PROVING CAUSATION IN A CLAIM FOR LOSS OF CHANCE IN CONTRACT

In 1995, the Court of Appeal dealt with the issue of loss of chance arising from a breach of contract in *Straits Engineering Contracting Pte Ltd v Merteks Pte Ltd* [1996] 1 SLR 227. Almost ten years on, the decision of the Court of Appeal in *Asia Hotel Investments Ltd v Starwood Asia Pacific Management Pte Ltd* [2005] 1 SLR 661 not only provided an opportunity for an update of the law in this area, but also presented a particular factual matrix upon which the court could provide valuable insight on how the thorny issue of causation in a claim for loss of a chance in contract is to be decided. Interestingly, the decision of the Court of Appeal was split, with the Chief Justice delivering a dissenting judgment. This article summarises the decision, analyses the differences of opinion in the Court of Appeal and surveys the decisions and authorities relied upon. There is also a brief discussion on how the views of the Court of Appeal differ with the law on loss of chance in the area of tort law. Finally, it aims to provide a framework for practitioners and courts in future cases involving a claim for loss of a chance in contract.

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I. Introduction

1 The law on loss of chance has always been a thorny issue in both contract law and tort law.[1] Since *Chaplin v Hicks*[2] at the turn of the last

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1 Lord Mackay of Clashfern commented in *Hotson v East Berkshire Area Health Authority* [1987] AC 750 at 789 that this is a "difficult area of the law". The focus of this article shall be on contract law, with a brief discussion of how, if at all, the approach should be different from that taken in tort law.

2 [1911] 2 KB 786. To refresh the memory of readers who have studied this *locus classicus* in the area of loss of a chance in their contract law course, this case involved a lady whose chances at winning a beauty contest were thwarted by the newspaper failing to inform her in time that she had been selected for the next round.

century, the Bench, the Bar and academia alike have found difficulty grasping the fundamental jurisprudential and theoretical basis for such a claim in contract in relation to other topics in contract law. This is not surprising because typically in a claim for loss of a chance, a defendant has breached a contract *vis-à-vis* the plaintiff, resulting in the plaintiff suffering the loss of a chance of a third party conferring a benefit on the plaintiff. Thus, the seeds of complexity are sown in the very factual scenario in which such a claim arises. Quite often, such a case involves a mix of events which actually happened between the immediate parties (*ie*, the plaintiff and the defendant), and postulations of whether a third party might have conferred a benefit on the plaintiff.

2 For example, in *Chaplin v Hicks*, there were two sets of events which had to be evaluated: first, whether the defendant-newspaper's failure to inform the plaintiff about an audition in time resulted in her losing a reasonable opportunity to present herself for selection by a theatre manager, and second, what her chances of being selected by the theatre manager (the third party) were, if she had been duly informed. The former involved an evaluation of past facts which actually happened while the latter necessitated a certain degree of speculation as to what the third party might have done.

3 The English Court of Appeal in *Chaplin v Hicks* drew a distinction between the two, but not before rejecting arguments by counsel that the damages to be awarded would have been too remote.[3] This is one illustration of how easy it is for a factual issue of causation to be camouflaged and passed off as another issue in contract law. Indeed,

3 Counsel for the newspaper before the Court of Appeal in *Chaplin v Hicks* argued that the damages were too remote because it could not be contemplated, at the time of entering into the contract between the newspaper and the plaintiff, that the plaintiff might suffer loss as a result of not being properly informed about the interview or audition. The English Court of Appeal rejected this argument by holding that "when we get a breach of that sort and a claim for loss sustained in consequence of the failure to give the plaintiff an opportunity of taking part in the competition, it is impossible to say that such a result and such damages were not within the contemplation of the parties as the possible direct outcome of the breach of contract": see Vaughan Williams LJ's judgment, *ibid* at 791. Counsel in that case also ran the argument that the damages were of such a nature as to be impossible of assessment because of, *inter alia*, the myriad possible considerations which might have gone into the mind of the theatre manager making the selection. It is plain that there was little merit in this other argument because it has always been the purview of the courts to take into account such contingencies when assessing damages.

the interaction of loss of chance as a concept with other areas of contract law has been the subject of literature both locally and overseas.[4]

4 Unlike the existing literature on this subject, this writer does not seek to be overly ambitious. The focus of this article will be on the interaction of causation and loss of chance in contract. In particular, it will discuss and analyse the standard of proof required of a plaintiff in proving loss of a chance where the issue of causation requires not just a determination of hypothetical actions by a third party, but also the hypothetical actions by the immediate parties, pursuant to the breach.

5 This was precisely the situation which arose in the recent decision of the Court of Appeal in *Asia Hotel Investments Ltd v Starwood Asia Pacific Management Pte Ltd.*[5] In that case, the High Court found that the defendants had breached the contract between the plaintiff and the defendants, but awarded nominal damages of $10 because the trial judge found that the plaintiff could not prove that its claim for loss of a chance was caused by the defendants' breach. The trial judge held that the plaintiff's own inaction and incapability in complying with the requirements of the deal were what caused the loss of a chance.[6] The appeal by the plaintiff was allowed by a majority of the Court of Appeal,[7] with Chief Justice Yong Pung How delivering a dissenting judgment.[8]

6 This article seeks to analyse the difference in opinion and survey the authorities which had been relied on by the Court of Appeal. A brief comparison is then made with the approach adopted by the courts towards proving causation in tort law. Finally, and more importantly, this article aims to provide the lawyers and the courts with a framework to consider future cases involving the issue of causation in a claim for loss of chance in contract.

4 See, for example, Brian Coote, "Chance and the Burden of Proof in Contract and Tort" (1988) 62 ALJ 761 and Lynn Kuok, "Loss of Chance in Contract: *Straits Engineering Contracting Pte Ltd v Merteks Pte Ltd*" (1996) 17 Sing Law Rev 322.

5 [2005] 1 SLR 661 ("*Asia Hotel*").

6 See the judgment of the trial judge at [2003] SGHC 289.

7 The majority judgment was delivered by Chao Hick Tin JA. The other judge forming the majority was Judith Prakash J.

8 As a matter of interest, oral arguments for the appeal were heard in May 2004 and judgment was reserved; the written judgments from both the majority and the learned Chief Justice were only issued sometime in September 2004. To the best of the writer's knowledge, this is the first (and to date, only) civil appeal where Yong Pung How CJ has dissented from his learned colleagues at the Court of Appeal.

II. A summary of the facts in *Asia Hotel* leading up to the appeal

7 An analysis of the decisions emanating from the Court of Appeal requires an understanding and appreciation of the facts in *Asia Hotel*. The plaintiff (and appellant in the appeal), Asia Hotel, was a company whose director was one Mr Gary Murray. The plaintiff wanted to invest in a hotel in Bangkok. This hotel was formerly known as the Grand Pacific Hotel ("Grand Pacific"). At the material time, Grand Pacific was owned by a company known as PS Development Ltd ("PSD"). PSD had two shareholders. The majority shareholder was the Lai Sun group of companies ("Lai Sun") and the minority shareholder was a Thai gentleman by the name of Mr Pongphan Samawakoop. The arrangement between Mr Pongphan and Lai Sun was such that if Lai Sun wanted to sell its shares in PSD, Mr Pongphan would have the first right of refusal. In short, this meant that Lai Sun would be able to sell its shares in PSD to others after Mr Pongphan declined to purchase those shares.

