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THE PRINCIPLES UNDERLYING THE BREAK EVEN PRESUMPTION IN RELIANCE LOSS AWARDS

The Circumstances which Justify the Reversal of the Burden of Proof

This article sets out the fundamental legal principles upon which reliance loss awards are made in loss of bargain contexts. It is generally accepted that the basis for awarding a claimant his or her reliance loss is the assumption that were the contract performed, the claimant would have at least fully recovered the costs and expenditure incurred, and the burden to disprove or rebut this shifts to the defendant. This article examines a number of important decisions of the English, Australian and Singapore courts (who have disagreed on the principles that typically arise in these cases) and attempts to clarify and refine these principles underpinning this assumption. It ultimately argues, with reference to the cases and principle, that claimants should be allowed to frame their claims as reliance loss claims but that this should not necessarily mean that a court should make the assumption mentioned above, or that the burden automatically shifts to the defendant if he or she is in fact confronted with a reliance loss claim.

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I. Three goals

1 Until the recent decision of Appellate Division of the Singapore High Court in *Liu Shu Ming v Koh Chew Chee*[2] ("*Liu Shu Ming*"), it has been generally accepted that a claimant seeking damages for breach of contract can frame his or her claim for expectation loss, reliance loss[3] or,

1 The author is grateful to the anonymous reviewer for their comments. All views and remaining errors are the author's own.
2 [2023] 1 SLR 1477.
3 *CCC Films (London) Ltd v Impact Quadrant Films Ltd* [1985] QB 16 at 39–40.

where the components of the claim do not overlap, both.[4] The Appellate Division in *Liu Shu Ming* had seemingly departed from this position and held, *obiter*, that a claimant does not have an unfettered option to claim reliance damages and that such a relief would be usually available if it is impossible, or at least extremely difficult, for a claimant to prove his expectation damages in the usual way or if his contract was not for profit.

2 This short article has three modest goals. First, it sets out a summary of the fundamental legal principles upon which reliance loss awards are made in loss of bargain contexts.

3 Second, it evaluates the Appellate Division's decision in *Liu Shu Ming*, which includes an examination of the Appellate Division's rejection of the "*CCC Films* Proposition" (defined at para 19(a) below) in coming to the view that a claimant does not have the unfettered option to claim reliance damages as described above. In doing so, this article draws attention to two cases which were not cited to the Appellate Division which, in this author's view, might have resulted in the *Liu Shu Ming* coram taking a different view had they been cited. These decisions (of the English High Court and the Singapore International Commercial Court) concern factual situations where claimants had framed their claim as reliance loss in circumstances where their expectation loss was provable and where doing so caused no difficulty with the disposition of the case.[5] Ultimately, the central argument in Part III is that the entitlement of a claimant to frame his or her case should be sharply distinguished from the principles underpinning why and when reliance loss awards are made.

4 Third, this article critiques a number of Australian cases concerning reliance loss awards. It is profitable to study these cases because, like the Appellate Division in *Liu Shu Ming*, the Australian courts have started to take an increasingly divergent path in circumstances where they share and draw, as the Singapore courts do, from the same principles of damages underlying reliance loss awards. This article argues that claimants should be able to claim or frame their case for reliance loss without any shift of the burden of proof (if there is no reason in principle to do so).

4 *Smile Inc Dental Surgeons Pte Ltd v OP3 International Pte Ltd* [2020] 3 SLR 1234 at [54].

5 *Parker v SJ Berwin & Co* [2008] EWHC 3017 (QB); *BCBC Singapore Pte Ltd v PT Bayan Resources TBK* [2023] 4 SLR 1.

II. The law on reliance damages

5 Consider the following accepted propositions of law for contractual damages:

(a) Damages for breach of contract are ordinarily assessed in terms of the claimant's *expectation loss*, which refers to the value of the benefit that the claimant would have obtained but for the breach of contract, or, to put it another way, the gains the claimant expected as a result of the full performance of the contract.[6]

(b) On occasion, damages for breach of contract may be quantified in terms of the claimant's *reliance loss* – that is, the costs and expenses the claimant incurred in reliance on the defendant's contracted-for performance, but which were wasted because of the breach of contract.[7]

6 The reason why damages for breach of contract are assessed in terms of the claimant's expectation loss is so well-rehearsed as to be almost self-evident. They are made to compensate the claimant for the value of the benefit the claimant would have received under the contract had it been properly performed.[8]

7 The circumstances in which orders for reliance loss are made are less apparent. One therefore needs to understand what they are premised on:

(a) The basis for awarding reliance loss is the assumption that were the contract performed, the claimant would have at least fully recovered the costs and expenditure incurred[9] ("Break Even Presumption"). It is helpful to think of reliance loss awards in this way in contexts where the contracts are aimed at financial gain.[10]

(b) In these cases, the costs and expenditure incurred are therefore a "proxy" for the expectation measure.[11] These are not

6 *Alvin Nicholas Nathan v Raffles Assets (Singapore) Pte Ltd* [2016] 2 SLR 1056 at [24].
7 *Alvin Nicholas Nathan v Raffles Assets (Singapore) Pte Ltd* [2016] 2 SLR 1056 at [24].
8 Neil Andrews, Andrew Tettenborn & Graham Virgo, *Contractual Duties: Performance, Breach, Termination and Remedies* (Sweet & Maxwell, 4th Ed, 2023) at para 21-040; *Turf Club Emporium Pte Ltd v Yeo Boong Hua* [2018] 2 SLR 655 at [1].
9 *Alvin Nicholas Nathan v Raffles Assets (Singapore) Pte Ltd* [2016] 2 SLR 1056 at [24].
10 Andrew Burrows, *A Restatement of the English Law of Contract* (Oxford University Press, 1st Ed, 2016) at para 20(7), Example 4.
11 Adam Kramer, *The Law of Contract Damages* (Bloomsbury, 3rd Ed, 2022) at para 18-68.

