejected in *ACTAtek (HC)* as acts giving rise to any legal liability on Tembusu to compensate the defendants. They remain rejected despite *ACTAtek (CA)*. Thus, for example, I am aware that Daniel Lee admitted on the stand that by refusing to sign certain pre-listing documents, he at least delayed AI's listing. The defendants repeatedly make this point in their

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37 Defendants' Reply Submissions dated 6 January 2017 at para 24.

38 Defendants' Submissions dated 16 December 2016 at para 12; Defendants' Reply Submissions dated 6 January 2017 at para 20.

submissions.[39] But this admission is of no legal significance. Daniel Lee's refusal to sign is not a breach of the 2012 CLA by Tembusu. And the defendants' attempt to found some other cause of action on that refusal failed at first instance and on appeal. In any event, Mr Lee's conduct cannot be attributed to Tembusu because I accept that his refusal was a result of his personal decision and not Tembusu's instruction.[40]

111 Unable to rely on these acts, the defendants have only one positive argument for why Tembusu's declaration of default caused AI's failure to list. It will be recalled that Tembusu's declaration of default was by way of a letter of demand: see [17] above. That letter required AI to repay the principal amount of the loan under the 2012 CLA within a week, failing which Tembusu indicated it would commence legal proceedings against AI.[41] The defendants complain that Tembusu sent this letter "knowing full well that the issuance of legal action will prevent [AI]'s listing on the NZAX".[42] Notably, nothing in this submission explains why Tembusu's repudiation on 16 May 2012 of its obligation to perform cl 5.1 caused AI's failure to list. It is not the defendants' case, and neither is there any evidence, that this suit was the inevitable outcome of Tembusu's repudiation.

112 In fact, the defendants' submission suggests that until Tembusu acted on its threat to sue, AI would not have been prevented from listing on the NZAX. As Tembusu points out, it also appears to be the import of the evidence adduced

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39 Defendants' Submissions dated 16 December 2016 at paras 9(h)(iv) and 13; Defendants' Reply Submissions dated 6 January 2017 at paras 5(d), 6, 7 and 18.

40 Certified Transcript, 12 August 2014, p 3 at line 19.

41 Thomas Wan's Affidavit of Evidence-in-Chief dated 9 May 2014 p 1108 at paras 5 to 6.

42 Defendants' Submissions dated 16 December 2016 at para 9(i).

at trial by the defendants themselves that it was the commencement of this action in August 2012 and not the repudiation in May 2012 which caused the failure to list.[43] Mr King said in his affidavit of evidence-in-chief that "[i]t was not possible for [AI] to continue with their listing in the [NZAX] with the pending legal action commenced by Tembusu", because AI would allegedly no longer be able to make a positive declaration of non-indebtedness as required by the NZAX regulations.[44] In response, the defendants point out that in cross-examination, Mr King opined that it was the whole course of Tembusu's conduct which had caused the derailment of AI's listing, and that he could not identify any single causative event.[45] But this opinion does not assist the defendants' case at all, because it does not entail that but for the declaration of default, the listing would have proceeded. In fact it implies the opposite: even if there had been no declaration of default, other events – which do not amount to a breach of the 2012 CLA – may well have derailed AI's listing.

113 In my judgment, therefore, AI has failed to prove on the balance of probabilities that Tembusu's declaration of default caused AI's failure to list on a "but for" analysis. But there is a further aspect to the attribution of AI's alleged loss of capitalisation to Tembusu's breach of contract. This has to do with the concept of contingent loss, which may be regarded as reaching into the causation inquiry, but which deserves to be addressed independently. This I turn to now.

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43 Plaintiff's Submissions dated 16 December 2016 at paras 52 to 53.

44 Brent King's Affidavit of Evidence-in-Chief dated 12 May 2014 at paras 25 to 26.

45 Defendants' Reply Submissions dated 6 January 2017 at paras 26 to 27.

(3) Contingent loss

114 The law requires a plaintiff to prove his damage with reasonable certainty: *McGregor* at para 10-002, citing *Ratcliffe v Evans* [1892] 2 QB 524 at 532–533. A lack of certainty can arise in a variety of ways. One of those ways is where the certainty of the plaintiff's loss is contingent on the actions of actors other than the defendant. It may safely be said that that type of contingency does not on its own preclude the recovery of damages. But, in order for a plaintiff to succeed where that contingency is in play, there are rules which he must satisfy. Those rules are applicable in the present case because entities including IRG, the NZAX, Mr Wan and AI itself would have had a role to play in bringing to fruition AI's application to be listed on the NZAX. As a result, AI's alleged loss of capitalisation is contingent on the actions of actors other than the contract-breaker (Tembusu). Accordingly, to put the matter in general terms, the law needs AI to demonstrate to a certain standard what these entities would have done on the hypothesis that Tembusu did not breach the 2012 CLA by declaring a default on 16 May 2012.

115 In respect of that standard, the law draws a distinction between losses contingent on the actions of a plaintiff and losses contingent on the actions of a third party. This distinction was articulated in the seminal judgment of Stuart-Smith LJ in *Allied Maples Group Ltd v Simmons & Simmons (a firm)* [1995] 1 WLR 1602 ("*Allied Maples Group*"), which was approved by the Singapore Court of Appeal in *Asia Hotel Investments Ltd v Starwood Asia Pacific Management Pte Ltd and another* [2005] 1 SLR(R) 661 ("*Asia Hotel*") at [47]–[48]. Both parties have cited that case to me.