8 It was undisputed that Lai Sun was in some financial trouble and that it was keen to sell its shares in PSD. Mr Murray was an interested buyer. The plaintiff, through Murray, wanted to upgrade the Grand Pacific (a four-star establishment) to a five-star hotel. In order to achieve its goal, the plaintiff had to raise finances of around 1.3bn Thai baht (or US$31m) to purchase Lai Sun's shares, restructure the debts of the Grand Pacific and renovate the hotel to a five-star status.

9 In November 2001, the plaintiff entered into a memorandum of understanding ("MOU") with Lai Sun for the sale of the shares. Under this MOU, Asia Hotel had up to 14 December 2001 to complete its due diligence and enter into a sale and purchase agreement. It was also obliged, under the MOU, to provide a deposit of US$500,000. In turn, Lai Sun undertook not to negotiate with any other party up to the expiry of this MOU.

10 After this MOU, Asia Hotel had to get the finances in place and to engage an international hotel management company. It approached

Starwood Asia Pacific Management Pte Ltd ("Starwood")[9] and on 4 December 2001, it signed a non-circumvention agreement ("NCA") with Starwood. Under this NCA, Asia Hotel and Starwood agreed not to enter into negotiations with any other party for the Grand Pacific deal for a period of one year.

11 Asia Hotel could not finish its tasks under the MOU by 14 December 2001. Instead, it asked for an extension of time from Lai Sun. Lai Sun turned down this request. In its letter to Asia Hotel,[10] Lai Sun stated expressly that it did not wish to tie itself down to any one purchaser and that it would serve its interests best by opening up the offers to others.[11]

12 Thereafter, the Narulas came into the picture. The Narulas were the ones who eventually won the race to secure the Lai Sun shares for the Grand Pacific. It is interesting to note that it was Mr Pongphan who approached the Narulas for the deal. It is even more interesting to realise that Mr Pongphan spoke to the Narulas only after he (Mr Pongphan) had informed Mr Murray that he would have to look for alternative partners. It was Mr Murray who told Mr Pongphan to go ahead.[12] Eventually, the Narulas entered into an MOU with Lai Sun on 5 February 2002 for the sale of the Lai Sun shares to the Narulas. Prior to that date, the Narulas also obtained Mr Pongphan's irrevocable approval for Lai Sun to sell the shares to the Narulas on 18 January 2002. The MOU was eventually extended indefinitely on 19 February 2002 to allow the Narulas to obtain financing for the deal. A sale and purchase agreement was then signed between the Narulas and Lai Sun on 22 March 2002. Two months later,

9 The plaintiff brought an action against both Starwood Asia Pacific Pte Ltd and its parent company, Starwood Hotels & Resorts Worldwide Inc. When the trial commenced, the parties agreed that the plaintiff would not pursue its claim in conspiracy against the parent company in exchange for the parent company agreeing to pay any damages that the Starwood Asia Pacific Pte Ltd might be ordered to pay for the claim in contract. For the sake of convenience, and as the learned Chao JA has done in his judgment, this article will refer to both defendants/respondents as Starwood collectively with the understanding that the NCA was entered into between Starwood Asia Pacific Pte Ltd and Asia Hotel.

10 See extract of letter reproduced by Yong CJ in his dissenting judgment, *supra* n 5, at [7].

11 It appears that counsel for Asia Hotel sought to rely on this letter (where Lai Sun stated, "If and when you feel you have resolved all of your stumbling blocks, please feel free to contact us again.") and other correspondence between Asia Hotel and Lai Sun to establish that Lai Sun never closed its doors on Asia Hotel for the sale of the shares. More will be made on this point later from paras 51 onwards of the main text below.

12 See *supra* n 5, at [8].

the Narulas' loan agreement with the bank was executed and on the same day, the sale and purchase of the shares to the Narulas was completed.

13 What complicated matters was the fact that the Narulas approached Starwood to manage the hotel. The evidence showed that on or about 15 February 2002, Starwood was approached by the Narulas' agent to discuss the possibility of Starwood managing the Grand Pacific as a Westin.[13] The basic terms of a management agreement was drawn up by the Narulas and Starwood on 28 February 2002 and a draft letter of intent sent from Starwood to the Narulas on 14 March 2002. In short, as the Narulas gathered pace in securing the deal with Lai Sun and with the financing arrangements, they negotiated with Starwood in haste. Finally, this led to a management agreement signed between Starwood's nominee and the shareholders of PSD (namely, the Narulas[14] and Pongphan) on 15 May 2002.

14 Apart from these facts upon which there is a similar emphasis in both the Chief Justice's dissent and the majority judgment from Chao Hick Tin JA, there appears to be a difference in emphasis on some of the other facts. For example, the Chief Justice appeared to place much weight on Mr Murray's "lacklustre negotiations" with the various parties offering a "stark contrast" from the conduct of the Narulas. Key amongst the facts highlighted by the Chief Justice was Mr Murray's insistence on a US$2m key money from Starwood in order to secure the deal. On the other hand, Chao JA placed reliance on the correspondence between Lai Sun and Mr Murray, as well as the letters from Mr Murray reminding Starwood that it was in breach of the NCA by negotiating with the Narulas.[15]

15 At the trial, Asia Hotel's claim was for a "breathtaking"[16] sum of some US$54m being the alleged damages for the breach of contract. When the trial commenced, it amended its claim to one for loss of a

13 The Narulas had another hotel managed by Starwood: a Sheraton located along the same street in Bangkok as the Grand Pacific. (Starwood manages different brands of hotels, including both the Hilton and Westin brands, amongst others: see Chao JA's judgment, *supra* n 5, at [91].) There is evidence to suggest that if the Narulas went with Starwood to manage the Grand Pacific, they would be cannibalising their business for the Sheraton as both the Sheraton and the Grand Pacific would be sharing the same worldwide reservation system: see the Chief Justice's judgment, *supra* n 5, at [73].

14 By then, the sale and purchase agreement between Lai Sun and the Narulas had been signed, on 22 March 2002.

15 See Chao JA's judgment, *supra* n 5, at [102] to [105].

16 To borrow the adjective used by the learned Chief Justice at [35] of His Honour's judgment.

chance.[17] In brief, the trial judge found that Starwood had breached the NCA. However, it was held that the breach of the NCA did not cause Asia Hotel to lose a "real and substantial chance" at obtaining those shares.[18] Consequently, the trial judge proceeded to award nominal damages of $10 to Asia Hotel. Being dissatisfied, Asia Hotel brought an appeal to the Court of Appeal.

