Sports Connection Pte Ltd *v* Asia Law Corp and another
[2015] SGHC 213

Case Number	: Suit No 613 of 2011/Q
Decision Date	: 14 August 2015
Tribunal/Court	: High Court
Coram	: Belinda Ang Saw Ean J
Counsel Name(s)	: Samuel Chacko, Charmaine Chan and Shi Jingxi (Legis Point LLC) for the plaintiff; Christopher Anand Daniel, Ganga Avadiar and Arlene Foo (Advocatus Law LLP) for the first and second defendant.
Parties	: Sports Connection Pte Ltd — Asia Law Corporation — Samuel Seow Law Corporation

Tort – Negligence

Contract – Breach

14 August 2015 Judgment reserved.

Belinda Ang Saw Ean J:

Introduction

1 This action is brought by the plaintiff, Sports Connection Pte Ltd ("Sports Connection") against its former solicitors for professional negligence in and about the conduct of Sports Connection's assessment of damages in Suit No 630 of 1999 (hereinafter referred to as either "Suit 630" or "the Singapore Assessment") against Mr N Swami and Mr Velekatt Krishnan Sankara Narayanan, the partners of a law firm, Messrs Swami & Narayanan ("S&N") in Singapore (for ease of reference, the defendants in Suit 630 shall be referred to as S&N). S&N was engaged by Sports Connection to register its trademark in Malaysia in 1991, but the partnership ended up being sued by Sports Connection for botching that registration.

2 Sports Connection is a company incorporated in Singapore and is a wholesaler and retailer of sporting goods and equipment. It is also a manufacturer of luggage bags, brief cases and the like. Mr Yee Kok Chew ("Mr Yee") and his wife, Ms Chang Hui Ming ("Ms Chang"), are the directors and shareholders of Sports Connection. Sports Connection is said to be the registered proprietor of the "BODYPAC + DEVICE" trademark in Singapore ("the Trademark").

3 Sports Connection's dissatisfaction with the outcome of the assessment of damages in Suit 630 against S&N subsequently led to the commencement of this action against three law firms on 1 September 2011, more than two years after the second defendant, Asia Law Corporation ("ALC"), ceased to have conduct of Suit 630.

4 The present action against the first defendant, Netto & Magin LLC ("N&M"), was discontinued on 13 November 2013. Sports Connection, however, continued with this action which proceeded to trial against ALC and the third defendant, Samuel Seow Law Corporation ("SSLC"). ALC and SSLC are hereafter referred to collectively as "the defendants".

5 It was agreed on the first day of trial that this court would not be required to consider any issue of apportionment of liability between ALC and SSLC as this matter would be resolved between the firms. This was a sensible approach since the lawyer who had conduct of Suit 630 throughout his time at ALC and SSLC was Mr A. Shahiran Anis bin Mohamad Ibrahim ("Mr Shahiran"). Mr Shahiran continued to have conduct of Suit 630 when he moved between the defendant firms.

6 In this action, Sports Connection is represented by Mr Samuel Chacko ("Mr Chacko") and counsel for the defendants is Mr Christopher Anand Daniel ("Mr Daniel").

Overview of the present proceedings

7 The case that Sports Connection seeks to make here involves Mr Shahiran's advice (or lack of advice) over a range of matters connected with Sports Connection's assessment of damages in Suit 630. Sports Connection's contention is that, owing to the defendants' negligence, it lost the chance of recovering substantial damages in Suit 630. The defendants deny that their scope of duty included giving advice as pleaded, deny breach and causation, allege a failure to mitigate and also assert contributory negligence. To the defendants, Sports Connection had not shown that it had suffered loss as a result of the defendants' alleged failure to give relevant advice.

8 As a matter of practicality, it is hardly straightforward to prove that a case which was lost after a full hearing would have been won if it had been conducted differently. Ultimately, this action will determine whether Sports Connection's failure to recover substantial damages in the Suit 630 was really due to the defendants' professional negligence, or whether it was a case where Sports Connection would not have recovered substantial damages in any event.

9 Sports Connection's complaints which formed the basis of its case against the defendants have been set out in broad and general terms in their pleadings even though they were crucial matters that would potentially fall for consideration. Sports Connection had advanced its case in both contract and tort. Insofar as Sports Connection argued that the same duty arose in contract because of an implied term of the retainer and in the tort of negligence, the analysis would be identical. This judgment will focus on the real issues in this case based on the basic principles of the law of negligence.

10 Other than its averment in the pleadings that ALC took over the conduct of the assessment of damages in Suit 630 from N&M in August 2006, there was no specific plea as to the precise scope and terms of the retainer save for an implied duty of skill and care in and about the conduct of Suit 630. Mr Daniel complained in the defendants' Closing Submissions dated 30 January 2015 that Sports Connection's claim against the defendants "has not been clearly or precisely framed or pleaded". Mr Chacko disagreed. He nonetheless endeavoured to set out the thrust of Sports Connection's case in his Reply Submissions dated 16 February 2015.

11 I agree that if the pleadings, evidence and arguments had been more focussed and precise, the real issues in this case would have emerged clearer and earlier for everyone concerned. The identification of the real issues in this case and my conclusions on the real issues follow from the arguments and distillation of the pleadings, voluminous bundles of agreed documents and a fair amount of evidence bearing to varying degrees upon the points.

12 As with most cases of professional negligence, the precise scope of the duty of skill and care established in the terms of engagement of the defendants to handle the litigation in Suit 630 is pivotal. In this regard, an important issue here is whether the defendants' advice (or lack of advice) as pleaded fell below the standard of the reasonably competent lawyer. With this issue in mind, a good approach and starting point for this particular case is to ascertain what the non-negligent

lawyer would have precisely advised in the particular circumstances in which the allegations of breach arose in order for this court to properly apply the relevant standard of the reasonably competent lawyer. Accordingly, Sports Connection has to establish the following matter: What advice in all the circumstances of the case would a reasonably competent lawyer in the position of Mr Shahiran have given? This question will hereafter be referred to as "the proper advice argument".

13 An analysis of how matters stood when the advice was supposedly given or omitted is necessary. This analysis is significant as: (a) the defendants cannot be liable for any error of judgment in the course of a lawsuit, and (b) the defendants' conduct is not to be assessed with the benefit of hindsight. As Lord Salmon observed in *Saif Ali and another v Sydney Mitchell & Co (a firm) and other* [1980] 1 AC 198 at 231:

> … Lawyers are often faced with finely balanced problems. Diametrically opposed views may and not infrequently are taken by barristers and indeed by judges, each of whom has exercised reasonable, and sometimes far more than reasonable, care and competence. The fact that one of them turns out to be wrong certainly does not mean that he had been negligent. …

14 Another important issue is causation. Was the advice (or lack of advice) as pleaded the reason for Sports Connection's failure to recover substantial damages in Suit 630? In this regard, Sports Connection has to show a causal link between the defendants' breach and the outcome of Suit 630. To show the relevant causal link, Sports Connection has to satisfy the court as to what action, if any, it would have taken to obtain the benefit or avoid the loss if the proper advice had been given. Put simply, the legal question that must be answered by Sports Connection is as follows: What action would Sports Connection, on a balance of probability, have taken if it had received proper advice? This question will hereafter be referred to as "the primary causation issue".

15 It must be remembered that the law of causation in the context of lawyers' negligence makes a distinction between a case where the negligence consists of giving advice, which is either bad or wrong, and a case where the negligence consists of failure to advise (*ie*, an omission). In the case of an omission, causation depends on the hypothetical question of what Sports Connection would have done if the omission had not occurred. Although the question is a hypothetical one, it is well-established that Sports Connection has to prove on a balance of probability that it would have taken action to obtain the benefit or avoid the risk if proper advice had been given (see *Allied Maples Group Ltd v Simmons & Simmons (a firm)* [1995] 1 WLR 1602 ("*Allied Maples*") at 1610) cited in *JSI Shipping (S) Pte Ltd v Teofoongwonglcloong (a firm)* [2007] 4 SLR(R) 460 ("*JSI Shipping*") at [147]). Evidentially, this issue could be a matter of inference to be determined from all the circumstances of the case. Where the evidential burden has shifted to the defendants, the inference could be rebutted by objective evidence to prove that the omission was not causative.

16 A feature of the pleadings on the issue of causation requires mention. Sport Connection's Statement of Claim averred as to what it would have done had it received proper advice in relation to its claim for damages against S&N. The pleadings also asserted the "courses of action" supposedly opened to Sports Connection, for example, to halt and defer the Singapore Assessment pending completion of the assessment of damages in Malaysia in respect of an interlocutory judgment obtained in 2005 (see [30] below) ("the Malaysian Assessment") and to use the amount adjudged in the Malaysian Assessment as evidence of Sports Connection's loss. Mr Chacko argued that a final judgment obtained in the Malaysian Assessment would "constitute irrefutable and/or conclusive and/or persuasive evidence of Sports Connection's losses" and as such it "would have been relevant to the Singapore Assessment and admissible as evidence in the Singapore Assessment".

17 This Judgment will examine whether the evidence of Sports Connection's principal witness, Mr

Yee, gave any indication as to what "courses of action" as pleaded he would in fact have adopted. Suffice to say for now that the evidence does not appear to support Sports Connection's pleaded case. In fact, the state of affairs that emerged reveals that the pleaded "courses of action" were not available and viable as options, or if available as an option, it was not followed through for reasons that were independent of the defendants' conduct (see [98]–[184] below).

18 By focusing on the two questions at [12] and [14] above (*ie*, the proper advice argument and the primary causation issue), and scrutinising the subsisting state of affairs at different stages of the litigation in Suit 630, the court would be in a position to decide if the loss which Sports Connection says it had suffered was in fact caused by the defendants' alleged failure to give relevant advice.

19 Sports Connection formulated its claim (*ie*, loss that arose from Mr Shahiran's advice (or lack of advice)) as the "loss of a chance" to recover more money in Suit 630 than was in fact recovered in respect of its various heads of claim against S&N in Suit 630. Alternatively, if it had been so advised, Sports Connection claims there would have been a real or substantial chance that it would have accepted S&N's offer to settle dated 31 March 2008 ("the March OTS") and, hence, the opportunity to obtain an amount higher than the sum that was eventually awarded in the Singapore Assessment. I pause here to note that this alternative plea in respect of the March OTS is directed against SSLC.

20 A real and fundamental question is whether the doctrine of loss of a chance should even apply to this case. This query is necessary because of: (a) the nature of the claims as pleaded; and (b) the legal requirements that need to be proved on a loss of chance analysis.

21 In brief, applying *Allied Maples*, if the loss in question is not dependent on how a third party would have acted, it is not a loss of a chance case. In contrast, where the loss suffered depends on how a third party would have acted, either in addition to the action of Sports Connection or independently of it, the loss of chance analysis arises. Notably, this specific analysis arises only after the primary causation issue has been established, *ie*, that Sports Connection would, on the balance of probability, have acted in a certain way (*ie*, to avail itself of the chance) if advice had been given. In the analysis at this liability stage, the claim for loss of a chance is made out provided that Sports Connection shows that there was a real or substantial chance (rather than a negligible one) of the third party acting so as to confer the benefit on or avoid the loss suffered by Sports Connection. This consideration is distinct from the assessment of the value of the chance in the event that a real or substantial chance has been proved. The degree of the chance lost is a matter for the quantification of damages and this matter is held over now that the proceedings were ordered to be bifurcated; the trial before me only concerns the defendants' liability.

22 It is thus important to discuss the question of the proper method of analysing the claim for loss of a chance. This case also demonstrates how evidence of causation remains of significance in the identification and correlation of both: (a) the scope of the professional duty (which does not exist in the abstract) that was allegedly breached; and (b) what the breach of duty was in respect of recoverable loss as pleaded. In other words, evidence on causation will have a bearing on evidence that pertains to the pleaded "advice", existence of duty in relation to the "advice" and breach. Recoverable loss is at the other end of the causal link.

Circumstances leading to Suit 630

23 The genesis of this case stems from the failure of S&N to register Sports Connection's Trademark in Malaysia in 1991. The application was defective in that S&N omitted to file one of the forms required for the registration.

24 Unknown to Sports Connection, its sole distributors of "Bodypac" products in Malaysia between 1992 and 1996, Mr Kaw Ah Kin ("Mr Kaw") and his wife, Ms Heng Nguang Keng ("Ms Heng") (collectively, "the Kaws") who were trading under the name of Evergreen Enterprises ("Evergreen"), managed to register themselves as the proprietors of the same trademark in Malaysia in 1994. The Kaws also traded under the name of Outdoor Outfitters. The couple incorporated a company named Bodypac (Malaysia) Sdn Bhd ("BM") in July 1996 to sell Bodypac products supplied by Sports Connection to Outdoor Outfitters. Further, the Kaws sold counterfeit Bodypac products in Malaysia using BM as their vehicle after the supply of the Bodypac products from Sports Connection stopped. I shall refer to the Kaws and BM collectively as "the KL parties".

25 In February 1997, Sports Connection discovered the misdeeds of the KL parties. Sports Connection thereafter incorporated Tearproof Sdn Bhd ("Tearproof") in Malaysia in June 1997 to sell Bodypac products in Malaysia. Tearproof is effectively owned and controlled by Mr Yee and his wife, Ms Chang.

26 S&N's carelessness duly engendered a series of related litigation which has lasted close to 18 years in Singapore and Malaysia. The following trademark infringement actions were started in Kuala Lumpur, Malaysia:

(a) Suit No D5-22-1079-1997 was commenced by the KL parties against Sports Connection, Tearproof and Mr Yee on 23 October 1997. The action was for infringement and passing off, procuring breach of contract, intimidation and slander of goods. The counterclaim in Suit No D5-22-1079-1997 was brought by only Tearproof and it was against the KL parties for an injunction to restrain the sale of goods and an inquiry as to damages.

(b) Suit No D1-22-1252-1997 was commenced by Sports Connection against the KL parties on 24 November 1997. This action mirrored the causes of action and relief sought in Suit No D5-22-1079-1997.

(c) Originating Summons No D4-25-1-1998 was commenced by Sports Connection against the Kaws on 9 January 1998 to rectify the trademark register.

27 All the actions in items (a) to (c) above were consolidated. They are collectively referred to hereafter as "the KL Suits". Sports Connection, Mr Yee and Tearproof were initially represented in the KL Suits by Messrs Sng & Co ("Sng & Co") and subsequently by Messrs Michael Chai & Co ("MCC").

28 In Singapore, Sports Connection sued S&N on 27 April 1999. Its heads of claim for damages in Suit 630 were for:

(a) loss of profits due to the sale of Bodypac products in Malaysia by the KL parties ("the Loss of Profits Claim"); and

(b) legal costs incurred in litigation in Malaysia against the KL parties ("the Legal Costs Claim").

29 As the on-going KL Suits, *inter alia*, pertained to who was the rightful proprietor of the Trademark and who had infringed the Trademark, S&N applied and successfully obtained an order to stay the proceedings in Suit 630 pending the resolution of the KL Suits. This stay order was granted on 15 October 1999.

30 Suit 630 was restored for hearing in May 2005. This was after Sports Connection obtained

interlocutory judgment in the KL Suits with damages to be assessed on 28 January 2005 ("the KL Interlocutory Judgment"). Costs and interest were also ordered against the KL parties. Written grounds of the KL Interlocutory Judgment were released on 6 May 2005.

31 I pause to flag a point that was raised in this case on the relevance of assessing damages in Malaysia following the KL Interlocutory Judgment in order to aid Sports Connection's claim for damages in Suit 630. Mr Shahiran's case is that the damages ordered to be assessed in the KL Interlocutory Judgment pertained only to Tearproof and not Sports Connection and Mr Yee. I will come to his assertion later. Suffice to say for now that a closer scrutiny of the KL Interlocutory Judgment revealed that: (a) damages that were ordered to be assessed were in respect of the Counterclaim filed in Suit No D5-22-1079-1997; and (b) that Counterclaim was brought by Tearproof alone. Yet MCC reported to Mr Yee in an e-mail dated 28 January 2005 that in "respect of all 3 suits, the Judge also ordered damages to be paid by Kaw to you to be assessed by the Registrar." [note: 1] The written grounds released by the Malaysian court on 6 May 2005 quite clearly stated that the order for damages to be assessed was in respect of Tearproof's Counterclaim in Suit No D5-22-1079-1997.

Outcome of Suit 630

32 On 26 August 2005, S&N consented to liability with damages to be assessed in Suit 630. As stated, Sports Connection failed to recover substantial damages in the assessment of damages that was heard by Assistant Registrar Teo Guan Siew ("AR Teo") from 3 to 5 November 2008.

33 A summary of AR Teo's decision of 15 January 2009 is as follows:

(a) As regards the Loss of Profits Claim, Sports Connection had not proved its loss; there were insufficient documents and evidence before the court to show that Sport Connection's sale of Bodypac products was adversely affected by any competing sales of infringing products by BM. No damages were ordered in relation to this head of claim.

(b) As regards the Legal Costs Claim, the legal costs incurred by Sports Connection in the KL Suits were determined at RM 418,375.50. Sports Connection, however, was only entitled to 30% of that amount as 70% of such costs ought to have been claimed by Sports Connection as party and party costs against the KL parties and not against S&N. Sports Connection was awarded a further sum of RM 35,000 being costs of the conduct of the appeal to the Court of Appeal of Malaysia in relation to the KL Interlocutory Judgment. A total sum of RM 160,512.65 was ordered under this head of claim.

Developments in Malaysia post-KL Interlocutory Judgment

34 After the KL Interlocutory Judgment was released, the centre of litigation gravitated to Singapore. N&M had Suit 630 restored for hearing and from then onwards Sports Connection turned its attention towards Suit 630. Significantly, the litigation front in Malaysia was limited to specific instructions to MCC to: (a) appeal one part of the KL Interlocutory Judgment; and (b) tax the party and party bill of costs in relation to the KL Interlocutory Judgment.

