IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2017] SGHC 197

Suit No 1022 of 2012

Between

RAMESH S/O KRISHNAN

… *Plaintiff*

And

AXA LIFE INSURANCE SINGAPORE PTE LTD

… *Defendant*

JUDGMENT

[Damages] – [Rules in awarding] – [Ascertainment difficult or impossible]
[Damages] – [Rules in awarding] – [Proof of actual damage]
[Damages] – [Measurement of damages] – [Tort]
[Damages] – [Aggravation] – [Tort]

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v
AXA Life Insurance Singapore Pte Ltd

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George Wei J
7–10, 14–17 January 2014; 2 December 2016

14 August 2017 Judgment reserved.

George Wei J:

Introduction

1 The plaintiff, Mr Ramesh s/o Krishnan ("the Plaintiff"), was formerly an agent of the defendant, AXA Life Insurance Singapore Pte Ltd ("the Defendant"). He brought claims in defamation, malicious falsehood and negligence against the Defendant in respect of several references and communications provided by the Defendant to two of his prospective employers and to the Monetary Authority of Singapore ("MAS"). On 6 May 2015, I dismissed all of the Plaintiff's claims. The decision is reported as *Ramesh s/o Krishnan v AXA Life Insurance Singapore Pte Ltd* [2015] 4 SLR 1 ("*Ramesh HC*") The Plaintiff appealed my decision to the Court of Appeal. On 27 July 2016, the Court of Appeal allowed the Plaintiff's appeal in part, finding that the Defendant was liable to the Plaintiff in negligence. The Court of Appeal also

remitted the matter to me for damages to be assessed. This judgment, therefore, pertains to the damages payable by the Defendant to the Plaintiff.

Facts

Facts leading to the dispute

2 The relevant facts are set out at length in the Court of Appeal's judgment in *Ramesh s/o Krishnan v AXA Life Insurance Singapore Pte Ltd* [2016] 4 SLR 1124 at [12]–[49] ("*Ramesh v AXA*"). For convenience, I set out the facts which are germane to the issue of damages.

3 The Plaintiff was engaged by the Defendant as an adviser and financial services associate manager on 26 July 2005. On 1 January 2007, he was promoted to the position of a financial services director ("FSD"), and began leading a group of advisers under his own agency organisation known as "the Ramesh Organisation". In 2009, the Plaintiff was again promoted to the position of a senior financial services director. As of April 2011, the Plaintiff had 47 advisers under his supervision in the Ramesh Organisation ("the Ramesh Organisation advisers"). It seems the Plaintiff performed very well in the five to six years that he was engaged by the Defendant. Apart from being promoted twice in that period, the Plaintiff also won numerous awards and accolades. As at February 2011, just two months before the Plaintiff departed from the Defendant, he was one of the Defendant's best compensated advisers (*Ramesh v AXA* at [121]).

4 While he was contracted to the Defendant as a financial services director, the Plaintiff received commissions from policies sold by the advisers in the Ramesh Organisation (*Ramesh v AXA* at [14]). These were known as

"overriding commissions". Apart from overriding commissions, the Plaintiff's remuneration also took the form of basic commissions (which were commissions from insurance products that he sold personally),[1] bonuses, business allowance and cash incentives.

5 The Plaintiff's relationship with the Defendant began to deteriorate in late 2010 for reasons that I need not discuss for the purposes of this judgment. That said, I note that it was around 1 December 2010 that Mr Glenn Williams ("Mr Williams") was appointed as the new chief executive officer of the Defendant (*Ramesh HC* at [17]).

6 As a consequence of the deteriorating relationship, the Plaintiff and a large number of advisers in the Ramesh Organisation contemplated resigning in January 2011. However, they were persuaded not to resign by the Defendant's senior management, who the Plaintiff claims made many "overtures" to him, including offering the Plaintiff a remuneration package known as the "AXA Growth Package".