separate from the measure of expectation loss.[12] Any suggestion of a separation is a "myth".[13] Both measures are compensatory and based on the claimant's loss.[14] Both are premised on the fundamental proposition that the purpose of the law of contract is to satisfy the expectations of the party entitled to performance.[15]

8 These principles require further elaboration. For instance, when and why does the Break Even Presumption apply?

9 The cases and authorities show the following:

(a) The Break Even Presumption was first developed in cases of profit-making ventures where it was impossible to prove the profits that would have been made but for the breach because the particular venture was speculative and/or had no history.[16]

(b) The Break Even Presumption applies as a matter of "fairness".[17] The court makes the presumption because "the claimant's predicament was caused by the defendant's breach".[18] As held by the Learned Hand CJ: "It is often very hard to learn what the value of the performance would have been; and it is a common expedient, and a just one, in such situations to put the peril of the answer upon that party who by his wrong has made the issue relevant to the rights of the other …".[19]

(c) The effect of the Break Even Presumption is that the defendant (the alleged contract breaker and wrongdoer) bears

12 Adam Kramer, *The Law of Contract Damages* (Bloomsbury, 3rd Ed, 2022) at para 18-68.

13 Adam Kramer, *The Law of Contract Damages* (Bloomsbury, 3rd Ed, 2022) at para 18-67, citing Andrew Burrows, *A Restatement of the English Law of Contract* (Oxford University Press, 1st Ed, 2016) at p 123.

14 *Turf Club Emporium Pte Ltd v Yeo Boong Hua* [2018] 2 SLR 655 at [127].

15 *Turf Club Emporium Pte Ltd v Yeo Boong Hua* [2018] 2 SLR 655 at [127].

16 Adam Kramer, *The Law of Contract Damages* (Bloomsbury, 3rd Ed, 2022) at para 18-62. Concerning contracts that are not for the purpose of financial gain or not "for profit", it is difficult to understand the presumption as one of recoupment. In these cases, one can instead presume that the expenditure incurred is the best approximation of expectation recovery: see David McLauchlan, "Reliance Damages for Breach of Contract" [2007] NZLR 417; and Andrew Burrows, *Remedies for Torts, Breach of Contract, and Equitable Wrongs* (Oxford University Press, 4th Ed, 2019).

17 *Yam Seng Pte Limited v International Trade Corporation Limited* [2013] EWHC 111 (QB) at [190], *per* Leggatt J; see also *Commonwealth v Amann Aviation Pty Ltd* [1991] HCA 54 at [45] ("just and fair"), *per* Mason CJ and Dawson J.

18 Adam Kramer, *The Law of Contract Damages* (Bloomsbury, 3rd Ed, 2022) at para 18-62.

19 *L Albert & Son v Armstrong Rubber Co* (1949) 178 F (2d) 182, *per* Learned Hand CJ.

the evidential burden of proof to show that the likely profits would not at least equal the claimant's expenditure.[20]

(d) The Break Even Presumption is a rebuttable one. A defendant can proceed to show that the claimant had made a bad bargain, or that the contract was a loss-making one, or that the defendant would not have recouped the entirety of its expenditure.[21] This would defeat the claimant's claim either entirely or *pro tanto*. If a defendant fails, the claimant succeeds in the claim for wasted expenditure.

(e) Finally, whether the Break Even Presumption applies and whether it is rebutted are separate inquiries.[22]

10 It is critical to appreciate that the Break Even Presumption is based on the commercial sense of the claimant entering into the contract.[23] This is why, as Mason CJ and Dawson J put it in the High Court of Australia decision of *Commonwealth v Amann Aviation Pty Ltd* ("*Amann Aviation*"), it is not appropriate to apply the Break Even Presumption to aleatory (*eg*, gambling or insurance) contracts.[24]

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20 *Turf Club Emporium Pte Ltd v Yeo Boong Hua* [2018] 2 SLR 655 at [128]; *Omak Maritime Ltd v Mamola Challenger Shipping Co* [2010] EWHC 2026 (Comm) at [47], *per* Teare J.

21 For cases where the presumption was wholly rebutted, see *Bowlay Logging v Domtar* (1978) 87 DLR (3d) 325 (British Columbia SC). The defendant in this case successfully showed that the losses the plaintiff would have incurred on full performance exceeded the expenditures actually made in part performance (at 335). For a case which accepted that the presumption can be rebutted *pro tanto*, see *Galtrade Ltd v BP Oil International Ltd* [2021] EWHC 1796 (Comm) at [126]: "The principle also operates as a cap, in that there is a sliding scale under which a claimant may be able to recover more or less of its wasted expenditure depending on how far it would have missed that break even point", *per* Mr Adrian Beltrami QC sitting as a Judge of the High Court.

22 See *123 259 932 Pty Ltd v Cessnock City Council* [2023] NSWCA 21 at [85].

23 *Chitty on Contracts* (Professor Hugh Beale gen ed) (Sweet & Maxwell, 34th Ed, 2022) at paras 29-030 and 29-033. This is often explained using the language of remoteness (*ie*, the costs incurred were or were not within the reasonable contemplation of the parties). The distinction is that while remoteness as a doctrine serves to *limit* liability, the application of this in the context of the Break Even Presumption can in some cases serve to enlarge liability: see *eg*, *Commonwealth v Amann Aviation Pty Ltd*, where the chance of renewing a loss-making contract was held to be within the contemplation of the parties at the time of contracting and so was a valuable benefit that the court could have regard to in deciding that the Break Even Presumption had not been rebutted. See also *Supershield Limited v Siemens Building Technologies FE Limited* [2010] EWCA Civ 7 at [43], *per* Toulson LJ: "[L]ogically, [the principle in *Hadley v Baxendale*] may have an inclusionary effect. If, on the proper analysis of the contract against its commercial background, the loss was within the scope of the duty, it cannot be regarded as too remote, even if it would not have occurred in ordinary circumstances."