III. The difference of opinion

16 The difference in treatment of the facts may lead some to surmise that the difference of opinion between the Chief Justice and the other judges boils down to a mere interpretation of the facts. It is submitted that that would be too simplistic a view of the difference in opinion; underlying the difference in opinion is a fundamental divergence of view with regard to the law and the standard of proof required of a plaintiff in proving causation for a claim for loss of a chance in contract. This fundamental difference in the law could have serious repercussions in future claims for loss of a chance in contract.

17 It is submitted that the difference of opinion can be traced, firstly, to the framing of issues by the majority and the minority. Secondly, the treatment of *Chaplin v Hicks*,[19] a *locus classicus* in this area of the law by any account, could have contributed to the difference of opinion.

A. Framing the issues – The genesis of the difference?

18 It is submitted that the differences in opinion between the Chief Justice and the other judges can be traced to the way the issues were framed. In the majority's view, there were two issues presented before the Court of Appeal:

> (a) the substantial question of whether, having found that Starwood was in breach of the contract, the judge was correct to have further found that on the facts, the breach on the part of Starwood did not effectively cause Asia Hotel to lose a real and substantial chance of obtaining the asset; and

17 There is nothing within the judgment of the trial Judge or the judgments of the Court of Appeal to indicate why exactly this happened, except an indication from the learned Chief Justice's judgment that Asia Hotel "reconsidered" its position during the trial: see [35] of the Judgment.

18 *Supra* n 6, at [62].

19 *Supra* n 2.

(b) the procedural question of whether the trial judge was correct in proceeding to determine that Asia Hotel was only entitled to nominal damages, after having found that Starwood had breached the NCA.

19 The "procedural question" was dealt with in a similar fashion by both the majority and the Chief Justice and this point can be summarily dealt with first. Counsel for Asia Hotel argued that the trial judge had erred because the parties agreed to submit only the issue of liability for adjudication but not the issue of quantum of damages. He argued that by awarding only nominal damages, the trial judge had erred because he had digressed into the realm of assessment of damages when the issue and the facts were not put before him.

20 The Court of Appeal was unanimous in holding that the trial judge's award of nominal damages as a matter of procedure was not erroneous. The Court of Appeal came to the view that once a trial judge found that the breach did not cause the loss, he or she was entitled to award nominal damages and such an award of nominal damages did not bring him or her within the realm of assessing the damages. This is a well-established principle as established in the case law and is not controversial.[20]

21 The more interesting question arises from the framing of the "substantial issues" by the majority. The issues raised by Asia Hotel in its written submissions were as follows:[21]

(a) Whether the trial judge was correct in dealing with the issue of quantum, in light of the agreement to deal only with the issue of liability;

(b) Whether the trial judge erred in the application of the principles of loss of chance;

(c) Whether the trial judge erred in finding that the appellant "had no real or measurable chance" of securing the Lai Sun shares even if Starwood Asia had not breached the NCA; and

20 See, for example, *Galoo Ltd v Bright Grahame Murray* [1994] 1 WLR 1360, *Anson's Law of Contract* (Oxford University Press, 28th Ed, 2002) at p 600 and *Chitty on Contracts* (Sweet & Maxwell, 29th Ed, 2004) at para 26-008. These authorities have been cited by the Chief Justice in his dissenting judgment, *supra* n 5, at [16].

21 These four issues have been quoted verbatim by the Chief Justice, *supra* n 5, at [37].

(d) Whether the respondents should have been made liable for the appellant's costs in the court below.

22 As pointed out by the Chief Justice, and as acknowledged by Chao JA, the majority of the Court of Appeal chose to collapse the second and third issues into one. The learned Chief Justice had this to say about the merging of the issues,[22] which merits citation in full:

> My learned colleagues have chosen to merge the second and third issues together. I disagreed with that approach. To my mind, the two issues have to be considered separately to understand the law and then to apply it to the facts. An appreciation of the law of causation in a situation of loss of chance will show that the plaintiff has to cross a high threshold in proving causation. By choosing to merge the second and third issues together, I found that my learned colleagues took the first steps towards becoming overly indulgent to the plaintiff, Asia Hotel. With the exception of the fourth issue which has become moot in light of the majority decision, I will deal with each of the three remaining issues in detail below.

23 It is unfortunate that counsel for Starwood chose to employ phrases such as "the trial judge erred in the application of the principles" and "the trial judge erred in finding" which seems to suggest that in both issues, counsel was attempting to criticise the trial judge's application of the law to the facts. The regrettable choice of words by counsel in framing the issues may have led the majority of the Court of Appeal to collapse the two issues into one.

24 Be that as it may, it is submitted that the Chief Justice, in observing the distinction, took the preliminary step to clarify the law first before applying it to the facts. It is perhaps in taking this step in the analysis that eventually led to the divergence of views. As this article will show in the parts to follow, by clarifying the law first in a more nuanced approach, the Chief Justice was perhaps more acutely aware of the standards and "thresholds" that the law has laid down for a plaintiff when proving loss of a chance in contract.

B. The majority's approach and its treatment of **Chaplin v Hicks**

25 Apart from the framing of issues, it is interesting to see how the Court of Appeal came to rather different views of the case of *Chaplin v*

22 *Supra* n 6, at [38].

Hicks which is the *locus classicus* in the law relating to loss of a chance in contract.[23] Counsel for Asia Hotel sought to rely on *Chaplin v Hicks* for the argument that if the purpose of an agreement was to enable Asia Hotel to have a chance, a breach of that agreement presented the appellant with an unchallengeable case of injury. Here, the NCA was to provide Asia Hotel with a chance to realise its investment plan. Starwood breached that agreement and therefore, Asia Hotel must have lost a chance attributable to the breach; any assessment of prospect of success should be left to the assessment of damages.

26 The majority of the Court of Appeal appeared to be persuaded by this argument. Chao JA, in his judgment, quoted the following passage of Fletcher Moulton LJ's judgment in *Chaplin v Hicks* with approval:[24]

> The very object and scope of the contract were to give the plaintiff the chance of being selected as a prize-winner, and the refusal of that chance is the breach of contract complained of and in respect of which damages are claimed as compensation for the exclusion of the plaintiff from the limited class of competitors. In my judgment nothing more directly flowing from the contract and the intentions of the parties can well be found.

27 Chao JA had this to say after the above quotation:[25]

> It would be noted that the compensation was for the loss of the chance to win. The plaintiff was not required to show, on a balance of probabilities, that the chance would have come to fruition.

28 The last statement from the majority judgment cited immediately above is particularly noteworthy. It is true that the plaintiff in *Chaplin v Hicks* was not required to show that the chance would have come to fruition on a balance of probabilities. The same can be said for any other plaintiff in a claim for loss of a chance. Indeed, if the law was otherwise, a plaintiff would have to accomplish the insurmountable task of not just proving causation on a balance of probabilities, but also having to show that the chance that it lost was more than 50%.

23 Indeed, the Court of Appeal in *Straits Engineering Contracting Pte Ltd v Merteks Pte Ltd* [1996] 1 SLR 227 ("*Straits Engineering*") went so far as to say that *Chaplin v Hicks* is "the authority on award of damages for loss of a chance in both contract and tort. It has been repeatedly cited with approval in subsequent cases": see Thean JA's judgment at 241, [42].

