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THE LIMITS OF RELIANCE ON RELIANCE DAMAGES?

Case Comment: Liu Shu Ming and another v Koh Chew Chee

[2023] 1 SLR 1477 / [2023] SGHC(A) 15
Appellate Division of the High Court of Singapore
Belinda Ang Saw Ean JCA, Woo Bih Li JAD, Hoo Sheau Peng J
28 April 2023

In *Liu Shu Ming v Koh Chew Chee* [2023] 1 SLR 1477 ("***Liu Shu Ming (AD)***"), the Court considered two questions on damages. These were, firstly, when a claimant would be able to claim reliance damages and secondly, whether a claimant would be able to claim reliance damages in the alternative to expectation damages. After considering these two issues, the Court seemingly expressed a preference for limiting claims for reliance damages to where it would be "impossible" or "extremely difficult" to prove expectation damages and not permitting claims for reliance damages in the alternative to expectation damages, or at the very least only where the claimant pleads such a case as early as possible. This case note addresses three questions that emerge following the Court's remarks on these issues: (**a**) whether reliance damages should be available as of right; (**b**) whether the two-pronged strategy should be permissible; and (**c**) how claimants should draft their pleadings to maximise recovery following the potential difficulties in claiming for reliance damages following *Liu Shu Ming (AD)*. In response, this note argues that it may be desirable to implement a threshold before allowing claimants to claim reliance damages and discusses some potential options. Secondly, this note argues that a claimant should only be permitted to pursue reliance damages in the alternative to expectation damages where the claimant pleads his case in a way that fulfils two conditions, as explained below. Lastly, if it becomes more difficult for claimants to claim reliance damages following *Liu Shu Ming (AD)*, this note recommends that claimants maximise their chances of obtaining effective compensation through more detailed and well-substantiated pleadings for expectation damages.

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I. Introduction

1 When a claimant seeks damages for a breach of contract, he must do two basic things. First, he must establish that there was a breach of the contract. Second, he must plead and prove the losses he has suffered from the breach.[1] In respect of the latter, at least two questions should pass through the claimant's mind. One, what can I plead to maximise my recovery? Two, what will I likely be able to prove on a balance of probabilities?[2]

2 In most cases, the claimant, being able to put forth evidence as to the quantum of his lost gross profits, would usually claim for expectation damages. This would enable him to recover all the profits he would have expected to receive had the contract been performed.[3] However, in some cases, the claimant will encounter considerable difficulty in proving what profits he would have earned had the contract been performed.[4] In such a situation, a claimant may seek reliance damages instead, to recover his *actual expenditure* pursuant to the contract.[5] This is because, unlike a claim for expectation damages, the claimant does not need to prove his loss beyond a balance of probabilities to succeed in claiming for reliance damages. Instead, the law presumes the claimant would have at least recouped his expenditure had the contract been performed and shifts the burden of proof to the defendant to rebut this presumption on a balance of probabilities.[6]

3 However, a claim for reliance damages presents the obvious disadvantage of limiting the quantum recoverable by the claimant to only his actual expenditure. In light of the occasional difficulty of proving that the contract would have been profitable if performed, and the unattractiveness of reliance damages in terms of maximising

[1] Failure to plead and prove a claim for substantial damages will result in an award of merely nominal damages – see *Youprint Productions Pte Ltd v Mak Sook Ling* [2023] 3 SLR 1130 at [5]–[7].
[2] The standard of proof in civil claims is indisputably on the balance of probabilities – see *Tang Yoke Kheng v Lek Benedict* [2005] 3 SLR 263 at [14].
[3] *Liu Shu Ming v Koh Chew Chee* [2023] 1 SLR 1477 at [130].
[4] *Liu Shu Ming v Koh Chew Chee* [2023] 1 SLR 1477 at [130]; *McGregor on Damages* (James Edelman ed) (Sweet & Maxwell, 21st Ed, 2021) at para 4-021.
[5] *Turf Club Auto Emporium Pte Ltd and others v Yeo Boong Hua and others and another appeal* [2018] 2 SLR 655 at [126].
[6] *Turf Club Auto Emporium Pte Ltd and others v Yeo Boong Hua and others and another appeal* [2018] 2 SLR 655 at [128], cited in *Liu Shu Ming v Koh Chew Chee* [2023] 1 SLR 1477 at [131].

recovery, a claimant may wonder whether he can work around these limitations. For example, could a claimant seek to circumvent these limitations by adopting the strategy of: (**a**) advancing a primary claim for expectation damages; and (**b**) falling back on a claim for reliance damages in the alternative (hereafter referred to as the "**two-pronged strategy**")?[7]

4 In *Liu Shu Ming v Koh Chew Chee* [2023] 1 SLR 1477 ("***Liu Shu Ming* (*AD*)**"), the Court considered two questions on damages. These were, firstly, when a claimant would be able to claim reliance damages in general and secondly, whether a claimant would be able to claim reliance damages in the alternative to expectation damages under the two-pronged strategy. While the Court ultimately expressed no definite view on both matters,[8] it seemingly expressed a preference for limiting claims for reliance damages to when it would be "impossible" or "extremely difficult" for a claimant to prove expectation damages "in the usual way" (hereafter referred to as the "**Extreme Difficulty Threshold**").[9] Further, for a claimant to avail itself of reliance damages, it is for the claimant to first cross the threshold that it is appropriate to consider reliance damages.[10] As for the two-pronged strategy, the Court appeared to lean towards not permitting it at all, or at the very least only where the claimant pleads such a case as early as possible.[11]

5 In light of the Court's remarks, future claimants may face significant challenges both in claiming for reliance damages in general and pursuing the two-pronged strategy. Against this context, this commentary seeks to analyse the Court's various propositions on these two issues, and to provide suggestions on how future claimants can secure effective compensation for losses flowing from contractual breaches.

6 It is submitted that while the Court's view that a claimant should not have an unfettered right to claim reliance damages is

[7] For a case whereby this strategy was attempted, see *Filobake Ltd v Rondo Ltd and another* [2005] EWCA Civ 563. However, it should be noted that in this case, the claimant, which initially claimed only expectation damages, only applied to amend the particulars of its claim at the appeal stage to insert an additional claim for reliance damages – see *Filobake Ltd v Rondo Ltd and another* [2005] EWCA Civ 563 at [64].
[8] *Liu Shu Ming v Koh Chew Chee* [2023] 1 SLR 1477 at [217].
[9] *Liu Shu Ming v Koh Chew Chee* [2023] 1 SLR 1477 at [217].
[10] *Liu Shu Ming v Koh Chew Chee* [2023] 1 SLR 1477 at [167].
[11] *Liu Shu Ming v Koh Chew Chee* [2023] 1 SLR 1477 at [165].

justifiable (as will be explained from para 27 below), the "Extreme Difficulty Threshold" would be overly restrictive. A lower threshold (such as those proposed from para 40 below) would better preserve the availability and value of reliance damages as an alternative to expectation damages, while sufficiently addressing the adverse implications of providing claimants an unfettered right to reliance damages. On the other hand, the Court was rightly reluctant to permit the two-pronged strategy owing to the various difficulties the strategy creates both for the defendant and the Court. As such, the two-pronged strategy should only be permissible under certain restrictions, as laid out from para 63 below. All that being said, however, given the potential difficulties surrounding both claiming reliance damages and pursuing the two-pronged strategy following *Liu Shu Ming* (*AD*), where possible, the preferable strategy for claimants to maximise their recovery may simply be to pursue expectation damages while framing their pleadings with greater particularity. This is addressed at the very end of this note at para 69 below.

7 To these ends, **Part II** will briefly cover the facts of the case, and the differing decisions of the trial judge and appellate judges on the issue of damages at first instance in the General Division of the High Court ("**GD**")[12] and on appeal in the Appellate Division of the High Court ("**AD**"). **Part III** will discuss the following: (**a**) whether reliance damages should be available as of right; (**b**) whether the two-pronged strategy should be permissible; and (**c**) practical tips for claimants to maximise recovery through more detailed and well-substantiated pleadings for expectation damages. **Part IV** will end with some brief concluding remarks.

II. Material facts

8 The "**Appellants**" (who were the defendants at first instance), Mr Liu Shu Ming and Ms Tong Xin, operated a "condotel" business where they provided condominium units for short-term accommodation.[13] In 2016, they tried to expand their business and sought investors. One such investor was the Defendant, Ms Koh Chew Chee ("**Ms Koh**").[14]

[12] *Koh Chew Chee v Liu Shu Ming and another* [2022] SGHC 25.
[13] *Liu Shu Ming v Koh Chew Chee* [2023] 1 SLR 1477 at [2].
[14] *Liu Shu Ming v Koh Chew Chee* [2023] 1 SLR 1477 at [2].