24 *Commonwealth v Amann Aviation Pty Ltd* [1991] HCA 54 at [42].

11 As the skeletal summary above makes clear, the Break Even Presumption lies at the heart of reliance loss awards. It is therefore an incomplete answer to claims for the recovery of wasted expenditure to say that such expenditure would still have been incurred regardless of the breach.[25]

12 Understanding the above, especially on the conceptual underpinnings of the Break Even Presumption, is important. As the rest of this article will seek to demonstrate, it illuminates the incidents that arise in claims for reliance losses. It would at least prevent the courts from taking a wrong turn, a turn which some learned commentators have argued the Appellate Division had in *Liu Shu Ming* taken.[26]

III. The Break Even Presumption should not have applied in *Liu Shu Ming v Koh Chew Chee*

13 The claimant in *Liu Shu Ming* had paid for five condominium units in the Philippines. The *agreement* for the sale and purchase of these condominium units obliged the defendants to transfer unencumbered title to the units to the claimant, which the defendants failed to do.[27] Jarringly, the defendants had taken out multiple loans secured by mortgages over the condominium units.[28] At the same time, the claimant entered into an agreement with the defendants to lease the units to the defendant for three years, renewable every three years.[29] The defendants failed to keep up with the rental payments.

14 It is important to contextualise the Appellate Division's decision in *Liu Shu Ming* and how the claim came to be one for reliance loss. The path taken by the claimant was not a clean or straightforward one, tightly pleaded and litigated. Rather, it arose in the following circumstances:

> (a) The claimant sought to recover the price she paid for the five units on the sole basis that a "buyback term" existed between the parties. The buyback term was such that the defendants agreed to repurchase the five units at the end of the leaseback period for a sum no less than the price that was paid.[30]

25 See Adam Kramer, *The Law of Contract Damages* (Bloomsbury, 3rd Ed, 2022) at para 18-81 *ff*.
26 Albeit *obiter*: see Alexander Yean & Seongwook Nam, "No Sympathy in Choice: Reliance Damages where Expectation Damages are Readily Provable" (2023) 139 LQR 546.
27 *Koh Chew Chee v Liu Shu Ming* [2022] SGHC 25 at [103].
28 *Koh Chew Chee v Liu Shu Ming* [2022] SGHC 25 at [4].
29 *Koh Chew Chee v Liu Shu Ming* [2022] SGHC 25 at [4(b)].
30 *Koh Chew Chee v Liu Shu Ming* [2022] SGHC 25 at [3].

(b) The General Division of the High Court found that no such term existed.[31] The normal measure of damages for the defendant's breach is the market value of the property at the time for completion (or some other suitable date), less the contract price if it has not already been paid. The claimant did not lead any evidence of the market value of the units, not even as a contingency. Because of this gap in the case, the claimant's claim for damages (on the expectation loss basis, which the claimant continued to maintain in its written closing submissions[32]) failed.[33]

(c) The court nevertheless proceeded to award damages on the reliance measure. It relied on the UK Supreme Court's decision of *One Step (Support) Ltd v Morris-Garner*[34] ("*One Step*") to say that it was able, at the post-trial stage, to re-characterise the claim for damages on the expectation measure to one on the reliance measure and shift the burden of proving that the expenditure would not have been recouped onto the defendants, while also holding that the defendants were highly unlikely to have been able to discharge this burden.[35]

15 Preliminarily, therefore, the question at the outset of the appeal in *Liu Shu Ming* was not whether a claimant was entitled to frame his or her claim as reliance damages where expectation damages are readily provable. The question of framing had already fallen by the wayside because *Liu Shu Ming* was an appeal where the claimant, having chosen to conduct the trial on the basis of a claim for expectation damages (indeed, the claimant in its written submissions continued to press ahead with an expectation loss claim),[36] received the benefit of having her claim re-characterised *by the lower court* as one for reliance damages. Whether the appeal could succeed simply depended on the question whether the lower court was entitled to do so and, for the reasons provided by the Appellate Division at [143]–[167] of *Liu Shu Ming*, it held that the lower court was not. This was supported by reasons at various levels including: (a) it would prejudice the defendants to allow the re-characterisation of the claimant's claim in this way; and (b) *One Step* did not in fact entitle

31 *Koh Chew Chee v Liu Shu Ming* [2022] SGHC 25 at [88].
32 *Koh Chew Chee v Liu Shu Ming* [2022] SGHC 25 at [129].
33 *Koh Chew Chee v Liu Shu Ming* [2022] SGHC 25 at [100]–[108].
34 [2019] AC 649.
35 *Koh Chew Chee v Liu Shu Ming* [2022] SGHC 25 at [128]–[148]. The UK Supreme Court held that: "The court will have to select the method of measuring the loss which is the most apt in the circumstances to secure that the claimant is compensated for the loss which it has sustained."
36 *Liu Shu Ming v Koh Chew Chee* [2023] 1 SLR 1477 at [120]–[123].

a court to award reliance damages in the manner that it did. The appeal succeeded on this ground alone.

16 For present purposes, this author's view is that the Appellate Division's decision in this respect was correct. The "unfettered option" referred to by Hutchinson J in *CCC Films (London) Ltd v Impact Quadrant Films Ltd*[37] ("*CCC Films*") was not a principle entitling a party to switch to a claim for reliance damages post-trial in circumstances where it failed to prove at trial a case pleaded and pursued on the expectation basis.