24 *Supra* n 2, at 795.

25 *Supra* n 5, at [133].

29 However, it is submitted that that is not, and should not, be the end of the investigation. One has to look at the factual matrix of *Chaplin v Hicks* to determine why Fletcher Moulton LJ arrived at his judgment quoted above. In a situation like *Chaplin v Hicks*, the only hypothetical action to evaluate is that of the third party: What is the chance of the third party conferring the benefit on the plaintiff if there had not been a breach by the defendant? In such a scenario, it is easy to see why Fletcher Moulton LJ applied the logic that he did. The contract between the plaintiff and the newspaper was to give the plaintiff a chance at being selected. The newspaper breached that contract by informing the plaintiff late. The late information *caused* the plaintiff to miss the appointment; that resulted in the plaintiff losing a chance at being selected. The sequence is straightforward: there was no conduct on the plaintiff's part to speak of or at the very least, the issue of what the plaintiff would have done (*eg* whether she could have travelled to the venue) was never in issue in that case. At the making of the contract, it was not the parties' intention that the plaintiff would be required to do certain tasks to put herself on track for a chance at being selected All she had to do was to turn up and she would be judged on her innate charm and good looks.

30 The situation in *Chaplin v Hicks* is quite different from the facts which arose in *Asia Hotel* and other more recent cases from the English courts. Unlike *Chaplin v Hicks*, the common thread that runs through these other cases (including *Asia Hotel*) is that in order to place itself on track to secure a chance, there *were* certain tasks that the plaintiff was expected to perform. In *Asia Hotel*, as rightly pointed out by the Chief Justice, these included Asia Hotel having to put together the agreements with the financial institutions for a loan, entering the sale and purchase agreement with Lai Sun and Mr Pongphan's waiver of first refusal in its favour.

31 In the light of this key difference in the factual matrices, it is respectfully submitted that it is difficult to see how and why the majority decided to sweep the differences with *Chaplin v Hicks* under the carpet and consider *Asia Hotel* in the same light. In delivering the majority judgment, Chao JA observed:[26]

> We recognise, and this was argued by counsel for Starwood, that in *Chaplin v Hicks* the plaintiff contracted for a chance to win a benefit in a competition. There, the defendant in breach of contract deprived the

26 *Supra* n 5, at [138] and [139].

> plaintiff of the chance. While there is this difference we do not think it is of any consequence. We have explained above why the breach by Starwood caused the appellant to lose a real chance to acquire the Lai Sun stake. It is clear that the appellant had, at all material times, maintained its intention to acquire the stake. Having secured Starwood for a year, it deliberately adopted the strategy of watching how the Narulas would wrap up a deal on their own.
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> Interestingly, while the fact situation in *Normans Bay*[27] is also different from that in *Chaplin v Hicks*, the respondents accepted … that it was akin to that in *Chaplin v Hicks*. *The truth of the matter is that while the circumstances of two cases may be different, it does not thereby follow that the principles established in the earlier case cannot be applicable to the later case.* At the end of the day, in a case like the present, two questions should be asked and answered. First, did the breach on the part of the defendant cause the plaintiff to lose a chance to acquire an asset or a benefit? Second, was the chance lost a real or substantial one; or putting it another way, was it speculative? While, as a rule, the plaintiff always has the burden of proof, the question as to who has to prove a particular fact, and whether in a particular fact situation the evidential burden shifts, are matters dependent wholly on the circumstances. In our opinion, *this case is as much akin to Normans Bay and Allied Maples*[28] *as it is to Chaplin v Hicks although in none of those cases did the party in default deliberately breach its commitment.*
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> [emphasis added]

32 It is submitted that these two paragraphs formed the heart of the majority's judgment and deserve closer examination. Four points may be made in response.

33 Firstly, the real difference between the factual situation in *Chaplin v Hicks* on one hand, and that in *Asia Hotel* on the other, lies not in the fact that the contract was for a chance to secure a benefit in the former but not in the latter. It is submitted that the real difference lies in whether the acts of the plaintiff form part of the assessment when the court considers the issue of causation; if it is, then a set of principles different from that in *Chaplin v Hicks* should apply.

34 Secondly, immediately after stating that the difference was not of any consequence, the majority of the Court of Appeal went on to state

27 *Normans Bay Ltd v Coudert Brothers* [2004] EWCA Civ 215 ("*Normans Bay*").
28 *Allied Maples Group Ltd v Simmons & Simmons* [1995] 1 WLR 1602 ("*Allied Maples*").

that it had earlier explained why, as a question of fact, Starwood's breach had caused the loss. With the greatest respect to the majority of the Court of Appeal, it is submitted that their Honours may have put the cart before the horse. The majority simply deemed the question to be one of fact, without a scrutiny of the threshold required of a plaintiff to prove causation in such a situation.

35 Thirdly, the majority stated that just because *Chaplin v Hicks* was different from *Normans Bay*[29] did not mean that the principles enunciated in the former case are inapplicable in the latter type of cases. The fact that there is a different factual scenario does not mean that all the principles in *Chaplin v Hicks* become automatically inapplicable. Indeed, it is humbly submitted that the overarching principles, that damages for loss of chance are not too remote and that a claim for loss of chance can only succeed if the lost chance was a "real and substantial" one, remain applicable even in situations where the court is tasked to evaluate the actions of the plaintiff as part of the question of causation. What it merely means is that the presence of that other factor, *viz* the hypothetical actions of the plaintiff, necessitates a more nuanced technique of analysis which the decision of *Chaplin v Hicks* itself did not cater for, because that factual scenario simply did not arise in that decision.

36 Fourthly, the majority noted that the case at hand was as much akin to *Normans Bay* and *Allied Maples*[30] on the one hand, and *Chaplin v Hicks* on the other, even though it was noted that in none of these three cases did the party in default act deliberately in breach of its contract with the plaintiff. More will be said about this issue of deliberate breach below.

C. The Chief Justice's approach

37 The approach taken by the majority of the Court of Appeal is in stark contrast with that adopted by the Chief Justice in his Honour's dissenting judgment. While the majority embarked on an evaluation of the facts first, the Chief Justice decided to survey the law first. In this regard, while the Chief Justice did not explicitly distinguish *Chaplin v Hicks*, his Honour appeared to be aware of the difference between the facts of *Asia Hotel* and those found in *Chaplin v Hicks* when his Honour enunciated that Asia Hotel's chances of securing the shares depended on a

29 *Supra* n 27.
30 *Supra* n 28.

combination of four facts.[31] Inherent in this reasoning was the awareness that "any loss of chance [by Asia Hotel] was contingent not just upon [Starwood's] breach, but also on [Asia Hotel's] own actions (or lack thereof) and those of Lai Sun".[32]

38 The Chief Justice then went on to examine, at great length, the decision in *Allied Maples*.[33] In particular, the Chief Justice adopted the framework employed by Stuart-Smith LJ in that decision[34] which merits citation in full here:

> [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. In the former case, the question of causation is one of historical fact. The court has to determine on the balance of probability whether the defendant's act, for example the careless driving, caused the plaintiff's loss consisting of his broken leg. Once established on balance of probability, that fact is taken as true and the plaintiff recovers his damage in full. There is no discount because the judge considers that the balance is only just tipped in favour of the plaintiff; and the plaintiff gets nothing if he fails to establish that it is more likely than not that the accident resulted in the injury. …
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> (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.* … 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. But again, if he does

31 *Supra* n 5, at [43] to [45].
32 *Id* at [45].
33 *Supra* n 28.
34 *Ibid* at 1609–1611 and 1614.