35 As for point (b), Mr Yee wanted to bankrupt the Kaws and to do that Sports Connection was advised that it had to first obtain judgment for a quantified sum against the Kaws. Taxation of party and party costs was cheaper and distinctly a more cost-effective way to obtain an order for a quantified sum as compared to going through with an assessment of damages in Malaysia. Indeed, the contemporaneous documentation showed that Sports Connection chose taxation over assessment of

damages. Factually, it cannot be disputed that no positive steps to assess damages before the Registrar of the Malaysian High Court in an assessment hearing were ever embarked upon until six years later in October 2011. By then, Sports Connection had failed to recover substantial damages in Suit 630 (see AR Teo's decision released in January 2009, a summary of which is set out above at [33]).

36 A common theme in this case is Sports Connection's lateness or non-payment of professional fees. Mr Yee would cite overcharging and taxation of the Malaysian lawyers' fees as reasons to hold back payment. That stance obviously affected Mr Yee's relationship with his Malaysian lawyers who were naturally reluctant to give their full attention to Sports Connection's matters. Even with the best will in the world, MCC's outstanding professional fees would have somehow dictated the pace of MCC's efforts to entertain and attend to Sports Connection and its matters.

37 I will deal with the specific instructions in turn before covering the events that halted the assessment of damages in Malaysia prior to 2011.

Appeal against one part of the KL Interlocutory Judgment

38 Dissatisfied with the part of the KL Interlocutory Judgment that refused to record Sports Connection as the rightful owner of the Trademark on the trademark register, Sports Connection filed notice of appeal in 2005. In January 2010, Sports Connection's appeal was dismissed with costs.

39 Although notice of appeal was filed in 2005, it was not clear if the requisite appeal papers were ever filed by 20 April 2005 (which was the original deadline intimated by MCC [note: 2]). The progress of the appeal could have been held up for an appreciable length of time on account of MCC's unpaid professional fees. It is not clear whether MCC completed work on the appeal in 2007 except to say that the appeal was not disposed of until January 2010. It is Mr Shahiran's evidence that he was not told of the appeal until receiving Mr Yee's e-mail of 11 July 2007. [note: 3]

Taxation of party and party costs of the KL Interlocutory Judgment

40 It is quite clear from the correspondence that Mr Yee wanted to "finish off" Mr Kaw by bankrupting him after obtaining the KL Interlocutory Judgment. Mr Yee was advised by MCC, on 14 June 2005, that before proceeding to bankrupt Mr Kaw, a quantified sum was required and the advice was to proceed to either assess damages, or tax party and party costs awarded in the KL Interlocutory Judgment.

41 Besides that route, it was also open to Mr Yee to bankrupt Mr Kaw via a different set of proceedings in Johor Bahru. This was Johor Bahru High Court CS No 22-136-1997 commenced by Sports Connection against Mr Kaw for a liquidated sum in respect of goods sold and delivered by Sports Connection to Mr Kaw in 2005 ("the JB Suit"). Sports Connection's lawyer in the JB Suit was one Shalini Sugumaran ("the JB lawyer"). I note that on 30 March 2006, the Malaysian High Court in Johor Bahru issued its judgment in respect of the JB Suit ("the JB Judgment") and awarded Sports Connection a judgment sum of RM 373,447.94.

42 On 4 August 2005, N&M advised Mr Yee not to "slow down" in bankrupting Mr Kaw via the JB Judgment and went on to state: [note: 4]

> We need a quick "liquidated" judgment to commence bankruptcy against Kaw Ah Kin and your KL case is not a liquidated claim whereas your JB matter is. So I do not think this "slowing down" will be beneficial to you.

43 The JB lawyer informed Mr Yee on 20 December 2006 that the sealed copy of the JB Judgment had been extracted and before pressing on with the bankruptcy application against Mr Kaw, Sports Connection was first required to settle the JB lawyer's legal fees. On 23 January 2007, Mr Yee instructed the JB lawyer to "go ahead" even if the bankruptcy was not necessary for the Singapore Assessment as the cost was "only RM6k". [note: 5]

44 Apparently, Mr Yee's realised from reading the JB lawyer's letter of demand to Mr Kaw that the JB Judgment was against Mr Kaw and that it could not be used to bankrupt Ms Heng. He then instructed the JB lawyer to make Ms Heng a bankrupt using the KL Interlocutory Judgment. He gave that instructions to the JB lawyer as MCC were disinterested in doing more work after Mr Yee had expressed an intention to tax MCC's bills. Understandably, the JB lawyer who had experienced late payment of his professional fees asked for a deposit of RM 5,000 before proceeding.

45 On 12 June 2007, Mr Yee realised that it would make more sense to enforce the KL Interlocutory Judgment as that route would allow him to bankrupt both Mr Kaw and Ms Heng. He instructed the JB lawyer not proceed with making Mr Kaw a bankrupt on the JB Judgment. He e-mailed Mr Shahiran of this development. He also e-mailed MCC's Mr Kenneth St James ("Mr KSJ"), instructing him to enforce the KL Interlocutory Judgment. Instructions to the same effect were again repeated in an e-mail dated 25 June 2007 wherein Mr Yee explained that he needed "to show this bankrupt proceedings to the [Registrar]/Court of Singapore". [note: 6]

46 In July 2007, Mr KSJ advised Mr Yee again that an order for a quantified sum was required and that bankruptcy proceedings could be approached via: (a) taxation of the party and party costs in the KL Suits; or (b) assessment of damages in respect of the KL Interlocutory Judgment (*ie*, the Malaysian Assessment). Whilst Mr KSJ asked for express instructions as to whether he should proceed with the Malaysian Assessment and/or the taxation of party and party costs, Mr Yee was reminded of MCC's unpaid bills and that work would be put on hold until MCC's bills were settled. Mr Yee gave Mr KSJ approval to go ahead to make Mr Kaw a bankrupt on 10 July 2007.

47 I digress to point out MCC's chaser to Mr Yee for payment of its professional fees, and Mr KSJ's e-mail on 21 November 2006 where he asked to meet Mr Yee to discuss three outstanding matters, namely, Sports Connection's appeal to the Court of Appeal, assessment of damages and enforcement of the costs order in the KL Interlocutory Judgment. As regards the matter of assessment of damages, Mr Yee's reply to Mr KSJ on 29 November 2006 was that he did not require Mr KSJ's assistance because he had engaged an expert witness from Deloitte & Touche Financial Advisory Services Pte Ltd ("Deloitte") to assist in quantifying the Loss of Profits Claim for the Singapore Assessment. At the same time, it must be remembered that Mr Yee had already obtained the JB Judgment and the standing instruction to the JB lawyer was to bankrupt Mr Kaw. Mr Yee's reply to Mr KSJ on 29 November 2006 stated rhetorically that taxation of costs order against Mr Kaw would be "futile" since Sports Connection's immediate intention was to bankrupt Mr Kaw. For convenience, I set out Mr Yee's reply of 29 November 2006 in italics: [note: 7]

> …
>
> 8. Then, could I suggest again that we meet up to discuss what can be done in relation to your Appeal to the Court of Appeal →*Please write me, what's this? [Terry 22/11]* the Assessment of Damages and enforcing →*We got Deloitte and Touche doing this now. [Terry 22/11]* the Order For Costs →*You mean, how much the courts should award me? With Kaw, is this futile? What's the implication since I endeavour to bankrupt Kaw now. [Terry 22/11]* made in your favour at

Trial.

[original emphasis omitted; emphasis added in italics]

48 Returning to July 2007, Mr KSJ sought clarification of Mr Yee's instructions of 10 July 2007. There was a telephone conference involving Mr Shahiran, Mr KSJ and Mr Yee on 2 August 2007, and it was during that conference call that Mr KSJ received instruction to bankrupt Mr Kaw by taxing the party and party costs instead of proceeding via the Malaysian Assessment. Mr KSJ e-mailed Mr Yee to confirm his instructions: [note: 8]

Bankruptcy Proceedings Against Kaw and Wife

to obtain a quantified amount of a Judgment debt so that you can commence bankruptcy proceedings against Kaw and his wife. I am to file a Bill of Costs (party-to-party costs) for taxation. I am to withhold the Assessment of Damages proceeding.

49 On 5 September 2007, Mr Yee asked for an update of the bankruptcy proceedings in Kuala Lumpur. He was informed by Mr KSJ that MCC was still in the midst of preparing the bill of costs, which would take some time as there were numerous proceedings spanning eight years. Mr Yee forwarded this reply to Mr Shahiran for his information.

50 On 21 May 2008, Mr Yee e-mailed Mr KSJ for information on the taxation of the party and party costs. On 26 August 2008, Mr KSJ informed Mr Yee that he was unable to serve the bill of costs on Mr Kaw and Ms Heng, and was only able to serve it on BM.

51 Eventually, taxation of the party and party costs took place on 17 September 2008 in the absence of Mr Kaw, Ms Heng and BM. The Assistant Registrar's decision of 15 October 2005 awarded taxed costs of RM 152,688.50 to Sports Connection, Tearproof and Mr Yee with interest thereon at the rate of 8% per annum to be paid by the KL parties from the date of the KL Interlocutory Judgment until the date of payment. The taxed costs were not produced at the Singapore Assessment in November 2008 which led to AR Teo's finding as set out at [33(b)] above.

52 In a letter from MCC to Sports Connection on 16 October 2008, Mr KSJ opined that the amount of taxed costs was "way too low and insufficient" and recommended that the amount be put to review to increase the total costs awarded by the court. [note: 9] Mr Yee did not reply to this letter.

53 Mr Shahiran appeared not to have been kept abreast of the party and party costs taxation. Earlier on 22 September 2008, Mr Shahiran in an e-mail to Mr Yee complained as follows: [note: 10]

Dear Sir,

Please recall that I would need a copy of all the documents that your lawyers in Malaysia have filed in the High Court there. …

Further to the above, kindly recall that your Mr. Yee has never issued instructions (i.e. that is until very recently) that taxation was being undertaken against the Defendants in the Malaysian matter. Kindly recall that Mr. Rajan Navaratnam was instructed to Bankrupt one of the said Defendants. And, Dato' Dr. R.K. Nathan has not even been informed of the taxation matter mentioned in the first paragraph.

In the circumstances, please let us know whether we may have the documents mentioned on an

URGENT basis. This matter is due to be heard shortly in Singapore.

54 For reasons that are not entirely clear, there was renewed interest in bankrupting Mr Kaw via the JB Judgment after Mr Yee's earlier instructions to the JB lawyer to bankrupt Mr Kaw had stalled for non-payment of legal fees and the provision of funds to proceed with the bankruptcy application. In or around June 2008, a different lawyer, one Mr Rajan Navaratnam ("Mr Rajan"), was engaged by Sports Connection to commence bankruptcy proceedings against Mr Kaw for non-payment of the JB Judgment. Mr Rajan agreed to proceed but Sports Connection was required to remit a deposit of RM 3,850 for disbursements. Mr Yee agreed to pay on receipt of the lawyer's invoice. On 4 November 2008, Mr Rajan sent a letter to SSLC, stating that he had not served the bankruptcy notice as he was still trying to determine Mr Kaw's latest address of service. By this time, the Singapore Assessment was already underway.

55 For completeness, Mr Kaw was made a bankrupt on 9 June 2009 by a creditor bank. Ms Heng was made a bankrupt on 11 September 2013 by Sports Connection.

No positive steps were taken to assess damages in Malaysia after the KL Interlocutory Judgment until 2011

56 Shortly after the KL Interlocutory Judgment was handed down on 28 January 2005, there was talk between MCC and Mr Yee about taking steps to assess damages against the KL parties. The idea in the early days (*ie*, 2005) was for the Malaysian Assessment to proceed concurrently with the Singapore Assessment. Hence, there were exchanges of e-mails between MCC and N&M where MCC in an e-mail dated 14 June 2005 promised to attend to the assessment of damages in the KL Suits "in due course". [note: 11] Prior to that, Mr Yee's e-mail of 26 April 2005 reminded MCC to "try to keep up" with Suit 630 given the faster pace of proceedings in Singapore. [note: 12] There was also a meeting on 14 July 2005 in Singapore that was attended by Mr KSJ, the case-handler of the KL Suits, Mr Leslie Netto of N&M ("Mr Netto") and Mr Yee. Mr KSJ had requested the meeting to "brainstorm to come up with the best method to compute [Mr Yee's] damages". [note: 13]

57 After S&N consented to liability on 26 August 2005, Mr Yee sought MCC's views on the quantum of damages to be claimed in Singapore. He wanted, in particular, MCC's formula to compute damages. Mr Yee wrote to KSJ in these terms: [note: 14]

> Dear Ken St. James,
>
> Please see this 2 letters [*ie*, letters from S&N's lawyers seeking further and better particulars]! We are now pushed to come up with our formula of claiming damages.
>
> I was hoping, you were able to contribute on this crucial requirement. But to date, there is nothing at your end.
>
> Please let me have your formula, by this evening, as I don't know, what's done to date.

58 KSJ replied on 14 October 2005, stating that he needed more time to finalise the computation and that he required further particulars and documents from Sports Connection. KSJ also stated that "if the Singapore assessment of damages and the Malaysian assessment of damages run *concurrently* and at a different pace, we should proceed with each of the respective proceedings accordingly. In other words, perhaps it is not expedient to allow one proceeding to hold up or be dependent on the other [emphasis added]". [note: 15]

59 In cross-examination, KSJ explained his frame of mind in stating the above: [note: 16]

> A: Yes. I wrote my 14 October 2005 email … with the factors of my outstanding bills as well as the, like I said, distorted instructions. So that was -- I recall that that was one of the -- one of the main reasons why I said what I said in the last paragraph, or the second-last paragraph.
>
> Whatever work I'm supposed to do on the assessment of damages, I was unsure. I didn't have a clear -- clear instructions. So let the Singapore lawyers do what they need to do, and let -- don't let them – in other words, I was suggesting not to hold back the Singapore assessment of damages. If they are required to move forward much faster, then let them do it, and I will deal with my instructions and what I need to do in the context of my outstanding bills as well as the cross-instructions, as it were, with Mr Yee for the Malaysian assessment.
>
> Q: You meant all of that in this email?
>
> A: No, that -- I recollect that that was in my mind when I prepared this email.

60 I have already mentioned MCC's unpaid bills and Mr Yee's November 2006 reply set out at [47] above to which I refer for context. By November 2006, Mr Yee did not require MCC to take steps to assess damages or come up with a formula to compute damages.

61 I mentioned earlier in [45] above that on 12 June 2007, Mr Yee realised that it would make more sense to enforce the KL Interlocutory Judgment as that route would allow him to bankrupt Ms Heng. I have also mentioned that Mr Yee instructed Mr KSJ to execute bankruptcy proceedings against the KL parties in an e-mail dated 25 June 2007 wherein Mr Yee explained that he needed "to show this bankrupt proceedings to the [Registrar]/Court of Singapore". [note: 17]

62 MCC's bills were still not paid. Mr KSJ informed Mr Yee in July 2007 that work at his end was held up because MCC's professional fees were not paid. Thereafter on 2 August 2007, specific instructions to tax the party and party bill instead of proceeding with the assessment of damages in Malaysia were given to MCC.

63 The events that happened showed quite clearly when, why and how the topic of bankrupting Mr Kaw via taxation of party and party costs came up. That route was seen to be a cheaper and more cost-effective way to obtain an order for a quantified sum as compared to going through with an assessment of damages. At that time, the objective was to bankrupt the Kaws and to do that Sports Connection had to first obtain an order for a quantified sum against the Kaws. Indeed, the contemporaneous documentation showed that Sports Connection chose taxation over assessment of damages.

64 Chronologically, the Malaysian Assessment was left dormant since the KL Interlocutory Judgment was pronounced in January 2005. On 27 April 2011, the defendants were told that Sport Connection intended to sue for negligence in respect of the defendants' failure to advise Sports Connection to proceed with the Malaysian Assessment. Sports Connection's purpose of reviving the Malaysian Assessment was to claim as damages in this action the amounts awarded to Sport Connection in the Malaysian Assessment.

Outcome of the Malaysian Assessment in 2012

65 The hearing of the Malaysian Assessment was unchallenged. It proceeded in the absence of the Director General of Insolvency for Mr Kaw (who was adjudicated a bankrupt on 9 June 2009), in the absence of Ms Heng and in the absence of the Director General of insolvency for BM (the company was wound up by a creditor bank on 19 April 2006).

66 On 28 March 2012, Sports Connection, Tearproof and Mr Yee were awarded damages in the Malaysian Assessment in the following sums ("the 2012 Judgment"): [note: 18]

(a) damages in the sum of RM 6,975,754;

(b) interest at the rate of 8% per annum on the sum of RM 6,975,754 from 16 August 1994 to 28 February 2011 and thereafter at a rate of 4% per annum from 1 March 2011 until full settlement;

(c) RM 500,000 in damages for the loss of goodwill and reputation; and

(d) costs of the Malaysian Assessment.

67 In the Malaysian Assessment in 2012, reliance was placed on the expert report of Ferrier Hodgson, Malaysia. According to Mr Shahiran, the expert's report: (a) did not contain additional and relevant documents from BM; and (b) included the JB Judgment as a head of claim for damages in the Malaysian Assessment and that was erroneous as the JB Judgment was distinct from the KL Suits. [note: 19]

68 Sports Connection blamed Mr Shahiran for not advising it to assess damages in Malaysia before the hearing of the Singapore Assessment in Suit 630. I have already recounted the reasons as to why the Malaysian Assessment was left dormant and it is against that backdrop that Sports Connection's allegations that Mr Shahiran in the conduct of Suit 630 did not advise on the following matters must be examined. The alleged failures to advise were as follows:

(a) The failure to advise Sports Connection on the effect of not proceeding with the Malaysian Assessment in light of the evidential value of the evidence that Sports Connection intended to present at the Singapore Assessment for its Loss of Profits Claim.