116 *Allied Maples Group* concerned loss suffered as a result of leasing property in reliance on negligent advice by a solicitor. Stuart-Smith LJ set out

three general categories of circumstances which he regarded as defining the border between the causation inquiry and the quantum inquiry when ascertaining recoverable loss (at 1609–1611 and 1614):

> (a) In the first category fall cases in which the defendant's negligence consists in some positive act or misfeasance and the question of causation is one of historical fact. Proof on a balance of probabilities prevails here.
>
> (b) In the second category fall cases in which the defendant's negligence consists of an omission where causation depends not upon a question of historical fact but upon an answer to the hypothetical question: "What would the plaintiff have done if there had been no negligence?" How the plaintiff would have reacted is again subject to proof on a balance of probabilities.
>
> (c) In the third category fall cases in which the plaintiff's loss depends upon the hypothetical action of a third party, whether in addition to action by the plaintiff or independently of it. Here, the plaintiff need only show that he had a "real or substantial chance" of the third party acting in such a way as to benefit him. Claims falling under this category are those which are properly to be regarded as claims for a loss of chance as an independent head of loss.

117 The only aspect of Stuart-Smith LJ's analysis which has attracted criticism is his method of dividing his first two categories, *ie*, the division between a defendant's acts and a defendant's omissions. It has been argued that the essence of the second category is not liability based upon omission but the need to ascertain how the plaintiff will react: *McGregor* at para 10-058. This argument was accepted by the Court of Appeal in *Asia Hotel* at [48]–[49]. It is

also supported by the approach to contingent loss taken in *The Law of Contract* at paras 21.022–21.025, which draws the distinction not between a defendant's act and omissions but simply invites the question whether the plaintiff's loss is contingent on some action he needs to have taken: see also *Sykes and Others v Midland Bank Executor and Trustee Co Ltd and Others* [1971] 1 QB 113 at 129A and *JSI Shipping (S) Pte Ltd v Teofoongwonglcloong (a firm)* [2007] 4 SLR(R) 460 at [148]. The consequence of this point is that it is not important whether Tembusu's breach of the 2012 CLA is to be regarded as an act or an omission. What is important is whether AI's loss of capitalisation was contingent on the actions of persons other than Tembusu.

118 The defendants' case is that AI's failure to list caused it to suffer a loss of capitalisation, and that Tembusu in turn caused that failure to list. As I have mentioned at [107] above, it is common ground that AI's listing did not depend only – if at all – on Tembusu. Even if Tembusu did not breach the 2012 CLA on 16 May 2012, AI and IRG would have needed to take steps to apply for AI to be listed on the NZAX – and the NZAX would have had to approve the application – in order for AI's listing to be successful. What has been shown at [106]–[113] is that Tembusu's repudiation of the 2012 CLA was not a "but for" cause of AI's failure to list. But even if it were a "but for" cause, the law as stated in *Allied Maples Group* and endorsed in *Asia Hotel* would still require AI to answer the additional question: whether AI, Mr Wan, IRG and NZAX would have acted to confer on AI the benefit of listing had Tembusu not committed its repudiatory breach.

119 To what standard must AI answer that question? That depends on whether the present case falls into Stuart-Smith LJ's second or third category. In my judgment, like the case of *Allied Maples Group*, this case has elements of both. In *Allied Maples Group*, the plaintiff had to show that, had it been properly

advised, it would have sought some alternate form of assurance from the vendors in place of a warranty, the absence of which the defendants had failed to advise the plaintiff on. This had to be shown on a balance of probabilities. The question then arose whether it was also necessary for the plaintiff to show that the vendors would have agreed to provide such alternate assurance. The English Court of Appeal decided that the plaintiff needed to show only that there was a real and not speculative chance that they would agree. Thus, the facts of *Allied Maples Group* attracted the application of the rules in Stuart Smith LJ's second and third categories.

120 Likewise, in the present case, had Tembusu not committed a breach of the 2012 CLA, AI itself would have needed to take certain steps to be listed. Accordingly, AI must prove, on the balance of probabilities, that it would have taken those steps. But AI's intended listing would also have involved IRG and the NZAX taking certain steps. NZAX is without question a third party and therefore within Stuart-Smith LJ's third category. AI has to prove only that, if Tembusu had not repudiated the 2012 CLA, there was a real and substantial chance that the NZAX would have taken the necessary steps to enable AI to list. As for IRG, AI's strongest case is that IRG too should be regarded as a third party and in Stuart-Smith LJ's third category. AI would then have to prove only that there was a real and substantial chance that IRG would have taken the necessary steps for a listing, and not that it would have done so on the balance of probabilities. I will take AI's case at its strongest. Having said that, I note in passing that there are weighty reasons for saying that IRG, on the basis of IRG's mandate from AI, ought to be regarded as AI's agent and therefore not as a third party.

121 What is clear now is that AI's claim on its pleaded characterisation of loss of capitalisation should be rejected, because it is properly to be understood a claim for a loss of chance. I therefore turn to assess this loss.

Loss of capitalisation II: loss of a chance

122 The defendants submit that as a result of Tembusu's breach of contract, AI lost a chance to obtain NZ$30.5m worth of shares in ACNTZ – by then a listed company – as consideration for the sale of AI's subsidiaries to ACTNZ. Although for present purposes I accept that this is the correct way of characterising AI's principal claim for loss, there are two fundamental problems with it.