> establish that, there is no discount because the balance is only just tipped in his favour. *In the present case the plaintiffs had to prove that if they had been given the right advice, they would have sought to negotiate with Gillow to obtain protection. The judge held that they would have done so. I accept Mr. Jackson's submission that, since this is a matter of inference, this court will more readily interfere with a trial judge's findings than if it was one of primary fact. But, even so, this finding depends to a considerable extent on the judge's assessment of Mr. Harker and Mr. Moore* [witnesses for the plaintiffs], *both of whom he saw and heard give evidence for a considerable time. Moreover, in my judgment there was ample evidence to support the judge's conclusion. ...*
>
> (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. ...
>
> All that the plaintiffs had to show on causation *on this aspect of the case* is that there was a *substantial* chance that they would have been successful in negotiating total or partial (by means of a capped liability) protection.
>
> [emphasis added]

39 The Chief Justice then went on to endorse this framework with one caveat: that there should not be a distinction between a positive act and an omission for the first and second categories. For this, the Chief Justice relied on *McGregor on Damages*, where the learned author took the position that the requirement of a division between acts and omissions for the first two categories was a "cavil" that one might have with the

"valuable analysis" provided by Stuart-Smith LJ.[35] The Chief Justice then found that the distinction between the first two categories really resided in whether any action was required on the plaintiff's part to put itself on course to realise the chance. Where such action was required, the Chief Justice opined that the plaintiff had to prove on a balance of probabilities that he would have taken that step to put himself on course to realise that chance. The Chief Justice proceeded to examine the results reached in *Sykes v Midland Bank Executor and Trustee Co Ltd*[36] and *Normans Bay*[37] to draw support for his statement of the law. Eventually, the Chief Justice took the view that according to Stuart-Smith LJ's framework, *Asia Hotel* was "as much a case in the second category as it was in the third category".[38]

40 When applying the principles to the facts of the case, the Chief Justice placed emphasis on the fact that there was inaction on the part of Starwood in securing the deal after it lost the first MOU with Lai Sun. More importantly, the Chief Justice highlighted how Mr Murray on behalf of Asia Hotel appeared to have conceded defeat in his correspondence. Unlike the majority, the Chief Justice took the view that the letters from Mr Murray to Lai Sun to enquire about the shares and the letters from Mr Murray to Starwood stating that Starwood had, in Asia Hotel's view, breached the NCA were not material or relevant to the issue of whether Asia Hotel had proved on a balance of probabilities that it was in a position to put itself on track to secure the shares.

IV. Analysing the difference of opinion

41 Underlying the interpretation of facts is a fundamental difference in the view of the law on two issues: (a) which of Stuart-Smith LJ's three categories should this case belong to; and (b) whether an omission is necessary to bring a case within the second category. These will be examined in turn below.

35 Harvey McGregor, *McGregor on Damages* (Sweet & Maxwell, 16th Ed, 1997) at para 381.
36 [1971] 1 QB 113.
37 *Supra* n 27.
38 *Supra* n 5, at [61].

A. *Which of the three categories does Asia Hotel belong to?*

42 While the Court of Appeal unanimously adopted the three-category approach from Stuart-Smith LJ's judgment in *Allied Maples*,[39] the judges differed on which category the case belonged to. The majority took the view that it belonged to the third category. The Chief Justice was of the opinion that the case was as much a case in the second category as it was in the third category.

43 It is submitted that the issue of which of the three categories the case belongs to is but a symptom of a larger issue that has perplexed academics and the courts over the years.[40] When a court is asked to evaluate evidence, it performs one of two roles. Firstly, and more commonly, it has to evaluate events which have happened in the past. Usually, such events can be evaluated with certainty and there is evidence either way to prove or disprove an allegation. Secondly, in cases involving loss of chance and causation, the court is often tasked to assess hypothetical scenarios: what the plaintiff would have done at some point in the future if the defendant had not breached the contract or caused an accident, and what the plaintiff will be entitled to in the future. The issue which looms large involves a determination of whether different standards should apply to the two roles. Some commentators have opined that there can be no difference in standard[41] while others have maintained that there can be a difference.[42] It is submitted that the better view must be that a distinction can and should be drawn although it should be one drawn not based on whether an event has happened in the past or will happen in the future, but even in the case of an event which has happened in the past, whether it can be evaluated or ascertained with certainty. Where the event can be assessed with certainty, then a balance of probabilities standard should be adopted. If an event in the past cannot be evaluated with certainty or if the event is to occur in the future, then the loss of chance (*ie*, "real and substantial chance") standard may be adopted. This is supported by the three categories propounded by Stuart-Smith LJ in *Allied Maples*. Where the issue of causation is dependent on action by the plaintiff in the past, which can be ascertained with certainty,

39 *Supra* n 28, at 1609–1611.
40 See the discussion of "asymmetric time" in David Hamer, "'Chance Would be a Fine Thing': Proof of Causation and Quantum in an Unpredictable World" (1999) 23 Melb U Law Rev 557; see also Helen Reece, "Losses of Chances in the Law" (1996) 59 MLR 188.
41 Reece, *ibid*.
42 See Kuok, *supra* n 4, at 339.

he has to prove it on a balance of probabilities. But where the loss of a chance is contingent upon the actions of third parties subsequent to the breach (which cannot be determined with certainty), the loss of chance standard may be applied.

44 Returning to the three categories in *Applied Maples*, at first glance, it may be tempting to agree with the majority of the Court of Appeal in placing *Asia Hotel* as a case in the third category only. This is particularly so when one examines Stuart-Smith LJ's judgment on the third category more closely:[43]

> 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, as Mr. Jackson submits, 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 chance being a question of quantification of damages?
>
> Although there is not a great deal of authority, and none in the Court of Appeal, relating to solicitors failing to give advice which is directly in point, I have no doubt that Mr. Jackson's submission is wrong and the second alternative is correct. …
>
> Mr. Jackson submitted that the plaintiffs can only succeed if in fact that chance of success can be rated at over 50 per cent. … [T]here is no reason in principle why it should be so. …
>
> [I]n my judgment, *the plaintiff must prove as a matter of causation that he has a real or substantial chance as opposed to a speculative one.*
>
> [emphasis added]

45 The fact that Stuart-Smith LJ had stated "hypothetical action of a third party, either in addition to action by the plaintiff … or independently of it" appears to suggest that so long as there is hypothetical action on the part of the plaintiff to examine, it would suffice to bring a case within the third category. This analysis might appear to be attractive because it makes the analysis simpler and more straightforward; in determining whether the plaintiff has proved causation, there will still be the ultimate formula that "the plaintiff must prove as a matter of causation that he has a real or substantial chance as

43 *Supra* n 28, at 1611 and 1614.

opposed to a speculative one". With this formula, one may argue that it is possible for the courts to ensure that the plaintiff proves his case based on the standard of proof required of him.