(b) The failure to advise Sports Connection to stay the Singapore Assessment pending completion of the Malaysian Assessment, and to thereafter present the outcome of the Malaysian Assessment (*ie*, the 2012 Judgment) in the Singapore Assessment ("Course of Action 1").

(c) The failure to advise that in the Malaysian Assessment, Sports Connection could have "obtained evidence in discovery and/or affidavit evidence from the [the KL parties] which would have been useful for and relevant to the Singapore Assessment" ("Course of Action 2").

69 This leads me to the question of causation in the light of Sports Connection's formulation of its claim for damages as "loss of a chance" and the proper method of analysing the claims.

Is this properly a "loss of chance" case?

70 Sports Connection claims that it has suffered the following losses:

(a) A real or substantial chance that Sports Connection would have been awarded damages at the Singapore Assessment for its Loss of Profits Claim.

(b) A real or substantial chance that Sports Connection would have been awarded the full solicitor and client costs (*ie*, the remaining 70% of the solicitor and client costs) that Sports Connection had incurred if:

(i) Sports Connection had been advised of its duty to mitigate its losses for the Legal Costs Claim by proceeding with the party and party taxation in Malaysia and attempting to recover the same from Mr Kaw and Ms Heng;

(ii) Sports Connection had proceeded accordingly and was unable to recover the party and party costs from Mr Kaw and Ms Heng; and

(iii) Sports Connection had presented evidence of item (ii) at the Singapore Assessment.

(c) Wasted costs of litigation in respect of the amount of costs paid by Sports Connection to one Ms Subitra, the solicitor who had conduct of the taxation of Sports Connection's solicitor and client costs in Malaysia, and the amount of costs Sports Connection was ordered to pay to Sng & Co and MCC in relation to the petition to tax their bills.

(d) Alternatively, a real or substantial chance that Sports Connection would have accepted the March OTS and obtained a higher amount than the sum that was eventually awarded by AR Teo at the Singapore Assessment.

(e) Alternatively, the wasted costs of litigation in respect of Sports Connection's Loss of Profits Claim, as Sports Connection was not awarded any damages for this head of claim in the Singapore Assessment, even though it incurred significant legal costs in that respect.

71 In outline, the case which Sports Connection has to make involves: (a) negligent advice; (b) establishing what Sports Connection would have done if advice had been given; and (c) if it is established that Sports Connection would have acted in a certain way but the question whether loss has been suffered depends on how third parties would have acted, the question becomes whether Sports Connection lost a chance. Chances that are regarded as real or substantial will suffice; those that are negligible will be ignored. The court's task is to do its best to place the chance within its proper range given the wide spectrum where certainty of a chance falls on the extreme end of the spectrum and a chance which is nil or negligible falls at the other end.

72 On the basis of the approach in *Allied Maples*, the losses in items (d) and (e) above (at [70]) are not dependent on how a third party would have acted and they are, therefore, not "loss of a chance" claims. Instead, Sports Connection's loss depends on what Sports Connection would have done if advice had been given. The primary causation issue is whether Sports Connection would have accepted the March OTS and not proceeded with the Singapore Assessment if it had received the advice it claimed that SSLC omitted to give. Sports Connection has to show on a balance of probability that *but for* Mr Shahiran's breach, it would have accepted the March OTS.

73 On the face of Sports Connection's formulation of items (a), (b) and (c) above at [70], the issue of proof of loss of a chance is the "real and substantial chance" analysis and this arises if it is first established, on a balance of probability, that Sports Connection would have acted in a certain way had the relevant advice been given. I will elaborate on this below.

What must be proved on a loss of chance analysis?

74 Apart from a denial that the defendants were under any duty to give advice as set out above

at [68], for matters of causation and damage, Mr Daniel's main focus was that Sports Connection had not established any loss. Having failed to do so, the causal link between the alleged failure to give advice and loss as a result of the failure to give relevant advice is missing. The analysis goes further as causation is dependent on what would have happened if Sports Connection had been given the alleged advice. The claim for a loss of a chance arises: (a) if it is established that Sports Connection would have acted in a certain way; and (b) the question whether loss has been suffered depends on how third parties would have acted.

75 The leading case on causation in the context of lawyer's negligence is *Allied Maples*, a decision cited by Sports Connection. In that case, Stuart-Smith LJ (at 1609–1614) stated the relevant principles in these terms:

> [W]here the plaintiffs' loss depends upon the actions of an independent third party, it is necessary to consider as a matter of law what it is necessary to establish as a matter of causation, and where causation ends and quantification of damage begins.
>
> (1) What has to be proved to establish a causal link between the negligence of the defendants and the loss sustained by the plaintiffs depends in the first instance on whether the negligence consists of some positive act or misfeasance, or an omission or non-feasance. …
>
> …
>
> (2) If the defendant's negligence consists of an omission, for example to provide proper equipment, [give] proper instructions or advice, causation depends, not upon a question of historical fact, ***but on the answer to the hypothetical question, what would the plaintiff have done if the equipment had been provided or the instruction or advice given?*** This can only be a matter of inference to be determined from all the circumstances. The plaintiff's own evidence that he would have acted to obtain the benefit or avoid the risk, while important, may not be believed by the judge, especially if there is compelling evidence that he would not. In the ordinary way, where the action required of the plaintiff is clearly for his benefit, the court has little difficulty in concluding that he would have taken it. …
>
> Although the question is a hypothetical one, it is well established that the plaintiff must prove on balance of probability that he would have taken action to obtain the benefit or avoid the risk. …
>
> (3) In many cases the plaintiff's loss depends on the ***hypothetical action of a third party*** , *either in addition to action by the plaintiff, as in this case*, or independently of it. In such a case, does the plaintiff have to prove on balance of probability … that the third party would have acted so as to confer the benefit or avoid the risk to the plaintiff, or can the plaintiff succeed provided he shows that he had a *substantial* chance rather than a speculative one, the evaluation of the substantial chance being a question of quantification of damages?
>
> …
>
> ***[T]he plaintiff must prove as a matter of causation that he has a real or substantial chance as opposed to a speculative one*** . If he succeeds in doing so, the evaluation of the chance is part of the assessment of the quantum of damage, the range lying somewhere between something that just qualifies as real or substantial on the one hand and near certainty on the other. …
>
> [emphasis added in italics and in bold italics]

76 *Asia Hotel Investments Ltd v Starwood Asia Pacific Management Pte Ltd and another* [2005] 1 SLR(R) 661 ("*Asia Hotel Investments*") approved the legal framework set out by Stuart-Smith LJ, and our Court of Appeal, on the facts of that case, went on to apply the third proposition in *Allied Maples*.

77 The plaintiffs in *Allied Maples* wanted to take over certain assets and businesses from the Gillow group of companies. The plaintiffs instructed the defendant-solicitors to act for them. The defendant-solicitors drafted an agreement which included a warranty by the vendor that its subsidiary had no outstanding contingencies or liabilities. During the course of negotiations, the defendants negligently allowed the clause to be amended in such a way that it no longer had its effect as a warranty as originally intended by the plaintiffs. After the agreement was entered into, the subsidiary (now belonging to the plaintiffs) faced substantial liabilities which would have been covered by the warranty had the defendants not negligently allowed the amendment. The plaintiffs therefore brought an action against the defendants. On appeal, Stuart-Smith LJ in the English Court of Appeal held that the plaintiffs had to prove on the balance of probability that if they had been given the right advice, they would have sought to negotiate further with Mr Gillow to obtain protection (at 1610). Once that was proved, it was not necessary to go further to prove that Mr Gillow would, on the balance of probability, have acted to confer on the plaintiffs the benefit of the warranty. It was sufficient that the chance (*ie*, the chance that they would have successfully negotiated for total or partial protection) was a real or substantial one.

78 In *JSI Shipping*, our Court of Appeal also applied this proposition. The plaintiff's complaint in that case was also one of negligence – the plaintiff sued the defendant-auditors for negligently auditing the accounts, allowing its Asia Director to siphon off substantial amounts of funds. One of the plaintiff's claims was for loss of chance to recover the sums misappropriated or to prevent further misappropriation. The Court of Appeal stated that in order to avail itself of this claim, the plaintiff had to prove on the balance of probability that if the defendants had not been negligent, it would have taken the necessary steps to investigate the matter (at [148]). One reason why the Court of Appeal held that this had not been proved was because the plaintiff's other director had not even read the audit report which the plaintiff complained was negligently prepared. To that extent, it was in fact this director's "general indifference" and "laxity in management" which lead to the misappropriation; in other words, it was not proved on the balance of probability that the plaintiff would have put in measures to avail itself of a chance of discovery, prevention or recovery (see [147]–[156]).

79 In the context of solicitors' negligence, the following passage set out by Neuberger J (as he then was) in *Peter Michael Harrison and another v Bloom Camillin (a firm) (No 2)* [2001] PNLR 7 is instructive (at [83]):

> … As I see it, one must initially ask whether the claimant would, in fact, have proceeded with the action, had he not been deprived of the right to bring it. After all, one is concerned with the loss which the claimant has suffered, and, for the reasons I have given, this cannot, at least normally, involve a market value exercise: generally it is only the claimant who could have brought the action, and, without his having done so, there would be no opportunity to recover damages. In my judgment, therefore, unless the point is conceded by the defendant in a particular case (and in most cases I suspect that it will be), the first question to be considered is whether the claimant would actually have pursued the action to the point where he would, subject to the court's assessment of the prospects, have recovered something. Applying normal principles, it is for the claimant to satisfy the court that he would have pursued the action to that extent, albeit only on the balance of probabilities. If the claimant fails at that point, that is the end of the matter. If he succeeds, it is necessary to turn to the second question, namely what would have happened if the claimant had pursued the action.

Does the loss of chance analysis apply on the facts to the Loss of Profits and Legal Costs Claims?

80 An interesting approach to the loss of chance analysis advanced by Sarah Green in *Causation in Negligence* (Hart Publishing, 2015) ("*Causation in Negligence*") is to distinguish between chances that are interlinked with the breach and those that exist independently of the breach of duty. In short, the distinction is between independent and interdependent chances.

81 I begin the analysis by referring to cases where the English Courts have declined to recognise loss of chance as an appropriate head of claim in medical negligence cases. In *Gregg v Scott* [2005] 2 WLR 268 ("*Gregg v Scott*"), the claimant developed a lump under his left arm, whereupon he attended at the defendant's medical practice, and was told by the defendant that it was benign and needed no further action. Subsequently, he saw another doctor, and it was discovered that the tumour was in fact cancerous and had spread to his chest. The claimant sued the defendant in negligence, claiming recovery for the loss of chance to have a better prospect of recovery if he was diagnosed earlier. The trial judge found that even if the defendant had accurately diagnosed the cancer earlier, the claimant would only have a 42% chance of cure (defined as surviving for more than ten years). The expert evidence was that the delay in the diagnosis reduced the claimant's chance of cure from 42% to 25%. The trial judge held that because the claimant would not have been cured anyway, the delay had not deprived the claimant of the prospect of a cure and dismissed the claimant's action.

82 On appeal, the House of Lords, by a bare majority of three to two, rejected the claim for loss of chance because the claimant had not shown on the balance of probability that the defendant had caused the adverse health consequences; the claimant had, at all times, at least a 58% chance of suffering those consequences irrespective of the defendant's breach. Lord Hoffmann was one of the three judges in the majority. He stated:

> 79 … the law regards the world as in principle bound by laws of causality. Everything has a determinate cause, even if we do not know what it is. …
>
> ...
>
> 82 One striking exception to the assumption that everything is determined by impersonal laws of causality is the actions of human beings. The law treats human beings as having free will and the ability to choose between different courses of action, however strong may be the reasons for them to choose one course rather than another. *This may provide part of the explanation for why in some cases damages are awarded for the loss of a chance of gaining an advantage or avoiding a disadvantage which depends upon the independent action of a another person*: see *Allied Maples* … and the cases there cited.
>
> 83 But the true basis of these cases is a good deal more complex. The fact that one cannot prove as a matter of necessary causation that someone would have done something is no reason why one should not prove that he was more likely than not to have done it. So, for example, *the law distinguishes between cases in which the outcome depends on what the claimant himself … or someone for whom the defendant is responsible … would have done, and cases in which it depends upon what some third party would have done.* In the first class of cases, the claimant must prove on a balance of probability that he or the defendant would have acted so as to produce a favourable outcome. In the latter class, he may recover for loss of chance that the third party would have so acted. This apparent arbitrary distinction obviously rests on grounds of policy. In addition, most of the cases in which there has been recovery for loss of chance have

involved financial loss, where the chance can itself plausibly be characterised as an item of property, like a lottery ticket. … [emphasis added]

83 Is the distinction between cases involving financial losses like *Allied Maples* and *Asia Hotel Investments* on the one hand and medical negligence cases like *Gregg v Scott* on the other based on principle or policy? Sarah Green argues for understanding the distinction as based on principle. She suggests in *Causation in Negligence* that the factual scenarios divide into two types (at p 154):

> **Type 1:** those in which the chance exists independently of the breach of duty, so that the breach affects a [plaintiff's] ability to avail herself of that chance, but not the substance of a chance itself. These are cases in which there is a genuine chance to be lost. …
>
> **Type 2:** those in which the chance and the breach of duty are interdependent because the breach affects the existence and content of the chance itself. These are not in fact loss of chance cases at all, because to claim that a chance has been lost here is to beg the question. …
>
> [emphasis in original]

84 On this analysis, Type 1 cases are therefore cases like *Allied Maples* and *Asia Hotel Investments* where the chance is independent of the defendant's breach. In *Allied Maples*, the plaintiff's chance of a successful negotiation with Mr Gillow was independent of the defendant's breach in failing to include the warranty. Similarly, in *Asia Hotel Investments* – which I should highlight was a contract case – the plaintiff's chance of obtaining the benefit sought (being a certain stake in the Grand Pacific Hotel) subsisted independently of the defendant's breach of a non-circumvention agreement ("NCA"). The defendant's breach of the NCA did not decrease the plaintiff's chances of obtaining the stake, but erased it. In both cases, the defendant's breach, on the balance of probability, caused the relevant chance to be lost.

85 In Type 2 cases however, the chance is interlinked with the breach. Thus, in *Gregg v Scott*, the probability of whether the claimant could be cured was already latent in the claimant – the defendant's failure to accurately diagnose the condition affected the claimant's probability of cure by decreasing it. However, no independent chance was lost. To claim for loss of chance in such a case is to beg the question as to whether a chance in fact existed. Sarah Green explains (p 164–165):

> Claimants in Type 2 cases … are not those who have lost a less-than-evens chance, but those for whom there is a less-than-evens chance that they have lost anything at all.
>
> … *Since the "chance" in question is really just a measure of the probability that the defendant's breach altered the claimant's course of events for the worse, the only question of legal relevance is whether this can be established on the balance of probabilities. …*
>
> …
>
> In *Allied Maples*, for example, the claimants' relationship with their solicitors had no influence whatsoever on the content of the chance of their being able to elicit concessions from their vendor in the hypothetical world in which they could attempt this. What was important to establish there was whether, on the balance of probabilities, the defendant had in fact denied the claimants the opportunity to take advantage of such a chance.
>
> This sort of conclusion is not one, however, which can be made on the basis of Type 2 factual scenarios because, in these situations, there is no such thing as an independently quantifiable

> opportunity which can be divorced from the question of whether the defendant's breach made the claimant worse off. In the Type 2 cases of [*Gregg v Scott*] … , for instance, the claimants' chances of avoiding an adverse physical outcome were inextricably bound up with the effects of the defendant's negligent diagnosis. The relevant "chance" therefore is not assessable independently of the breach, since it is defined and determined by it. *Given that there is nothing extraneous from which the claimant can be excluded, the question is not whether, on the balance of probabilities, the claimant has been denied access to an opportunity, but whether the claimant ever had such an opportunity in the first place, and whether the defendant's breach deprived her of it.* … [emphasis added]

86 The author thus concludes that while Type 1 cases are true loss of chance cases, Type 2 cases are not true loss of chance cases, as there is no independent chance which could have been lost.

87 In the present case, however, the complaint is not that an independent chance of succeeding at the Singapore Assessment had been lost, although it is couched as such. If one examines the claim and the facts in closer detail, the chance is not in fact independent of the defendants' breach. Sports Connection's true complaint is that if not for the defendants' breach, it would have had X% chance of success, but because of the breach, it had (X-Y)% chance of success instead. As the loss in fact eventuated, the legally relevant question must be the extent to which the defendants' alleged breach caused that loss. From this perspective, Sports Connection's case falls squarely into the Type 2 situation advocated by Sarah Green. As a Type 2 case, Sports Connection must show, on a balance of probability, that but for the defendants' breach, it would have obtained a more favourable outcome at trial. This is the conventional analysis of "but for" causation.

88 If Sports Connection's claims were bad to begin with (defined as having a less than 50% chance of success), it is not clear why it should be indemnified for the loss of any percentage chance of that success from its allegedly negligent solicitors, since the failure at the Singapore Assessment, on a balance of probability, would be more likely to be due to the fact that the claim was bad, rather than the defendants' negligence. I am mindful that no case was pleaded that Mr Yee in fact thought the claim for damages in Suit 630 was hopeless but Mr Shahiran failed to advise Mr Yee accordingly.

89 I say no more about this matter as the parties are in agreement as to the basis of a loss of chance analysis. Nevertheless, it is open to this court to examine whether on the evidence the claim for loss of a chance in this particular case in fact existed. Given the spectrum of chances, where certainty of chance is at one end and nil or negligible chance is at the other extreme end, the court's task is to do its best to place the alleged chance within its proper range. It seems to me that the arguments on loss of chance in this case are premised on "a chance upon a chance" and that begs the question as to whether a "real chance" in fact existed. I use the words "real chance" because that reflects the language used by Stuart-Smith LJ in *Allied Maples*. Clearly, a chance upon a chance is not a real chance.