9 Ms Koh entered into two agreements with the Appellants (the "**Contracts**"): (**a**) an agreement to purchase five condominium units (the "**Units**") from the Appellants; and (**b**) an agreement that the Appellants would rent the Units from Ms Koh (the "**Leaseback Agreement**"), where the rent paid was to provide a 6 to 7% annual return on the principal purchase price of the Units.[15] Pursuant to the Contracts, Ms Koh paid S$1,468,895.69 to the Appellants to purchase the Units.[16]

10 Further, Ms Koh claimed that the Appellants agreed orally to protect her principal investment by offering to repurchase the Units at the original purchase price if their market price fell at the end of the leaseback period (the "**Alleged Buyback Term**").[17]

11 By late 2019, however, the Appellants started to fall behind on rent.[18] On 27 December 2019, Ms Koh allegedly terminated the Contracts.[19] Subsequently, Ms Koh filed a lawsuit against the Appellants for damages for breach of the Contracts based on: (**a**) the Appellants' failure to transfer title to the Units; and (**b**) their non-payment of rent.[20]

A. The proceedings in the GD

12 When the matter was heard in the GD,[21] the trial judge held that the Appellants had an obligation to transfer legal title to Ms Koh after she purchased the Units pursuant to the Contracts. The Appellants' breach of this condition hence entitled Ms Koh to terminate the Contracts and sue for damages.[22]

13 After finding that there was breach and termination of the Contracts, the judge considered the issue of damages.[23] Ms Koh had framed her claim for damages as one for expectation damages, seeking to recover her principal investment of around S$1.5 million on the basis that she would have recovered this sum if the Appellants had performed

[15] *Liu Shu Ming v Koh Chew Chee* [2023] 1 SLR 1477 at [4].
[16] *Liu Shu Ming v Koh Chew Chee* [2023] 1 SLR 1477 at [8].
[17] *Liu Shu Ming v Koh Chew Chee* [2023] 1 SLR 1477 at [6].
[18] *Liu Shu Ming v Koh Chew Chee* [2023] 1 SLR 1477 at [9].
[19] *Liu Shu Ming v Koh Chew Chee* [2023] 1 SLR 1477 at [12].
[20] *Liu Shu Ming v Koh Chew Chee* [2023] 1 SLR 1477 at [13].
[21] *Koh Chew Chee v Liu Shu Ming and another* [2022] SGHC 25.
[22] *Koh Chew Chee v Liu Shu Ming and another* [2022] SGHC 25 at [98].
[23] *Koh Chew Chee v Liu Shu Ming and another* [2022] SGHC 25 at [99].

their obligations under the Alleged Buyback Term.[24] However, Ms Koh had not adduced evidence of the market value of the Units at the time she alleged the Appellants should have bought back the Units, which was crucial to quantifying her expectation losses.[25]

14 Nonetheless, the judge held that even if the Appellants could have shown a drop in the market value of the Units, that did not show that Ms Koh would not have been able to recoup her expenses. This was because, in the face of a weak market, Ms Koh could have waited for an upswing, and continue leasing out the Units in the meantime to generate revenue.[26] Hence, the judge held that it was possible to compensate Ms Koh on the reliance measure, and awarded her reliance damages representing the amount she advanced towards the purchase of the Units, less the sums she had already received in leaseback rental payments.[27]

B. Issues on appeal

15 On appeal, however, the AD set aside the GD's award of damages. In contrast to the GD, the AD held that Ms Koh did not validly terminate the Contracts. Therefore, Ms Koh was not entitled to claim damages based on termination, whether as expectation or reliance damages.[28] Instead, as the Contracts had not been terminated, she was entitled to seek specific performance of the Contracts. The AD hence made an order for the Appellants to transfer title of the Units to the Defendant's nominee.[29]

16 Given the AD's decision that Ms Koh had failed to validly terminate the Contracts, the issue of whether reliance damages should have been granted was a purely academic one.[30] Nonetheless, the AD considered whether the GD had been right to award the Defendant damages on a reliance basis, assuming that the Contracts had been validly terminated.[31]

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[24] *Koh Chew Chee v Liu Shu Ming and another* [2022] SGHC 25 at [100].
[25] *Koh Chew Chee v Liu Shu Ming and another* [2022] SGHC 25 at [103].
[26] *Koh Chew Chee v Liu Shu Ming and another* [2022] SGHC 25 at [142].
[27] *Koh Chew Chee v Liu Shu Ming and another* [2022] SGHC 25 at [184].
[28] *Liu Shu Ming v Koh Chew Chee* [2023] 1 SLR 1477 at [113].
[29] *Liu Shu Ming v Koh Chew Chee* [2023] 1 SLR 1477 at [113].
[30] *Liu Shu Ming v Koh Chew Chee* [2023] 1 SLR 1477 at [114].
[31] *Liu Shu Ming v Koh Chew Chee* [2023] 1 SLR 1477 at [114].

17 After reviewing the law and cases from Singapore and other jurisdictions, the AD decided that the GD erred in awarding Ms Koh reliance damages and laid down the following propositions instead:

(a) First, expectation damages are what claimants would ordinarily be entitled to claim for contractual breaches.[32]

(b) Second, it is not open to a claimant to claim reliance damages simply because he or she chooses not to adduce evidence of expectation damages.[33] Neither is there a wide discretion for the court to award reliance damages in every case even when such damages have not been pleaded.[34]

(c) Third, while the impossibility of proving expectation damages is *not* a prerequisite to claiming reliance damages, reliance damages would likely only be available if (**a**) the Extreme Difficulty Threshold is satisfied; or (**b**) the contract was not for profit.[35] Ms Koh's case fell into neither category.[36]

18 However, the AD left open the issue of whether claims for both expectation and reliance damages may be made if both are being pursued as alternatives.[37] Assuming they may, the claimant should give notice of a claim for reliance damages as soon as possible for the defendants to take such steps as they deem fit.[38]

III. Discussion

A. Whether reliance damages should be available as of right generally

19 The GD and AD's vastly differing views on when reliance damages should be available require us to begin with the ostensibly (and

[32] *Liu Shu Ming v Koh Chew Chee* [2023] 1 SLR 1477 at [169].
[33] *Liu Shu Ming v Koh Chew Chee* [2023] 1 SLR 1477 at [124].
[34] *Liu Shu Ming v Koh Chew Chee* [2023] 1 SLR 1477 at [124]. See also Tham Chee Ho & Tan Zhong Xin, "13. Contract Law" (2022) 23 SAL Ann Rev 359 at paras 13.109–13.111.
[35] *Liu Shu Ming v Koh Chew Chee* [2023] 1 SLR 1477 at [217].
[36] *Liu Shu Ming v Koh Chew Chee* [2023] 1 SLR 1477 at [217].
[37] *Liu Shu Ming v Koh Chew Chee* [2023] 1 SLR 1477 at [165].
[38] *Liu Shu Ming v Koh Chew Chee* [2023] 1 SLR 1477 at [165].

perhaps deceptively) simple question: Should there be any restrictions on a claimant's rights to seek reliance damages? After all, the classic (English) authorities on the matter – for example, *CCC Films (London) Ltd v Impact Quadrant Films Ltd*[39] and *Anglia Television v Reed*[40] (and very recently, the High Court of Australia in *Cessnock City Council v 123 259 932 Pty Ltd*)[41] – certainly did not think such restrictions necessary. However, given the intimation in *Liu Shu Ming* (*AD*) that the court would be hesitant to award reliance damages unless the Extreme Difficulty Threshold is satisfied, this question merits deeper exploration.

(1) The case for reliance damages being available as of right – the general sensibility of the rule

20 First, in support of the position that reliance damages should be available as of right, it is worthwhile to examine the justifications behind the concept of reliance damages. It is trite that where the claimant claims for reliance damages, the burden of proof is shifted to the defendant to prove that the claimant would not have recouped his expenditure even if the contract had been performed.[42] This is arguably a sensible rule for several reasons.

21 First, the reversal of the burden of proof is based on the presumption that the claimant ordinarily would not contemplate entering into a loss-making contract.[43] It is submitted that this presumption is generally logical, at least where both parties are sophisticated commercial parties, and the contract is not one that is clearly speculative in nature where "inherent in the entry into such a contract is the contingency that not even the slightest expenditure will be recovered, let alone the securing of any net profit", such as a gambling contract.[44]

[39] [1985] QB 16 at 32 – "a plaintiff may always frame his claim in the alternative way if he chooses".
[40] [1972] 1 QB 60 at 63–64.
[41] [2024] HCA 17 at [2]–[4].
[42] *Bowlay Logging Ltd v Domtar Ltd* (1978) 87 DLR (3d) 325 at [37]; *Commonwealth of Australia v Amann Aviation Pty* (1991) 104 ALR 1 at 14–16; *Yam Seng Pte Ltd v International Trade Corporation Ltd* [2013] 1 All ER (Comm) 1321 at [187]. In Singapore, see O*ut of the Box Pte Ltd v Wanin Industries Pte Ltd* [2012] 3 SLR 428; *Turf Club Auto Emporium Pte Ltd and others v Yeo Boong Hua and others and another appeal* [2018] 2 SLR 655 at [128].
[43] *Commonwealth of Australia v Amann Aviation Pty (*1991) 104 ALR 1 at 44, cited in *Koh Chew Chee v Liu Shu Ming and another* [2022] SGHC 25 at [120].
[44] See, *eg*, *Commonwealth of Australia v Amann Aviation Pty* (1991) 104 ALR 1 at 15. The question of where this presumption should or should not apply is beyond the scope of the

Thus, it is justifiable to place the burden of proof on the defendant to establish circumstances showing otherwise.