(1) Two fundamental problems

123 The first fundamental problem is that AI does not bring itself within the defined circumstances under which the law recognises the loss of a chance as itself an identifiable head of loss. The principal requirement for such recognition may be put in one of two ways: (a) the object of the duty that has been breached must have been to provide the chance in question; or (b) the essence of the breach of duty must be to deprive the plaintiff of the chance or opportunity of securing a favourable outcome: *McGregor* at para 10-047. Thus, in the leading case of *Chaplin v Hicks* [1911] 2 KB 786 at 795, Fletcher Moulton LJ observed that the very object and scope of the contract was to give the plaintiff a chance of being selected as a prize-winner. Similarly, in *Kitchen v Royal Air Force Association* [1958] 1 WLR 563, the widow was deprived of the chance of succeeding in her Fatal Accidents Act claim, which was within the object of the solicitor's retainer.

124 In the present case, it cannot be said that the purpose of the 2012 CLA was for Tembusu to give AI a chance of being listed on the NZAX. The purpose of the 2012 CLA was simply for Tembusu to extend an investment loan to AI in the hope that AI would obtain a listing: see [11]–[13] above. This is clear for three reasons. First, Tembusu did not, under the 2012 CLA, undertake even a negative commitment not to jeopardise AI's chances of listing, let alone any positive commitment to maximise AI's chances of listing. The only obligation towards listing under the 2012 CLA is an obligation under cl 5.2 on AI's shareholders, and even then it is an obligation only to "endeavour" to do so without a moratorium on Tembusu's converted shares. Second, the 2012 CLA expressly contemplated the possibility that AI might not list. Clause 5 of the CLA gave Tembusu an option to convert its loan into shares in AI if AI did not list. Third, AI expressly rejected Tembusu's offer to act as a paid consultant to facilitate the listing.[46]

125 It was obviously the parties' hope when they entered into the 2012 CLA that AI would list. But that was not the contractual objective of the 2012 CLA. Tembusu's duty under the 2012 CLA was to lend money to AI in exchange for the prospect of converting that loan into shares. It was not Tembusu's duty under the 2012 CLA to provide AI a chance of being listed and it was not the essence of its breach of duty in declaring a default on 16 May 2012 to deprive AI of the chance to list. Accordingly, even if Tembusu's breach did cause AI to lose a chance of obtaining NZ$30.5m worth of shares in a listed company, that loss is not in principle recoverable.

126 The second fundamental problem is that it is difficult to understand why AI equates the value of the chance that it allegedly lost with the value of its

[46] Plaintiff's Submissions dated 16 May 2014 at paras 545 to 547.

subsidiaries. If the value of AI's subsidiaries is NZ$30.5m, then the value of an opportunity to sell those subsidiaries for NZ$30.5m worth of shares will be worth NZ$30.5m only if the value of the subsidiaries has, as a result of Tembusu's breach, fallen to zero: see [103] above. AI has adduced no evidence of such a fall in value. So its subsidiaries, on the evidence before me, must be taken still to be worth NZ$30.5m. But if that is the case, then the lost opportunity to sell them is technically worthless. The sale of those subsidiaries through the proposed listing at NZ$30.5m has been presented to me as an exchange for fair value, not as an exchange at an inflated value. The effect of AI's claim here is equivalent to saying that a person who loses the chance to exchange his ten-dollar note for another person's ten-dollar note loses not only a chance of adding ten dollars to his wallet, but a 100% chance of doing so.

127 In the absence of any evidence that the subsidiaries have depreciated in value, the only sensible way AI could frame a loss of chance claim is to say that the sale of its subsidiaries for shares in ACTNZ would have caused a premium to accrue to the value of the shares issued, and as a result of Tembusu's breach, AI lost the opportunity to obtain that premium. But even on this hypothesis, the value of the shares (*ie*, NZ$30.5m) could hardly be the right approximate for the value of the premium, much less the value of the chance to obtain it. And in any event, the loss of a chance to obtain a premium is not the way in which AI has characterised its claim for the loss of a chance.[47]

(2) Causation

128 Leaving aside these two fundamental problems, I turn to consider what AI needs to show in order for its claim for loss of chance to succeed. First, it

[47] Defendants' Closing Submissions dated 16 December 2016 at para 38.

must show, on the balance of probabilities, that Tembusu's breach of the 2012 CLA caused it to lose a chance of selling its subsidiaries for NZ$30.5m worth of shares in a listed company: *Allied Maples Group* ([115] *supra*) at 1610A–B. The loss of chance invites the question of causation and not merely quantum because it is itself an identifiable head of loss. As Lord Hoffmann put it in *Barker v Corus UK Ltd* [2006] 2 AC 572 at [36], "the law treats the loss of a chance of a favourable outcome as compensatable damage in itself". Second, having established causation for the loss of chance, AI must show that the chance which was lost was "real or substantial" and not merely speculative: *Asia Hotel* ([115] *supra*) at [135] and [139], endorsing *Allied Maples Group*. In my view, neither of these requirements is made out.

129 A plaintiff establishes causation for the loss of a chance by showing on the balance of probabilities that he has lost the chance: *McGregor* at para 10-046. The issue is whether AI has shown that it would have had a chance to sell its subsidiaries for NZ$30.5m worth of shares in a listed company but for Tembusu's declaration of default on 16 May 2012. In this regard, AI relies on various aspects of Tembusu's conduct as causative events even though, as I have explained at [109] above, it is not open to AI to do so because that conduct does not amount to breaches of the 2012 CLA. These aspects include Tembusu's refusal to settle the dispute underlying this action, Tembusu's commencement of this action against the defendants, and Daniel Lee's refusal to sign the pre-listing documents as a director of ACTNZ.[48] The result is that AI has presented no evidence on the critical point which it must prove: that but for Tembusu's declaration of default, AI would have had a chance of selling its subsidiaries for NZ$30.5m worth of shares in a listed company.