7 Notwithstanding these "overtures" by the Defendant's senior management, the Plaintiff was served with a letter of termination on 29 April 2011. The Plaintiff requested to resign instead, which request was acceded to by Mr Williams. The Plaintiff resigned that same day.

8 Shortly after leaving the Defendant, the Plaintiff applied to join Prudential Assurance Company Singapore Private Limited ("Prudential"). In connection with this application, the Defendant supplied Prudential and MAS

1 Certified Transcript for 7 January 2014 at pp 16–17.

with certain references and communications, which form the basis of the Defendant's liability to the Plaintiff in negligence.

9 For context, MAS has in place several measures to ensure that regulated activities ("Regulated Activities") under the Financial Advisers Act (Cap 110, 2007 Rev Ed) and the Securities and Futures Act (Cap 289, 2006 Rev Ed) are carried out by fit and proper persons. One such measure is the "Representative Notification Framework" ("RNF") under which financial institutions regulated by MAS are required to obtain a licence ("RNF licence") before they appoint a representative to carry out Regulated Activities. These financial institutions are also required to conduct due diligence checks in respect of the representatives they propose to appoint. This includes conducting reference checks with the representatives' former employers or principals in order to establish that the proposed representatives meet certain prescribed standards.

10 Running in tandem with the RNF is an industry-initiated scheme known as the "Industry Reference Check System", which is a standardised reference checking system for the financial advisory and insurance industry. Under the Industry Reference Check System, financial institutions such as the Defendant and Prudential are required to conduct reference checks with a prospective employee's or agent's former employer or principal before hiring that prospective employee or agent. This is done using a standardised form known as the "Industry Reference Check Form" ("Reference Check Form"). The negligent reference which the Defendant supplied to Prudential was in the format of the Reference Check Form.

11 Specifically, on 21 May 2011, Prudential sent a reference check request to the Defendant using the Reference Check Form. The Defendant completed

the form and sent it back to Prudential on 7 June 2011 ("the Prudential Reference Check Form"). Attached to the Prudential Reference Check Form was an annex which suggested that the Ramesh Organisation had a low persistency ratio, and that, between 2008 and 2011, 14 Ramesh Organisation advisers (including the Plaintiff) had been investigated for "compliance issues". The form also stated that disciplinary action was taken against five advisers, and that three cases were referred to the police for further investigations.

12 A persistency ratio is a measure used to track the number of insurance policies sold by an adviser that are still in force over a given period of time. These ratios are used as an indicator of the quality of an adviser's sales. A high ratio indicates sales of a good quality, in that many of the adviser's clients have continued to maintain their policies during the relevant period of time. As the Court of Appeal noted (*Ramesh v AXA* at [116]), persistency ratios may be measured using various different methods and there is no standard industry practice or formula. A given adviser's persistency ratios may vary greatly depending on the formula by which the ratio is calculated. Correspondingly, the impression which a persistency ratio gives of an adviser's performance may also vary greatly, depending on the formula used.

13 After receiving the Prudential Reference Check Form from the Defendant on 7 June 2011, Prudential wrote back the same day seeking further information from the Defendant regarding the 14 Ramesh Organisation advisers who had been investigated, and the details, reasons and outcome of the investigations. The Defendant clarified that the Plaintiff had been investigated for unprofessional conduct, but no action was taken because the evidence was inconclusive. Apart from this, however, the Defendant was unwilling to supply the Plaintiff with information on the other Ramesh Organisation advisers.

14 On 16 June 2011, Prudential made the Plaintiff a conditional offer of employment with an "establishment package" ("the Establishment Package"), the terms of which provided that the Plaintiff would receive (a) a Commencement Allowance of $675,000; (b) $65,625 in monthly compensation for the first twelve months; and (c) $43,750 in monthly compensation for the following 18 months. The total compensation which the Plaintiff would receive under this package was $2.25m. The offer, however, was expressly stated to be subject to the following conditions:[2]

> 1. Submission of a certified-true copy of income statements and production statements;
>
> 2. A face-to-face interview;
>
> 3. Having no outstanding MediSave liability to the Central Provident Fund Board;
>
> 4. Clearance of reference check(s) with ex-principal(s);
>
> 5. Fulfilment of all requirements under "Fitness and Propriety"; and
>
> 6. Final management approval.