A chance upon a chance is not a real chance

90 The question whether Sports Connection lost a chance of being better off financially than it did as a result Mr Shahiran's advice on the litigation in the Singapore Assessment depends on many questions of chances at different stages. In the end, what has to be considered is the real chance of Sports Connection being financially better off than what it got in the Singapore Assessment if the advice as pleaded had been given.

91 Sports Connection has put its case for loss of a chance to recover its claim for loss of profits in

a way that is illustrative of the many questions of chances that can arise at different stages. For example, what chance would Sports Connection have had of staying the Singapore Assessment? What chance would Sports Connection have had of proceeding with the Malaysian Assessment without staying the Singapore Assessment? What chance would Sports Connection have had of assessing damages in its name back in 2006 to 2008 when the counterclaim for damages in the KL Suits was brought only by Tearproof and not Sports Connection and Mr Yee, and that the decision of the Malaysian Judge on damages was in favour of Tearproof? What was the chance of the Malaysian Assessment going ahead uncontested in 2006 to 2008? The Malaysian Assessment in 2012 was not contested because the KL parties did not show up at the hearing. By then BM was wound up and Mr Kaw was already a bankrupt. All these questions bring into focus a case of "a chance upon a chance" that would render Sports Connection's claims formulated on "loss of a chance" (based on the likely actions of third parties) completely uncertain and hence fanciful.

Loss of Profits Claim

Approach to the issues of duty, breach, causation and loss

92 In brief, Sports Connection blamed Mr Shahiran for not advising it to assess damages in Malaysia before the hearing of the Singapore Assessment in Suit 630, given "the paucity of supporting evidence", an expression used by Mr Chacko. Sports Connection's case is that Mr Shahiran should have given such advice while he had conduct of the Singapore Assessment. Crucially, there were various opportunities for Mr Shahiran to have rendered this advice, such as when various expert reports were produced. Significantly, an analysis of how matters stood when the advice was supposedly omitted is pivotal, and I will go through this point in detail below. The Statement of Claim averred to what Sports Connection would have done had it received proper advice in relation to its claim for damages against S&N. The omission was "to advise" on, what I have termed, "courses of action" supposedly open to Sports Connection to take and which Sports Connection would have taken if advice had been given. I have set out the two main "courses of action" pleaded in the Statement of Claim at [68] above. For convenience, I repeat them here:

(a) Course of Action 1: To stay the Singapore Assessment pending completion of the Malaysia Assessment, and to thereafter present the amount assessed in the Malaysian Assessment as evidence of Sports Connection's claim for loss of profit in the Singapore Assessment.

(b) Course of Action 2: That in the Malaysian Assessment, it could have "obtained evidence in discovery and/or affidavit evidence from the [the KL parties] which would have been useful for and relevant to the Singapore Assessment".

93 All in all, Sports Connection must satisfy three conditions in its claim for negligence and breach of retainer in the conduct of Suit 630. The first condition is the proper advice argument which is whether the defendants' advice (or lack of advice) as pleaded fell below the standard of the reasonably competent lawyer. The critical question, which has been set out at [12] above is, what advice in all the circumstances of the case would a reasonably competent lawyer in the position of Mr Shahiran have given?

94 The second condition is the primary causation issue. As stated at [14] above, the legal question that must be answered by Sports Connection is as follows: what action would Sports Connection on a balance of probability have taken if it had received proper advice?

95 With these two conditions analysed, the court is well placed to examine the third condition, *viz*, whether the loss which Sports Connection claimed that it had suffered was in fact caused by the

failure to give the relevant advice. This collective approach as outlined was explained by Slade LJ in *Boateng v Hughmans (a firm)* [2002] EWCA Civ 593 at [35], and I gratefully adopt the explanation and approach in this particular case.

96 As alluded to earlier, the evidence and arguments in this case are closely intertwined in that matters pertaining to the core issue of causation have a significant bearing on all the other issues of negligence and vice versa. I propose to examine the evidence that is common to issues of scope of duty, breach, causation and loss before returning to answer the three specific conditions above.

97 An analysis of the common features of this case foreshadows at an early stage the flaw that underlines the Loss of Profits Claim. In fact, the state of affairs that emerged is tellingly simple: in the particular circumstances of the case, the pleaded Courses of Action were illusory and fanciful to qualify as "advice" that would fall within Mr Shahiran's scope of duty for no reasonably competent lawyer in the position of Mr Shahiran would have advised Sports Connection to take them.

State of the evidence in relation to the claim for Loss of Profits in Suit 630

Summary

98 Right from the time Sports Connection restored Suit 630 for hearing in May 2005, it experienced tremendous difficulties gathering relevant documents and information to substantiate its Loss of Profits Claim. For over three years, delays were encountered so often that deadlines to give discovery of documents and furnish proper answers to Further and Better Particulars requested by S&N had to be repeatedly extended. Consequently, trial dates were vacated no less than six times. The state of the documentary evidence remained incomplete to the very end in November 2008. The state of affairs subsisting at different periods in time demonstrated that Mr Yee was, and I so find, fully aware that documents bearing upon Sports Connection's Loss of Profits Claim were incomplete to substantiate its claim.

99 Initially, Sports Connection cobbled together an exaggerated claim amount of S$38m as the quantum of its Loss of Profits Claim. This was in February 2006. It was a figure that Mr Yee knew could not be supported. He was told by Sports Connection's auditor, Mr Dickson Poon, that some of the numbers that his firm had used to put forward this quantum of S$38m were either not audited or verified. [note: 20] By February 2007, the claim figure of S$38m was drastically reduced to between S$1,762,649 and S$1,958,499 by its expert witness, Mr Tam Chee Chong ("Mr Tam") of Deloitte. After Mr Shahiran took over the conduct of Suit 630 in August 2006, Deloitte was appointed "to quantify [Sports Connection's] loss of profit in relation to the Malaysian market for sales of BodyPac products for the period since the ex-distributor registered the trademark "BodyPac" (ie. 1994) to 2004". [note: 21] Not only did Deloitte find the figure of S$38m inflated, it could not support Mr Yee's target claim figure of S$4m despite numerous documents produced by Sports Connection to Deloitte.

100 Mr Tam's expert report was criticised by Mr Foong Daw Ching ("Mr Foong") of Baker Tilly Consultancy (S) Pte Ltd, S&N's expert who looked into the Loss of Profits Claim. In the Baker Tilly Report dated 15 October 2007 ("Baker Tilly Report"), Mr Foong opined that there was nothing in the disclosed documents that could be used meaningfully to assess the Loss of Profits Claim. At the Singapore Assessment, AR Teo agreed with Mr Foong's testimony, amongst other things, and dismissed Sports Connection's entire claim for Loss of Profits.

101 It was against this backdrop of AR Teo's findings outlined above that Mr Yee argued that Mr Shahiran was negligent in not advising Sports Connection to stay the Singapore Assessment and

proceed with the Malaysian Assessment first. In substance, the picture that emerged revealed that Sports Connection's plea that Mr Shahiran ought to have advised Sports Connection to take the Courses of Action as pleaded were not, in light of the evidence, feasible and viable Courses of Action. Based on the evidence, suffice to say for now that the so-called Courses of Action were illusory and fanciful and could hardly be said to be "advice" that would fall within Mr Shahiran's scope of duty for no reasonably competent lawyer in the position of Mr Shahiran would have advised Sports Connection to take them. I will elaborate on this below at [145]–[173]. .

Claim amount of S$38m

102 Mr Netto of N&M wrote to the High Court on 13 April 2005 to restore Suit 630 for hearing. A Pre-Trial Conference ("PTC") was held on 9 May 2005. At PTC, trial dates for 29 August to 1 September 2005 were given. Those dates were vacated after S&N consented to liability. Interlocutory Judgment with damages to be assessed was entered on 26 August 2005.

103 Mr Yee was aware that Sports Connection had to come up with a methodology for the Loss of Profits Claim and to produce documentary evidence to substantiate the claim. As early as 22 April 2005, N&M asked Sports Connection to provide documentary evidence to support the Loss of Profits Claim: [note: 22]

> We note that the Amended Statement of Claim only provides [Sports Connection's] sales figures up to 1999. ***Kindly provide sales figures for the period thereafter. You need to also provide us with particulars of Evergreen's profits.*** Para 21 of the Amended Statement of Claim only gives the figures for 1st January 1994 to 1st August 1997. Kindly let us have full figures for the entire duration of time when damages were suffered and the documents that support the same. [emphasis added in bold italics]

104 Mr Yee asked MCC to suggest a formula to best compute quantum of the Loss of Profits Claim. There was a meeting in Singapore on 14 July 2005 that was attended by Mr KSJ, Mr Netto and Mr Yee. Mr KSJ had requested the meeting to "brainstorm to come up with the best method to compute [Sports Connection's] damages". [note: 23]

105 I note that in July 2005, Mr KSJ told Mr Netto and Mr Yee at that meeting that there was no hard evidence in support of the Loss of Profits Claim. Mr KSJ was questioned in cross-examination about that meeting. His testimony that there was no hard evidence in support of the Loss of Profits Claim turned out to be spot on: [note: 24]

> Q: Okay. This is the meeting where you say general stuff was discussed, you can't really remember much about it?
>
> A Yes, not specifics.
>
> If I can offer something else. I also recall informing Mr Yee's then Singapore solicitors that, as far as trademarks law is concerned, the courts would more readily infer damages in a trademark infringement or passing-off matter, because the damages or the losses suffered would be loss of business profits, a diversion of business, and loss of goodwill and reputation.
>
> And these are intangibles. *There is no hard evidence to directly prove these head of losses.* I remember advising or suggesting to Mr Yee's Singapore lawyers that. [emphasis added]

106 N&M had also urged Mr Yee to get documents from Evergreen otherwise the Loss of Profit Claim would be "speculative". On 21 September 2005, N&M sought Sports Connection's instructions on the quantification of the damages. Mr Netto e-mailed Mr Yee on 14 October 2005 as follows: [note: 25]

> Bear in mind that without getting the sales figures of Evergreen, the matter of damages will have a strong element of speculation and the judge who assesses the damage will be justified in drastically reducing it. How can we reduce this element of speculation? Can we get the sales figures of Evergreen quickly?

107 Again, on 11 November 2005, Mr Netto pressed for Evergreen's documents. He wrote to Mr Yee: [note: 26]

> … What is important is what Evergreen sold. If we can get their invoices, that can help, provided there are enough to make them at least as part of the basis of the claim.
>
> …
>
> I cannot understand how all sales documents in the possession of Kaw cannot be obtained by your Malaysian lawyers from Kaw's lawyers. Kaw's lawyers may even comply on request.
>
> Terry, there is a limited time to get these documents. Once we file your affidavit of evidence in chief for the assessment of damages, we will have great difficulty admitting these documents at a later stage. Further, once the Defendants have filed their affidavit of evidence, it would be almost impossible. So act now. Go to KL if you have to.

108 Mr Yee approached Mr KSJ for assistance. He queried Mr KSJ whether it was possible to require Mr Kaw to reveal his sales of Bodypac products. Importantly, he remarked: [note: 27]

> We should have gotten this, when we are still in the courts fighting. *Now, it seems that I won the battle but lost the war.* [emphasis added]

109 Again, on 24 October 2005, Mr Yee e-mailed Mr KSJ, stating that he needed the latter to get Mr Kaw to give information on Mr Kaw's Bodypac business from 1994 to 2005. Again, no reply was forthcoming. In cross-examination, Mr KSJ's testified that by the middle of 2005, he had been instructed not to proceed with the formal application for the Malaysian Assessment, but to only assist in the computation of the assessment of damages in Singapore. It is however difficult to see how Mr KSJ could have assisted in the assessment of damages in Singapore when he ignored e-mails from Mr Yee and Mr Netto on the matter.

110 I note that given the difficulties in substantiating the Loss of Profits Claim, Mr Yee accepted in two e-mails of 21 October 2005 that the loss was Tearproof's rather than Sports Connection's. [note: 28]

111 In the background, S&N was similarly asking for Evergreen's documents, amongst others. On 5 July 2005, Messrs Rajah & Tann ("R&T") representing S&N sought discovery of documentary evidence in support of Sports Connection's Loss of Profits Claim due to the sale of Bodypac products in Malaysia by the KL parties. R&T required discovery by 19 July 2005, a deadline which N&M agreed to. However, Sports Connection was not able to meet that deadline, and on 21 July 2005, N&M told R&T that "there has been a delay caused by our client's attempts to obtain certain document[s] from Malaysia". [note: 29] A list of documents was compiled for the purposes of discovery by 27 July 2005.

The discovered list of documents was found to be incomplete even though the list was said to be the "best" that Sports Connection could provide. [note: 30] Dissatisfied, R&T sought specific discovery of documents on 3 August 2005. The categories of documents included the following:

(a) Sports Connection's accounts for the period 1991 to 1998; and

(b) documents evidencing Sports Connection's sales figures from 1991 to 1998.

112 On 28 April 2006, R&T wrote to N&M, stating that Sports Connection had failed to provide, *inter alia*, the following documents:

(a) the affidavit of Evergreen, which Sports Connection referred to in providing the Further and Better Particulars dated 28 February 2006;

(b) the accounting records of Evergreen from 1991 to 2005;

(c) the documents showing Evergreen's infringing sales of Bodypac products; and

(d) Sports Connection's audited accounts from 1991 to 2005.

113 In reply, N&M informed R&T on 8 May 2006 of the following:

(a) There were no accounting records of Evergreen or evidence of their infringing sales, but Sports Connection had already provided invoices from 1992 to 1995.

(b) Sports Connection had already provided their audited accounts for the years 1993 to 2004. There were no audited accounts for the years 1991 and 1992, and the audited accounts for 2005 would be provided in a supplementary list of documents.

114 Besides discovery, R&T requested Further and Better Particulars of Sports Connection's heads of claim on 3 October 2005. In brief, S&N sought Further and Better Particulars of the Loss of Profits Claim and the Legal Costs Claim. That included information on Evergreen's profits from the sale of the Bodypac Products in Malaysia and particulars of how such profits were arrived at. Sports Connection was ordered to provide particulars by 25 February 2006.

115 Sports Connection served its answers to the Further and Better Particulars dated 28 February 2006 on 1 March 2006. In there, the claims were quantified as follows:

(a) S$38.49m for loss of profit;

(b) S$1m for loss of goodwill, reputation and value of the Trademark; and

(c) RM 633,590.40 in legal costs incurred in Malaysia.

116 The figures were put together with the assistance of Sports Connection's auditor who was appointed, on 28 November 2005, to help quantify the claims and to provide expert evidence on the costs of sales and expected costs of sales as well as what Mr Yee could claim as loss of goodwill and reputation.

Downward revision of the claim amount by Deloitte

117 Mr Shahiran took over conduct of Suit 630 on 15 August 2006. By that time, directions given at PTC held on 3 August 2006 were, *inter alia*, as follows: (a) Affidavits of Evidence-in-Chief ("AEIC") of factual and expert witnesses to be exchanged by 28 September 2006; and (b) two days set aside in the week of 20 November 2006 for the hearing of assessment of damages. On Mr Shahiran's advice, Mr Tam was appointed as Sports Connection's expert witness to quantify Sports Connection's loss of profits in relation to the Malaysian market for sales of Bodypac products for the period 1994 to 2004. That appointment was made more than one year after S&N consented to liability.

118 At the time of Mr Tam's appointment, the court's directions required Sports Connection to produce the expert report and expert's AEIC by 22 September 2006. Unsurprisingly, Deloitte required an extension of the 22 September 2006 deadline in light of the scope of work that it had to undertake. Mr Shahiran applied for an extension of time on 26 September 2006 and the court extended the time for the filing of Deloitte's Report to 24 November 2006. The trial was also re-fixed to 12 and 13 of February 2007. As we now know, this new deadline was difficult for Deloitte to meet for the reasons discussed below. The deadline was duly extended to 28 February 2007 on 24 November 2006 pursuant to another application taken out by Mr Shahiran. Consequently, trial dates in February 2007 were vacated.

119 On 30 October 2006, R&T wrote to Mr Shahiran, requesting further particulars of Sports Connection's Statement of Claim as it was of the view that the particulars provided by Sports Connection on 28 February 2006 (while N&M was still Sports Connection's solicitors) were insufficient. These requests included, but were not limited to: (a) details of Evergreen's profits; and (b) details of how the loss of goodwill claim was computed. R&T also took the view that Sports Connection had not complied with its discovery obligations. In particular, Sports Connection had not disclosed certain pages from its annual financial reports as well as its income tax documents from 1991 to 2005.

120 It is convenient to refer to R&T's letter of 10 January 2007 to ALC for a snap shot of the events that happened in the proceedings after S&N consented to liability on 26 August 2005:

> Dear Sirs,
>
> **SUIT NO. 630 OF 1999**
>
> We refer to the above matter.
>
> Since judgment was entered on 26 August 2005, there have been multiple delays caused by your client in these proceedings which have prevent matters from moving forward and even required the vacation of hearing dates. The delays caused by your client, include but are not limited to
>
> (a) delays in filing and serving supplementary lists of documents;
>
> (b) failure to furnish complete discovery more than 1 year after judgment had been entered;
>
> (c) repeated failures to provide further and better particulars of the Amended Statement of Claim;
>
> (d) wholly changing its position on the quantum of damages to be claimed more than 1 year after judgment had been entered, rendering your client's Further and Better Particulars dated 28 February 2006 nugatory; and
>
> (e) engaging an expert witness to quantify its claim only around 20 September 2006 when your

client was due to file its affidavit of evidence-in-chief on 28 September 2006.

We further note that to date, your client has not provided any concrete figures regarding its total claim for damages.

In view of the above, we put you on notice that our clients intend to look to your client for any costs incurred as a result of these delays.

Our clients' rights in respect of any interest and costs to be determined at the assessment hearing are fully and expressly reserved.