[48] Defendants' Submissions dated 16 December 2016 at para 13.

130 I therefore have no basis on which to find that Tembusu's breach caused AI its alleged loss of chance.

(3) Real or substantial chance

131 Even if AI were able to show "but for" causation, it must also show that the chance that it lost was a real or substantial chance of achieving a successful listing. That, in turn, requires AI to show, on the hypothesis that Tembusu did not declare a default, a real or substantial chance that IRG and the NZAX would have acted in such a way as to facilitate the success of AI's listing: see [120] above.

132 I begin with Tembusu's submission that it is ultimately IRG's fault that AI's listing did not proceed.[49] The context for this submission is the second step of the listing, which involved AI's sale of its subsidiaries to ACTNZ: see [99(b)] above. This step would have been performed through a contract of sale between AI and ACTNZ. According to IRG's mandate, it was a condition precedent of the contract – and Mr King accepted this during cross-examination[50] – that IRG must procure ACTNZ to raise NZ$750,000 worth of capital in the form of NZ$250,000 and BT$500,000 by issuing 3,000,000 shares at 25 cents per share to qualifying investors.[51] Tembusu says that there is no evidence that IRG succeeded in fulfilling this condition precedent. If that is true, then there was no substantial chance of IRG taking the necessary steps to enable AI to list, even if Tembusu had not breached the 2012 CLA on 16 May 2012.

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49 Plaintiff's Submissions dated 16 December 2016 at para 46.

50 Certified Transcript, 12 August 2014, p 41 at lines 10 to 14.

51 Thomas Wan's Affidavit of Evidence-in-Chief dated 9 May 2014 p 909 at para 4.4.

133 The defendants respond by saying that Mr King "categorically rebutted" this allegation at trial.[52] But I find no such rebuttal in the record. As Tembusu correctly submits, Mr King was wholly unable during cross-examination to identify any evidence before me which showed that this condition precedent was ever satisfied. The only document he could point to was AI's disclosure document dated 11 May 2012 which was submitted to the NZAX. But that document is inconclusive. In that document, the figure of NZ$250,000 is listed in ACTNZ's *pro forma* unaudited statements only on the "assumption" that it had been raised.[53]

134 There is evidence contrary to that assumption. For example, an email from Mr King to Mr Wan on 15 May 2012, *ie*, after the disclosure document was submitted to the NZAX, indicated that IRG was experiencing "quite a push back from investors" against its effort to raise capital for ACTNZ.[54] When Mr King was confronted with this email at trial, he decided to mention, for the very first time in his evidence, the existence of an agreement with an underwriter to buy shares in ACTNZ for NZ$250,000. But he was unable to name the underwriter or produce any documentary proof of the agreement.[55] And similarly, he could point to no evidence that the BT$500,000 had been raised.

135 In the absence of evidence that IRG would have been able to fulfil a condition precedent for which it was alone responsible in the listing process, the defendants fail to satisfy me that there was a real or substantial chance that IRG would have acted to facilitate AI's listing had Tembusu not repudiated the 2012

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52 Defendants' Reply Submissions dated 6 January 2017 at para 19.

53 Plaintiffs' Submissions dated 16 December 2016 at para 33; Brent King's Affidavit of Evidence-in-Chief dated 12 May 2014 p 259 at paras 1 and 4.

54 Thomas Wan's Affidavit of Evidence-in-Chief dated 9 May 2014 p 1092 at para 1.

55 Certified Transcript, 12 August 2014, p 45 at line 26 to p 46 at line 27.

CLA. Given this missing step, there could not also have been a real or substantial chance that the NZAX would have approved AI's application to list. It is therefore also not necessary to consider whether AI has shown, on the balance of probabilities, that it would itself have taken the necessary steps to facilitate its listing.

136 But there is a further reason why AI's lost chance was not real or substantial. This reason arises from the fact that AI, as I have noted at [103] and [126] above, is not claiming the difference between the subsidiaries' value and the value of its shares in ACTNZ were AI to list. AI's subsidiaries presumably are still worth NZ$30.5m as they were then, absent any evidence to the contrary. If that is AI's position, then AI must show that it lost all possibility of ever listing as a result of Tembusu's repudiatory breach on 16 May 2012. It must show that it lost *the* chance forevermore to list, not *a* chance in 2012 or 2013, to list. If not, AI could well list today and benefit from the capitalisation of a new company's shares in the value of NZ$30.5m. And if that is the case, then it cannot be said that AI lost a "real and substantial chance" that a third party would facilitate its listing had Tembusu not repudiated the 2012 CLA. But AI has produced no evidence to persuade me its chance of listing was permanently lost by reason of Tembusu's breach. That is another reason why its claim for damages for the loss of a chance must fail.