15 The offer also stated as follows:

> The GSFD [*sic*] rank is offered to your candidate on a special case basis. Provided that he successfully appoints 25 new FCs and achieves at least $2,400,000 AIPI unit production within 6 months from his appointment date, the company reserves the right to review his GFSD title.

I note that "GFSD" stands for "Group Financial Services Director".

16 Mr Tay Teck Leong ("Mr Tay") from Prudential testified at the trial that the offer was "not finalised", that it was probably intended "for the first few

[2] Exhibit P9.

cuts" of discussions between the Plaintiff and Prudential and that, in his opinion, it was "a draft" because it had not been signed by Prudential's CEO.[3]

17 After making the Plaintiff the conditional offer, Prudential continued to seek clarification from the Defendant concerning the method by which it had calculated the persistency ratios in the Prudential Reference Check Form, and the outcome of the three cases involving Ramesh Organisation advisers which had been referred to the police for investigations (see [11] above). Prudential sought this information through two emails dated 21 June 2011 and 18 July 2011. The Defendant did not respond to Prudential for a long time and its eventual reply did not address the Plaintiff's queries. Despite this, on 12 August 2011, Prudential proceeded to apply to MAS for an RNF licence for the Plaintiff.

18 Subsequently, on 14 October 2011, Mr Williams sent a letter to Prudential's CEO, copying MAS ("the 14 October Letter"). The letter highlighted that the Ramesh Organisation had a "very poor" persistency ratio and alluded to possible ethical violations by Ramesh Organisation advisers.

19 Sometime in October 2011, MAS contacted the Defendant seeking information about the Plaintiff. In the course of the Defendant's correspondence with MAS, the Defendant essentially reiterated that it had concerns about the Plaintiff's low persistency ratios, and again alluded to possible ethical violations within the Ramesh Organisation.

20 Sometime in November or December 2011, MAS informed Prudential that it was only prepared to issue a conditional RNF licence to the Plaintiff. This

3 See Certified Transcript for 14 January 2014, p 2 and p 71.

meant that conditions would be imposed on Prudential in the event that the Plaintiff was hired as its representative. MAS added that such conditions had to be imposed because of "several issues of concern" over the Plaintiff's working relationship with the Defendant. Eventually, on 15 December 2011, Prudential withdrew its application for an RNF licence and decided not to hire the Plaintiff.

21 In January 2012, the Plaintiff applied to Tokio Marine for a job as a financial adviser. As noted by the Court of Appeal, the role which the Plaintiff applied for was considerably less senior than his role with the Defendant (*Ramesh v AXA* at [40]). Like Prudential, Tokio Marine requested a reference check from the Defendant. Again, the Defendant sent Tokio Marine a completed Reference Check Form in terms that were materially similar to those in the Prudential Reference Check Form. When Tokio Marine approached the Defendant for more information concerning the Plaintiff, the Defendant responded by highlighting the Plaintiff's poor persistency rates. Internal correspondence between the Defendant's Compliance Manager, Mr Jack Ng ("Mr Ng") and Mr Williams shows that Mr Williams had vetted this response before it was sent to Tokio Marine. It seems Mr Williams instructed Mr Ng to word the response in "much stronger" terms. Eventually, Tokio Marine also decided not to hire the Plaintiff without even embarking on the process of applying to MAS for an RNF licence for the Plaintiff (*Ramesh v AXA* at [47]).