22 Second, where a claimant seeks to recover reliance losses, he is making a claim for a more modest sum than when he makes a claim for expectation damages,[45] typically because the defendant's breach has made it "very hard to learn what the value of the performance would have been".[46] Indeed, it is worth highlighting that the inherent nature of expectation damages can oftentimes create significant evidential difficulties for claimants seeking damages. This is because the test for expectation damages is *prospective* rather than retrospective in nature.[47] To prove a claim for expectation damages, the claimant cannot simply produce evidence of events which have already occurred. Rather, the claimant must produce evidence to prove that he would be in a certain *hypothetical* position where he would have been in if there had not been a breach of contract. Further, he must also estimate and prove the monetary amount he should receive for the loss of that hypothetical position.[48]

23 Against this backdrop, reliance damages circumvent some of the evidential difficulties associated with a claim for expectation damages and provide the claimant with a slight tactical advantage at

issues examined in this note. For more discussion on this issue, refer to Darren Low Jun Jie, "The Principles Underlying the Break-Even Presumption in Reliance Loss Awards" *Singapore Academy of Law Journal* (2024) 36 SAcLJ 113 especially at paras 9–10. In any case, it is to be noted that this is clearly a rebuttable presumption that can be disproved by contrary evidence.

[45] This is since a claim for reliance damages is limited to the claimant's actual expenditure pursuant to the contract as opposed to the profits the claimant may have earned if the contract was performed – see para 2 above.

[46] *L Albert & Son v Armstrong Rubber Co* (1949) 178 F (2d) 182 at 188.

[47] Michael G. Bridge, "Expectation Damages and Uncertain Future Losses", in *Good Faith and Fault in Contract Law* (Jack Beatson, and Daniel Friedman eds) (Oxford University Press, 1997).

[48] Justin Osborn, "Expectation damages for breach of contract and the principle of restitutio in integrum" (1993) 7(2) *Auckland University Law Review* 305 at 305. See also the recent decision of the High Court of Australia in *Cessnock City Council v 123 259 932 Pty Ltd* [2024] HCA 17 at [13], where the court stated as follows:

> Difficulty of proof of any benefit or gain which the plaintiff might have expected from performance of a contract might well furnish a practical explanation for why a particular plaintiff might choose to frame a claim for damages wholly or partly as a claim for wasted expenditure in a particular case. The reality that difficulty of proof of such benefit or gain is frequently encountered in practice by plaintiffs in a variety of different factual scenarios is a reason for recognising wasted expenditure as a distinct category of compensable damage… .

trial, by shifting the burden of proof to the defendant. Indeed, without providing such a tactical advantage, reliance damages would arguably never, practically speaking, be worth pursuing for the claimant as compared to expectation damages. This is since the claimant would be forsaking a claim for a greater measure of damages, without deriving any benefit from doing so.

24 Lastly, it might be argued that the shift of the burden of proof is desirable on a normative level, to uphold the principle of sanctity of contract.[49] As was explained in *Commonwealth of Australia v Amann Aviation Pty*, "it would be an invitation to the repudiation of contractual obligations if the law were to deny to an innocent plaintiff the right to recoup the expenditure he justifiably incurred for the purpose of discharging contractual obligations simply on the ground that the contract breached would not have been or could not be shown to have been profitable".[50] Shifting the burden of proof onto the defendant may, owing to the slight tactical advantage it offers a claimant, prevent a defendant from escaping liability in some cases where his breach fortuitously results in the claimant facing substantial difficulties in proving that the contract would have been profitable had the contract not been breached. This might have the effect of discouraging breaches of contractual obligations in some cases.

25 For illustration, take the case of *McRae v Commonwealth Disposals Commission* ("***McRae***"). The facts of *McRae* were as follows. The defendants sold the claimants one oil tanker including lying on the Jormaund Reef which was said to contain oil. The claimants paid the purchase price, and in addition, incurred significant expenses in fitting out a salvage operation and undertaking a search for the tanker. After a thorough search of the area, the claimant was unable to locate the tanker. In fact, it did not exist. It was found that the Commonwealth Disposals Commission was in breach of contract because it made a promise about the subject of the bargain, being the existence and location of the oil tanker, but that that they had likely lied about the existence of the tanker.[51] The court could not assess damages for this breach of contract

[49] The sanctity of contract has also been affirmed as one of the fundamental principles of the law of contract in Singapore – see *Tee Soon Kay v AG* [2007] 3 SLR 133 at [109]. In England see *Associated Japanese Bank (International) Ltd v Crédit du Nord SA* [1989] 1 WLR 255 at 266.
[50] *Commonwealth of Australia v Amann Aviation Pty (*1991) 104 ALR 1 at 10.
[51] (1951) 84 CLR 377 at 377.

under the more traditional head of expectation damages given that the oil tanker was non-existent. Hence, if damages were assessed on the expectation measure, the claimant could potentially have received no or insignificant/nominal damages [52] and the Commission would have escaped liability for its false promises based on fortuitous circumstances.

26 However, the court noted that the impossibility of assessing expectation damages in this case was brought about precisely owing to the defendant's breach.[53] In light of these circumstances, the court was of the view that it was "not for the Commission to complain" that it was not liable to pay damages even though the claimant could not prove its losses in accordance with the normal expectation measure, unless it could prove that the claimant would not have recouped its expenditures in absence of its breach.[54] Accordingly, the claimant was entitled to recover damages consisting of the agreed purchase price together with the expenditure wasted in reliance on the promise that there was an oil tanker at the locality given.[55]

(2) The case for restricting the availability of reliance damages

27 However, this reversal of the burden of proof, while generally sensible (and certainly beneficial for claimants) also brings about various adverse implications for the defendant. These adverse implications arguably make it desirable to restrict the circumstances under which the claimant can rely on reliance damages.

28 First, when the burden of proof is reversed, this diverges from the usual position in litigation that "he who asserts must prove".[56] In the case of damages, this means the claimant bears the responsibility of proving a claim for damages against the defendant on a balance of probabilities.[57] The reversal of the burden thus raises concerns over potential prejudice to the defendant who now bears the burden of

[52] See, *eg*, *Youprint Productions Pte Ltd v Mak Sook Ling* [2023] 3 SLR 1130 at [5]–[7]; *Panatown Ltd v Alfred McAlpine Construction Ltd* [2001] 1 AC 518 – failure to prove losses will result in an award of nominal damages even if there is a breach of contract.
[53] *McRae v Commonwealth Disposals Commission* (1951) 84 CLR 377 at 414.
[54] *McRae v Commonwealth Disposals Commission* (1951) 84 CLR 377 at 414.
[55] *McRae v Commonwealth Disposals Commission* (1951) 84 CLR 377 at 414.
[56] *Liu Shu Ming v Koh Chew Chee* [2023] 1 SLR 1477 at [1]; see also Evidence Act 1893 s 103(1).
[57] *Liu Shu Ming v Koh Chew Chee* [2023] 1 SLR 1477 at [1].

proving what the claimant would typically be responsible to prove.[58] This potentially raises the concern that the promisor's default is essentially turning him into an "insurer of the promisee's venture",[59] which is clearly misaligned with the nature of usual commercial ventures and the typical relationship between commercial parties.[60]

29 Further, if claimants have an unfettered right to reliance damages, this could be excessively exploited by some claimants who simply wish to bypass the inconveniences of adducing evidence to prove a claim for expectation damages,[61] to the detriment of potential defendants. As such, it is still worthwhile to explore the issue of the appropriate level of restrictions on the recovery of reliance damages.

30 Since an unfettered discretion to claim reliance damages raises these difficulties, it is worthwhile to consider what an appropriate restriction on the availability of reliance damages would be. In this regard, it is submitted that the Extreme Difficulty Threshold preferred in *Liu Shu Ming (AD)* is too restrictive. Two alternative lower thresholds are proposed instead.

(3) An appropriate threshold for the availability of reliance damages

(a) The Extreme Difficulty Threshold is unduly restrictive

31 First, the Extreme Difficulty Threshold may be too restrictive for a few reasons. On the facts of *Liu Shu Ming*, it is understandable that the conceptual difficulty of denying the claimant the right to claim reliance damages based on the Extreme Difficulty Threshold was not apparent. *Liu Shu Ming* did not involve a case where the claimant's claim for reliance damages was denied based on the claimant facing genuine and substantial difficulty in proving expectation damages. Rather, Ms

[58] *Liu Shu Ming v Koh Chew Chee* [2023] 1 SLR 1477 at [167].
[59] *L Albert & Son v Armstrong Rubber Co* (1949) 178 F (2d) 182 at 189.
[60] David Winterton, "Reassessing 'Reliance Damages': The High Court Appeal in *Cessnock City Council v 123 259 932 Pty Ltd*" (2024) 46(1) Sydney Law Review (advance) at 6 and 8.
[61] The facts of *Koh Chew Chee v Liu Shu Ming and another* [2022] SGHC 25 itself provide a good example of a claimant who chooses not to adduce evidence to prove a claim for expectation damages whereby it is relatively straightforward to do so, serving to illustrate the potential dangers of providing claimants an unfettered option to pursue reliance damages.