121 I should explain R&T's comment that the Further and Better Particulars dated 28 February 2006 had become nugatory. R&T was alluding to Sports Connection's withdrawal of the quantum of the heads of claim provided in the Further and Better Particulars dated 28 February 2006. In fact, R&T was told in November 2006 that the Loss of Profits Claim would be based on Mr Tam's report which was being prepared.

122 In the meantime, promises were made in November 2006 to give discovery of a substantial number of documents that were from Malaysia and that the bulk of the documents would be received in December 2006. As it turned out, the promises were not kept. As at 23 January 2007, Sports Connection still had not furnished the documents. Mr Swami complained in an affidavit affirmed on 24 January 2007 that Sports Connection's repeated delays had affected S&N's ability to prepare for assessment of damages and the delays had resulted in the parties' repeated attendances in court to extend deadlines.

123 The preparation of Mr Tam's expert report (*ie*, the Deloitte Report) took five months. For its report, Deloitte asked Sports Connection for documents such as:

(a) a copy of BM's affidavit;

(b) a copy of Sports Connection's Malaysian entity's audited accounts;

(c) Sports Connection's annual sales and cost of sales for Bodypac products in Malaysia from 1994 to 2004; and

(d) a copy of BM's financial statements for the period from 1994 to 2004.

124 Deloitte also wanted Tearproof's management accounts from the date of its incorporation, but they were not available. According to Sports Connection, it was not Tearproof's practice to keep such accounts. [note: 31] Sports Connection also only had BM's financial statements from 1997 to 2000. Nothing fruitful appeared to have materialised from Mr Poon's request to the "Malaysian CPA" for those documents. I note Deloitte's terms of appointment highlighted that possible limitations to the preparation of the expert's report, one of which was that the financial statements of BM for certain years may not be available. In fact, Deloitte had even, via its office in Kuala Lumpur, tried to obtain BM's financial statements post-2000. That avenue was also unfruitful.

125 Initial correspondence between Mr Yee and Deloitte revealed that the original strategy and methodology was to use Evergreen's profits as the basis for the computation of the Loss of Profits Claim. [note: 32] Deloitte worked on the methodology that required it to use Evergreen's profits but it faced many difficulties because of the incomplete information from Mr Yee. Notably, Mr Yee expressly acknowledged in contemporaneous communication that those difficulties were caused by him not

being able to provide information to Deloitte. Mr Yee thought of getting a court order in Malaysia to compel Evergreen's auditor to provide information that Deloitte would need for the quantification and e-mailed Mr Shahiran to ask how this information might be obtained in Malaysia, [note: 33] but instead Mr Yee settled on getting Deloitte to come up with an alternative methodology to compute the Loss of Profits Claim.

126 By 16 November 2006, it became very clear that most of the information that was needed in relation to Evergreen and BM were not at all available. Mr Yee acknowledged this situation as the "absolute truth". [note: 34]

127 In view of the difficulties gathering documentary evidence, Sports Connection was unable to serve its reply to Further and Better Particulars requested by S&N and Mr Shahiran was instructed to get more time on 20 November 2006. [note: 35] Deloitte by that time was already warning Mr Yee that he should "appreciate that [the] reliability of any numbers provided by [Sports Connection] may possible be contested by the defendants". [note: 36] Deloitte also had to send chasers to the staff of Sports Connection to provide the documents it required for the Loss of Profits Claim. Even when the information was provided pursuant to those chasers, I note that Deloitte had difficulty reconciling the discrepancies in the data and even identified certain material discrepancies in relation to the sale of Bodypac products. [note: 37] Mr Yee was completely alive to the problems with substantiating the numbers from the outset, and in an e-mail to Mr Tam's team member, one Benjamin Thong ("Mr Thong"), on 9 January 2007, Mr Yee wrote: [note: 38]

> … please ensure we [do not] give the impression [that] our accounts are not reliable as it will give [Mr Tam] [a] hard time when he [testifies] in court.

128 It should be noted that this e-mail was not copied to Mr Shahiran. In view of the many discrepancies, Deloitte made a trip to KL to inspect the documents in order to "eliminate any doubts" with respect to the documents. [note: 39]

129 I pause to note that the correspondences do not reveal the discussions on the alternative methodology that was to be employed by Deloitte in computing the Loss of Profits Claim. However, looking at the Deloitte Report, it is clear that this methodology involved, *inter alia*, extrapolating the numbers from the financial years while the Trademark was infringed using BM's sales figures (for the years 1996 to 2000) and Tearproof's sales revenue (for the years 2000 to 2005).

130 Meetings between the team from Deloitte and Mr Yee did not include Mr Shahiran. In January 2007, Mr Shahiran started to remind Mr Yee that Deloitte had to meet the deadline of 28 February 2007. The deadlines were also reinforced by a threat from R&T to take out an "unless order" or orders for costs if the prevailing timelines were not complied with. At a PTC held on 9 January 2007, Sports Connection was directed to serve its reply to Further and Better Particulars by 19 January 2007. At that time, Mr Yee was still actively dealing with Deloitte directly and he promised to get "Deloitte to see the urgency" of the deadlines. [note: 40]

131 However, even as late as 17 January 2007, Deloitte was having difficulties reconciling the discrepancies between the Sports Connection's export invoices and Tearproof's purchase invoice listings, which should have tallied as Sports Connection was Tearproof's sole supplier. [note: 41] One of Sports Connection's employees attempted to work around these discrepancies but not all of them could be resolved. [note: 42] In fact, Deloitte continued to identify "a huge discrepancy" in certain

aspects of the accounts provided by Sports Connection. [note: 43] Mr Yee then mooted the idea of convening a meeting between Deloitte, Mr Shahiran and himself on 18 January 2007 so that Mr Shahiran could review the actual documents that were the subject of Deloitte's Report. At this juncture I note that Deloitte requested Mr Shahiran to obtain access to the books of BM by writing to the Official Receiver in Malaysia. Deloitte once again requested Mr Shahiran to obtain the information on 23 February 2007. It is unclear what transpired but as no books of BM have come to light, the approach was probably another dead end.

132 On 29 January 2007, a PTC was held before AR David Lee, who ordered that Sports Connection was to provide its documents and reply to Further and Better Particulars no later than 5 February 2007, failing which Sports Connection's claim would be dismissed. Mr Yee realising the importance of the order, instructed Deloitte to "view this with utmost urgency and fulfil the time line as required". [note: 44] Once again, this e-mail was not copied to Mr Shahiran.

133 On 2 February 2007, Mr Yee wrote to Mr Shahiran stating that "[t]he verdict is out! [Deloitte's estimate] is at S$3,490,695.47". [note: 45] Mr Yee then informed Mr Shahiran that Mr Tam was "confident of this figure and [was] willing to stand by it in court". Answers to Further and Better Particulars requested were then prepared based on estimate of loss of profits initially stated at S$2.5m to S$3.5m. [note: 46] The correspondences revealed without more that Mr Tam had made some last minute changes to the position in the draft Deloitte Report [note: 47], which cut down the estimate of the loss of profits in the particulars to S$2.5m to S$3m, a departure from Mr Yee's "target" of S$4m that he was willing Deloitte to reach in relation to the claim for loss of profits. The figures in the final version of the Deloitte Report were between S$1.7m and S$1.9m.

134 On 23 February 2007, Mr Tam's draft report was sent to ALC. Mr Shahiran responded. He acknowledged the methodology of extrapolation used and asked whether the documents used in the report were included therein. Mr Shahiran also suggested that the computation of damages should continue into the years 2005 to 2007. Mr Thong, for Deloitte, responded that those years were not included as Sports Connection was no longer losing any sales. I set out pertinent portions of Mr Thong's reply to shed light on the way Deloitte computed the claim for loss of profits: [note: 48]

> The quantification period determined is a measurement of the period in which you allegedly loss your sales as a result of the infridgment [*sic*] of the trademark. As such, it is not the point when you are restated as the rightful owner of the Bodypac trademark but when you have stopped losing sales as a result of the infridgement of the trademark.
>
> For example, at the present moment in Malaysia, even though you have not obtained the reinstatement of the trademark, but you are also not "losing" sales as anyone who wants to buy a Bodypac product could only turn to your company to buy such a product. …
>
> Therefore, in the same vein, we can only look at the period whereby there is more than 1 party in the Malaysia market whereby the consumer could purchase the Bodypac products as a result of the infridgement of the trademark. For example, during the period when [BM] was still a live company, a consumer could either buy a Bodypac product from your Malaysia entity or from BM. So if the consumer buys from [Tearproof] you did not lose a sale but however, if the consumer chose to buy it from BM, then you lose a sale. Then, we would compute all these sales that consumers choose to buy from BM as your loss of profits.

135 Mr Shahiran's case is that he sent a letter dated 27 February 2007 to Sports Connection, warning Sports Connection that the Deloitte report might not be accepted by the court, due to the

lack of important documents and that accordingly, Sports Connection should consider if it wished to proceed with the Loss of Profits Claim, or only with the Legal Costs Claim. Mr Yee disputes ever receiving this letter.

136 Be that as it may, Mr Tam affirmed his AEIC on 28 February 2007 enclosing the Deloitte Report, with the Loss of Profits Claim valued between S$1.7m and S$1.9m.

Baker Tilly Report and meeting with Deloitte on 22 February 2008

137 After Mr Tam's AEIC was filed on 1 March 2007, R&T requested documents that were used in the Deloitte Report. The documents were delivered by Sports Connection to R&T on 10 July 2007. R&T subsequently noted that there were still missing documents. In October 2007, R&T filed and served the Baker Tilly Report in reply to the Deloitte Report.

138 Following the Baker Tilly Report, on 18 February 2008, Deloitte asked for further documents from Mr Yee:

(a) Tearproof's ledger for the years 1997 to 2006. This was because Baker Tilly stated that Tearproof was not a good proxy for BM.

(b) Sports Connection's sales figure split between Malaysia, Singapore and Thailand. This was because Baker Tilly alleged that it appeared highly unlikely that increase in sales to Malaysia would result in no increase in any indirect costs, such as advertisement, labour, staff costs or administration costs.

139 It is safe to presume that no such documents were provided by Mr Yee. A meeting was held between Mr Shahiran and Mr Yee on 22 February 2008. At this meeting, they discussed obtaining BM's financial accounts through Malaysian solicitors. Later that day, Mr Shahiran and Mr Yee met with Mr Tam and his colleagues from Deloitte. I note that Mr Yee accepted in cross-examination that during the said meeting, Mr Tam, Mr Shahiran and himself discussed the Deloitte Report and Baker Tilly Report and the evidential implications it would have on the Singapore Assessment: [note: 49]

[Q]:Mr Yee, will you agree that once the Baker Tilly report was issued, there was a meeting between Mr Shah, yourself and Mr Tam, and the sum total of that was that Mr Tam was still confident that he could stand by his report because the Baker Tilly report, all it had done really was to complain about various aspects of Mr Tam's report, but had not professed its own view of what the losses would be. Correct?

Basically, he was saying, "All they are doing is throwing stones at me, but they are not building anything, so I'm prepared to stand by my report". That's what he said, right?

A: Yes, probably so.

140 It was also clear that after this discussion, Mr Yee was reassured by Mr Tam that he would be able to stand by his report: [note: 50]

Q: Isn't it true that after the Baker Tilly report was released, there were discussions between yourself and Mr Tam Chee Chong and with Shah's involvement, the upshot of which was that Mr Tam took the view that he was still confident in his report and he could stand by it. Correct?

A: Yes.

141 Mr Shahiran deposed in his AEIC that one of the issues discussed at that meeting was whether the Loss of Profits Claim could be assessed through any other entity other than Sports Connection or Tearproof. However, Mr Yee and Deloitte concluded that there was no better proxy other than Tearproof. Mr Shahiran also testified that it was discussed at that meeting whether BM's sale of Bodypac products could be discovered if they could find out the orders placed by BM with ELF Trading to manufacture Bodypac products in infringement of the Trademark. Mr Yee informed Mr Shahiran that he had previously provided him with one invoice from ELF Trading which demonstrated Evergreen's purchase of such Bodypac products, but Mr Shahiran was not able to locate the invoice. In March 2008, Mr Yee handed Mr Shahiran a box of documents pertaining to ELF Trading.

142 Mr Yee subsequently e-mailed Mr Shahiran to "zero in on [Kaw]'s earlier testimony, where he said his sales in [RM] 2m per year" to bolster his damages claim. [note: 51] It should be noted that documents in this regard had been requested by N&M as early as June 2005, but none appeared to be forthcoming. Eventually, the Deloitte Report relied on notes of evidence of what Mr Kaw said in the Malaysian proceedings, and not on Mr Kaw's affidavit.

143 On 20 March 2008, Mr Shahiran e-mailed Mr Rajan, requesting his assistance to obtain copies of documents relating to the winding up of BM in Malaysia. In or around this time, the hearing of the Singapore Assessment was fixed for 21 to 25 April 2008. Mr Rajan replied in early April 2008 with details of BM's winding up, although no documents were obtained.

Conclusion on state of the evidence in relation to the Loss of Profits Claim

144 Given the state of the evidence outlined above, the following are the key features. First, the chance of obtaining relevant documentary evidence such as the range of documents from BM and Evergreen (for example at [124]–[127] above) including those identified by Deloitte after the Baker Tilly Report was served (*ie*, further documents requested pertained to Tearproof and Sports Connection but the entities did not have them to begin with (at [138]–[139] above)) was nil or negligible. Second, the documentary evidence to substantiate the Loss of Profits Claim was incomplete. Despite the state of the evidence and the Baker Tilly Report, the expert witness, Mr Tam, was willing to stand by his report. Third, the documentary evidence to substantiate the Loss of Profits Claim remained incomplete despite several extensions of time given to Sports Connection to give discovery and serve its reply to R&T's request for Further and Better Particulars. In particular, two extension of time had also been granted to Sports Connections for Mr Tam to prepare his report. Dates set aside to assess damages in Suit 630 were vacated at least six times. The first set of trial dates that included the hearing on liability was scheduled for as early as August 2005. When Mr Shahiran took over the conduct of Suit 630, the trial dates were fixed for November 2006. Trial dates were vacated along the way, and the Singapore Assessment was only heard in November 2008. Finally, Mr Yee is an individual who was sure of his own mind. He was overall a determined litigant convinced that the alternative action in Suit 630 against his former legal advisers S&N was more valuable than the Malaysian Assessment would have been. By 2006, BM was already wound up by a creditor bank. I am driven to the conclusion that Sports Connection would have gone ahead willy-nilly with the Singapore Assessment in November 2008 to attempt to achieve total recovery even though a decision to continue was indicative of something of a gamble seeing that the supporting documents were incomplete and hope was pinned on Mr Tam's reputation in his field of expertise to carry the day.

Illusory Courses of Action

145 I have set out the Courses of Action as pleaded in [92] above. I will now discuss the Courses of Action in turn.

Stay of the Singapore Assessment indefinitely for Malaysian Assessment

146 I find the pleaded Course of Action 1 to stay the Singapore Assessment to be illusory and fanciful. That assertion presupposes that a stay of the Singapore Assessment was viable and could be obtained. It was fanciful and was never a realistic prospect for several reasons.

147 The evidence points to Mr Yee's decision not to proceed with the Malaysian Assessment in 2006 (see [47] above). After the KL Interlocutory Judgment was obtained, Suit 630 was restored for hearing. Deloitte was appointed and worked on the quantum of the claim in 2006. As Deloitte needed more time, Sport Connection applied twice in 2006, September and November, to extend time to file and serve Mr Tam's AEIC. At PTC held on 13 February 2007, Sports Connection was ordered to file and serve Mr Tam's AEIC by 28 February 2007. Notably, Sports Connection had until 5 February 2007 to comply with discovery and reply to Further and Better Particulars failing which its claim would be dismissed. Quite clearly, no reasonably competent lawyer in the position of Mr Shahiran would have advised a stay of the Singapore Assessment. Mr Chacko has not suggested the basis upon which Mr Shahiran could have gone before the PTC Registrar to secure a stay of the Singapore Assessment.

148 As can be seen from the narrative in [56]–[64] above, there was no desire to proceed with the Malaysian Assessment before the conclusion of the Singapore Assessment. I also note that it was Mr Yee who decided to "drop" the Malaysian Assessment back in 2006, 2007 and 2008. It is clear from [47] above that it was Mr Yee who decided in November 2006 that he did not need to assess damages in Malaysia, did not require Mr KSJ's assistance to come up with a formula to assess damages in Singapore and Malaysia and that enforcing the costs order was futile as he was planning to bankrupt Mr Kaw using the JB Judgment. Consistent with that conduct, is the acceptance of Mr Shahiran's advice on which the decision to use Mr Tam as an expert to compute the Loss of Profits Claim was made, and Mr Yee's decision made in or around June to August 2007 to rely on taxation of party and party costs instead of assessing damages to obtain a quantifiable sum for the purpose of bankrupting the Kaws.

149 As an aside, Mr Yee had not paid his Malaysian lawyers in 2006 and 2007. Separately, he had arranged for the Malaysian lawyers' bills to be taxed. He only contacted Mr KSJ in June 2007 when he wanted to bankrupt the Kaws using the KL Interlocutory Judgment. As stated, whilst Mr KSJ asked for express instructions as to whether he should proceed with the Malaysian Assessment and/or the taxation of party and party costs in July 2007, Mr Yee was reminded of MCC's unpaid bills and that work would be put on hold until MCC's bills were settled. It was confirmed on 2 August 2007 that Mr KSJ was to tax party and party costs for the purpose of bankrupting the Kaws (see [45]–[46] and [48] above).