22 After learning that his application to join Tokio Marine had been unsuccessful, the Plaintiff sought assistance from his Member of Parliament, Deputy Prime Minister Teo Chee Hean ("DPM Teo") in July 2012, as he was worried that he would no longer be able to work in the financial advisory and insurance industry. DPM Teo wrote to MAS on the Plaintiff's behalf. On 31 August 2012, MAS wrote to the Plaintiff, explaining that it had "several

issues of concern" including the low persistency rates of the Ramesh Organisation, and the fact that several Ramesh Organisation advisers had been disciplined for unprofessional or improper conduct. It was in view of these concerns that MAS had only been prepared to issue Prudential a conditional RNF licence for the Plaintiff. The Plaintiff claims that he was not aware that MAS had these concerns until he received this letter (*Ramesh v AXA* at [49]).

The Plaintiff's employment since departing from the Defendant

23 In May 2011, shortly after the Plaintiff had resigned from the Defendant, the Plaintiff and his wife incorporated Tulasi Vegetarian & Café Pte Ltd which, as its name suggests, operates a vegetarian restaurant ("Tulasi"). The Plaintiff is a director and 20% shareholder in Tulasi. His wife holds the remaining 80% of the shares in the business. It seems that working in Tulasi has been the Plaintiff's only employment since his departure from the Defendant. The Plaintiff characterises his work as that of a "kitchen-hand" in Tulasi, and emphasises that he earned a "meagre salary" of $12,300 in 2013. The Defendant takes the position that the Plaintiff has downplayed his role in Tulasi and is more accurately characterised as "co-proprietor" of the business. Although the Defendant describes Tulasi as a "successful and popular vegetarian restaurant", the Plaintiff adduced evidence which suggests that Tulasi had operated at a loss of $301,290 in 2012, and a loss of $338,505 in 2013.

24 Apart from the Plaintiff's application to join Tokio Marine in January 2012 (see [21] above), the Plaintiff in response to a request for Further and Better Particulars claimed that between 12 May 2011 and 1 August 2012, he also made enquiries with other insurance companies: "Manulife, AVIVA, HSBC, Great Eastern and AIA".[4] However, these companies allegedly "rejected

the Plaintiff". I note, however, that the Plaintiff did not lead any evidence on these enquiries at trial. The Plaintiff's claims that he had made these enquiries were also not challenged by the Defendant at trial.

25 There is no evidence that the Plaintiff has made further attempts to obtain employment in the financial advisory and insurance industry since August 2012. Neither is there evidence that the Plaintiff has attempted to find any other kind of employment, apart from his role in Tulasi. The Defendant claims that the Plaintiff essentially decided to retire from the financial services industry to operate Tulasi. In this regard, the Defendant adduced evidence of a Facebook post ("the Facebook Post") put up by the Plaintiff on 12 December 2011, in which he stated:

> aFter sO mAny yeaRs oF worKkinG i'M finaLly callING iT quiTs. DeAr all I'M reTirinG, RETIRE…… hahahahahahha. i'M goinG tO starT enJoyIng the fruitS oF mY labour fOr the past 35 yeaRs oF worK……. Not many can do it At 40 bUt God as BlesseD mE ovEr this…….. PoweRrrrrrRrrrr

26 At trial, however, the Plaintiff testified that 12 December 2011 was the day that Prudential had informed him that it was withdrawing his RNF licence application. He claimed that he had said he was "retiring" in the above Facebook Post not because he truly intended to retire, but because he was sad about the outcome of his application to join Prudential, and wanted to console and encourage himself.[5] I note that, despite what the Plaintiff said in the Facebook Post, he did go on to apply for a position at Tokio Marine about one month later in January 2012 (see [21] above).

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4 Plaintiff's Particulars served Pursuant to Request dated 7 February 2013, p 12.

5 Plaintiff's written submissions, para 66.

The present suit and the Court of Appeal's findings

27 The Plaintiff commenced the present proceedings against the Defendant on 30 November 2012, claiming in defamation, malicious falsehood and negligence. I dismissed all three claims on 6 May 2015. With regard to the claim in negligence, I held that whilst the Defendant owed a duty to take reasonable care in providing information to other organisations in respect of the plaintiff's employment, there was no breach of duty on the facts. In addition, whilst no decision was made on causation, I noted that it was questionable whether the Plaintiff had proved that the Defendant had caused its loss (*Ramesh HC* at [284]). The Plaintiff appealed in respect of my decision on the claim in negligence.