Koh could have easily adduced evidence showing the valuation of the Units to prove her expectation losses (which was the only form of damages which she had expressly pleaded) but had simply chosen not to do so.[62] It was on this basis that the court denied her claim for reliance damages.[63]

32 However, the practical effect of the Extreme Difficulty Threshold may potentially be to restrict the availability of reliance damages so severely as to almost completely eliminate them. This may arguably create undue difficulties for claimants who seek reliance damages owing to genuine and substantial difficulties of proof inherent in the nature of expectation damages.[64] First, as reliance damages are simply a subset of expectation damages,[65] it would arguably be quite rare for a court to find that it was "impossible" or "extremely difficult" for the claimant to prove expectation damages but find that the claimant would be entitled to reliance damages. Where the claimant can satisfy this threshold and prove that he faces extreme difficulty in proving potential profits under a claim for expectation damages, it may very well be possible for the defendant to show that the contract was a "bad bargain" contract whereby the claimant would likely not even have recouped its losses as well.[66] For example, the Extreme Difficulty Threshold may be satisfied where there is a high risk investment contract where the claimant's claim for profits is largely speculative. Hence, the claimant makes a claim for reliance damages instead. In such a case however, the defendant would arguably be able to easily prove that, given the high risks associated with the investment, the contract would likely have been a loss-making contract where the claimant would not even have recouped its expenditure.[67]

33 More importantly, even if the Extreme Difficulty Threshold does not heavily restrict the availability of reliance damages, this

[62] *Liu Shu Ming v Koh Chew Chee* [2023] 1 SLR 1477 at [184].
[63] *Liu Shu Ming v Koh Chew Chee* [2023] 1 SLR 1477 at [124].
[64] See para 22 above.
[65] *C Omak Maritime Ltd v Mamola Challenger Shipping Co* [2011] 2 All ER (Comm) 155 at [35] and [42]; *Turf Club Auto Emporium Pte Ltd and others v Yeo Boong Hua and others and another appeal* [2018] 2 SLR 655 at [127]; *Liu Shu Ming v Koh Chew Chee* [2023] 1 SLR 1477 at [135].
[66] See *Turf Club Auto Emporium Pte Ltd and others v Yeo Boong Hua and others and another appeal* [2018] 2 SLR 655 at [127]–[128] – the claimant will not be able to claim for reliance losses where the defendant can prove that the claimant made a bad bargain where he would not have recouped his losses even if the contract had not been breached.
[67] See note 44 and accompanying text.

threshold would certainly have the effect of depriving reliance damages of most of their practical utility as an alternative measure to expectation damages. This is because requiring the claimant to prove that it will be "extremely difficult or impossible" for him to prove a claim for expectation damages before he can pursue reliance damages may "in many cases saddle the plaintiff with just the sort of difficulties of proof that this alternative measure (*ie*, reliance damages) is designed to avoid".[68] As mentioned above, reliance damages only have value as an alternative measure to expectation damages insofar as they assist the claimant to avoid some of the evidential difficulties in proving a claim for expectation damages by shifting the burden of proof onto the defendant.[69] However, the Extreme Difficulty Threshold subjects the claimant to an obligation to prove that it would be impossible or extremely difficult to prove his claim for expectation damages before he can pursue reliance damages. This obligation would likely prove equally onerous as the obligation to prove one's claim for expectation damages in most cases, outside of exceptional circumstances such as the *McRae* case, which involved the complete destruction/disappearance of the subject matter of the contract.[70] For example, it might be contended that the claimant does not face "extreme" difficulty in proving expectation damages, since the claimant can theoretically work around some of the difficulties inherent in proving expectation damages by, for example, framing his pleadings in a more detailed fashion (as discussed from para 69 below). This might be so even though doing so can, in practice, prove considerably challenging for the claimant.[71]

34 Hence, it is submitted that if it was the AD's intent for reliance damages to only be available in extremely restricted circumstances, it would be necessary for the court to expound more on why this would be desirable. This would have to be shown, for example, by showing that the various justifications behind reliance damages as canvassed above are unpersuasive, or that the general principle that "he who asserts must prove" [72] in civil litigation should override the aforementioned justifications for reliance damages.

[68] See *CCC Films (London) Ltd v Impact Quadrant Films Ltd* [1985] QB 16 at 32: "…I reflect that to hold that there had to be evidence of the impossibility of making profits might in many cases saddle the plaintiff with just the sort of difficulties of proof that this alternative measure is designed to avoid".
[69] *Liu Shu Ming v Koh Chew Chee* [2023] 1 SLR 1477 at [135].
[70] See the facts of *McRae* as discussed at paras 25–26 above.
[71] See para 76 below.
[72] *Liu Shu Ming v Koh Chew Chee* [2023] 1 SLR 1477 at [1].

35 Nonetheless, even if it is accepted that reliance damages are a sensible feature of the law on damages, one may still argue that the Extreme Difficulty Threshold is necessary to address the issue of potentially undue tactical advantage to the claimant[73] and prejudice to the defendant[74] from the reversal of the burden of proof that a claim for reliance damages entails. However, it is submitted that while these are certainly significant issues, they may not be so severe as to justify such a restrictive threshold as proposed by the AD. The reversal of the burden of proof when claiming reliance damages may not necessarily accord the claimant as large of a tactical advantage nor cause the defendant as much prejudice as the AD implicitly suggests through seemingly advocating for the Extreme Difficulty Threshold.[75]

36 This point can be illustrated through explaining the concepts of legal and evidential burdens of proof. It must again be recalled that all a claim for reliance damages does for the claimant is to establish a rebuttable presumption that the claimant would probably have recouped its expenditures in reliance on the contract had the contract been performed. [76] Afterwards, the defendant bears the burden (and opportunity) of rebutting this presumption – *ie*, by showing that the claimant had made a "bad bargain" such that he would not have recouped his expenditure even if the contract had not been breached.[77] While there is indeed no "legal burden of proof" (*ie*, a strict obligation at trial) for the claimant to put forth evidence to respond to the defendant's case where the claimant claims for reliance damages, a strong case can be made that there remains an "evidential burden" on his part to do so.[78] The evidential burden of proof refers to a "tactical onus to contradict, weaken or explain away the evidence that has been led".[79]

[73] Refer to paras 27–29 above.
[74] Refer to paras 27–29 above.
[75] *Liu Shu Ming v Koh Chew Chee* [2023] 1 SLR 1477 at [217].
[76] *Turf Club Auto Emporium Pte Ltd and others v Yeo Boong Hua and others and another appeal* [2018] 2 SLR 655 at [128], cited in *Liu Shu Ming v Koh Chew Chee* [2023] 1 SLR 1477 at [131].
[77] *Turf Club Auto Emporium Pte Ltd and others v Yeo Boong Hua and others and another appeal* [2018] 2 SLR 655 at [127]–[128].
[78] See *Chan Tam Hoi (alias Paul Chan) v Wang Jian and other matters* [2022] SGHC 192 at [40]–[41].
[79] *Britestone Pte Ltd v Smith & Associates Far East Ltd* [2007] 4 SLR(R) 855 at [58] cited in *Chan Tam Hoi (alias Paul Chan) v Wang Jian and other matters* [2022] SGHC 192 at [41].

37 This concept of discharging one's "evidential burden" is especially pertinent when one considers that the standard of proof in civil proceedings is merely on a balance of probabilities. The reversal of the burden of proof only requires the defendant to convince the court that it was *more likely than not* that the claimant made a "bad bargain" and would not have recouped his expenditure even if the contract had been performed. A claimant who claims reliance damages and does not adduce any evidence to challenge the defendant's case subjects himself to a substantial risk the court will accept that the defendant has put forth a case that is persuasive enough and discharged his burden of proof, leaving the claimant with no recovery.[80]

38 Further, it should be borne in mind that a claimant's ability to claim for reliance losses is always subject to the additional control mechanism of remoteness of damage. It is trite that to recover damages for a breach of contract, the claimant must show that his losses were not too remote.[81] In the recent case of *Cessnock City Council v 123 259 932 Pty Ltd*, the High Court of Australia reaffirmed that "[t]he proper application of *Hadley v Baxendale* as a control on remoteness of damage in a claim for wasted expenditure is whether, when the contract was made, it was within the reasonable contemplation of the parties that the relevant expenditure would be incurred and, if the contract were breached in the relevant manner, wasted."[82] Hence, when claiming for reliance damages, the claimant may be called upon to show that its expenditures would reasonably be regarded as necessary preparatory

[80] This can be contrasted with criminal proceedings, where for example, an accused's inability to prove his defence on a balance of probabilities may not, in many cases, mean the Prosecution will be successful in proving the charges against the accused. This is because the Prosecution is held to the higher standard of having to prove its case beyond a reasonable doubt, as opposed to simply on a balance of probabilities, and even if the accused fails to make out his defence on a balance of probabilities, there may still remain a reasonable doubt as to whether the Prosecution's case is established. In criminal proceedings, a reversal of the burden of proof which relieves the prosecution of its burden of proving the elements of the charge beyond a reasonable doubt and places the burden on the accused to disprove the elements of the charge on a balance of probabilities would clearly give the Prosecution a greater tactical advantage in securing a conviction and be more prejudicial to the accused than a reversal of burden of proof in civil proceedings.