150 I reiterate, Mr Yee's instructions to Mr KSJ in July and August 2007 were to get party and party costs taxed and not to proceed with the Malaysian Assessment. His decision was tactical as the plan was to bankrupt the Kaws. Put another way, he wanted to finish off the Kaws after the KL Interlocutory Judgment, and it was never his intention to spend more money on assessing damages in Malaysia which he considered "futile" (see [47] above). I find that he considered recovery against S&N as being more valuable than the Malaysian Assessment against the KL parties. By then BM was already wound up and he was going to bankrupt the Kaws. There is no evidence as to what happened in the period after party and party costs were taxed in October 2008. I am referring to the gap in the evidence as to why MCC had not followed through with its standing instructions to bankrupt the Kaws. This evidence seems relevant to the Legal Costs Claim. There is nothing in the evidence to

show that Sports Connection was ready to mitigate its claim for loss of a chance to recover legal costs by enforcing the award for taxed costs on the Kaws.

151 I now come to the Baker Tilly Report which Mr Foong affirmed in October 2007. Yet at this time, Sports Connection was not ready with its Legal Costs Claim as Mr Yee wanted the appeal costs in Malaysia to be claimed in the Singapore Assessment. Sports Connection applied in November 2007 to have the Legal Costs Claim and the Loss of Profits Claim bifurcated. Naturally S&N objected to the application which was dismissed. It was at this stage that the PTC Registrar suggested the Sports Connection make use of expert witnesses on costs. By this stage, the Singapore court was not minded to delay the Singapore Assessment. By the same token, quite clearly, no reasonably competent lawyer in the position of Mr Shahiran would have advised a stay of the Singapore Assessment. Again, Mr Chacko has not suggested the basis upon which Mr Shahiran could have gone before the PTC Registrar to secure a stay of the Singapore Assessment.

152 It can also be seen from details of the state of the evidence in relation to the Loss of Profits Claim in Suit 630 above that the state of affairs over a period of three years was one that was consistently plagued with delays and trial dates had to be repeatedly vacated. The state of affairs subsisting at different periods in time demonstrated that Mr Yee was, and I so find, fully aware that documents bearing upon Sports Connection's claim for loss of profits in Suit 630 were incomplete. It must be emphasised that R&T had requested for Further and Better Particulars as early as in October 2005 and Sports Connection's replies continued to be unsatisfactory even after the Deloitte Report as far as R&T was concerned.

153 At a PTC held on 11 April 2008, Senior Assistant Registrar Cornie Ng ("SAR Ng") informed counsel in no uncertain terms that her patience was wearing thin with the constant delays caused by Sports Connection. She further made clear that delays caused by Malaysian lawyers in getting documents and passing them to Sports Connection would not be acceptable excuses any more. SAR Ng's warnings were issued at the time when the April 2008 dates for the Singapore Assessment were vacated again. Those April dates were given in February or March 2008.

154 Prior to the PTC in April 2008, there were two earlier occasions when the court made orders for Suit 630 to be dismissed or struck out if timelines were not complied with. On 29 January 2007, Sports Connection was ordered to give discovery of documents relied on by Deloitte and in its reply to Further and Better Particulars by 5 February 2007 failing which Sports Connection's claim would be dismissed. One year later, on 6 February 2008, the court imposed a deadline for Sports Connection to file two AEICs, by 18 February 2008, 4pm, failing which Sports Connection's claim would be dismissed with costs. This new timeline necessitated the dates fixed for March 2008 for the Singapore Assessment to be vacated.

155 Another point to note as regards "advice" in the form of Course of Action 1 – a stay of the Singapore Assessment pending disposal of the Malaysian Assessment which was to proceed first and for the judgment in the Malaysian Assessment to be used in evidence as proof of the quantum of Sports Connection's Loss of Profits Claim – is that a stay of the Singapore Assessment for the Malaysian Assessment did not feature in the case until Sports Connection lost before AR Teo. As I have alluded to earlier, the litigation moved to Singapore from Malaysia in 2005 (see [34] above).

156 In my view, there is no basis for the argument that Mr Yee lost the chance to take the pleaded Course of Action 1 because of Mr Shahiran's alleged negligence. Course of Action 1 begs the question whether it was a real and feasible option in the first place. Reviving the Malaysian Assessment was a chance upon a chance in that it depended on the courts in Singapore agreeing to stay the Singapore Assessment indefinitely.

157 I have already concluded that it is illusory and fanciful to imagine that Course of Action 1 was even an option. In my view, a reasonably competent lawyer in the position of Mr Shahiran with knowledge of the long history of the background facts and the proceedings in Suit 630 would not, on account of those circumstances, have advised Sports Connection to stay the Singapore Assessment indefinitely. As stated, the procedural history was one of prolonged delays, instances of orders to strike out Suit 630 if timelines were not complied with and trial dates vacated repeatedly. Despite extensions of time, Sports Connection had not been able to produce over the course of three years complete documentary evidence needed to support its claim for loss of profits. There is evidence that in April 2008, Mr Shahiran warned Mr Yee that the Singapore court had given Sports Connection more than enough time to prepare for the Singapore Assessment. This warning was made in the context of the lack of evidence in respect of certain legal fees which Mr Yee recently disclosed that he had paid but not been included in the report prepared by Dato' Kamalanathan s/o Ratnam ("Dato' Nanthan") and which Mr Yee wanted Mr Shahiran to claim for in the Singapore Assessment. Mr Yee replied that this was his "honest mistake", and insisted on including these claims. [note: 52] Mr Shahiran highlighted the pitfalls of such a course of action in an e-mail dated 30 April 2008, and requested express instructions for a supplementary expert report to be filed and for him to apply to have the supplementary report admitted. [note: 53] Pursuant to further advice, Mr Yee changed his mind on including these further claims.

Effect of a foreign judgment on quantum

158 Sports Connection's argument is not about the economic value of a judgment in the Malaysian Assessment; its focus is on the evidential value it would have in the Singapore Assessment. In this regard, Mr Chacko submitted that a judgment in the Malaysian Assessment would constitute "irrefutable and/or conclusive evidence of Sports Connection's losses for its Loss of Profits Claim". He relied on ss 13 and 45 of the Evidence Act (Cap 97, 1997 Rev Ed).

159 From the outset, this contention that opportunity had been lost of presenting conclusive evidence in the form of a judgment on damages assessed in the Malaysian Assessment to support Sports Connection's loss of profits in the Singapore Assessment is legally flawed. As a matter of law, a judgment in the Malaysian Assessment is not conclusive evidence of Sports Connection's loss of profits. In other words, there is no underlying basis for its proposition that it has lost a chance to present conclusive evidence via the Malaysian Assessment to substantiate the Loss of Profits Claim.

160 Sports Connection reliance on *Arul Chandran v Chew Chin Aik Victor JP* [2000] SGHC 111 ("*Arul Chandran*") to support its contention that a judgment in the Malaysian Assessment would have been admissible in the Singapore Assessment is misplaced. In *Arul Chandran*, the defendant there sought to rely on certain remarks made by a Malaysian Court on the conduct of the plaintiff. Chan Seng Onn JC (as he then was) opined as follows:

> 140 Where facts are not agreed or admitted by the parties, they must be proved by admissible evidence. Documents which are not in the bundles agreed as to authenticity must be proved in the usual way before they can be admitted into evidence. Regard must be had to the Evidence Act as to what amounts to relevant evidence that is admissible. In relation to the relevancy and admissibility of a judgment, sections 42 to 46 of the Evidence Act are of interest. *But these provisions do not help, if the defendant wishes to rely on what has been stated as undisputed facts or facts found by the Malaysian Courts or the Privy Council as evidence to prove those same facts in this trial*.
>
> 141 Subject to s 42 to 45A, *a previous judgment making certain findings of fact cannot be*

merely tendered in another trial as proof of the existence or the truth of those facts. If questions of res judicata or issue estoppel arise for determination for instance, then the previous judgment is admissible under s 42, (a) to prove the existence of that previous judicial determination as a final judgment of a competent court, and (b) to establish what the cause of action there was, who the parties were, in what capacities they were litigating, and what exactly were the issues previously determined so that the court can decide those questions. But this by no means provides the gateway for the flood of facts established in other judicial forums to be admitted as evidence or as conclusive proof of the same facts which are in dispute in another trial where all or some of the parties are different. *The general rule is that the production of a previous judgment merely evidences the fact that there has been a judgment and there are certain legal consequences.* But tendering the previous judgment and then quoting parts of the judgment at length in a question to which the witness refuses to accept as being undisputed will not *per se* amount to evidence proving the correctness or the truth of any of the facts mentioned therein.

[emphasis added]

161 As noted by Chan JC, "a previous judgment making certain findings of fact cannot be merely tendered in another trial as proof of the existence or the truth of those facts". Therefore, a judgment in the Malaysian Assessment would have no probative value in Singapore in relation to the fact of whether Sports Connection suffered any loss. Such loss would still have to be independently proved in Singapore and a judgment in the Malaysian Assessment could never be the starting point.

162 Mr Chacko argued that the court's recognition of "certain legal consequences" flowing from a foreign judgment (*Arul Chandran* at [141]) would include the legal consequence that the KL parties are liable. This is a misreading of the case. As explained by Mr Daniel, the phrase "certain legal consequences" referred to the doctrine of res judicata and/or estoppel. Both these doctrines are inapplicable in the current case as S&N were not a party to the KL Interlocutory Judgment or the Malaysian Assessment in 2012.

163 *Trans-World (Aluminium) Ltd v Cornelder China (Singapore)* [2003] 3 SLR(R) 501 clearly states (at [19]) that *in personam* judgment of a foreign court cannot be relied on for the correctness or truth of any of the facts covered there. In that case, the plaintiffs attempted to adduce a judgment obtained in the Supreme People's Court of the People's Republic of China as conclusive as to all matters adjudicated upon including the reasons given for the decision and the grounds upon which the judgment is based. In that case, the following observations were made:

18 Similarly, with an in *personam* judgment, finding of facts in that proceeding are equally inadmissible evidence in a later proceeding. …

19 Hence, without the agreement of or admission from an appropriate witness for the defendants, the plaintiffs cannot simply refer to matters in the judgment of the Supreme People's Court as evidence of the correctness or truth of any of the facts covered there. … Evidence must be adduced in the usual way.

164 Likewise in *Antariksa Logistics Pte Ltd and others v McTrans Cargo (S) Pte Ltd* [2012] 4 SLR 250, the findings in decisions of the Central Jakarta District Court and Jakarta High Court were strictly inadmissible evidence (at [133]):

… The parties separately urged this court to rely on the findings of the Indonesian courts to advance different points. However, I was not inclined to do so as the narration and findings in

> the decisions were strictly inadmissible evidence that could not, without more, be taken as evidence of the truth or correctness of the matters that transpired in Indonesia or the participation of persons in any illegality perpetuated there …

165 For the reasons stated, Sports Connection cannot argue that they could have relied on a Malaysian judgment alone to prove the Loss of Profits Claim in Suit 630.

166 For completeness, I should bring up a related matter which is whether the losses that were assessed in 2012 were those of Sports Connection or Tearproof. In the current proceedings, the parties do not dispute that damages were awarded to Sports Connection in the KL Interlocutory Judgment. The real question is whether the losses assessed in the Malaysian Assessment in 2012 was that of Sports Connection or Tearproof. Sports Connection argued that, in reality, Tearproof's losses were essentially Sports Connection's losses, as Tearproof was merely a proxy for Sports Connection. Mr KSJ, who was called as Sports Connection's witness, said that the damages awarded in the KL Interlocutory Judgment was only to Sports Connection with damages suffered by Tearproof and Mr Yee forming a "subset" of the damages suffered by Sports Connection as they are related to the Trademark that was owned by Sports Connection.

167 In contrast, Mr Daniel argued that the losses assessed in the Malaysian Assessment were Tearproof's as the Ferrier Hodgson Report stated that: [note: 54]

> … in view that we have limited information on [BM], Evergreen/[Outdoor Outfitters'] financial accounts to quantify [Sports Connection's] losses, we have opted to combine the said information with [Sports Connection's] sales of [Bodypac] products to [Tearproof] in the Malaysian Market for the period between June 1997 and April 2006 to determine the losses suffered by [Sports Connection]. …

168 Mr Daniel also pointed out that AR Teo noted in the Singapore Assessment that Sports Connection continued to sell Bodypac products through Tearproof during the quantification period and that there was no evidence that such sales were adversely affected by any competing sales of infringing products. Mr Daniel pointed out that even Mr Yee was aware and accepted that the losses claimed in the Malaysian Assessment were Tearproof's and not Sports Connection's (see [110] above). In light of the contemporaneous documentary evidence, and the fact that the counterclaim in Suit No D5-22-1079-1997 in Malaysia was brought by Tearproof alone and that the Malaysian Judge awarded damages in the counterclaim to be assessed in favour of Tearproof, Mr KSJ's testimony that Tearproof's loss was a "subset" of Sport Connection's claim was ill-founded. The KL parties did not attend the Malaysian Assessment in 2012 and Sports Connection could freely argue that the losses suffered by Tearproof could be ascribed to Sports Connection. In any event, if the Singapore Assessment had been stayed in favour of the Malaysian Assessment, and assuming *arguendo* that a judgment similar to the 2012 Judgment was obtained and presented in Suit 630, it would be open for S&N to dispute that the damages assessed in the Malaysian Assessment were in truth Sports Connection's damages. In that hypothetical situation, Sports Connection would have to prove its entitlement to rely on the Malaysian judgment to show that it had suffered recoverable loss. Even so, this might not be accepted by the court. Once again, this demonstrates Sports Connection's arguments as premised on a chance upon a chance.

Prospect of discovering other documents in the Malaysian Assessment

169 This "prospect" is Course of Action 2 which is dependent on the Singapore Assessment being stayed indefinitely for the Malaysian Assessment to be revived. Course of Action 2 is crafted in abstract terms. The absence of details and specificity as to the type of documents that could be

available from the KL parties is symptomatic of this case.

170 Mr Daniel argued that Course of Action 2 was untenable. He noted that even Mr Yee was "lost for words" when Mr Yee was pressed to explain what alleged additional evidence he could have obtained in the Malaysian Assessment. [note: 55] The basis of Course of Action 2 for discovery assumed that additional documents existed and could be ordered to be produced. It seems to me that in coming up with Course of Action 2, Sports Connection had not given thought to: (a) the earlier unsuccessful attempts (outlined in [124]–[127] above) at recovering documents; and (b) its explanation for its inability to provide additional documents sought by Deloitte after the Baker Tilly Report was available. The additional documents requested related to Tearproof and Sports Connection and if they existed, Sports Connection ought to have made them available to Deloitte (at [138]–[139] above).

171 Notably, no additional documents from BM were made available in support of the Malaysian Assessment in Ferrier Hodgson Report. This is not surprising seeing that BM was wound up in April 2006 by a creditor bank and the winding up was before Mr Shahiran took over the conduct of Suit 630.

172 I also note Mr Yee's evidence in cross-examination on the Ferrier Hodgson Report:

> Q: Agree with me that Ferrier Hodgson relied on Kaw's evidence in the underlying matter in Malaysia to say that he was selling products to Bodypac Malaysia, and 90 per cent of his sales was Bodypac Malaysia. So the extrapolated figures there to come with a conclusion as to what the sales numbers were for Bodypac Malaysia. Agree? That is an important part of their report.
>
> A: That's true.
>
> Q: That is exactly what Deloitte & Touche tried to use in Singapore, which the court in Singapore didn't accept. Correct? You know this, right?
>
> A: Yes, that's true.

173 As it turned out, the Registrar in the Malaysian Assessment in 2012 was relying on the same evidence as AR Teo in the Singapore Assessment. As stated, the Malaysian Assessment in 2012 was uncontested in the absence of the KL parties. By 2012, BM was wound up and Mr Kaw was adjudicated a bankrupt. This development in 2012 does not translate to Sports Connection obtaining the same or similar result if the Malaysian Assessment had been carried out earlier before the Singapore Assessment.

Issues of breach of duty, breach, causation and loss

174 The proper advice argument (at [93] above) focuses on the question whether Mr Shahiran's advice (or lack of advice) as pleaded fell below the standard of the reasonably competent lawyer. Having reached the conclusion that the Courses of Action were illusory and fanciful, the Courses of Action were hardly "advice" that would fall within Mr Shahiran's scope of duty for no reasonably competent lawyer in the position of Mr Shahiran would have raised them as advice to Sports Connection and to advise the latter to take them.

175 For completeness, I should mention Mr Shahiran's contention that he sent a letter dated 27 February 2007 to Sports Connection, warning Sports Connection that the Deloitte Report might not be

accepted by the court, due to the lack of important documents and that accordingly, Sports Connection should consider if it wished to proceed with the Loss of Profits Claim, or only with the Legal Costs Claim. Mr Yee disputes ever receiving this letter. I agree with Mr Chacko that Mr Shahiran had not discharged the burden which is on him to prove that the letter was sent. Be that as it may, this finding does not affect my conclusion on the scope of the relevant duty based on the standard of the reasonably competent lawyer in [174] above (see also [147], [151] and [157] above).

176 Like the proper advice argument, the second issue of primary causation (at [94] above) also fails. To show the relevant causal link, the legal question that must be answered by Sports Connection is what action Sports Connection would on a balance of probability have taken if it had received proper advice.

177 As to whether it would ever have been the case that Sports Connection would have proceeded to assess damages in Malaysia before the Singapore Assessment if Mr Yee had been advised to go to Malaysia because of the paucity of evidence supporting the Loss of Profits Claim, there was significantly no satisfactory evidence at all from Mr Yee that he would have proceeded in Malaysia before the Singapore Assessment. Furthermore, the pleaded Courses of Action were dubious; they were illusory and fanciful. As such, it has not been proved on the balance of probability that Mr Yee would have adopted the pleaded Courses of Actions if such "advice" had been given by the defendants at any relevant point in time after Mr Shahiran took over the conduct of the Suit 630 in August 2006 until before the Singapore Assessment. In the circumstances, primary causation is not proved, the second stage of the third principle in *Allied Maples* (*ie*, whether the chance was a real or substantial one) does not arise for determination and that is the end of the claim for loss of a chance as formulated.