17 There is a difference between a claimant incorrectly formulating the measure of damages (which a court is entitled to correct provided the defendant is not unfairly prejudiced)[38] and a claimant not being able to prove on the basis of a correctly formulated measure of damage. The latter case is one where courts often refuse awards on alternative bases even if there is evidence to support it.[39] The claimant in *Liu Shu Ming* fell into the latter category and not the former: the claimant omitted to adduce the evidence supporting a claim for expectation damages.[40] Further, the question of prejudice to the defendants as a result of the lack of notice of a reliance loss claim weighed heavily in the Appellate Division's decision to allow the appeal.[41]

18 The Appellate Division, after having dealt with this point, then moved on to the issue which this article is primarily concerned with, *ie*, whether a claimant is entitled to claim reliance damages at his or her unfettered option or whether such a claim may only be made if it was impossible to prove expectation damages.[42]

19 In this regard, the Appellate Division's views are as follows:

> (a) First, the Appellate Division did not agree with the validity of the principle enunciated in *CCC Films*, where Hutchinson J held that the claimant has an "unfettered choice: it is not only in those cases where he establishes by evidence that he cannot prove loss of profit or that such loss of profits as he can prove is small that he is permitted to frame his claim as one for wasted expenditure … a [claimant] may always frame his

37 [1985] QB 16.
38 Adam Kramer, *The Law of Contract Damages* (Bloomsbury, 3rd Ed, 2022) at para 18-32.
39 Adam Kramer, *The Law of Contract Damages* (Bloomsbury, 3rd Ed, 2022) at para 18-30.
40 *Liu Shu Ming v Koh Chew Chee* [2023] 1 SLR 1477 at [123].
41 *Liu Shu Ming v Koh Chew Chee* [2023] 1 SLR 1477 at [164].
42 *Liu Shu Ming v Koh Chew Chee* [2023] 1 SLR 1477 at [119].

> claim in the alternative way if he chooses". This is the *CCC Films* Proposition referred to at para 4 above. The Appellate Division held that a claimant does not have an unfettered option to claim reliance damages.[43]
>
> (b) Second, on the question of the Break Even Presumption and the reversal of the onus of proof, the Appellate Division observed that, on the authority of *L Albert & Son*, "it must be hard to learn (*ie*, to establish) the value of the performance, before shifting the burden [to prove that the expenditure would not have been recouped] to a defendant". That said, the Appellate Division held that impossibility of proving expectation damages is not strictly speaking a requirement to claim reliance damages, though such a relief is usually available if it is impossible, or at least extremely difficult, for a plaintiff to prove his expectation damages in the usual way or if his contract was not for profit.[44]

20 Whether (a) a party has a choice to frame his case as one for expectation loss or, alternatively, reliance loss, and whether (b) the Break Even Presumption ought to apply are distinct issues in principle. As mentioned above, whether the Break Even Presumption ought to apply is a question of fairness. It is an instrument deployed so as not to defeat an otherwise good claim for breach of contract. On the other hand, how a party chooses to frame its case on damages concerns issues such as the material facts it wishes to prove at the trial and whether the other side is taken by surprise. It would put the cart before the horse to disallow a party to plead his or her case as one for reliance loss instead of expectation loss because it is not fair; it would only be unfair if, by the art of pleading, one would be able to automatically pray in aid of the Break Even Presumption.

21 There are many cases which illustrate this distinction in practice.

22 One of the earliest examples is *CCC Films* itself. Hutchinson J, having opined that plaintiffs have an "unfettered choice" to frame a claim for damages as one for wasted expenditure if they so choose, went on to make a critical observation in relation to the question of burden. He held that:[45]

> Even without the assistance of such authorities, I should have held on principle that the onus was on the defendant. *It seems to me that at least in those cases where the plaintiff's decision to base his claim on abortive expenditure was dictated by*

43 *Liu Shu Ming v Koh Chew Chee* [2023] 1 SLR 1477 at [217].
44 *Liu Shu Ming v Koh Chew Chee* [2023] 1 SLR 1477 at [217].
45 *CCC Films (London) Ltd v Impact Quadrant Films Ltd* [1985] QB 16 at 39–40.

> *the practical impossibility of proving loss of profit rather than by unfettered choice, any other rule would largely, if not entirely, defeat the object of allowing this alternative method of formulating the claim.* This is because, notwithstanding the distinction to which I have drawn attention between proving a loss of net profit and proving in general terms the probability of sufficient returns to cover expenditure, in the majority of contested cases impossibility of proof of the first would probably involve like impossibility in the case of the second. It appears to me to be eminently fair that in such cases where the plaintiff has by the defendant's breach been prevented from exploiting the chattel or the right contracted for and, therefore, putting to the test the question of whether he would have recouped his expenditure, the general rule as to the onus of proof of damage should be modified in this manner. [emphasis added]

23 Hutchinson J's opinion in this regard shows that where a claimant chooses to bring a claim for wasted expenditure in circumstances where loss of profit was readily provable, there may in fact be no reversal of the ordinary burden of proof.

24 This was where the lower court in *Liu Shu Ming* fell into error. It wrongly concluded that the burden of proof automatically shifts to the defendant to disprove recoupment where reliance damages are claimed.[46]

25 That the decision of *CCC Films* does not in fact stand as authority for the proposition that the burden automatically shifts to the defendant to disprove recoupment upon being faced with a claim for reliance loss can be seen from the opinion of Hamblen J in *Parker v SJ Berwin & Co*[47] ("*Parker*"). This case was not cited in either the lower court or the Appellate Division but it is instructive.