28 As mentioned, the Court of Appeal allowed the appeal, and found that the Defendant did owe the Plaintiff a duty of care in preparing the references and communications which it had sent to Prudential and to MAS. The applicable standard of care was that an employer (or in this case, principal) who writes a reference for an employee must take reasonable care to:

(a) ensure that (i) the facts contained in the reference are true; and (ii) any opinions expressed in the reference are based on, and supported by, facts which are true (*Ramesh v AXA* at [102(a)]);

(b) ensure that the reference is accurate in the sense that it does not give an unfair or misleading overall impression of the employee (*Ramesh v AXA* at [102(b)]; and

(c) disclose any information that relates to information that has already been disclosed, where withholding such information would render the disclosed information incomplete, inaccurate or unfair (*Ramesh v AXA* at [102(c)]).

29 The Court of Appeal further found that the Defendant had breached its duty of care to the Plaintiff in the following ways:

(a) The Defendant had used the 13-month measure, as opposed to the 19-month measure for persistency ratio of regular premium policies, which was misleading and unfair to the Plaintiff because the Defendant itself had never used the 13-month measure to the Plaintiff (*Ramesh v AXA* at [117]–[121). The Defendant had also made further misleading statements in the 14 October Letter concerning these persistency ratios, without explaining that the reason the 13-month persistency ratios may have fallen so drastically was the fact that the Plaintiff and the bulk advisers had left the Defendant, leaving many "orphan policies" with no adviser to take over (at [124]–[125]).

(b) The Defendant had provided incomplete information concerning the compliance issues involving the Plaintiff and certain Ramesh Organisation advisers. In essence, the Prudential Reference Check Form had failed to mention important details concerning the investigations against the Plaintiff, the "disciplinary action" faced by five Ramesh Organisation advisers, and the three cases which had been referred to the police for further investigations. The overall effect of this incomplete information was that it unfairly cast doubt on the Plaintiff's character and managerial abilities, and suggested to a reasonable recipient that the Plaintiff and/or advisers under his supervision had been involved in very serious misconduct (at [127]–[132]).

(c) The Defendant had withheld relevant information and had failed to respond adequately in subsequent communications with Prudential. Specifically, the Defendant had refused to explain how it calculated the persistency ratios it had provided in the Prudential Reference Check Form (*Ramesh v AXA* at [122]). The Defendant had also refused to provide information about the nature and gravity of the alleged misconduct which led to the investigations pertaining to the other Ramesh Organisation advisers (see [13] and [17] above).

(d) In the 14 October Letter and in its communications with MAS, the Defendant had made very serious allegations of, and allusions to, potential ethical violations by the Plaintiff and the advisers under him. These allegations appeared to have been made without basis.

30 It should be noted that the tone taken by the Defendant in the 14 October Letter and its communications with MAS, together with Mr Williams' conduct in vetting the response to Tokio Marine (see [21] above), led the Court of Appeal to conclude that the Defendant was "attempting to paint [the Plaintiff] in as bad a light as possible", and aimed "to highlight as much negative information about [the Plaintiff] as possible" (*Ramesh v AXA* at [140]). The Court of Appeal stated that it need not come to a finding on whether the Defendant acted in bad faith for the purposes of deciding on the Plaintiff's negligence claim. However, it noted that "at the very least", the Defendant had not provided the information in the reference check responses in an objective manner (*Ramesh v AXA* at [140]).