178 I now turn to the loss suffered by Sports Connection. The main focus of Mr Daniel's submissions was that Sports Connection could not establish any loss. It seems to me and I agree with Mr Daniel that the outcome of the Singapore Assessment was the result of Sports Connection's inability to adduce evidence to substantiate its loss. I have set out in detail the state of the evidence that was being gathered over three years and the documentary evidence remained incomplete until the end. I find that Sports Connection's failure at the Singapore Assessment was, on the balance of probability, more likely due to the fact that the claim was bad, rather than negligence of the defendants. As AR Teo found, there was no proof that Sports Connection's sales were adversely affected by any competing sales of infringing products. The evidence was that Sports Connection continued to sell Bodypac products through Tearproof during the quantification period and there was no countervailing evidence of competing sales by BM for that period. Contrary to Mr Chacko's submissions, AR Teo did not rule Mr Kaw's statement inadmissible. AR Teo could not have found Mr Kaw's statement inadmissible if the ruling was that it was inadequate after evaluation of the statement with the rest of the evidence.

179 In part, AR Teo's decision depended on whether he accepted Mr Yee's evidence of facts and Mr Tam's expert evidence. It has not been suggested specifically that Mr Yee should have been advised that his factual evidence and Mr Tam's expert opinion would not be accepted, or that he was not properly advised of the risk of the court not accepting his and Mr Tam's evidence and in the event in some crucial respects their evidence were rejected. Mr Tam's formula to compute loss of profits was accepted by AR Teo but the numbers needed for computation of the loss based on the formula were lacking.

180 No case was pleaded that Mr Yee in fact thought the claim was hopeless, but Mr Shahiran failed to advise Mr Yee accordingly. I should also say that I reject the suggestion advanced to the effect that Mr Yee was unaware of any shortcomings in the evidence to substantiate the claim for

loss of profits and that he would never have pursued the Singapore Assessment if advised that it was subject to any significant risk.

181 As stated, the way Sports Connection puts its case, the question whether Sports Connection lost a chance of being better off financially than it did as a result of litigating in the Singapore Assessment depends on chances at different stages. To also say that Sports Connection lost a chance of obtaining conclusive evidence of loss of profits in the Malaysian Assessment would not provide itself a claim for damages in this action. The suggested damage is the loss resulting from not proceeding with the Malaysian Assessment before the Singapore Assessment. However, there is no evidence of this loss since one cannot use the 2012 Judgment because it would be indulging in hindsight reasoning. Neither has Mr Chacko specified the type of documents that might have been obtained from the KL parties in a hypothetical Malaysian Assessment held at the material time.

182 Once Suit 630 was restored for hearing, the route embarked upon was to recover damages from S&N rather than to pursue the KL parties for damages. This is evident from the history of the background facts, proceedings and tactics decided upon without the benefit of hindsight. The focus of the litigation moved from Malaysia to Singapore. Energy, resources and time were directed and spent at the litigation in Singapore over a period of three years. The Malaysian Assessment was decidedly left dormant to concentrate on Suit 630.

183 I have already recounted the reasons as to why the Malaysian Assessment was left dormant and it is against that backdrop that Sports Connection's allegations in [92] above must be examined. Equally important was the state of the evidence that was consistently incomplete over a period of three years and where delays in Suit 630 were encountered.

184 In my judgment, Sports Connection could not show that it had a real or substantial chance of obtaining further evidence in Malaysia from the KL parties, *a fortori*, it was not able to show that it would have obtained such evidence on the balance of probability even if the defendants had not committed the breaches complained of. I must also add that Sports Connection's argument on the evidentiary value of a Malaysian *in personam* judgment for use in the Singapore Assessment is a complete non-starter for reasons discussed above.

185 For these reasons, the Loss of Profits Claim fails.

Loss of Legal Costs Claim

Duty to mitigate

186 Mr Chacko clarified in his Reply Submissions that the nub of Sports Connection's complaint was about Mr Shahiran's failure to advise Sports Connection on the duty to mitigate by: (a) taxing party and party costs of the KL Interlocutory Judgment; and (b) enforcing the taxed party and party costs against the Kaws. As a result of Mr Shahiran's omission, Sports Connection lost a real or substantial chance to recover full solicitor and client costs that Sports Connection had incurred in the KL Suits (*ie*, the remaining 70% of the solicitor and client costs disallowed by AR Teo).

187 I narrated the developments that led to instructions to MCC to proceed to tax party and party costs for use in the Singapore Assessment in [40]–[54] above. Indeed, Sports Connection accepted that Mr Shahiran had advised it on the taxation of party and party costs in a telephone conference call on 2 August 2007. Mr KSJ in cross-examination conceded that Mr Shahrian had asked him to proceed with the taxation of party and party costs.

188 However, Sports Connection took a fine point which was that Mr Shahiran requested it to proceed with the taxation of party and party costs to get a quantified sum as a precursor to bankrupting Mr Kaw and Ms Heng and not because he appreciated that Sports Connection needed to mitigate its losses in relation to the Legal Costs Claim. In addition, Sports Connection argued that Mr Shahiran had breached his duty by not following up with the status of the party and party costs for more than one year. Eventually, the party and party costs were taxed in Malaysia before the hearing of the Singapore Assessment, but Mr Shahiran had refused to accept the papers relating to the taxed costs from Mr Yee as the former took the view that the taxed costs were no longer relevant for the Singapore Assessment.

189 I make a few points. First, I do not follow the logic of the distinction made by Sports Connection between taxing party and party costs as a precursor to bankrupting the Kaws and mitigation. Various correspondences between the parties revealed that Mr Yee knew that the bankruptcy of the Kaws would be relevant to the Singapore Assessment. In an e-mail dated 25 June 2007, Mr Yee instructed Mr KSJ to execute bankruptcy proceedings against BM, Mr Kaw and Ms Heng. Importantly, he stated "[d]o note, I need to show this bankrupt proceedings to the [Registrar]/Court of Singapore". Again, on 21 May 2008, Mr Yee e-mailed Mr KSJ stating: [note: 56]

> **Subject**: Re: Bill of costs on kaw ah kin
>
> To Ken St. James,
>
> Please furnish full details, including all time lines and it's status.
>
> I need this, as due court will query me, why I didn't make kaw a bankrupt, even though the judgement in my favour is 3 years old.

190 The fact that Mr Shahiran recognised the need to bankrupt both Mr Kaw and Ms Heng showed that Mr Shahiran appreciated the need for Sports Connection to establish, in the Singapore Assessment, that it was not able to recover its legal costs incurred in the KL Suits from the Kaws. Notably, AR Teo stated that Sports Connection was "precluded from recovering the 70% of costs which it could have recovered had it proceeded to enforce its entitlement to costs in Malaysia", revealing that the basis of awarding only 30% of the legal costs claimed to Sports Connection was because Sports Connection should have claimed the remaining 70% from the Kaws. Hence, if Sports Connection had shown that the Kaws were bankrupt or impecunious, Sports Connection might have succeeded in recovering the Legal Costs Claim in full. There is nothing to the complaint that Mr Shahiran had not advised Sports Connection to mitigate its losses in relation to the Legal Costs Claim.

191 Second, party and party costs were taxed and the amount of the taxed costs was known on 15 October 2008. However, the result of the taxed costs in the sum of RM 152,688 together with interest thereon at the rate of 8% per annum from the date of the KL Interlocutory Judgment until the date of payment was not produced at the Singapore Assessment in November 2008 and that led to AR Teo's findings as set out at [33(b)] above. Mr Yee said that the reason why information and the papers on the taxed costs were not produced at the Singapore Assessment was that Mr Shahiran did not want them. Mr Shahiran disagreed with Mr Yee. Mr Shahiran contended that he was not told the results of the taxation. In response, Mr Daniel submitted that it was Mr Yee who withheld information on the taxed party and party costs and papers from Mr Shahiran.

192 I accept Mr Daniel's submissions in light of some objective evidence in support of his position:

(a) Mr Yee's AEIC said nothing about Mr Shahiran's refusal to accept the papers on taxed

party and party costs from Mr Yee.

(b) The amount of the taxed party and party costs was disappointingly low and it was not in Sports Connection's interest to reveal the amount that was taxed in the Singapore Assessment. In fact, Mr KSJ recommended a review as the amount of taxed costs was "too low and insufficient" (see [52] above). Mr Yee did not reply to this letter. Logically, presenting the papers in the Singapore Assessment might risk reducing the Legal Costs Claim seeing that Sports Connection was awarded RM 152,688.50 as taxed costs. Even when this amount is scaled-up to solicitor and client costs, that amount would be lower than that estimated by the experts on costs. S&N's expert, Mr Anantham Kasinather ("Mr Kasi") in his report gave the figure RM 418,375.50. Dato' Nathan's Report gave the figure of RM 1 million.

(c) As pointed out by Mr Daniel, Mr Shahiran complied and filed Sports Connection's 2nd Supplementary List of Documents, consisting largely of documents filed by Ms Subitra in respect of the solicitor and client taxation in Malaysia on 17 October 2008 in Suit 630. I agree with Mr Daniel that in keeping with Sports Connection's continual disclosure obligations, the papers on the party and party taxation would in the normal course of events have been included in the 2nd supplementary list of documents in Suit 630 if they were handed over to Mr Shahiran.

(d) Mr Yee did not reveal that party and party costs had been taxed when he testified before AR Teo. Mr Yee's evidence in the Singapore Assessment was to the effect that he could still be "in the process" of working out the costs that BM was supposed to pay in respect of the Malaysia Assessment. [note: 57] In relation to this point, Mr Yee had misled the court in the Singapore Assessment while he was on oath by being economical with the truth.

193 The inference that I draw from the totality of the circumstances is that Mr Yee had withheld the papers in relation to the taxed party and party costs from Mr Shahiran. No question of a loss of a chance arises since it was the conduct of Sports Connection and not that of a third party that was involved.

194 In conclusion, Sports Connection has no basis to complain that Mr Shahiran was liable in negligence for not advising that it should have taxed party and party costs in Malaysia for use in the Singapore Assessment when Sports Connection had in fact done so and obtained taxed costs in those proceedings, which it later failed to produce before AR Teo in the Singapore Assessment.

Dato' Nathan's Report and Mr Kasi's Report

195 By way of background, it appeared that when Mr Shahiran took over the conduct of Suit 630 from N&M, the claim for legal costs against S&N was limited to the costs incurred in the KL Suits and obtaining the KL Interlocutory Judgment on liability. Subsequently, around June 2007, Mr Shahiran came to understand that there were still matters on-going in Malaysia, namely, the appeal to the Malaysian Court of Appeal, and that Sports Connection was intending to seek to recover the appeal expenses under its Legal Costs Claim in Singapore. Mr Shahiran therefore suggested that the Singapore Assessment be bifurcated so that the Loss of Profits Claim could proceed first leaving the costs of the appeal to be quantified later since it was on-going in Malaysia at the material time. Mr Yee agreed to that suggestion and an application for bifurcation of the claims was taken out. The Assistant Registrar heard the application but dismissed it. However, he suggested that the parties could tender expert evidence from Malaysia to support their respective positions in relation to the Legal Costs Claim.

196 Pursuant to this suggestion, Sports Connection engaged Dato' Nathan, a retired Judge of the

High Court of Malaysia, to prepare an expert report to support the Legal Costs Claim. Dato' Nathan's Report was exhibited in his AEIC dated 16 February 2008. Dato' Nathan's Report considered the following matters involving Sports Connection in assessing the solicitor and client costs that were or would be incurred by Sports Connection:

(a) the KL Suits;

(b) the appeal to the Malaysian Court of Appeal;

(c) the taxation of MCC's invoices; and

(d) the JB Suit.

Having considered the above, Dato' Nathan estimated that the taxed costs exclusive of disbursements would amount to RM 1 million.

197 S&N engaged a Malaysian lawyer, Mr Kasi, as their expert in respect of the Legal Costs Claim. Mr Kasi was a senior practitioner. In Mr Kasi's Report, Mr Kasi opined that the solicitor and client costs incurred by Sports Connection to its solicitors in Malaysia in relation to the Legal Costs claim would be RM 418,375.50.

198 After assessing these expert reports, AR Teo opined that in relation to the Legal Costs Claim, Mr Kasi's Report should be preferred and the legal costs incurred by Sports Connection in the KL Suits were RM 418,375.50. AR Teo held that Sports Connection was only entitled to 30% of that amount as 70% of such costs ought to have been claimed by Sports Connection as party and party costs against the Kaws and not against S&N. In this regard, AR Teo noted that Sports Connection did not adduce evidence to show that it had proceeded with the party and party taxation and taken the necessary steps to enforce the taxed costs against the Kaws.

199 Sports Connection alleged that Mr Shahiran had failed to advise Sports Connection on the issues in Dato' Nathan's Report and Mr Kasi's Report. The complaint is that Mr Shahiran should have pointed out to it that Dato' Nathan's estimate was at odds with the amount invoiced by MCC at that time which amounted to RM 680,000. Essentially, Sports Connection argued that Mr Shahiran should have pointed out that Dato' Nathan had no explanation as to why a Malaysian court would order taxed costs above and beyond the amounts stated on the solicitor's invoices.

200 Sports Connection also argued that Mr Shahiran should have pointed out that Dato' Nathan had erroneously included the JB Suit in the assessment of the taxed costs. The JB Suit was entirely separate from the KL Suits and did not arise out of or relate to the infringement of the Trademark and could not be attributed to the S&N's negligence.

201 The points mentioned here were raised in Mr Kasi's Report which was exhibited in his AEIC filed on 17 March 2008, a month after Dato' Nathan filed his affidavit.

202 Having considered the background facts and the complaints against Mr Shahiran in respect of the differing views of the experts on costs in Malaysia, I do not see how these complaints against Mr Shahiran are relevant to the Legal Costs Claim and it is not surprising that Mr Chacko confined his Reply Submissions to the duty to mitigate issue (at [186] above). I say no more about this aspect of the complaint.

Advice to tax solicitor and client costs incurred in the KL Suits for the Legal Costs Claim

203 In this action, Sports Connection seeks to recover as wasted costs the professional fees of the Malaysian lawyer, one Ms Subitra, who assisted Sports Connection to tax the professional fees of MCC. This complaint is based on Mr Shahiran's erroneous advice to tax solicitor and client costs for the purposes of the Legal Costs Claim in the Singapore Assessment despite being informed by Mr KSJ that taxation was out of time.

204 At the outset, there is no satisfactory evidence that Mr Shahiran had expressly given advice that it was solicitor and client taxation, and not taxation of party and party costs that was relevant for the purposes of the Singapore Assessment. I am mindful that Sports Connection was already unhappy with his Malaysian lawyers' bills way back in 2003. Mr Yee felt that the bills were too high and wanted to tax the bills of Sng & Co and MCC. I refer to a letter sent by N&M to Sports Connection on 25 February 2003, which reads: [note: 58]

> **TAXATION: KUALA LUMPUR HIGH COURT SUITS & RELATED MATTERS**
>
> I refer to the above matter and your query on whether you would be able to recover your costs of taxation of Sng & Co and Ken St. James's Bill of Costs.
>
> Terry there are really two issues here. The first is taxation of the costs you have paid to Sng & Co or will pay to Ken St. James for the *ongoing* trial, *which you deem very high*. The second is whether the costs of taxation which you incur in Malaysian can be recovered in your suit against Ms Swami & Narayanan in Singapore.
>
> …
>
> [emphasis added in italics and in bold italics]

In this letter, N&M advised Sports Connection that solicitor and client costs were "not claimable", and that party and party costs were relevant.

205 In June 2005, Mr Yee contacted Ms Subitra to inquire if there was a time limitation to tax the Malaysian lawyers' bills. By September 2005, Mr Yee had instructed Ms Subitra to tax the Malaysian lawyers' bills. In April 2006, Ms Subitra informed Mr Yee that she had prepared the relevant papers to tax Sng & Co's bill and was intending to have them filed the first week of May 2006. Mr Yee then asked Ms Subitra about how to go about taxing MCC's bill. Ms Subitra replied that she needed to look at the file to estimate the costs based on work that was actually done. Some documents were sent to Ms Subitra in early 2006. Ms Subitra was also queried about the feasibility of taxing both Sng & Co and MCC together, as Mr Yee felt that both firms duplicated certain items of work but was concerned that he would be able to tax both firms fees at the same time. Ms Subitra stated that while she might not be able to tax both bills at the same time, she could ask the court for a consolidated hearing. Mr Yee agreed "since Ken St. James [MCC's] bill is also not low". [note: 59]

206 This intention to tax the lawyers' bills continued into the time Mr Shahiran took over the conduct of Suit 630 in August 2006 and beyond. It seems to me that Mr Yee conveniently used for his own purpose the Singapore Assessment as an excuse to press on with the taxation of his Malaysian lawyers' bills and sought to claim the legal costs for that from S&N. Indeed, Mr KSJ doubted Mr Yee's explanation and queried the relevance of taxing his bill for the Singapore Assessment. In an e-mail dated 22 June 2007, Mr KSJ stated that the solicitor and client bills which he raised "would not be directly relevant to the amount of costs that Kaw was ordered to pay you". [note: 60] Again, on 9 July 2007, Mr KSJ reiterated his position that he found it "unusual that the Singapore Court wants

your taxed Solicitor-Client costs as opposed to your taxed Party-To-Party costs". [note: 61] The application to tax the Malaysian lawyers' bills was eventually dismissed on 18 March 2008 as it was filed out of time.

207 Sports Connection's true intention in taxing the Malaysian lawyers' bills was because Mr Yee was unhappy with the bills incurred in the KL Suits. In the papers filed in the taxation of the lawyers' bills, he deposed that the bills were "excessive and unreasonable and/or not equivalent to the legal services which have been provided". He also deposed that the charges of the two law firms were "excessive and/or exorbitant" and that there seemed to be an "overlap of charges" for the "same amount of work done". [note: 62]

208 Given the background, the fact that Mr Shahiran was copied in communication between Mr Yee and Ms Subitra that referred to the Singapore Assessment is neither here nor there. According to Mr Shahiran, he never advised Sports Connection to tax the Malaysian lawyers' bills and it was something that Sports Connection wanted.