26 In *Parker*, Hamblen J cited the passage in *CCC Films* above and held that an "important consideration" in determining whether the onus of proof lay on the defendant as opposed to the claimant was whether proof of loss of profit is a "practical impossibility rather than a matter of choice".[48] Hamblen J observed that "the underlying reason for putting the onus of proof on the defendant is one of fairness" and that, on the facts of the present case, since the claimant itself accepts that it was open to claim damages on a "loss of chance" basis (*ie*, expectation loss), and since the claimant's own case ventured to prove what was "very likely" to have

46 *Koh Chew Chee v Liu Shu Ming* [2022] SGHC 25 at [119]. Respectfully, the same error was made by the learned authors in "No Sympathy in Choice: Reliance Damages where Expectation Damages are Readily Provable" (2023) 139 LQR 546, where it was suggested at 551 that "a claimant may prefer to rely on the rebuttable presumption that the contractual venture will break even, even if their expectation losses are readily provable".

47 [2008] EWHC 3017 (QB).

48 *Parker v SJ Berwin & Co* [2008] EWHC 3017 (QB) at [73].

happened, there was no particular unfairness in not shifting the onus of proof onto the defendants on the recoupment point.[49] Another reason why the onus should not shift, as Hamblen J went on to further observe, was that there was in fact practical difficulty and unfairness if the burden was placed on the defendants.[50]

27 In light of these reasons, Hamblen J held that the Break Even Presumption would not apply and that the claimants must proceed to prove their case on the normal expectation basis applicable to loss of chance claims.[51]

28 The Appellate Division in *Liu Shu Ming* did not make the same error that the lower court did. The Appellate Division recognised that the burden shifted because the Break Even Presumption was raised.[52]

29 If this is correct, then when would the burden shift? The Appellate Division observed that, on the authority of *L Albert & Son*, that "it must be hard to learn (*ie*, to establish) the value of the performance, before shifting the burden of proof [to disprove recoupment] to a defendant".[53] This would be "one basis to claim reliance damages".[54]

30 Imposing a strict requirement that reliance damages are claimable only where it is hard to learn the value of performance suffers from the problems of both under- and over-inclusivity. It would wrongly cause the burden of proof to shift or indeed remain in cases where it would not be fair or appropriate to do so.

31 Take for example the aleatory contract, which was accepted by the High Court of Australia to be an inappropriate case to impose the Break Even Presumption.[55] Despite it being patently "hard to learn the value of performance" in such cases, it would not be fair for the Break Even Presumption to apply simply by virtue of the speculative and contingent nature of benefits to be earned under the contract. Other examples are cases where the bargain lost was to participate in ventures such as racing horses, where the benefits lost took the form of prospective winnings from bets and stable commissions. In these cases, it would be appropriate

49 *Parker v SJ Berwin & Co* [2008] EWHC 3017 (QB) at [77].
50 *Parker v SJ Berwin & Co* [2008] EWHC 3017 (QB) at [78].
51 *Parker v SJ Berwin & Co* [2008] EWHC 3017 (QB) at [82].
52 *Liu Shu Ming v Koh Chew Chee* [2023] 1 SLR 1477 at [122].
53 *Liu Shu Ming v Koh Chew Chee* [2023] 1 SLR 1477 at [183].
54 *Liu Shu Ming v Koh Chew Chee* [2023] 1 SLR 1477 at [122].
55 See para 10 above.

to hold that the Break Even Presumption does not apply or, alternatively, that the Break Even Presumption is likely to be rebutted.[56]

32 On the other hand, it may in some cases be fair for the burden to remain on the claimant even where it is hard to learn the value of performance. This would in principle be strongest if the claimant's own position at the start was to venture to prove the value of such performance. This was the case in *Parker* and, in this author's view, *Liu Shu Ming*, already canvassed above. There may also be reasons of procedural fairness to keep the burden firmly on the claimant, as was the case in *Filobake Ltd v Rondo Ltd*,[57] where a claimant attempted to amend the particulars of its claim to include a wasted expenditure claim, on an appeal from a decision which was litigated in the first instance on the basis of a loss of profits claim that it failed to prove.

33 Finally, there are cases where, even if it would be hard to learn the value of performance, the claimant ought not to gain the benefit of the Break Even Presumption because the nature of expenditure incurred in reliance on the contract was not of a kind that the parties had reasonably contemplated would be recouped from the benefits to be gained from the contract.[58] The facts of *Out of the Box Pte Ltd v Wanin Industries Pte Ltd*[59] are an example of this, where the claimant entered into a contract with the defendant for the manufacturing and supply of a sports drink. The claimant had grand plans for the drink and incurred around S$780,000 in advertising and promotional costs. The defendant breached the contract as the drink was found to be contaminated with insects, necessitating a recall.[60] It would have been hard to learn the value of performance in this case, because one could not rule out the possibility of the drink becoming a resounding success. Yet, the claimant should not be able to pray in aid of the Break Even Presumption to recoup its outlandish advertising costs because the nature of the contract that was breached was for the manufacture and supply of the sports drink.[61] Put another way, it would be unfair to presume that the claimant would have recouped its expenditure from the cash flows from the eventual sales of

56 Adam Kramer, *The Law of Contract Damages* (Bloomsbury, 3rd Ed, 2022) at para 18-82, citing *Howe v Teefy* (1927) 27 SR (NSW) 301.

57 [2005] EWCA Civ 563.

58 It is an open question whether the ceiling of recovery imposed by virtue of the contract being a loss-making or bad bargain ought to extend to these expenses incurred.

59 [2013] 2 SLR 363.