46 However, it is humbly submitted that categorising the case as a case of the third category *simpliciter* when there is conduct on the part of the plaintiff to be evaluated creates a pitfall for the trial judge. Because the "formula" becomes one of "real or substantial chance", it is tempting for the trial judge to unnecessarily lower the bar required of the plaintiff without even realising that he has done so. It is submitted that this was what precisely happened in *Asia Hotel* as a result of the majority's analysis. By placing the case as a case of the third category *simpliciter*, the majority had forgotten that the plaintiff was still required to prove its case on a balance of probabilities. However, that does not mean that the plaintiff must prove that he has more than a 50% chance. Indeed, Stuart-Smith LJ was quite right in rejecting this line of arguments put forth by counsel for the defendant (Mr Jackson) in *Allied Maples*.

47 Be that as it may, it is submitted that the Chief Justice's analysis of placing the case in both categories two and three is apt and more appropriate. It must be remembered that in *Asia Hotel*, the evaluation of what Asia Hotel would have done to put itself on track to secure the Lai Sun shares, if Starwood did not commence negotiations with the Narulas, was a necessary and vital part of proving the plaintiff's case. Just as the evaluation of the hypothetical actions of the defendant (for the first category) is an evaluation of historical facts, the evaluation of what Asia Hotel would have done prior to the breach by Starwood consisted of an evaluation of historical facts. Given that the former is evaluated on a balance of probabilities, there is no reason to adopt a more lenient view for the latter and it should therefore be evaluated on the same "balance of probabilities" test.

48 It is submitted that a requirement of "balance of probabilities" to evaluate the hypothetical conduct of the plaintiff is not unduly harsh. In *Mallett v McMonagle*,[44] Lord Diplock, in drawing a distinction between the court's role in deciding what had happened in the past on the one hand, and in deciding what would happen in the future and what would have happened on the other hand, held:[45]

44 [1970] AC 166.
45 *Ibid* at 176.

> The role of the court in making an assessment of damages which depends on its view as to what will be and what would have been is to be contrasted with its ordinary function in civil actions of determining what was. In determining what did happen in the past a court decides on the balance of probabilities. Anything that is more probable than not it treats as certain. But in assessing damages which depend on its view as to what will happen in the future or would have happened in the future if something had not happened in the past, the court must make an estimate as to what are the chances that a particular thing will or would have happened and reflect those chances, whether they are more or less than even, in the amount of damages to be awarded.

49 As with any other civil claim, the evaluation of what the plaintiff's state of affairs would have been if the defendant had not breached its duty or contract falls within the realm of historical facts. For this, the plaintiff has to adduce evidence to prove on a balance of probabilities. For example, in a claim for damages incurred in tort as a result of a motor vehicle injury, it is typical for a plaintiff to argue that but for the accident, he could have continued work as a painter earning a particular sum a month. The plaintiff would have documents sufficiently contemporaneous to the time of the accident to show that he was earning that particular sum of money, in order to support such a claim.[46] Similarly, a plaintiff who has to prove his state of affairs prior to the breach in a claim for loss of a chance in contract should be required to do the same. The evaluation of what the plaintiff *would* have done if there had not been a breach can be evaluated based on an *ex post facto* evaluation of what the plaintiff *did* in fact do or what he *did not* do. Such was the approach taken by the Chief Justice and it is submitted that that is the more nuanced and principled approach of the two approaches.

50 One might be cynical and be tempted to ask if there is any value in placing a case into the proper category. One might ask if such an exercise is merely academic. It is submitted that the exercise of placing a case in the proper and right category or categories is not a futile one. Its importance lies in the utility of the framework serving as a reminder to the judge about the threshold required by the plaintiff to prove the elements of his case.

46 A similarity may also be drawn with the case of *Hotson v East Berkshire Area Health Authority*, *supra* n 1, ("*Hotson*"). There will be a more detailed comparison of the approach in *Hotson* and *Asia Hotel* in Part V of the main text below.

B. Is omission a prerequisite for a case to fall within the second category?

51 Another issue of controversy between the majority and dissenting opinions lies in whether an omission is a prerequisite for a case to fall within the second category in Stuart-Smith LJ's framework. The majority of the Court of Appeal took the view that if the defendant breached the contract deliberately, then that took it out of the realm of the second category and placed it purely into the third category. The majority drew strength from the fact that in cases such as *Normans Bay* and *Allied Maples* the facts only showed that the defendant had negligently breached the contract; in none of those surveyed cases was there a deliberate breach by the defendant. The Chief Justice, adopting the passage from *McGregor on Damages*,[47] took the contrary view – that "the essence of the second category is not liability based upon omission but the need to ascertain how the plaintiff will react".[48]

52 It is submitted that an omission should not be a prerequisite to bring a case within the second category. Admittedly, it is difficult to explain away Stuart-Smith LJ's choice of words "omission" when describing the second category. Be that as it may, the distinction between omission and deliberate acts has been criticised in various aspects of the law and the distinction drawn in this instance is no different. Further support for this may be found in the Canadian decision of *Laferrière v Lawson*[49] where Gonthier J came to the conclusion that he saw "no basis for treating acts and omissions differently". On the facts of that case, Gonthier J found that the traditional causal analysis could similarly apply even if the facts did not involve an omission.

53 In short, placing emphasis on whether an act was negligent or deliberate in this context serves no purpose, other than to detract from the true cause behind the analysis, which is to examine the plaintiff's state of affairs and what his hypothetical conduct would be prior to the breach. If that conduct does not cross the threshold of a "balance of probabilities" then causation as a question of fact is not established.

47 *Supra* n 35.
48 *Supra* n 5, at [48].
49 [1991] 1 SCR 541; (1991) 78 DLR (4th) 609.

C. *Is a higher threshold necessary?*

54 The corollary of the above analysis is that a higher threshold is to be demanded of a plaintiff if his hypothetical conduct is put into issue. One might ask whether such a higher threshold is necessary. One may even be tempted to argue that this higher threshold puts a plaintiff in an unenviable position – not only does he have to surmount the task of evaluating a chance which is difficult to put a figure to, he will also have to prove his hypothetical conduct on a higher standard of a "balance of probabilities".

55 It is submitted that such fears are unfounded. As Hamer summed it up so well, "what the plaintiff would have done is considered to have been 'his choice, not the choice of fate'".[50] In *Sellars v Adelaide Petroleum NL,*[51] the High Court of Australia held:

> When the issue of causation turns on what the plaintiff would have done, there is no particular reason for departing from proof on the balance of probabilities notwithstanding that the question is hypothetical.