31 Having found that the Defendant had breached its duty of care to the Plaintiff, the Court of Appeal next considered whether causation had been made out. The Court of Appeal commented at [143] that causation "should not be

unduly technical or pedantic" and is largely a matter of common sense. In this regard, the Court endorsed the observations of Lord Lowry in *Spring v Guardian Assurance plc and others* [1995] 2 AC 296 ("*Spring*") that where a plaintiff claims negligence on the part of his former employer in preparing a reference, the plaintiff does need not to show that but for the negligent reference, the prospective employer *would* have employed him. Rather, the plaintiff only needs to show that by reason of the negligence he has lost a *reasonable chance* of employment (*Ramesh v AXA* at [143]).

32 The Court of Appeal found that causation had been made out and that the Defendant's breach of duty had caused Prudential not to hire the Plaintiff. In coming to this conclusion, the Court specifically noted Mr Tay's evidence that Prudential decided not to hire the Plaintiff *because of the delays and lengthy process* of clearing the Plaintiff's job application and obtaining an RNF licence for him, and "*not because* of the conditions that MAS intended to impose on the [Plaintiff's] RNF licence or for any other reasons" [emphasis added] (*Ramesh v AXA* at [146]). For convenience, the delays faced by Prudential in processing the Plaintiff's job application and obtaining an RNF licence for him will hereafter be referred to as "the Processing Delays". The Processing Delays were, in turn, attributable to either the Defendant's response in the Prudential Reference Check Form, or the information which the Defendant conveyed in its subsequent correspondence with Prudential and MAS (at [150]), or the fact that the Defendant had not been forthcoming in providing Prudential with the relevant information (at [151]).

33 I note that the Plaintiff had brought two claims in negligence – one in respect of the reference check response provided to Prudential, and one in respect of the reference check response provided to Tokio Marine. At first

instance, both actions in negligence were dismissed. On appeal, the Court of Appeal noted that the Plaintiff was not entitled to obtain damages for both claims even if he succeeded on both, because the Plaintiff could only have been employed by *either* Prudential *or* Tokio Marine (at [108]). For that reason, the Court held that it was unnecessary to address the Plaintiff's claims in negligence relating to his application to join Tokio Marine. Indeed the Court of Appeal allowed the appeal only insofar as it related to the Plaintiff's application to join Prudential (at [3]).

34 Whilst my decision insofar as it related to the application to join Tokio Marine was not reversed, it may be helpful to make a few comments about that application. The position applied for by the Plaintiff at Tokio Marine was for the position of a financial adviser. The Court of Appeal commented at [40] this was a far less senior role than the Plaintiff's position when engaged by the Defendant. It also appears to have been a far less senior position than that which the Plaintiff had sought at Prudential. There was very little evidence placed before the court at first instance as to what was the remuneration expected. The only evidence was that the Plaintiff was orally offered a sign-on fee of $20,000 (see *Ramesh HC* at [30]). The Court of Appeal also commented that, by the time the Plaintiff applied to Tokio Marine, it was evident that "his application to join Prudential was unlikely to succeed" (*Ramesh v AXA* at [40]). Finally, I note that the contents of the Reference Check Form which AXA provided to Tokio Marine were "materially similar to those of the Prudential Reference Check Form" (*Ramesh v AXA* at [41]). Nevertheless, the Court of Appeal expressly stated at [47] that it was unclear why Tokio Marine decided not to employ the Plaintiff.

Procedural Background

35 As will shortly become clear, my decision was eventually shaped very much by the state of the evidence before me. In light of this, it is worth saying something about the procedural history against which I make this decision.

36 Neither of the parties ever applied for the trial of this action to be bifurcated and, indeed, it was not bifurcated. At trial, both parties led some evidence which was relevant to the issue of the Plaintiff's loss and his possible claim for damages. After the Court of Appeal issued judgment on 27 July 2016 and remitted the matter for damages to be assessed, the Plaintiff filed a Summons for Directions for assessment of damages in HC/SUM 3928/2016 on 10 August 2016. On 24 August 2016, the Defendant's solicitors, M/s Rajah & Tann Singapore LLP ("R&T"), wrote to the Registry and inquired whether the Plaintiff should be permitted to lead further evidence pertaining to the issue of damages. The Plaintiff's solicitors, M/s Eugene Thuraisingam LLP ("ET"), also wrote to the Registry setting out the Plaintiff's position. By way of a letter from the Registry to the parties dated 7 September 2016, the Court of Appeal gave the following directions:

> The Court of Appeal has directed that there is no need for an oral hearing, and has given the following directions …
>
> (a) Damages are to be assessed by the trial judge on the basis of the evidence that has already been adduced. There is neither any basis for further discovery to be carried out nor for further evidence to be adduced. The trial judge did not assess damages not because the trial was bifurcated but because he had dismissed the Appellant's claim in its entirety.