[81] *Hadley and another v Baxendale and others* [1843-60] All ER Rep 461 at 465. The rule in *Hadley v Baxendale* has continued to be applied in recent cases: see, *eg*, *The Achilleas* [2009] AC 61; *Attorney General of the Virgin Islands v Global Water Associates Ltd* [2021] AC 23.

[82] [2024] HCA 17 123 at [2], reaffirming *123 259 932 Pty Ltd v Cessnock City Council* (2023) 110 NSWLR 464 at [146].

expenditures to enable the performance of the contract.[83] If not, the claimant may not be able to recover damages, even if the defendant fails to prove that the claimant would not have recouped these expenditures if the contract had been performed.

39 Hence, in many circumstances, a claim for reliance damages may not necessarily be a ticket for the claimant to unduly bypass all the evidential difficulties in proving a claim for expectation damages. The tactical advantage a claim for reliance damages provides the claimant should hence not be overstated.

(b) Two potential alternative thresholds

40 If the Court in *Liu Shu Ming (AD)* was indeed endeavouring to set a threshold for when reliance damages may be available,[84] in light of the above, a lower threshold for claiming reliance damages may be preferable instead. Instead, this note proposes two alternative thresholds for consideration.

41 Under the first potential threshold, the claimant would be permitted to pursue reliance damages when he is able to satisfy the court that it would, minimally, be no more onerous for the defendant to prove that the claimant would not have recouped its expenditure than it would be for the claimant to prove that he would have earned a profit had the contract been performed.

42 Under the second potential threshold, the claimant can pursue reliance damages where he can satisfy the court that it is substantially more likely than not that the claimant would fail to prove a claim for expectation damages.

43 It is submitted that either of these two lower thresholds would further the fundamental objective of effective compensation for contractual breaches underlying the law of contract[85] by allowing reliance damages to be available to the claimant as an alternative to

[83] *123 259 932 Pty Ltd v Cessnock City Council* (2023) 110 NSWLR 464 at [70]; *Cessnock City Council v 123 259 932 Pty Ltd* [2024] HCA 17 at [136], citing *L Albert & Son v Armstrong Rubber Co* (1949) 178 F (2d) 182 at 189.
[84] See Tham Chee Ho & Tan Zhong Xin, "13. Contract Law" (2022) 23 SAL Ann Rev 359 at para 13.110.
[85] *Robinson v Harman* (1848) 1 Exch 850 at 855 (Parke B).

expectation damages in a larger range of circumstances, while sufficiently addressing the potential concerns arising from an unfettered right to claim reliance damages.

44 The first suggested threshold addresses the issue of unwarranted prejudice to the defendant by ensuring that this burden is reversed only where it is "just to place the peril of the answer … of what the value of performance would have been" on the defendant.[86] Indeed, in a usual case, the claimant who brings the complaint that he has suffered loss from the defendant's breach would usually be better situated to produce evidence to prove that it suffered such a loss, and it would be justified for the claimant to bear the burden of proof. However, in cases where this first threshold is met, by virtue of the defendant's breach, the defendant has become, at the very least, equally situated in his capabilities to disprove the claimant's claim as the claimant is in proving his claim for damages.

45 On a practical and economical level, this first threshold aligns with the consideration that the burden of proof should fall on the party that is more equipped to produce evidence to prove/disprove a claim with minimal time and expense. This is one of the primary considerations in determining which party bears the burden of proof in civil litigation.[87] In usual circumstances, the claimant would usually be the one who bears the burden of proof to prove his claim for damages as he would be better equipped to produce evidence to demonstrate the loss he complains of. However, where both parties are equally situated to prove/disprove the claimant's claim for damages, the burden of proof can justifiably fall on the defendant to disprove the claim as well.

46 That being said, this first threshold may admittedly create significant difficulties by requiring the court to weigh the relative capabilities of the claimant and defendant in proving/disproving the claimant's claim. In light of this, the second proposed threshold may be preferable. The second proposed threshold allows the claimant to pursue a claim for reliance damages where he faces "substantial difficulty" in proving a claim for expectation damages. The more flexible nature of

[86] *L Albert & Son v Armstrong Rubber Co* (1949) 178 F (2d) 182 at 188.
[87] See Bruce L. Hay & Kathryn E. Spier, "Burdens of Proof in Civil Litigation: An Economic Perspective" (1997) 26 J. Legal Stud. 413; Richard A. Posner, *An Economic Approach to the Law of Evidence* (1999) University of Chicago Law School, John M. Olin Law & Economics Working Paper No. 66.

this test means the court will not need to engage in the fine weighing exercise under the first proposed threshold.

47 At the same time, the term "substantial difficulty" is wider than that of "extreme difficulty". Hence, this expands the court's discretion to allow a claim for reliance damages outside the extremely restrictive Extreme Difficulty Threshold. At the same time, this second threshold is still considerably restrictive, allowing the court to disallow claims for reliance damages where the court is satisfied the claimant is well-equipped to prove a claim for expectation damages and simply using reliance damages to get around its obligation to prove its losses. For example, in Ms Koh's case, where she could have easily adduced evidence of the valuation of the Units to prove a claim for expectation damages, her claim for reliance damages would still be denied.[88]

(4) Any proposed threshold creates considerable practical difficulties under the current law in Singapore

48 However, while setting a threshold for when reliance damages can be claimed appears conceptually attractive, all the above thresholds (including the Extreme Difficulty Threshold) pose one difficult question – how and when is the court supposed to decide whether the above thresholds are satisfied and whether the claimant can proceed with his claim for reliance damages?[89]

49 On one hand, assuming these thresholds are subject to proof on a balance of probabilities,[90] it might be difficult to determine this question early on or even before trial. Rather, the court is likely to be able to make an accurate assessment of whether any of these thresholds have been crossed after evidence has been led, and both parties have had an opportunity to make submissions at trial.

50 On the other hand, it would also be undesirable if a claimant has chosen to advance a claim for reliance damages (and hence has

[88] This appears to have been the AD's concern with the GD's wide conception of the availability of reliance damages, with the AD expressing strong disapproval of the possibility of a claimant "claim(ing) reliance damages simply because he or she chooses not to adduce evidence of expectation damages" – see *Liu Shu Ming v Koh Chew Chee* [2023] 1 SLR 1477 at [124].

[89] There do not seem to be any authorities which have expressly dealt with this issue.

[90] Which, as mentioned, is the usual standard of proof applicable to most civil claims – see *Tang Yoke Kheng v Lek Benedict* [2005] 3 SLR 263 at [14], note 2 above.

potentially been made to forsake a claim for expectation damages)[91] but is only informed at the close of the trial that his claim for reliance damages is untenable for failing to satisfy the above thresholds. The claimant would then potentially be left with no means of being compensated for any potential losses he has suffered from the defendant's breach.

51 Further, if the court can only determine whether the claimant should be permitted to pursue reliance damages towards the close of trial, one can question what utility this threshold adds, as opposed to simply permitting claims for reliance damages as of right and determining whether reliance damages should be awarded at the end of trial. Such a threshold criterion would contribute little to filtering out arguably unwarranted attempts to claim reliance damages, to prevent the court and the defendant from expending unnecessary time and resources on considering and responding to such claims.

52 At first glance, it would seem that one potential way to address these issues could be for the claimant to make an application for the court to make a pre-trial decision concerning the issue of the availability of reliance damages under O 9 r 19(1) of the Rules of Court 2021 ("**ROC 2021**").[92] A pre-trial decision on the availability of reliance damages would provide the claimant certainty as to whether he can pursue a claim for reliance damages at trial.

53 However, O 9 r 19(1) only provides the court the ability to decide on "any *question of law* or the construction of any document". There is substantial doubt as to whether the question of whether the threshold to claim reliance damages is satisfied would fall under either

[91] See *Liu Shu Ming v Koh Chew Chee* [2023] 1 SLR 1477 at [165], where the Court expresses hesitance as to allowing the claimant to pursue both expectation and reliance damages. Hence, the claimant may be required to elect to pursue only one measure of damages. See also *Koh Chew Chee v Liu Shu Ming and another* [2022] SGHC 25 at [135] where the Court considers whether there may be grounds for creating a rule that claimants are to commit to a measure of damages and expressly plead the measure of damages they intend to pursue. That being said, at paras 57–68 below, it is argued that it should be permissible to plead reliance damages in the alternative to expectation damages in certain specified circumstances. If claimants are permitted to pursue both measures of damages (albeit in restricted circumstances), this may mitigate the difficulties mentioned in this paragraph.