137 For completeness, I will turn to consider whether AI mitigated it loss, as this issue was fully argued.

(4) Mitigation of damages

138 The principal rule on mitigation of damages is that a plaintiff must take reasonable steps to mitigate the loss he suffers as a result of the defendant's

wrong; if he suffers any avoidable loss as a result of unreasonable action or inaction, he cannot recover damages for that loss: *McGregor* at para 9-004, endorsed by the Court of Appeal in *The Asia Star* [2010] 2 SLR 1154 at [24]. This rule has conventionally been referred to as a "duty" to mitigate. But it is well-recognised that the rule does not give rise to a duty in the sense that the plaintiff owes an obligation to the defendant to do so: *Darbishire v Warran* [1963] 1 WLR 1067 at 1075. Instead, the rule simply bars the plaintiff from recovering damages which he could reasonably have avoided: *The Asia Star* at [23].

139 It is well-established that the burden of proof on the issue of mitigation rests on the contract breaker, who in this case is Tembusu: *Roper v Johnson* ([36] *supra*) at 181–182; *The Asia Star* at [24]. So I reject Tembusu's submission that AI bears the burden of proof on the question of mitigation.[56] As regards what exactly Tembusu must show, the Court of Appeal has said that the "singular practical focus" of the mitigation inquiry is one of reasonableness, *ie*, "whether or not the aggrieved party acted reasonably to mitigate its loss": *The Asia Star* at [30]. What is reasonable in any given case must in turn be assessed with a sense of commercial reality and with a sensitivity to the facts of the case. After all, the question of mitigation of damage is a question of fact: *Payzu, Limited v Saunders* [1919] 2 KB 581 at 589 *per* Scrutton LJ. So it is to the facts of this case that I now turn.

140 Mr Wan considers Tembusu's act in commencing this action against the defendants in August 2012 to be one of the main obstacles in the listing process.[57] Commencing this action is not, however a breach of the 2012 CLA.

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56 Plaintiff's Reply Skeletal Submissions dated 6 January 2017 at para 38.

57 Defendants' Submissions dated 16 December 2016 at para 42(c).

Nor does the defendants' counterclaim encompass a claim for damages against the plaintiff for malicious prosecution in bringing this action.

141 Leaving that aside, the parties' submissions on mitigation have centred on the issue whether AI attempted reasonably to mitigate its loss by overcoming the obstacle to listing which this action posed. That assumes, contrary to my findings thus far, that (a) this action is brought in breach of one of Tembusu's obligations under the 2012 CLA and (b) that breach caused AI to suffer the loss of the sale of its subsidiaries for NZ$30.5m worth of shares in a listed company or the loss of the chance to achieve such a sale. So I will proceed to analyse the issue with these assumptions in mind. It will be seen that even on this hypothesis, AI's claim must fail because it did not act reasonably to mitigate its loss.

142 Tembusu's contention is that AI could have proceeded with the listing notwithstanding this action but made no reasonable efforts to do so. Tembusu rests this contention on three grounds. First, there is no evidence that the applicable listing rules contained a requirement that a company seeking to be listed had to be able to make a positive declaration of non-indebtedness.[58] Thus it could not be said that AI's inability to make such a declaration – because of Tembusu's claim in this action that AI's obligation to repay the sums lent under both the 2007 CLA and the 2012 CLA were immediately due and payable on and from 16 May 2012 by reason of a default – was what prevented it from listing. Second, even if there were such a requirement, AI could have attempted through IRG to avoid its consequence by either choosing not to disclose the litigation to the NZAX or applying to the NZAX to waive the requirement. In this regard, Mr King gave evidence that he had experience with these options

[58] Plaintiff's Submissions dated 16 December 2016 at paras 58 to 59.

when listing another company, MYKRIS Ltd, who had been sued for NZ$4.7m.[59] Third, ACTNZ did not even attempt to submit its application for listing, even though there was no reason not to do so.[60]

143 The defendants' first response is that AI had no means to give the NZAX an assurance, in the form of a deposit of between NZ$4m and NZ$5m, that AI would be able to withstand losing to Tembusu in this action.[61] But this misses the point. It does not answer Tembusu's charge, which Mr King accepted,[62] that AI did not even try to seek a waiver of such a requirement. He also accepted that it was possible, as a general matter, for the NZAX to waive this a requirement in the exercise of its discretion.[63]

144 In response to that point, the defendants say that Mr King decided in his professional judgment that there was no point in applying for a waiver because, unlike the situation in MYKRIS Ltd, there was here a major dispute between the two major stakeholders in the business to be listed.[64] It is true that Mr King testified that his view of the circumstances did not enable him in good faith as a listing sponsor to help ACTNZ obtain a listing.[65] However, his evidence also suggests that this was too conclusory a view to take. It appears from his evidence that not even the NZAX took the view that ACTNZ could not be listed when it was informed about the dispute between AI and Tembusu. When asked during

59 Plaintiff's Submissions dated 16 December 2016 at paras 61 to 67.

60 Plaintiff's Submissions dated 16 December 2016 at para 68.

61 Defendants' Reply Submissions dated 6 January 2017 at paras 31 to 33.

62 Certified Transcript, 12 August 2014, p 75 at lines 11 to 18.

63 Certified Transcript, 12 August 2014, p 67 at lines 13 to 20.

64 Defendants' Reply Submissions dated 6 January 2017 at para 35(ii).

65 Certified Transcript, 12 August 2014, p 76 at lines 19 to 26.

cross-examination whether he knew that the NZAX had considered the listing aborted because of the dispute, Mr King demurred and said only that NZAX would not proceed until the pre-listing agreement was signed.[66]