60 *Out of the Box Pte Ltd v Wanin Industries Pte Ltd* [2013] 2 SLR 363 at [5].

61 The case was decided on remoteness grounds, in that the defendant was not aware at all of the claimant's "grand plans" for the product.

the sports drink to the entire market in circumstances where the product was a new and untested one.[62]

34 There should be no difficulty in practice separating and distinguishing between the concepts of: (a) the framing of the claim as one for reliance damages or, in particular, wasted expenditure; and (b) the burden of proving whether the expenditure would have been recouped or not. In cases where wasted expenditure claims are litigated in circumstances where profits were readily provable (or at least could not be said to be "impossible" or "difficult" to quantify), the courts can proceed to engage with detailed and expert evidence led on cash flows with no invocation of the Break Even Presumption. One such case was *BCBC Singapore Pte Ltd v PT Bayan Resources TBK*[63] ("*Bayan*"). The claimants in this case brought a wasted expenditure claim for the defendants' repudiatory breach of a joint venture.[64] In answering the question whether the claimants would have recouped their expenditure, the Singapore International Commercial Court engaged with a number of factual sub-issues, in particular whether a venture's cash flow (and repayment to the claimants) would have covered the claimants' expenditure.[65] This is the exact same issue that would have been addressed if damages were to be assessed on the expectation loss basis. The court did not resort to the Break Even Presumption in such a case.

IV. Reliance loss awards in the Australian courts

35 The Australian courts have not had any difficulty with the *CCC Films* Proposition. They accept that a party is able to frame his or her claim as one for reliance loss even where expectation losses are readily

62 It is said that the expenditure incurred must be reasonably contemplated as likely to be wasted if the contract were broken: see *Anglia Television v Reed* [1971] 3 WLR 528 at 531, *per* Lord Denning MR. In this connection, it has been argued that an explanation for wasted expenditure awards is that the contract breaker, in agreeing to perform, assumed responsibility for the reasonably foreseeable expenses that the innocent party was likely or required to incur in reliance on his or her performance, and would compensate the innocent party if those expenses were wasted as a result of the breach of contract: see Richard Taylor, "Rethinking Reliance Damages for Breach of Contract" in *Shaping the Law of Obligations: Essays in Honour of Professor Ewan McKendrick KC* (Edwin Peel & Rebecca Probert eds) (Oxford University Press, 2023). This echoes the rationalisation of the contractual remoteness rules alongside the concept of "assumption of responsibility" that were settled in the Singapore Court of Appeal decision of *MFM Restaurants Pte Ltd v Fish & Co Restaurants Pte Ltd* [2011] 1 SLR 150.

63 [2023] 4 SLR 1.

64 *BCBC Singapore Pte Ltd v PT Bayan Resources TBK* [2023] 4 SLR 1 at [18].

65 *BCBC Singapore Pte Ltd v PT Bayan Resources TBK* [2023] 4 SLR 1 at [30(b)(ii)].

provable.[66] However, it appears that the Australian courts are increasingly taking a divergent path, going one step further to hold that a defendant bears the burden to disprove recoupment whenever it is faced with a claim for reliance loss.

36 A convenient starting point would be the joint opinion of Mason CJ and Dawson J in *Amann Aviation*:[67]

> [*McRae v Commonwealth Disposals Commissions* [1951] HCA 79] *illustrates the proposition that a plaintiff has a prima facie case for recovery of wasted expenditure once it is established that the expense was incurred in reliance on the promise of the party in breach, there being a failure of performance by that party*. By reason of its facts, the reasoning in *McRae* does not depend upon the presumption that an innocent party would not have entered into the contract unless it would at least have recovered its reliance expenditure under the contract had it been performed. But the reasoning is not inconsistent with the application, in appropriate cases, of that presumption which, in our view, has much to commend it. *Indeed, it is just and fair that the repudiating party should bear the onus of showing that the party not in breach would have made a loss on the contract.* [emphasis added]

37 Building on this, the Court of Appeal of New South Wales in *Meetfresh Franchising Pty Ltd v Ivanman Pty Ltd*[68] ("*Meetfresh*") categorically accepted that, in respect of a claim for wasted expenditure or reliance damages, "the law assumes that a plaintiff would at least have recovered his or her expenditure had the contract been fully performed, with the consequence that the onus of proof rests on the party breaching the contract to establish that the reliance expenditure would have been wasted even if the contract had been performed".[69]

38 *Meetfresh* was approved in *123 259 932 Pty Ltd v Cessnock City Council*[70] ("*Cutty Sark*"). The court in *Cutty Sark* held as follows:[71]

> Cutty Sark having incurred expenditure in reliance on the Council's promise to take all reasonable steps to procure registration of the Plan, and the Council having repudiated that obligation so as to render it impossible for Cutty Sark to receive the contractual benefits for which it had bargained, Cutty Sark's expenditure was wasted in the relevant sense. That sufficed to engage the presumption.

66 *123 259 932 Pty Ltd v Cessnock City Council* [2023] NSWCA 21 at [73].
67 *Commonwealth v Amann Aviation Pty Ltd* [1991] HCA 54 at [45].
68 [2020] NSWCA 234.
69 *Meetfresh Franchising Pty Ltd v Ivanman Pty Ltd* [2020] NSWCA 234 at [29].
70 *123 259 932 Pty Ltd v Cessnock City Council* [2023] NSWCA 21 at [93]. As of the time of writing, this decision is on appeal to the High Court of Australia.
71 *123 259 932 Pty Ltd v Cessnock City Council* [2023] NSWCA 21 at [121]. See also [96].