[92] Rules of Court 2021 O 9 r 19(1): "Upon a party's application or on the Court's own accord, the Court may decide any question of law or the construction of any document arising in any action without a trial or hearing on the facts, whether or not such decision will fully determine the action."

of these categories. Pure questions of law are questions the court can resolve without resolving any questions of fact or assessing the strength of evidence presented by the parties.[93] The case law has stated that "occasions on which it will be possible to state that the issue before the court is solely a 'clean' or 'clear' question of law will be very rare indeed".[94] Such questions would typically arise, for example, in cases where the court's determination is confined to the interpretation of statutory provisions or the meaning of certain words.[95] The question of whether the threshold to claim reliance damages has been met will most likely not be a "clean" question of law, for it clearly does not solely involve the interpretation of statutory provisions, contractual provisions or other words. Instead, it will likely be necessary for the court to analyse factual evidence from the claimant, such as financial reports projecting the profits the claimant would have earned had the contract been performed, to ascertain if the threshold has been met. Such issues of fact have to be dealt with at trial, rather than through a summary determination of a "question of law".[96]

54 Thus, unless there are plans to amend the ROC 2021 to include a provision that would allow claimants to make an application for the court to make a pre-trial decision on questions of fact or mixed questions of law and fact,[97] the considerable practical difficulties surrounding the ascertainment of whether any proposed threshold has been met *on a*

[93] See, *eg*, *Smith v R* [2000] 1 WLR 1644 at 1645 and 1653.
[94] *Wong Keng Leong Rayney v Law Society of Singapore* [2006] 4 SLR(R) 934 at [14].
[95] *Chong Chieng Jen v Government of State of Sarawak & Anor* [2019] 3 MLJ 300 at [60]–[62], where the court considered what would constitute a "question of law" under O14A of the Rules of Court 2012 in Malaysia, which bears a substantial resemblance to O 9 r 19(1) of the Rules of Court 2021.
[96] *United Overseas Bank Ltd v Lippo Marina Collection Pte Ltd and others* [2016] 2 SLR 597 at [13]–[18].
[97] While under O 33 r 5 of the previous Rules of Court 2014 (Cap 322, s 80), the court could preliminarily consider questions of fact as well, this was also restricted to questions of fact which would "substantially dispose of the cause" or "render the trial unnecessary" and hence likely would not permit a claimant to apply for a preliminary decision as to the availability of reliance damages.

> **Dismissal of action, etc., after decision of preliminary issue (O. 33, r. 5)**
> 5. If it appears to the Court that the decision of any question or issue arising in a cause or matter and tried separately from the cause or matter substantially disposes of the cause or matter or renders the trial of the cause or matter unnecessary, it may dismiss the cause or matter or make such other order or give such judgment therein as may be just.

balance of probabilities might militate in favour of reliance damages being available as of right.[98]

55 That being said, these practical issues might be addressed by having the proposed thresholds above subject to a lower standard of proof than on a balance of probabilities. For example, the claimant could simply be required to show a *good arguable case* that he will face substantial difficulty in proving a claim for expectation damages". The test of a good arguable case is one that requires "more than a mere *prima facie* case but is lower than that of a balance of probabilities".[99] Thus, the court would not require that much evidence as compared to if the threshold was subject to proof on a balance of probabilities, and can hence determine this question earlier on in the proceedings, mitigating the difficulty mentioned at para 50 above. Admittedly, while this is a less robust safeguard against potential exploitation of the reliance measure by claimants, it is still a considerably valuable one. For example, in *Liu Shu Ming (AD)*, the fact that Ms Koh could have easily adduced reports from an expert on the valuation of the Units to prove her claim for expectation losses[100] would likely mean that she did not even have a good arguable case that she would face "substantial difficulty" in proving a claim for expectation losses.

56 Lastly, it should be mentioned that if the claimant is permitted to pursue the two-pronged strategy, where he can pursue both expectation damages and reliance damages in the alternative (albeit under certain restrictions), this would also remove the practical difficulties with implementing a threshold requirement before reliance damages can be pursued as discussed above. Thus, this note now turns to examine the circumstances in which the two-pronged strategy should arguably be permitted.

B. Should the two-pronged strategy be permissible?

57 Having considered when reliance damages should be available in general, the next issue is whether a claimant should be able to claim for reliance damages in the alternative to expectation damages. It is

[98] Indeed, this is the position that some commentators have taken on the availability of reliance damages – see Alexander Yean & Seongwook Nam, "No sympathy in choice: reliance damages where expectation damages are readily provable" (2023) 139 LQR 546.
[99] *Cosmetic Care Asia Ltd and others v Sri Linarti Sasmito* [2021] SGHC 157 at [30].
[100] *Liu Shu Ming v Koh Chew Chee* [2023] 1 SLR 1477 at [184].

submitted that, considering the complications this two-pronged strategy introduces for the court and potentially the defendant, the preferable position is that it should not be permitted, save for where the conditions mentioned at para 63 below are satisfied.

58 The first challenge associated with the two-pronged strategy that the AD identified was the potential contradiction between a claim for expectation damages and a claim for reliance damages. This contradiction would complicate the fact-finding role of the court should both claims be pursued in the same trial. In this regard, the AD cited the following passage from the judgment of the GD:

> It would be rather confusing – in a single trial – to hold the defendant to proof that the plaintiff "would not even have generated (x) in revenue" so as to recoup the expenses reasonably undertaken in reliance of the contract, whilst simultaneously holding the plaintiff to proof that it "would not only have generated (x) in revenue, it would have made (x + y)", with (y) representing the plaintiff's net profits. Such a situation would make the fact-finding role of the court quite difficult.[101]

59 The second objection raised by the Court against the two-pronged strategy was the prejudice that this would cause to the defendant. In this regard, the Court cited *Filobake Ltd v Rondo Ltd and another* ("***Filobake***") in which the English Court of Appeal said:

> [T]here are formidable objections to running the two claims in the alternative, not the least being that, as we have seen, on the issue of the outturn of the contract the burden under a lost expense claim rests with the defendant; whereas under a lost profits claim the claimant bears the burden of establishing his loss. That conjunction is at least potentially embarrassing for the defendant.[102]

[101] *Liu Shu Ming v Koh Chew Chee* [2023] 1 SLR 1477 at [153], citing *Koh Chew Chee v Liu Shu Ming and another* [2022] SGHC 25 at [134].
[102] *Filobake Ltd v Rondo Ltd and another* [2005] EWCA Civ 563 at [64], cited in *Liu Shu Ming v Koh Chew Chee* [2023] 1 SLR 1477 at [153].

60 The AD's observation that the two-pronged approach complicates the fact-finding process is a compelling one. Considering how reliance losses are simply a subset of expectation losses,[103] one cannot help but note that more trial time, which is already scarce, will be used to consider alternative claims for what is essentially the same loss.[104]

61 However, the concern over prejudice to the defendant might have been overstated. Rather, whether there is prejudice will depend on how the claimant frames his pleadings and when the claimant introduces the alternative claim for reliance damages.

62 Hence, it is important to consider the factual context in which the comments regarding prejudice in *Filobake* were made. In *Filobake*, the claimant applied to amend the particulars of its claim at the appeal stage to insert a claim for reliance damages.[105] To introduce a claim for reliance damages this late in proceedings was clearly unfair to the defendant, who had been preparing his case on the basis that the claimant bore the burden of proof to prove its loss throughout the entire trial thus far.[106]

63 With this context in mind, it is submitted that it should be possible for a claimant to pursue the two-pronged strategy without resulting in substantial prejudice to the defendant. This is provided that two conditions are satisfied:

(a) First, the two-pronged strategy must be advanced from the outset when the claimant first files his Statement of Claim.

(b) Second, the claimant must frame his claim with sufficient detail to allow the defendant to respond meaningfully instead of being completely caught defenceless by the alternative claim for reliance damages.

[103] *Turf Club Auto Emporium Pte Ltd and others v Yeo Boong Hua and others and another appeal* [2018] 2 SLR 655 at [128].
[104] *C Omak Maritime Ltd v Mamola Challenger Shipping Co* [2011] 2 All ER (Comm) 155 at [42].
[105] *Filobake Ltd v Rondo Ltd and another* [2005] EWCA Civ 563 at [58].
[106] *Filobake Ltd v Rondo Ltd and another* [2005] EWCA Civ 563 at [62].