145 This brings me to the defendants' final argument in response. They argue that, in any event, Daniel Lee of Tembusu scuttled the listing by refusing to sign the pre-listing agreement in his capacity as a director of ACTNZ. I reject this submission. From a causation perspective, Mr Lee's refusal to sign is irrelevant because it was established at trial that that was his personal decision, and not a decision which was directed by or which could otherwise be attributed to Tembusu.[67] Further, from the perspective of mitigation, I note that the 2012 CLA entitled Tembusu to have a nominee director only on AI's board.[68] It did not entitle Tembusu to have a nominee director on ACTNZ's board. So AI owed Tembusu no obligation to keep Mr Lee on ACTNZ's board. Therefore, as Tembusu argues, if AI had really wanted a director's signature on the pre-listing agreement so that the listing could proceed, it was entirely open to AI to replace Mr Lee on ACTNZ's board with its own nominee. But AI of course did no such thing.

146 In my judgment, therefore, Tembusu has succeeded in establishing that AI failed to take reasonable steps to surmount any obstacle which Tembusu's declaration of default presented to AI's listing. If the defendants' case is to be believed, they were in mid-2012 on the brink of losing the benefit of capitalising some NZ$30.5m worth of assets. The size of this incentive, though, apparently

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66 Certified Transcript, 12 August 2014, p 69 at lines 18 to 27.

67 Certified Transcript, 12 August 2014, p 3 at line 19.

68 Thomas Wan's Affidavit of Evidence-in-Chief dated 9 May 2014 p 774 at para 6.2; Andy Lim's Affidavit of Evidence-in-Chief dated 23 December 2013 at para 25.

was not a sufficient spur to AI to make every effort through IRG to push the listing through. As Tembusu has put it, it appears that after Tembusu's declaration of default on 16 May 2012, IRG was content simply to "sit on its hands, keep its fee and declare that it was no longer possible to list".[69] That suggests to me that either the incentive was not as large as the defendants have made it out to be – which undermines AI's case on the value of its loss – or that AI did not take reasonable steps to prevent or reduce that loss – which undermines its case on mitigation.

147 On all of the grounds I have set out above, I reject AI's claim for the loss of a chance.

Costs incurred in preparing for listing

148 Next, AI claims that it suffered loss in the form of costs totalling a little under NZ$1.6m which it incurred in preparing for listing. This is, essentially, a claim for reliance loss. The loss claimed, and whether that loss is pleaded, may be summarised as follows:

(a) NZ$50,000 in legal fees due for services rendered by Minter Ellison Rudd Watts (partially pleaded);[70]

(b) NZ$6,656.55 in fees paid to NZX Limited (pleaded);[71]

(c) NZ$85,000 in fees paid to IRG under IRG's mandate (pleaded);[72]

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69 Plaintiff's Submissions dated 16 December 2016 at para 70.

70 Defence and Counterclaim (Amendment No 5) dated 8 July 2014 at para 88; Defendants' Closing Submissions dated 16 December 2016 at para 8(b)(i).

71 Defence and Counterclaim (Amendment No 5) dated 8 July 2014 at para 88.

72 Defence and Counterclaim (Amendment No 5) dated 8 July 2014 at para 88.

(d) NZ$15,000 worth of Bartercard dollars paid to IRG as a non-refundable deposit under IRG's mandate (unpleaded);[73]

(e) Outstanding liabilities to IRG under IRG's mandate, comprising:

(i) NZ$15,000 in GST due on the sum of NZ$85,000 already paid (unpleaded);[74] and

(ii) NZ$1,300,000 in liability to AI under IRG's mandate (unpleaded).[75]

149 I have no hesitation in dismissing these claims. I have found that Tembusu's declaration of default did not cause AI's failure to list: see [113] above. That is sufficient to dispose of AI's claim for what it claims was its expectation loss. It is also sufficient to dispose of AI's claim for reliance loss.

150 Even if my conclusions on causation and other issues relating to AI's claim for the loss of a chance are in error, and AI therefore succeeds in that claim, it would still be unable to recover the costs it incurred to prepare for listing. As Tembusu correctly submits,[76] a plaintiff cannot claim wasted expenditure and loss of profit at the same time because a claim for profit is made on the hypothesis that the expenditure has been incurred: *Hong Fok Realty Pte Ltd v Bima Investment Pte Ltd and another appeal* [1992] 2 SLR(R) 834 ("*Hong Fok*") at [59], cited with approval in *Alvin Nicholas Nathan v Raffles Assets (Singapore) Pte Ltd* [2016] 2 SLR 1056 at [25]. Thus, if AI succeeds in a claim

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73 Defendants' Closing Submissions dated 16 December 2016 at para 8(b)(iii).

74 Defendants' Closing Submissions dated 16 December 2016 at para 8(b)(ii).

75 Defendants' Closing Submissions dated 16 December 2016 at para 8(c).

76 Plaintiff's Submissions dated 16 December 2016 at para 72.

for damages on the expectation measure for the loss of chance of obtaining NZ$30.5m worth of shares, it cannot also claim damages on the reliance measure for the costs incurred to obtain listing.

151 In response, AI argues that it is claiming damages for a loss of profits on a net basis.[77] This being the case, it claims it is entitled to damages for the costs incurred in order to obtain that net profit. AI relies on *The Law of Contract* at para 21.038, which states that "where the claim as to 'loss of profits' has been made on a *net* basis, and a separate claim is then made as to the 'reliance losses' in terms of the expenses and costs that had been incurred and which would have had to be incurred to enable the claimant to earn the *net* profits, there would be *no* double-counting" [emphasis in original].