209 I refer to R&T's Further and Better Particulars dated 3 October 2005. In that regard, Mr Yee sent an e-mail to Mr Shahiran on 16 November 2006, stating that in relation to the particulars sought which pertained to the Legal Costs Claim, Mr Shahiran was to note that Sports Connection was taxing the "2 firms that did my litigation in Malaysia". [note: 63] In a reply to R&T dated 20 November 2006, ALC informed R&T of the taxation of the Malaysian lawyers' bills. Over the course of Mr Shahiran's retainer, Mr Yee sent and forwarded Mr Shahiran many e-mails pertaining to his taxation of the Malaysian lawyers' bills. Finally, on 29 April 2008, R&T wrote to SSLC, requesting copies of the notes of evidence, court attendance notes and written submissions concerning the taxation of solicitor and client bills.

210 In light of all the aforementioned matters in [209] above, I accept Mr Shahiran's explanation that he had not advised Sports Connection to tax the Malaysian lawyers' bills and that he asked Sports Connection for updates on the taxation of the Malaysian lawyers' bills as he was required to disclose them as part of Sports Connection's discovery obligation in Suit 630.

211 For the reasons stated, the claim for wasted costs as described in [70(c)] above fails.

The March OTS

Preliminary points

212 In March 2008, S&N offered to pay the sum of S$200,000 in full and final settlement of Suit 630 (*ie*, the March OTS). Sports Connection's argument is that it had lost a real or substantial chance to accept the March OTS which would have given it more than what was recovered in the Singapore Assessment.

213 As I have alluded earlier, Sports Connection's alternative claim for the loss of chance to accept the March OTS is *not* a case for loss of a chance. Sports Connection's loss did not depend on the hypothetical actions of a third party, but instead depended on the hypothetical actions of Sports Connection itself if the alleged breach had not occurred. In short, the facts pertaining to the March OTS fell within the second principle in *Allied Maples* (see [75] above). As such, the inquiry concerns the primary causation issue, *viz*, whether Sports Connection would have accepted the March OTS if it had received the advice it claims SSLC omitted to give. This is a matter which Sports Connection must prove on a balance of probability.

State of affairs after March OTS until the Singapore Assessment

214 S&N served the March 2008 OTS on 31 March 2008. This appeared to be forwarded to Sports Connection on 30 April 2008 accompanied by Mr Shahiran's written confirmation that Mr Yee did not want to accept the offer.

215 On 9 April 2008, Mr Shahiran e-mailed Mr Yee seeking more information and further documents with respect to the Legal Costs Claim as Mr Yee was seeking to include many types of costs under this head of claim. He also reminded Mr Yee that the hearing was fixed for 21 to 25 April 2008.

216 On 11 April 2008, in a PTC before SAR Ng, the trial dates were vacated as documents still could not be obtained. SAR Ng expressed dissatisfaction with the prolonged delays at that PTC. Mr Shahiran reported to Mr Yee stating: "In brief Mr. Yee, we are at a critical stage of the proceedings. I still do not have the affidavits from Malaysia." [note: 64]

217 On 22 April 2008, Mr Shahiran sent a letter to Mr Yee stating that given Mr Yee's concurrence and the availability of the expert witnesses, the revised dates for the hearing should remain as fixed from 7 to 11 July 2008.

218 On 29 April 2008, R&T wrote to SSLC, requesting copies of the notes of evidence, court attendance notes and written submissions concerning the taxation of solicitor and client bills. SSLC replied that it could only obtain the notes of evidence from the court in Malaysia, and that the solicitors in Malaysia only made oral submissions. At the next PTC before SAR Ng on 9 May 2008, SAR Ng directed Sports Connection, *inter alia*, to provide handwritten attendance notes to S&N, and to apply for the notes of evidence in Malaysia. The trial dates for July were vacated. These materials were provided by Sports Connection on 14 May 2008.

219 Besides R&T's request, I have also stated above at [157] that Mr Shahiran was also dealing with the lack of evidence in respect of certain legal fees which Mr Yee recently disclosed as having paid and was now insisting should be included in Sports Connection's claim. Pursuant to further advice, Mr Yee changed his mind on including these further claims. In an e-mail dated 2 May 2008, Mr Shahiran stated: [note: 65]

> …please recall the following:
>
> a. You have your own lawyers in Malaysia;
>
> b. We do not practice Malaysian Law;
>
> c. We were never retained to locate, recommend and/or instruct Ms. Subitra or her firm or any firm. Apparently her fees of RM$5,000 was not the bargain your goodselves thought it was; Till this very day your goodselves have not reconciled the invoices and receipts that are particularized in Mr Yee's affidavit filed to support the [solicitor and client taxation];
>
> …
>
> We would put it in his fashion: We are informed by Mr. Yee that it was he that decided the scope and limit of the [solicitor and client taxation] to be filed in Malaysia. And, your Malaysian lawyers acted on these instructions.

220 In July 2008, the Singapore Assessment was finally fixed for the dates 3 to 7 November 2008. The PTC Registrar directed that the Loss of Profits Claim would be heard from 3 to 5 November 2008. In between this period to October 2008, Mr Shahiran and Mr Yee appeared focussed on shoring up the evidence to support the claims for legal costs, as Mr Yee stated that he "want[s] to claim all monies already spent in Malaysia". [note: 66] On 17 October 2008, Sports Connection filed its 2nd supplementary list of documents and accompanying affidavit which concerned documents relating to the Legal Costs Claim.

221 In Malaysia, the party and party costs were taxed on 15 October 2008. The next day, Mr KSJ informed Mr Yee that the taxed costs were too low and recommended a review. There was no reply from Mr Yee and there was no review.

222 The hearing of Singapore Assessment was from 3 to 5 November 2008. AR Teo reserved judgment until January 2009.

What action would Sports Connection on a balance of probability have taken if it had received proper advice (ie, the primary causation issue)?

223 This March OTS was made while the trial dates were fixed for 21 to 25 April 2008. It appears that Mr Shahiran forwarded the March OTS to Sports Connection on 30 April 2008 at the time he wrote to Mr Yee to confirm Mr Yee's decision and instructions not to accept the March OTS. With that decision not to accept the March OTS, the parties pressed on with litigation. The trial dates in the horizon were July 2008. However, the July dates were also vacated. Eventually, in July 2008, the Singapore Assessment was finally fixed for November 2008.

224 It seems to me that having come so far in the litigation, there was no incentive to settle at a fraction of the claim amount in the Deloitte Report. The next opportunity to advise on the March OTS was after the November 2008 hearing of the Singapore Assessment. I am mindful that, on 11 November 2008, Mr Shahiran wrote to Mr Yee shortly after the hearing of the Singapore Assessment to set out his views on how Sports Connection fared in the assessment. He expressed his concerns that the assessment hearing did not go well. He highlighted the testimonies of Mr Tam and Mr Yee as areas of major concern. Mr Yee did not see Mr Shahiran's letter as his advice to accept the March OTS. In cross-examination, Mr Yee said that it was because Mr Shahiran did not say that "There's no other way". [note: 67]

225 In my view, the message in the letter of 11 November 2008 was clear enough and Mr Yee's attempt to place a gloss over it is baseless and without merit. The 11 November 2008 letter discussed the following: First, it commented that "the opposing solicitor … has through his cross examination, badly effected [*sic*] your case". It then discussed the problems in the Deloitte Report arising from the lack of evidence and documents. After repeating the costs implications of not accepting the March OTS, the letter sought Sports Connection's confirmation that it wished to reject the offer.

226 The court in reviewing the advice rendered in relation to an offer to settle would not expect that the solicitor renders comprehensive advice that is of great precision. In my opinion, it is sufficient that the advice discusses the merits of the case and highlights that the March OTS would still be available for acceptance. The 11 November letter touched on the merits of the case as evinced from Mr Shahiran's discussion of the evidence adduced in the Singapore Assessment. It is implicit in the 11 November letter that Mr Shahiran was asking Sports Connection to consider the March OTS once again. I am of the view that Mr Shahiran has, in the 11 November letter, sufficiently advised Sports Connection in relation to the March OTS.

227 As to whether it would ever have been the case that Sports Connection would have accepted the March OTS if Mr Yee had been given advice stating that there was "no other way" as Mr Yee said Mr Shahiran should have told him about, two things stand out: (a) there was no specific plea of that point in the Statement of Claim, and (b) there was significantly no clear evidence to show on the balance of probability that Mr Yee would have accepted the March OTS but for Mr Shahiran's alleged breach.

228 A related argument is that Sports Connection would have accepted the March OTS if Mr Shahiran had advised it to take it as early as April 2008. Sports Connection's complaint is that Mr Shahiran had not advised that it should accept the March OTS as it was likely that Sports Connection would obtain less than the March OTS sum in the Singapore Assessment.

229 As can be seen from the narrative of the state of affairs after the March OTS was filed on 31 March 2008 (at [214]–[222] above), the hearing of the Singapore Assessment was fixed for 21 to 25 April 2008. At that time, Mr Yee was still seeking to include other types of costs under the Legal Costs Claim. It was not surprising to see Mr Shahiran confirming Mr Yee's rejection of the March OTS.

230 Besides, Sports Connection's submission in [228] is hard to believe for a variety of reasons. The loss that was being alleged is the difference between the March OTS sum and the sum of RM 160,512.65 (approximately S$66,716.26) which was what was eventually recovered in the Singapore Assessment. Given the costs expended in the Malaysian proceedings at that time and the size of Sports Connection's claim (with the Loss of Profits Claim valued between S$1.7m–S$1.9 m and the Legal Costs Claim valued at about RM 1 million), it is unlikely on the balance of probability that Sports Connection would have accepted the March OTS however well-advised it was.

231 As noted in my analysis of the Loss of Profits Claim, Mr Yee was confident in Mr Tam's ability to stand by the Deloitte Report despite the Baker Tilly Report. Also, as noted in my analysis of the Legal Costs Claim, Mr Yee was equally content to go along with Dato' Nathan's Report which opined a figure much higher than the party and party costs that was taxed in October 2008. In this regard, it is also significant that in Suit 630, the expert witness for S&N, Mr Kasi, had opined that Sports Connection should be entitled to at least RM 292,862.85 (approximately S$125,000). Mr Kasi also estimated the Legal Costs Claim at about RM 418,375.50 (approximately S$173,000). These would have been relevant facts for Sports Connection to take on board.

Conclusion on the March OTS

232 In sum, I find that Mr Shahiran had sufficiently advised Sports Connection on the March OTS. Even assuming for the sake of argument that the advice rendered to Sports Connection was inadequate, I would not hold Mr Shahiran liable for negligence because I am of the view that Sports Connection has not proved on a balance of probability that it would have accepted the March OTS in the circumstances subsisting at the material time.

Wasted Costs

233 Sports Connection has an alternative claim for wasted costs in [70(e)] above being the legal fees paid to the defendants in the sum of S$305,345.20. The argument is that it wasted legal fees in respect of the Loss of Profits Claim, as Sports Connection was not awarded any damages for this head of claim in the Singapore Assessment, even though it incurred significant legal costs in that respect.

234 As noted, Sports Connection also argued that should Mr Shahiran be held to have erroneously

advised it to embark on solicitor and client taxation, it would have incurred wasted costs in relation to the legal costs paid to Ms Subitra on the taxation of the Malaysian lawyers' bills and the costs of RM 30,000 it was ordered to pay after its taxation petition was dismissed. This is the wasted costs as described in [70(c)] above and has been dealt with at [203]–[211] above.

235 There is no merit to this claim for wasted costs of litigation as I have already concluded that Mr Yee would have in any case proceeded with the Singapore Assessment.

236 As an aside, I should mention the history of Mr Yee's unhappiness with the defendants' bills. The genesis of it had nothing to do with Mr Shahiran's negligence.

237 Shortly after the files in relation to Suit 630 were transferred to Legis Point LLC in June 2009, Sports Connection in July 2009 asked for the bills of ALC and SSLC to be taxed. The hearing took place in March 2010 and the High Court's decision is reported as *Sports Connection Pte Ltd v Asia Law Corp and another* [2010] 4 SLR 590 ("*Sports Connection (Taxation)*"). It will be seen in *Sports Connection (Taxation)* at [44] that the Judge took the view that there was no evidence of overcharging on the part of the defendants. The Judge also made the following observations on Sports Connection's motives behind bringing the application:

> 42 … Evidently there was sufficient information to enable [Sports Connection] to make an informed decision to pay the bulk of the invoices raised by the [defendants]. In fact from the evidence before me, in particular the conduct of [Sports Connection], it was clear that it did not believe that there was overcharging by the [defendants] as and when each of the successive invoices was raised. It was not without significance that the dispute over the fees only emerged after the outcome of the assessment. Obviously [Sports Connection] was not entirely pleased with the end result but this, in my view, does not amount to special circumstances.
>
> 43 It did not escape my attention that [Sports Connection] similarly applied to tax the costs of its Malaysian solicitors in respect of work done for the litigation against the parties who had infringed [Sports Connection's] trademark in Malaysia long after the bills were paid or, in any event, outside the prescribed period (in Malaysia, the period is six months). It was no coincidence that alleged overcharging by the solicitors was the principal ground relied on by [Sports Connection] for leave to tax the bills. The application was dismissed by the Malaysian court in March 2008 more than 18 months prior to the filing of the present OS. Although this dismissal is strictly irrelevant as to whether there was overcharging by the [Defendants] for their conduct of the Suit, it served to highlight the fact that [Sports Connection] was, on all accounts, *a sophisticated litigant who is adequately familiar with solicitors' costs and access to taxation*. *The fact that five sets of solicitors were altogether instructed in relation to* [*Suit 630] merely reinforced the point*. [emphasis added]

238 Sports Connection appealed against the decision of the Judge and the appeal was dismissed with costs by the Court of Appeal in December 2010.

239 On 21 September 2010, Mr Yee lodged a complaint against Mr Shahiran to the Law Society of Singapore ("Law Society") alleging that Mr Shahiran was guilty of "gross overcharging" Sports Connection ("the Law Society Complaint"). The Law Society Complaint was dismissed by the Law Society in November 2011. I note in passing that there was no allegation by Mr Yee that Mr Shahiran was negligent in the conduct of Suit 630 in the Law Society Complaint.

240 On 1 September 2011 – about two years after Mr Shahiran ceased to have conduct of Suit 630 – Sports Connection commenced the current action against N&M, ALC and SSLC.

Conclusion

241 For the reasons stated in this Judgment, Sports Connection's action against ALC and SSLC is dismissed in its entirety with costs to be taxed if not agreed.

[note: 1] Plaintiff's Core Bundle, Vol 1 ("1PCB"), p 1.

[note: 2] Agreed Bundle, Vol 1 ("1AB"), p 49.

[note: 3] Mr Shahiran's AEIC, para 77.

[note: 4] 1AB, p 351.

[note: 5] 13AB, p 5553.

[note: 6] 15AB, p 6199.

[note: 7] 1PCB, p 54.

[note: 8] 16AB, p 6692.

[note: 9] 18AB, p 7741-7742.

[note: 10] 18AB, p 7589.

[note: 11] 1AB, p 110.

[note: 12] 1AB, p 69

[note: 13] 1AB, p 134.

[note: 14] 2AB, p 529.

[note: 15] 2AB, p 535.

[note: 16] Transcript dated 7 November 2011, p 81-82

[note: 17] 15AB, p 6199.

[note: 18] 49AB, p 21588-21591.

[note: 19] Shahiran's AEIC para 200(3).

[note: 20] 2AB 725

[note: 21] 16AB 6565.

[note: 22] 1AB, p 64-65.

[note: 23] 1AB, p 134.

[note: 24] Transcript dated 7 November 2014, p 78

[note: 25] 2AB, p 536.

[note: 26] 2AB, p 592.

[note: 27] 2AB, p 564.

[note: 28] 2AB, p 562 & 564.

[note: 29] 1AB, p 296.

[note: 30] 1AB, p 334.

[note: 31] 9AB, p 3628.

[note: 32] 9AB, pp 3563 & 3594.

[note: 33] 9AB, p 3773.

[note: 34] 9AB, p 3831.

[note: 35] 9AB, p 3837-3839

[note: 36] 9AB, p 3835.

[note: 37] 10AB p, 4265 and 11AB, p 4727.

[note: 38] 11AB, p 4725.

[note: 39] 11AB, p 4726.

[note: 40] 11AB, p 4746.

[note: 41] 13AB, p 5493.

[note: 42] 13AB, p 5498.

[note: 43] 13AB, p 5501.

[note: 44] 13AB, p 5574.

[note: 45] 13AB, p 5599.

[note: 46] 13AB, p 5604.

[note: 47] 13AB, pp 5634 & 5637.

[note: 48] 14AB, p 5700

[note: 49] Transcript dated 31 October 2014, p 93.

[note: 50] Transcript dated 4 November 2014, p 79.

[note: 51] 16AB, p 6977

[note: 52] 17AB, p 7208-7211

[note: 53] 17AB, p 7221

[note: 54] 58AB, p 25333.

[note: 55] Transcript dated 5 November 2014, p 26-27.

[note: 56] Mr Shahiran's AEIC, p 2001

[note: 57] Mr Shahiran's AEIC, p 91, para 218(3).

[note: 58] 1AB, p 31-32.

[note: 59] 8AB, p 3315

[note: 60] 1PCB, p 105

[note: 61] 1PCB, p 165

[note: 62] 41AB, p 17757.

[note: 63] 9AB, p 3818.

[note: 64] 17AB, p 7127

[note: 65] 17AB, p 7231

[note: 66] 18AB, p 7592

[note: 67] Transcripts dated 4 November 2014, p 125.

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