This is no different from the approach taken in *Norman Bays* and *Allied Maples*: Quite simply, the plaintiff must show that he would have acted in such a way that had the defendant not breached the contract, he would have placed himself in a position to put himself on track to obtaining the chance.

56 It must also be remembered that by exacting a standard of balance of probabilities for the hypothetical conduct of the plaintiff, the law is putting the plaintiff in a position no different from plaintiffs in other civil claims. What is feared, if the majority's view is adopted in future cases, is that the courts may set the threshold too low, thereby putting the plaintiff in a claim for loss of chance in an unduly advantageous position, simply because his claim had been formulated as one for a loss of chance. Therefore, in short, one should not ask whether a higher threshold is necessary, but rather, whether there is consistency in approach with other cases when setting where the threshold should be.

50 Hamer, *supra* n 40, at 605.
51 (1994) 179 CLR 332 at 353.

V. A brief comparison with the approach in tort cases

57 A discussion on causation in a case involving loss of a chance in contract will benefit from a brief comparative study on the approach in tort cases, and in particular, medical negligence cases. To that end, this section hopes to draw parallels with the developments in tort law and seeks to persuade the reader that the decision of the Chief Justice is more in tandem with the development of the law, even in torts.

58 In *Hotson v East Berkshire Area Health Authority*,[52] the House of Lords was invited to decide whether a plaintiff could claim for a lost chance of a better medical result which might have been achieved with the proper prognosis. There, the plaintiff, then aged 13, had fallen from a tree. He was brought to the hospital where his dislocated hip was not diagnosed. As the pain persisted, the plaintiff was brought to the hospital again five days later, whereupon the doctors then realised that he had a dislocated hip. By that time, the plaintiff was already suffering from a permanent deformity in his hip, resulting in loss of movement in the hip and a wasting of a left leg which resulted in a limp.

59 The hospital admitted that it had failed to detect the dislocated hip earlier on the first visit. However, they dispute that their misdiagnosis had caused or contributed to the plaintiff's injuries. There was conflicting evidence as to whether the plaintiff was suffering from avascular necrosis – a condition which causes a lack of blood circulation to the material tissues – when he first went to the hospital. If he had been suffering from avascular necrosis as a result of the fall and before he went to the hospital on the first occasion, then it could not be said that the hospital's misdiagnosis caused his injuries. The hospital's expert took the view that it was a 100% certainty that avascular necrosis had set in immediately after the fall and prior to the first visit to the hospital. The plaintiff's expert was more tentative, taking the view that there was a 40 to 60% chance that the avascular necrosis would have set in before the first visit. The trial judge, Simon Brown J, took the middle ground and found that there was a 75% chance that avascular necrosis had set in before the first visit. Conversely, he found that by the misdiagnosis, the plaintiff had lost a 25% chance of full recovery. As a result, he awarded the plaintiff 25% of the damages. The Court of Appeal dismissed the appeal by the hospital in its entirety. Interestingly, the Court of Appeal was persuaded by counsel's

52 *Supra* n 1.

arguments that a parallel could be drawn between the case of *Chaplin v Hicks*[53] and a lost chance of full medical recovery.

60 On further appeal to the House of Lords, the appeal was allowed. The House of Lords chose not to opine on the issue of whether there could be a claim for a lost chance of a medical result due to medical negligence.[54] Instead, their Lordships preferred to allow the appeal on the narrow ground that the plaintiff had not proved causation against the defendants. Their Lordships unanimously held that the trial judge had erred on this issue. Lord Bridge of Harwich summed it up best in the following paragraph of the judgment:[55]

> In some cases, perhaps particularly medical negligence cases, causation may be so shrouded in mystery that the court can only measure statistical chances. But that was not the case here. On the evidence there was a clear conflict as to what had caused the avascular necrosis. The authority's evidence was that the sole cause was the original traumatic injury to the hip. The plaintiff's evidence, at its highest, was that the delay in treatment was a material contributory cause. *This was a conflict, like any other about some relevant past event, which the judge could not avoid resolving on a balance of probabilities. Unless the plaintiff proved on a balance of probabilities that the delayed treatment was at least a material contributory cause of the avascular necrosis he failed on the issue of causation and no question of quantification could arise.* … [T]he [trial] judge's findings of fact … are unmistakably to the effect that on a balance of probabilities the injury caused by the plaintiff's fall left insufficient blood vessels intact to keep the epiphysis alive. This amounts to a finding of fact that the fall was the sole cause of the avascular necrosis. [emphasis added]

61 Thus, even in the realm of medical negligence cases, it can be seen that the law exacts the requirement that the plaintiff show that the injury was caused by the negligent conduct of the defendant doctors. If

53 *Supra* n 2.

54 For example, Lord Bridge of Harwich opined, *supra* n 1, at 782–783 that:

> There is a superficially attractive analogy between the principle applied in such cases as *Chaplin v. Hicks* … and the principle of awarding damages for the lost chance of avoiding personal injury or, in medical negligence cases, for the lost chance of a better medical result which might have been achieved by prompt diagnosis and correct treatment. *I think there are formidable difficulties in the way of accepting the analogy*. But I do not see this appeal as a suitable occasion for reaching a settled conclusion as to whether the analogy can ever be applied. [emphasis added]

Unfortunately, Lord Bridge did not state what the "formidable difficulties" were.

55 *Id* at 782.

the injury had been proved, on a balance of probabilities, to have been caused prior to the misdiagnosis, the fact that the misdiagnosis *could* have lowered the chances of a full recovery was insufficient to cross the bar for causation. In short, if the trial judge found that *on a balance of probabilities,* the plaintiff had been suffering the injury prior to the misdiagnosis, then causation would not be established.

62 *Hotson* was applied in a more recent Court of Appeal decision in *Gregg v Scott.*[56] There, the plaintiff found a lump in his left arm in 1994. The defendant general practitioner diagnosed it as lipoma, which is a benign condition involving accumulation of fatty tissue. A year later, after the plaintiff had moved to another district, he consulted another general practitioner who referred him to a consultant. This time, the consultant suspected that the plaintiff was suffering from lymphoma and his doubts were confirmed after a biopsy was performed.

63 The judge at first instance found that defendant's failure to refer the plaintiff to a specialist in 1994 delayed his treatment by about nine months. The trial judge also found that the delay in treatment had reduced the plaintiff's chances of survival by 25%. Relying on *Hotson*, the trial judge dismissed the plaintiff's claim on the ground that the plaintiff had not proved on a balance of probabilities that the delay in treatment had a material outcome on the disease. On the evidence, for a person suffering from the same type of lymphoma as the plaintiff, the prospects of a cure were less than 50%, so it was more probable than not that the plaintiff would have been in the same position even if the treatment had commenced earlier. The appeal was dismissed, uneventfully, by the Court of Appeal.