152 There is no conflict between Tembusu and the defendants on the content of the applicable principles. But the figure of NZ$30.5m does not represent the net value of the benefit or profit that AI would have allegedly obtained had the listing proceeded. That figure represents what the defendants assert to be the actual value of AI's subsidiaries and also the value of the shares ACTNZ would have issued to AI in exchange for AI's subsidiaries. NZ$30.5m therefore represents the gross value, not the net value, of the benefit which would allegedly have accrued to AI. So the defendants' submission must be rejected on a plain application of the principle stated in *Hong Fok*.

153 For completeness, I will record my observations on the merits of and evidence for each of these heads of reliance loss claimed.

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[77] Defendants' Reply Submissions dated 6 January 2017 at paras 38 to 39.

(1) Legal fees for Minter Ellison Rudd Watts

154 The figure of NZ$50,000 for legal fees owing to Minter Ellison Rudd Watts is inflated. The defendants appear to have based this sum on a clause in IRG's mandate requiring AI's payment of the sum to IRG.[78] But there is no evidence that an actual liability for NZ$50,000 in fees has actually been incurred and that the fees are actually due and payable to Minter Ellison Rudd Watts. In fact, the figure stated in IRG's mandate appears to be an *estimate* for fees to be incurred, not a demand for payment of fees actually due for work done. The provision in question obliges AI to pay IRG legal fees of "up to $50,000 + GST".[79] The invoices in evidence show that AI has incurred only NZ$29,469.11 in legal fees owed to Minter Ellison Rudd Watts. This is in fact the original amount pleaded.[80] But I would have disallowed recovery of even this lower quantum in view of my findings on causation.

(2) Fees paid to NZX Limited and IRG

155 These losses were pleaded and Tembusu does not dispute the evidence on them.[81] But I would have disallowed recovery for these losses in view of my findings on causation.

(3) Non-refundable deposit with IRG

156 This loss was unpleaded, although it appears on the face of IRG's mandate that AI would have had to place a non-refundable deposit with IRG for

78 Thomas Wan's Affidavit of Evidence-in-Chief dated 9 May 2014 p 910 at para 5.3.

79 Thomas Wan's Affidavit of Evidence-in-Chief dated 9 May 2014 p 910 at para 5.3.

80 Defence and Counterclaim (Amendment No 5) dated 8 July 2014 at para 88.

81 Defence and Counterclaim (Amendment No 5) dated 8 July 2014 at para 88.

their services. But I would have disallowed recovery for these losses in view of my findings on causation.

(4) Outstanding liabilities to IRG

157 The outstanding GST in the sum of NZ$15,000 owing to IRG appears to be supported by an invoice attached to IRG's mandate.[82] But I would have disallowed recovery for this loss in view of my findings on causation.

158 The claim for NZ$1.3m, on the other hand, is entirely unmeritorious. The defendants submit that this is the value of AI's liabilities to IRG which would have accrued upon the listing of ACTNZ on the NZAX.[83] But these liabilities never arose because ACTNZ never listed. Furthermore, according to IRG's mandate, it is ACTNZ and not AI who would be liable to pay IRG the sum of NZ$1.3m.[84] So AI could not possibly bring a claim for a loss of NZ$1.3m. In the circumstances, the defendants' claim for NZ$1.3m would not have succeeded even if it had been properly pleaded and even if all my other findings in this assessment were in AI's favour.

Loss of reputation, credit and future business

159 Finally, there is a claim for loss of future reputation, publicity and financial credit suffered by AI, quantified at S$100,000.[85] As Tembusu correctly submits, there is no evidence both as to the fact and the quantum of this loss. Quite apart from anything else, I would therefore have disallowed its recovery on its merits.

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82 Thomas Wan's Affidavit of Evidence-in-Chief dated 9 May 2014 p 913.

83 Defendants' Closing Submissions dated 16 December 2016 at para 8(c).

84 Thomas Wan's Affidavit of Evidence-in-Chief dated 9 May 2014 p 910 at para 5.4.

85 Defendants' Submissions dated 16 December 2016 at paras 50 to 52.

Decision on losses suffered due to breach

160 For the reasons above, I find that the defendants have suffered no losses as a result of Tembusu's breach of the 2012 CLA for which damages are recoverable.

Judgment

161 Having found that the defendants have failed to prove their losses in respect of their counterclaim, an award of nominal damages is appropriate. The nature of such damages was explained by the Earl of Halsbury LC in *The Owners of the Steamship "Mediana" v The Owners, Master and Crew of the Lightship "Comet" (The Mediana)* [1900] AC 113 at 116:

> … "Nominal damages" is a technical phrase which means that you have negatived anything like real damage, but that you are affirming by your nominal damages that there is an infraction of a legal right which, though it gives you no right to any real damages at all, yet gives you a right to the verdict or judgment because your legal right has been infringed. But the term "nominal damages" does not mean small damages …

162 Thus, on the assessment of damages, having found that Tembusu has breached the 2012 CLA and thus caused an infraction of AI's legal right to have that contract performed, and having also found that no loss was proved to have been sustained by AI as a result, I order the Tembusu to pay to AI nominal damages on AI's counterclaim. I fix the quantum of those nominal damages at S$1,000. Tembusu is, however, under no liability to pay any damages to Mr Wan on his counterclaim. As I have explained, he is not a party to the contract on which his counterclaim now stands.