These two requirements are consistent with the basic principles of good pleadings, which serve the basic purposes of ensuring "the opposing party is *given fair notice* of the case to be met … [to] direct his evidence to the relevant issues"[107] and to "*enable the opposing party to know what case is being made in sufficient detail* to enable that party properly to prepare to answer it".[108]

64 The importance of satisfying the first requirement was recently affirmed in the Court of Appeal ("CA") case of *BCBC Singapore Pte Ltd and another v PT Bayan Resources TBK and another* ("*BCBC*").[109] In this case, the appellant had initially advanced a claim for loss of profits (*ie*, expectation loss), and, a claim for wasted expenditure (*ie*, reliance loss) in the alternative in its Statement of Claim.[110] However, the appellants subsequently amended their Statement of Claim and dropped the claim for loss of profits, with the claim becoming one that was solely for wasted expenditure.[111] Following this amendment, the defendant sought to amend their pleadings to include a new defence against the appellant's claim for wasted expenditure.[112] The CA disapproved of the defendant's late amendment,[113] stating that "the defendants could and should have provided fuller pleadings on wasted expenditure at the outset, including the Winding Up Defence. After all, they knew from the appellants' pleadings that the appellants were claiming for lost profits, and in the alternative, wasted expenditure. It was therefore "abundantly clear from the outset that they would have to shoulder the burden of proof in so far as the appellants' claim for wasted expenditure was concerned".[114]

[107] *Element Six Technologies Ltd v Ila Technologies Pte Ltd* [2017] SGHCR 16 at [12(b)], cited in *Singapore Airlines Ltd v CSDS Aircraft Sales & Leasing Inc* [2020] 5 SLR 221 at [9] (emphasis added).
[108] *Robert McAlpine & Sons Ltd* (1994) 72 BLR 26 at 33, cited in *Singapore Airlines Ltd v CSDS Aircraft Sales & Leasing Inc* [2020] 5 SLR 221 at [7] (emphasis added).
[109] [2023] SGCA(I) 8.
[110] *BCBC Singapore Pte Ltd and another v PT Bayan Resources TBK and another* [2023] SGCA(I) 8 at [40].
[111] *BCBC Singapore Pte Ltd and another v PT Bayan Resources TBK and another* [2023] SGCA(I) 8 at [39].
[112] *BCBC Singapore Pte Ltd and another v PT Bayan Resources TBK and another* [2023] SGCA(I) 8 at [37]–[39].
[113] *BCBC Singapore Pte Ltd and another v PT Bayan Resources TBK and another* [2023] SGCA(I) 8 at [37].
[114] *BCBC Singapore Pte Ltd and another v PT Bayan Resources TBK and another* [2023] SGCA(I) 8 at [41].

65 Thus, the CA found no issue with the appellant's use of the two-pronged strategy, since the appellant had advanced this at the outset when it first filed its Statement of Claim. Further, it is notable that the CA in fact cited *Liu Shu Ming (AD)* in support of its conclusions on this matter.[115] This arguably suggests that the CA was not inclined to take up and further the potential implication in *Liu Shu Ming (AD)* that the two-pronged strategy should not be permissible at all.[116] In fact, it found instead that the defendant's late amendment of its pleadings to include a defence in response to the appellant's claim of wasted expenditure was objectionable, for it should have included this defence earlier to give the appellant notice of its case to better inform the appellant's conduct of its case.[117] The CA also made clear that where the two-pronged strategy is utilised by a claimant,[118] the defendant bears the burden of proof to disprove the alternative claim for wasted expenditure (*ie*, reliance damages), which exists alongside the claimant's burden of proving the claim for loss of profits.[119]

66 While the first requirement for utilising the two-pronged strategy is relatively self-explanatory, the second requires more elaboration. One potential way for the claimant to satisfy the second requirement is to claim for 'loss of profits' (*ie*, expectation losses) *on a net basis*, and then make a *separate* claim for 'reliance losses' in terms of the expenses and costs that were necessarily incurred to enable the claimant to earn the net profits.[120]

67 This method of framing one's claims for damages has in fact been seen as rather uncontroversial by both case authorities and academic commentary. In *Smile Inc Dental Surgeons Pte Ltd v OP3 International Pte Ltd,* the court, citing a passage from *The Law of Contract in Singapore*, stated that:

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[115] *BCBC Singapore Pte Ltd and another v PT Bayan Resources TBK and another* [2023] SGCA(I) 8 at [40], citing *Liu Shu Ming v Koh Chew Chee* [2023] 1 SLR 1477 at [131] and [164]–[167].
[116] *Liu Shu Ming v Koh Chew Chee* [2023] 1 SLR 1477 at [165].
[117] *BCBC Singapore Pte Ltd and another v PT Bayan Resources TBK and another* [2023] SGCA(I) 8 at [41].
[118] *BCBC Singapore Pte Ltd and another v PT Bayan Resources TBK and another* [2023] SGCA(I) 8 at [39].
[119] *BCBC Singapore Pte Ltd and another v PT Bayan Resources TBK and another* [2023] SGCA(I) 8 at [40].
[120] *The Law of Contract in Singapore* (Andrew Phang Boon Leong gen ed) (Academy Publishing, 2nd Ed, 2022) at para 21.063.

> These observations [*ie*, that a plaintiff cannot claim wasted expenditure and loss of profits at the same time] are unobjectionable and perfectly in keeping with the desire to avoid double compensation of the claimant…
>
> *However, where the claim as to 'loss of profits' has been made on a net basis, and a separate claim is then made as to the 'reliance losses' in terms of the expenses and costs that had been incurred and which would have had to be incurred to enable the claimant to earn the net profits, there would be no double-counting.* ***Hence, there is nothing to bar a claim for both 'expectation' as well as 'reliance' losses****…* .[121]

It is submitted that if the two-pronged strategy is pleaded in this way, it will not result in undue prejudice to the defendant. This is because the claimant would have necessarily set out in his pleadings: (**a**) the gross profits he claimed he would have made had the contract been performed and supporting facts; as well as (**b**) the expenditure he claims he had incurred in reliance on performance of the contract by the defendant (since net profits is essentially gross profits minus expenditures).[122] This would supply the defendant with the necessary material facts to aid him in knowing the case he has to meet and in directing his evidence to challenge the relevant facts to rebut the presumption that the claimant would have recouped his expenditure.

68 That being said, it is acknowledged that even this suggestion does not fully address the concern of complications to the fact-finding process and more time being spent in assessing damages. Even if the claims for expectation damages and reliance damages are for different losses, a claim for expectation damages based on net profits combined with a claim for reliance damages for expenditures incurred still entails the claimant bearing the burden of proof to show the contract would be

[121] *Smile Inc Dental Surgeons Pte Ltd v OP3 International Pte Ltd* [2020] 3 SLR 1234 at [52] (emphasis added), citing *The Law of Contract in Singapore* (Andrew Phang Boon Leong gen ed) (Academy Publishing, 2012) at para 21.038. See also *The Law of Contract in Singapore* (Andrew Phang Boon Leong gen ed) (Academy Publishing, 2nd Ed, 2022) at para 21.063.

[122] For an illustration of this with a simple hypothetical situation, see *Smile Inc Dental Surgeons Pte Ltd v OP3 International Pte Ltd* [2020] 3 SLR 1234 at [56]–[57].

profitable, while the defendant bears the burden of proof to prove the contradictory proposition that the claimant would not even have recouped its actual expenditure.[123] Hence, future claimants who wish to consider utilising this strategy may wish to take note of the risk regarding whether a future court would accept the use of the two-pronged strategy. In view of the potential difficulties in advancing both a claim for reliance damages and the two-pronged strategy following *Liu Shu Ming (AD)*, the objective of effective compensation may in most cases be more effectively achieved through the claimant making a claim for expectation damages and putting forth more detailed pleadings. This will present less difficulties for both the court and the defendant, and arguably even the claimant. This note now turns to elaborate on this suggestion.

C. An alternative solution to securing effective compensation – well-substantiated and detailed pleadings

69 Considering the potential difficulties a claimant may face when making a claim for reliance damages and the two-pronged strategy following *Liu Shu Ming (AD)*, an alternative means for claimants to maximise their recovery where there is uncertainty in proving profits would be for the claimant to plead expectation damages while framing their pleadings with a higher degree of detail.

70 To understand why this would help a claimant to maximise recovery, one must again recall that in essence, all claims for expectation damages hinge upon how persuasively a claimant is able to construct a counterfactual situation of the sums the claimant would have earned had the contract not been breached.[124] Hence, where a claimant faces some difficulty in proving a claim for expectation damages, this may be due to how the counterfactual situation in which the contract would have been profitable depends on the occurrence of *multiple* hypothetical events.[125] This makes the claimant's claim for damages more difficult to

[123] This once again raises the difficulties mentioned at paras 58–59 above.
[124] See Justin Osborn, "Expectation damages for breach of contract and the principle of restitutio in integrum" (1993) 7(2) *Auckland University Law Review* 305 at 305. For an illustration on how the success in proving a claim for compensatory damages very much depends on the construction of a realistic counterfactual, see generally *Lewis v Australian Capital Territory* (2020) 381 ALR 375.
[125] For an illustration of a complex claim for damages which arguably involved the need to prove a multi-tiered counterfactual for the claimant to receive the full amount claimed,

prove as the claimant must prove that each and every one of the hypothetical events would have occurred.

71 In such situations, the claimant may find it helpful to break down the counterfactual into a chain of hypothetical events, calculate the respective profit/revenue it would have earned upon the occurrence of each hypothetical event, and set forth his respective claims with more specificity in his pleadings. To illustrate this concept, the claimant's pleadings can be framed to show that, if both events A and B would have occurred if the contract had not been breached, the claimant would have recovered $X (representing, *eg*, a net profit position). However, if only event A would likely have occurred, the claimant still would have recovered $Y (representing, *eg*, a break-even position).