64 The interesting lesson that can be gleaned from these two cases is that even in the realm of medical negligence, the law has been consistent in requiring that the plaintiff show on a balance of probabilities that the state of the plaintiff prior to the misdiagnosis was such that the misdiagnosis would have had a material impact on the plaintiff's chances of recovery. Similarly, drawing a parallel with the facts of *Asia Hotel,* there should be no reason why the law should not exact the same requirement of the plaintiff: he has to show on a balance of probabilities that he would have placed himself on course for the benefit prior to the defendant's breach of contract. In both *Asia Hotel* and the medical negligence cases,

56 [2003] Lloyd's Rep Med 105; (2003) 71 BMLR 16.

this is merely an exercise in examining past facts which has to be evaluated on a balance of probabilities.

65 To make the parallel with *Asia Hotel* even more stark, one could turn to the Australian case of *Duyvelshaff v Cathcart & Ritchie Ltd*[57] which was a case involving the negligence of an employer *vis-à-vis* his employee at the worksite. The plaintiff there was a plumber and the defendant was his employer. The plaintiff had fallen from a plank on which he was sitting while joining a pipe to another and injured himself as a result of the fall. The plaintiff argued that the defendant should have provided a safety belt to use with the ladder provided by the defendant. In a decision reminiscent of the second category in *Allied Maples* which requires that the action of the plaintiff be proved on a balance of probabilities, Walsh J held that the fact that the defendant should have provided a safety belt was not the end of the inquiry. The plaintiff still had to prove that "it is probable that he [the plaintiff] would have used the belt if it had been furnished". Similarly, one can see that to require the plaintiff in *Asia Hotel* to prove his hypothetical conduct (namely, to place himself on track for the benefit of the chance to purchase the Lai Sun shares, prior to the defendant's breach) is no different from that required of the plaintiff-plumber in *Duyvelshaff*.

66 From a survey of these tort cases, it is submitted that the decision of the Chief Justice, in requiring the plaintiff to prove his hypothetical action on a balance of probabilities, is one which is more consistent with the approach in the cases in tort law. Even though there is an underlying desire to assist plaintiffs in tortious claims and medical negligence cases,[58] the law has still required a higher threshold of plaintiffs in those categories of cases. *A fortiori*, there is little reason to depart from this approach in a case involving contracts where the parties are trading at arms' length.

57 (1973) 47 ALJR 410 at 414.
58 As can be seen from the use of flexible concepts as such duty of care to delineate boundaries.

VI. Lessons learnt: A proposed framework for future cases

67 Having surveyed and analysed the differences in opinion, it leaves this writer to propose a framework for future cases.[59] Regardless of the controversy and difference of views, certain matters remain trite. Evaluation of chance falls within the realm of assessment of the quantum of damage; evaluation of the issue of causation falls within the realm of liability. In assessing causation, one is entitled to look to the overarching formula that the plaintiff "must prove as a matter of causation that he has a real or substantial chance as opposed to a speculative one".[60]

68 From that overarching principle, the analysis can take one of two paths. First, if the analysis does not necessitate an examination of the hypothetical actions of the plaintiff (*eg* in *Chaplin v Hicks*, where the breach of the contract directly caused the loss because the aim of the contract was to confer an opportunity on the plaintiff to secure that chance), one can simply evaluate, as a question of fact, whether causation had been established.

69 On the other hand, if the plaintiff is required to do certain acts in order to secure that chance, then regardless of the defendant's breach, the plaintiff would have to show that its hypothetical conduct would have put it on track to secure the benefit of that chance. In situations where the plaintiff had received negligent advice, such as in *Allied Maples* and *Normans Bay*, the plaintiff will have to show that it would have re-negotiated with the third party to have the particular error corrected in order to obviate the loss or to obtain a particular benefit. In situations where the plaintiff is required to put together other pieces in the puzzle in order to secure a chance, as was the case in *Asia Hotel*, the plaintiff ought to be required to show that its conduct with regard to the other pieces would have put it on track to secure the chance.

70 Where the plaintiff has to accomplish a number of tasks in order to put itself on track to obtain that chance, this writer hastens to add that the plaintiff need not be required to prove that each and every task would

59 There is a structured and detailed framework put forward by Kuok in her article, *supra* n 4, at 353 *ff*. Many of the points raised there in still remain useful guidelines today and they offer valuable guidance to the practitioner. The aim of this section, however, is more modest: it merely seeks to provide a framework on the narrow issue of proving causation (especially in cases involving hypothetical acts of the plaintiff) in a claim for loss of chance in contract. To that end, this section may be used to compliment the framework by Kuok in her article as a compendium of sorts.

60 *Allied Maples*, *supra* n 28, at 1614 *per* Stuart-Smith LJ.

have resulted in success on a balance of probabilities. Translated into the context of *Asia Hotel*, it means that the plaintiff need not be required to show that it would have obtained the financial arrangements from the banks *and* that Mr Pongphan would have waived the right of first refusal in its favour, both on a balance of probabilities. What is required is an overall evaluation of the facts. It is submitted that if Mr Murray had been more forthcoming in one of the other requirements, *eg* in his negotiations with the banks *per se*, that might have made it easier for a trial judge to come to the conclusion that Asia Hotel had proved causation on a balance of probabilities because it had shown that its hypothetical conduct would have put it on track to secure the benefit.

71 Another way to analyse the situation is to examine whether the contract is the "be-all-and-end-all" for the plaintiff to secure the chance. If the contract is the *sole* ingredient required by the plaintiff to put itself on track to secure the chance, *eg* as in *Chaplin v Hicks*, then one need not adopt the three-category approach from Stuart-Smith LJ; one can simply look to the facts and embark on a purely factual determination. However, if the contract is but one of many ingredients needed to secure the chance, then one should turn to Stuart-Smith LJ's framework and determine which category or categories the case should rightly belong to. Only then can one be reminded of the proper test to be applied to establish the standard of proof required at each stage of the evaluation.

VII. Conclusion

72 It is perhaps unfortunate that the majority of the Court of Appeal neglected the distinction between *Chaplin v Hicks* and other cases which require a more nuanced approach. This may have resulted in the majority taking an unduly favourable stance towards the plaintiff for the issue of causation. Through a short survey of the approach in medical negligence and tort cases, it is submitted that perhaps the decision of the Chief Justice is more consistent with the approach taken in other categories of cases. In this regard, this writer humbly submits that the Chief Justice's more nuanced and careful analysis of the law should have been adopted. Whether a similar case will come along for the Court of Appeal to reverse its own decision, only time will tell. In the meantime, it is this author's fervent hope that other jurisdictions will be able to draw lessons from this case which has divided the Singapore Court of Appeal.

73 As a postscript of sorts, it is pertinent to note that the upshot of the Court of Appeal's decision is that the case will be remitted to a judge or the Registrar of the Supreme Court for the damages to be assessed.[61] Not since the case of *Straits Engineering*[62] has our Supreme Court been asked to assess the damages for the loss of a chance in contract. It will be interesting to see what arguments are presented at the assessment hearing and what decision awaits the parties. This long-running saga involving a businessman and his crusade against one of the largest hotel operators in the world has just closed a chapter, but is about to open a fresh one.

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61 At press time, it is this author's understanding that the assessment hearing will be fixed for sometime in the second half of this year.

62 *Supra* n 23.