Costs

163 Having foreshadowed my judgment and a summary of my reasons to the

parties, I then heard the parties on costs. Tembusu disclosed then that it had served an offer to settle on the defendants under which it had offered to pay the defendants S$2,500 to settle their counterclaim. Accepting that offer would have been a better outcome for both Mr Wan and for AI than pressing ahead with the assessment.

164 In my decision on costs, I bear in mind the general rule that costs should follow the event and the specific rule applicable here, which is O 22A r 9(3) of the Rules of Court (Cap 322, R 5, 2014 Rev Ed).

165 The event in the assessment of damages is in AI's favour. Costs following the event, AI is entitled to the costs of the assessment on the standard basis from the date of its counterclaim, but only up to the date of the offer to settle. Tembusu quantifies these costs at between S$10,000 and S$15,000. AI did not accept Tembusu's offer to settle and has recovered less than Tembusu offered. So Tembusu is entitled to costs on the indemnity basis from the date of the offer to settle to the date of my judgment. Tembusu quantifies these costs at about S$15,000.

166 The defendants do not object to Tembusu's figures. Indeed, they have in large part adopted those figures by suggesting that I order AI to pay Tembusu a net sum of S$4,500 for the costs of the assessment.[86]

167 I see no reason to differ from Tembusu's figures. My order therefore is that AI shall pay a net sum of S$5,000, which includes disbursements, to Tembusu for the costs of its assessment of damages.

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[86] Notes of Evidence, 24 April 2017, p 2 at lines 18 to 22.

168 The Court of Appeal in *ACTAtek (CA)* "remitted the matter to the Judge for an assessment of damages" (at [116]). Mr Wan, as one of the two appellants before the Court of Appeal, took the position that that meant that he was entitled to have his damages on the counterclaim assessed. If that position were well-founded in law, he would, like AI, be entitled to at least some part of his costs of the assessment. But the Court of Appeal did not compel or even permit Mr Wan to initiate a wholly misconceived assessment of damages arising from a breach of a contract to which he was not even a party.

169 Mr Wan will therefore have to pay to Tembusu the entire costs of his assessment of damages. Those costs will be on the standard basis from the date of the counterclaim up to the date of the offer to settle and on the indemnity basis thereafter.

170 Tembusu quantifies its costs up to the date of the offer to settle at S$20,000 to S$30,000. It justifies this quantum on two main grounds.[87] First, the counterclaim raised, at a very late stage, complex issues of fact and law, including how a failed listing could result from a breach of contract. Second, after the defendants brought their counterclaims, I ordered both defendants to furnish S$120,000 as security for the costs of their counterclaims. Out of this S$120,000, Tembusu estimates that S$20,000 to S$30,000 is attributable to Mr Wan's counterclaim, based on his shareholdings in AI and its associated companies. Mr Wan, on the other hand, invites me to fix these standard costs at S$5,000, although he makes no argument to support that figure.[88]

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87 Notes of Evidence, 24 April 2017, p 11 at lines 7 to 21 and p 14 at line 19 to p 20 at line 5.

88 Notes of Evidence, 24 April 2017, p 6 at lines 13, 21 and 24.

171 Separately, as Mr Wan did not accept Tembusu's offer to settle and has achieved an outcome which is not more favourable to him, Tembusu is entitled to costs on the indemnity basis from Mr Wan from the date of the offer to settle up to 27 January 2017. Mr Wan quantifies these indemnity costs at S$4,500.[89] Tembusu does not object to this figure.[90]

172 My order therefore is that Mr Wan shall pay a net sum of S$20,000, which includes disbursements, to Tembusu for the costs of his assessment of damages. While I accept that Tembusu was put to unnecessary expense in order to respond to Mr Wan's counterclaim in this assessment, a significant aspect of his claim – *ie*, the effect on him of AI's loss of capitalisation – overlapped with that of AI. I am therefore of the view that S$20,000 is a fair and adequate sum of costs in respect of Mr Wan's counterclaim.

Stay of execution

173 Finally, the defendants ask for a stay of execution on my orders on costs. They point out that Tembusu is now in liquidation. They submit that if they succeed on appeal, they may not be able to secure Tembusu's repayment of the costs which they have now been ordered to pay to Tembusu because there is no guarantee by Tembusu that that money will not be distributed in its liquidation.

174 I reject this submission for two reasons. First, although Tembusu is in liquidation, it is in members' voluntary liquidation. It is therefore solvent and able to pay its debts.[91] That implies that the costs which the defendants now pay to Tembusu will not be dissipated, for want of a better word, in the liquidation.

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89 Notes of Evidence, 24 April 2017, p 6 at lines 14, 22 and 24.

90 Notes of Evidence, 24 April 2017, p 15 at lines 8 to 9.

91 Notes of Evidence, 24 April 2017, p 8 at lines 4 to 7.

Second, as Tembusu has pointed out, its liquidation is in the hands of independent external liquidators. It may safely be assumed that they will not effect a final distribution of Tembusu's assets without regard to its contingent liabilities, including those arising from this action. That fact is sufficient assurance that the defendants will be able to recover these costs if their appeal succeeds even without a stay.

175 I therefore decline to order any stay of execution on any of the awards of costs.

Vinodh Coomaraswamy
Judge

Daniel Chia and Ker Yanguang (Morgan Lewis Stamford LLC) for the plaintiff;
S Magintharan, James Liew and Vineetha Gunasekaran (Essex LLC) for the defendants.