72 When pleadings are framed in this way, even if the court disagrees that both events A and B would have occurred on a balance of probabilities, at least the claimant leaves the court with the option of considering whether it would have been more likely than not for event A alone to have occurred. If the court determines that only event A would likely have occurred, the court can still award the claimant a more modest sum of $Y based on the evidence presented by A. This is in line with the "material facts principle", which provides that if the claimant includes all the material facts necessary to support a certain legal result (even if not expressly pleaded), the court will be inclined to allow the legal claim.[126] In this case, the court will award a sum of $Y even though the claim is for $X, since even though the claim for $X has not been proven on a balance of probabilities, the facts sufficiently show that $Y would still have been recovered.

73 Another example of when more particular pleadings would be essential to proving a claimant's case for damages is in cases whereby parties envision a particular contract between themselves to be particularly long-running (potentially even indefinite), but one party later terminates the contract prematurely. Parties may enter into such long-term contracts for a variety of reasons. One or more of the parties may wish to lock in a favourable unit price for a certain good for the

see the cases of *BCBC Singapore Pte Ltd and another v PT Bayan Resources TBK and another* [2023] SGCA(I) 1 at [24] and *BCBC Singapore Pte Ltd and another v PT Bayan Resources TBK and another* [2022] SGHC(I) 2 at [22]–[29].

[126] See *How Weng Fan and others v Sengkang Town Council and other appeals* [2023] SGCA 21 at [19] and [29].

long term whereby the price of a good, if left up to market conditions or other factors, may fluctuate greatly.[127] Alternatively, one party may be seeking to capitalise on the benefits of engaging a single service provider for a long term, since the service provider would be more familiar with its business operations and needs over time.[128] The contract may also be a "relational contract", a contract "involving a longer-term relationship between parties who make a substantial commitment" which is "based on mutual trust and confidence and expectations of loyalty 'which are not legislated for in the express terms of the contract but are implicit in the parties' understanding and necessary to give business efficacy to the arrangements".[129]

74 Building on the idea of the relational contract, take the example of a distribution agreement between two parties, where the claimant is the distributor and the defendant the supplier. Suppose both parties have previously had a long-running and smooth working relationship on other occasions. Hence, the parties reach an agreement that the claimant, the distributor, invests a large sum upfront to set up its distribution network and infrastructure, with an expectation that the contract will run for at least eight years, after which the claimant can break even and earn substantial profits subsequently. However, the distributor is prevented from recouping his expenses and earning a profit, for the supplier wrongfully and prematurely terminates their agreement in breach of

[127] See, *eg*, *Alliance Petroleum Australia Pty Ltd, Re* [1997] ACompT 2 at 19 (on long-term energy supply contracts in the Australian context): " Given the lack of physical connection between the gas supply systems serving each mainland Australian state, given past interventions by state governments to protect local interests when the gas supply arrangements were being formulated, and given the need for substantial borrowed funds for the various gas production and transmission projects, with the lender requiring that repayment be secured against project revenues, the Tribunal finds it unsurprising and perhaps inevitable, that the primary supply and gas haulage contracts in Australia have been, in all cases up to the present on which evidence was submitted, long-term contracts with a term of 20 years or more, incorporating some form of "take-or-pay" or similar provision…".

[128] See, *eg*, the long-term hotel management service contracts in *Holiday Inns Inc v Hotel Enterprises Ltd* [1974-1976] SLR(R) 362 at [17]; *Re Regent International Hotels (UK) Ltd v Pageguide Ltd* (1985) Times, 13 May; *Bouverie No 1 Ltd v De Vere Hotels & Leisure Ltd* [2006] EWHC 2242 (Ch) at [2].

[129] See *Yam Seng Pte Ltd v International Trade Corporation Ltd* [2013] 1 All ER (Comm) 1321 at [142]. See also David Campbell, "Good Faith and the Ubiquity of the 'Relational' Contract" (2014) 77(3) *The Modern Law Review* 475; Melvin A. Eisenberg, 'Relational Contracts', in *Good Faith and Fault in Contract Law* (Jack Beatson & Daniel Friedman eds) (Oxford University Press, 1997).

contract in the third year, due to a deterioration of the parties' relationship or other circumstances.[130]

75 In such a case, the distributor may simply argue that the contract would have run indefinitely. However, this would be a relatively risky argument to run, as the distributor would have to show that there were unlikely to be any circumstances in this entire timeframe that could lead to the contract being justifiably terminated by either party. Hence, the distributor may wish to frame his pleadings in a more detailed fashion instead. For example, the distributor could argue in his pleadings that if the contract did not run indefinitely, it would at the very least have run for 10 years, or eight years, or at the very least five years if not for the supplier's wrongful termination, since the distributor would have fulfilled all contractual duties on its end, and the supplier would have had no reason to terminate the contract. Depending on what counterfactual the supplier is able to prove on a balance of probabilities, the court would, even if it finds that the contract would not have run indefinitely, at the very least be able to compensate the supplier for any expected revenue/profits he would have earned up to a certain earlier date.[131] This would likely enable the supplier to maximise the damages he can recover.

76 All this being said, however, while the above strategy may mitigate some of the difficulties inherent with a claim for expectation damages by increasing the probability of claimants obtaining some degree of compensation, it is not completely free from difficulties. In certain circumstances (such as the *McRae* case, where quantifying expectation damages would involve the valuation of a non-existent tanker with an unspecified amount of oil)[132] proving expectation damages would clearly still remain impossible even with the technique mentioned above. Alternatively, it may also be prohibitively expensive and time-consuming for the claimant to construct a multi-event counterfactual where the contract would have been profitable, or meaningfully estimate the profit these events would have generated.

[130] Relational contracts may include, in some cases, long-term distribution agreements – see *Globe Motors, Inc (a corporation incorporated in Delaware, USA) and others v TRW Lucas Varity Electric Steering Ltd and another* [2016] EWCA Civ 936 at [67]; *Yam Seng Pte Ltd v International Trade Corporation Ltd* [2013] 1 All ER (Comm) 1321 at [142].
[131] This is again in line with the material facts principle in *How Weng Fan and others v Sengkang Town Council and other appeals* [2023] SGCA 21 at [19] and [29].
[132] For the facts of *McRae*, refer to paras 25–26 above.

Thus, despite the difficulties posed by the availability of reliance damages as of right – there may very well remain a case to retain a more permissive approach towards the availability of reliance damages to claimants, as opposed to the highly restrictive approach under the Extreme Difficulty Threshold.

IV. Conclusion

77 In conclusion, *Liu Shu Ming (AD)*, while a relatively uncontroversial decision on its facts, might have gone too far insofar as it may have suggested restricting the availability of reliance damages only to cases where the Extreme Difficulty Threshold is met. In this regard, this commentary has suggested two alternative lower thresholds for when reliance damages should be available, which arguably strikes a greater balance between preserving the availability of reliance damages as an option for claimants while mitigating the complications brought about by an unfettered right to reliance damages.

78 On the other hand, *Liu Shu Ming (AD)* rightly highlights some of the formidable objections against permitting the two-pronged strategy. Indeed, there are several compelling reasons to restrict the permissibility of the two-pronged strategy to exceptional circumstances. Hence, considering the potential difficulties surrounding claims for reliance damages and the two-pronged strategy after *Liu Shu Ming (AD)*, in many cases, a preferable solution for claimants to maximise recovery where there is uncertainty in proving profits may be through putting forth more detailed pleadings for expectation damages.

79 As a final note, the factual context in which the Court in *Liu Shu Ming* (*AD*) made its remarks on the availability of reliance damages should be emphasised. The Court was faced with a claimant, Ms Koh, who had *elected to pursue expectation damages only*, failed to adduce proof of her expectation losses, and then tried to recover damages by relying on the reliance measure instead.[133] The Court's concern about restricting the availability of reliance damages are understandable against this background, and its comments on the availability of reliance damages should arguably be confined to this context.[134]

[133] *Liu Shu Ming v Koh Chew Chee* [2023] 1 SLR 1477 at [184].
[134] *Liu Shu Ming v Koh Chew Chee* [2023] 1 SLR 1477 at [123].

80 Nonetheless, pending any potential clarifications by future courts on the availability of reliance damages, claimants seeking to increase their chances of succeeding in claiming reliance damages can certainly take away one simple lesson from *Liu Shu Ming (AD)*. That is, where one seeks reliance damages, one should expressly plead reliance damages as early as possible, and not leave the matter of whether reliance damages should be available solely to the court's discretion.[135]

[135] *Liu Shu Ming v Koh Chew Chee* [2023] 1 SLR 1477 at [124]: "We are also of the view that it is not open to a plaintiff to claim reliance damages simply because he chooses not to adduce evidence of expectation damages. Such a plaintiff does not have an unfettered option to switch to a claim for reliance damages and *the court does not have a wide discretion to grant such damages in every case even when such damages are not pleaded.*" See also Darren Low Jun Jie, "The Principles Underlying the Break-Even Presumption in Reliance Loss Awards" (2024) 36 SAcLJ 113 at para 51.