39 At least one case of the High Court of England and Wales has adopted that line of thinking. In *Cardiorentis AG v Iqvia Limited*[72] ("*Cardiorentis*"), the court held that "once the claimant has shown that expenditure has been wasted as a result of the defendant's breach, then it benefits from a rebuttable presumption that it would have generated enough revenue to at least break even".[73]

40 It is submitted that the approach of the Australian courts in *Cutty Sark* and *Meetfresh* is difficult to justify if applied unthinkingly to all contracts, but not primarily for the reasons provided by the Appellate Division at paras 194–197 of *Liu Shu Ming*. The Appellate Division's reasons related to whether a principle that reliance damages may be recovered where a plaintiff does not prove an expectation of a profit can be extracted from the opinions in *Amann Aviation* and *Cutty Sark*. Parking the merits of these observations to one side, the more fundamental (and in this author's view, more convincing) objection arises not from a forensic study of the opinions of Mason CJ and Dawson J in *Amann Aviation* and the later authorities, but rather from an examination of the effect of showing that a claimant's expenditure had been wasted.

41 It is important to appreciate that, as observed by the English High Court in *Galtrade Ltd v BP Oil International Ltd*,[74] the "mere incurrence of expenditure does not in and of itself give rise to a loss sounding in damages. Under the so-called reliance measure, the critical further component, which converts the expenditure into a potentially recoverable loss, is that this has been wasted or rendered futile by reason of the breach".[75] So where a claimant shows that he has incurred expenditure that has been wasted, he has simply shown that he has suffered a loss which is *potentially* recoverable. It does not, without more, explain why the loss should *in fact* be a *recoverable* one.

42 The Break Even Presumption is a departure from the ordinary rule that a claimant must prove that his loss should be protected by an award of damages by showing its amount and its causation.[76] The reason why the ordinary rule exists is because the law of contract does not punish wrongdoing; rather it satisfies the expectations of a party entitled to performance.[77] A claimant still has to establish a reason why

72 [2022] EWHC 250 (Comm).
73 *Cardiorentis AG v Iqvia Limited* [2022] EWHC 250 (Comm) at [449], *per* Mr Justice Butcher.
74 [2021] EWHC 1796 (Comm).
75 *Galtrade Ltd v BP Oil International Ltd* [2021] EWHC 1796 (Comm) at [117].
76 Adam Kramer, *The Law of Contract Damages* (Bloomsbury, 3rd Ed, 2022) at para 18-15.
77 *Turf Club Emporium Pte Ltd v Yeo Boong Hua* [2018] 2 SLR 655 at [128].

the court ought to order that he or she be *compensated* for the loss; simply saying that he or she has suffered one goes nowhere. Since showing that expenditure has been caused to be wasted is no more than showing that loss has been suffered, it is submitted that there is, by virtue of this simple fact, no *a priori* reason why the law ought to depart from the ordinary rule. A claimant alleging that he has suffered loss in a wasted expenditure scenario is no worse off than any other claimant who is seeking expectation damages, and so there is no immediate reason to shift the ordinary burden of proof.

43 This conclusion is fortified somewhat by the recognition that all claims for loss of gross profit can be reframed as claims for loss of profits on a net basis coupled with a separate claim in terms of the expenses and costs that had been incurred.[78] Where a claim has been reframed in such a manner, the claimant should, barring any other reason, still be obliged to prove that his or her loss is to be protected by an award of damages. If the court were to automatically apply the Break Even Presumption in such a case, that would involve a departure from and subvert the ordinary rule because all that has changed is the framing of the claim.

44 Difficulties or incoherence would not result if claimants were allowed to frame their claims for reliance loss without a shift in the burden of proof. *Bayan* as set out above shows that this is entirely possible. The unique incident of showing that expenditures have been wasted, however, is that it shifts the evidential burden onto the defendant to show that the expenditures would have been wasted in any event.[79] The defendants in *Bayan* managed to succeed because they showed that the joint venture company would have been wound up well before the claimants could even begin to recoup their expenditures.[80]

45 It is important to appreciate that there is a difference between proving that expenditure incurred would have been wasted in any event and proving that expenditure incurred would not have been recouped. There is a degree of overlap, in that expenditures could be said not to have been wasted because, for example, the claimant has received a benefit in exchange for the expenditure.[81] To this extent, the claimant must give credit and any damages awarded would be liable to be reduced by such an amount.[82] But there is another sense of proving wastage (or the

78 *Smile Inc Dental Surgeons Pte Ltd* [2020] 3 SLR 1234 at [54].
79 *Commonwealth v Amann Aviation Pty Ltd* [1991] HCA 54 at [47].
80 *BCBC Singapore Pte Ltd v PT Bayan Resources TBK* [2023] 4 SLR 1 at [154].
81 *123 259 932 Pty Ltd v Cessnock City Council* [2023] NSWCA 21 at [71].
82 Neil Andrews, Andrew Tettenborn & Graham Virgo, *Contractual Duties: Performance, Breach, Termination and Remedies* (Sweet & Maxwell, 4th Ed, 2023) at para 21-061.

lack of it). A defendant may concede that a contract could conceivably be one where the claimant would recoup his or her expenditure, while consistently taking the point that the expenditure incurred was not in fact wasted. Take for instance a claimant who incurs the cost of labour and materials which have been alleged to be wasted as a result of the breach. If such labour and materials were in fact redeployed to other ventures, and the defendant can prove such a thing, there would be no wastage.[83] The claimant's claim is defeated simply because the threshold to mount a claim for wasted expenditure is not even crossed. Such a conclusion is reached without even needing to engage in a recoupment analysis.[84] It is therefore strongly arguable that the mere fact that expenditure has been shown to be wasted should not necessitate the automatic application of the Break Even Presumption.

46 An illustration of the point above at para 45 is the old Australian case of *Banks v Williams*.[85] The claimant entered into a contract with a state government to sell maps which he would make. In his claim for breach of contract, he succeeded in recovering expenditure spent on rent and gas on premises in which he had performed the contract. However, since the evidence was not clear as to what extent these expenses were or were not attributable to the performance of the contract, the appellate court ordered a new trial of the matter as the claimant had been awarded expenses which, arguably, had not been irretrievably lost.[86]

47 There is another way of looking at why the Break Even Presumption ought not to automatically apply as a result of a claimant making out a *prima facie* case that expenditures have been wasted. As mentioned above, the Break Even Presumption takes an overall view of the commercial sense of the contract. The commercial sense of the

83 See, *eg*, Neil Andrews, Andrew Tettenborn & Graham Virgo, *Contractual Duties: Performance, Breach, Termination and Remedies* (Sweet & Maxwell, 4th Ed, 2023) at para 21-053.

84 If one engages in a recoupment analysis, the Break Even Presumption may apply such that the claimant is presumed to recoup expenditure which was not in fact wasted. This is not necessarily inconsistent with the commercial sense of the presumption (see para 47 *ff*) but it would nonetheless be objectionable on the basis that the claimant has suffered no *prima facie* case of loss.

85 (1910) 10 SR (NSW) 220.

86 See Neil Andrews, Andrew Tettenborn & Graham Virgo, *Contractual Duties: Performance, Breach, Termination and Remedies* (Sweet & Maxwell, 4th Ed, 2023) at para 21-057. Admittedly, it would have been difficult, if not impossible, for the claimant in *Banks v Williams* to apportion his expenses on rent and gas in a surgically precise manner. On one view, a claimant must show that his or her expenditure is wasted and there is no reversal of the onus of proof in this regard: see *Cardiorentis AG v Iqvia Limited* [2022] EWHC 250 (Comm) at [447]. On another view, the claimant may rely on the principle of reasonable assumptions: see Adam Kramer, *The Law of Contract Damages* (Bloomsbury, 3rd Ed, 2022) at para 18-23.

contract is to be assessed at least by or at the time the claimant enters into it pursuant to which expenditures have been incurred.[87] As Deane J put it in *Amann Aviation*, the "rational basis of that presumption is that that total detriment represents *what would reasonably have been in the contemplation of the parties themselves as the cost to the plaintiff of full performance by the defendant* and *constitutes some evidence, in proceedings between them, of the value of the total benefits* which would have been derived by the plaintiff from such performance"[88] [emphasis added].

48 The breach, which will invariably occur after the expenditure sought to be recovered has been incurred and which causes such expenditure to be wasted, should not in principle affect the commercial sense of the contract (which is to be assessed at an earlier time).[89] If it did, that would be tantamount to the tail wagging the dog.

49 The upshot of the above is that the Australian courts are starting to take a wrong turn in holding that the Break Even Presumption automatically applies when expenditure incurred in reliance on a contract has been shown to be wasted. This should be resisted, for the reasons stated above. A focus on the effect of expenditure shown to be wasted followed by an examination of the Break Even Presumption ought to help courts pin down what the heart of the issue truly is, which is whether it is ultimately fair and just on the facts of the case for a claimant to pray in aid of the presumption.

50 There remains the final issue of whether it is a requirement to claim reliance damages that a claimant's claim on the usual expectation loss basis is impossible or difficult. The answer to this is straightforward and it is "No". On this point, the English,[90] Singapore[91] and Australian[92] authorities speak with one voice. It is submitted that this is right and not a controversial point, especially in circumstances where in every loss of bargain case a party can potentially frame his claim as one to recover

87 In accordance with ordinary remoteness rules: see *MFM Restaurants Pte Ltd v Fish & Co Restaurants Pte Ltd* [2011] 1 SLR 150; and Adam Kramer, *The Law of Contract Damages* (Bloomsbury, 3rd Ed, 2022) at para 14-27.

88 *Commonwealth v Amann Aviation Pty Ltd* [1991] HCA 54 at [11].

89 Just like how the rules of remoteness (which are generally assessed at the time of contracting) can be postponed, there is a colourable argument that the commercial sense of the presumption should be assessed *at the time the relevant expenditure has been incurred*. This coheres better with the application of the presumption in cases concerning long term ventures where the costs of performance and the prospect of recovery are subject to constant change.

90 *CCC Films (London) Ltd v Impact Quadrant Films Ltd* [1985] QB 16 at 39–40.

91 *Liu Shu Ming v Koh Chew Chee* [2023] 1 SLR 1477 at [201] and [215].

92 *123 259 932 Pty Ltd v Cessnock City Council* [2023] NSWCA 21 at [96].

expenses and his loss of net profits.[93] The more significant question is whether the Break Even Presumption applies. This, as canvassed above, is a question of fairness of which the impossibility of assessing expectation damages in the usual way is but one factor.

V. Conclusion

51 The survey of the authorities set out above reveals that the simpler, principled and more direct way to resolve the problem faced by the Appellate Division in *Liu Shu Ming* would be to hold that the claimant would have been allowed to frame her claim as one for wasted expenditure had she done it pre-trial, but subject of course to the usual burden to prove that she would have recouped this expenditure had the contract been performed. Because expectation damages were readily provable, and because it would not otherwise offend the notions of justice and fairness not to apply the Break Even Presumption, the chips would lie where they fall. The claimant, not having proven that she had suffered any recoverable loss, rightly was denied her claim. This might be a particularly unpalatable conclusion, especially given that the facts strongly supported a claim in unjust enrichment for total failure of basis, but this aspect of the Appellate Division's decision cannot, in this author's view, be gainsaid.

93 See above at para 44.