37 The above guidance made clear that the evidence adduced by the parties up until the conclusion of the trial is the basis upon which I am to assess the loss which has been occasioned to the Plaintiff, and the corresponding damages

which the Defendant is liable to pay. Accordingly, on 27 October 2016, I directed the parties to file written submissions on the assessment of damages by 2 December 2016, and further directed that there was to be no further evidence in accordance with the Court of Appeal's directions.

38 The submissions were duly filed on 2 December 2016. Whilst differences in the parties' positions are only to be expected, the final figures reached by the parties in their submissions were polar opposites. The Plaintiff's position is that it is entitled to a global sum of $63m comprising $42m in loss of earnings and $21m in aggravated damages. The Defendant submits that only nominal damages of $1 should be awarded.

The parties' arguments in respect of damages

The Plaintiff's case

39 The Plaintiff seeks damages in respect of two heads of loss:

(a) first, loss of earnings as a result of Prudential's decision not to hire him, which can be further broken down into

(i) pre-assessment-of-damages loss of earnings ("PADLE") for the period from August 2011 to July 2016; and

(ii) loss of future earnings ("LFE") for the period from August 2016 to July 2021; and

(b) secondly, aggravated damages.

I should mention that although the Plaintiff has used the term "pre-assessment-of-damages loss of earnings", this label appears to be a misnomer, because the Plaintiff is actually claiming in respect of his loss of earnings up until the date of the Court of Appeal's judgment in *Ramesh v AXA*. Nevertheless, I adopt this terminology for convenience.

The Plaintiff's arguments on his loss of earnings

40 In respect of the first head of loss – *ie*, loss of earnings as a result of Prudential's decision not to hire the Plaintiff – the Plaintiff emphasises the Court of Appeal's finding that Prudential ultimately decided not to hire him *because* of the Processing Delays which, in turn, were caused by the Defendant's negligence.[6] The Plaintiff interprets the Court of Appeal's observation as a finding that *but for* the Defendant's negligence, Prudential *would have* hired the Plaintiff.[7] This is as opposed to a finding that but for the Defendant's negligence the Plaintiff would have merely stood a *chance* of being employed by Prudential. According to the Plaintiff, the import of this is that damages should not be assessed on the basis that this is "a 'loss of chance' case, and [the Defendant] is precluded from arguing for any discount to damages on that basis".[8] Rather, all losses arising from the Defendant's negligence are recoverable in full, subject only to mitigation and the requirement that the losses suffered must be a reasonable foreseeable consequence of the tort. The Plaintiff further asserts that it was a reasonably foreseeable consequence of the tort that the he has lost "the high levels of remuneration he would have earned as a GFSD at Prudential".[9] This forms the basis of the Plaintiff's claim for loss of earnings.

41 With regard to quantifying the loss of earnings, the Plaintiff acknowledges that what he would have earned as a GFSD is dependent on many

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6 Plaintiff's written submissions, para 5.

7 Plaintiff's written submissions, para 4.

8 Plaintiff's written submissions, para 6.

9 Plaintiff's written submissions, para 18.

counterfactual events which are uncertain. However, the Plaintiff cites the decision of *Parabola Investments Ltd and another v Browallia Cal Ltd (formerly Union Cal Ltd) and others* [2011] QB 477 ("*Parabola CA*") at [22] for the proposition that where consequential loss is not capable of precise calculation because it depends on "the attempted measurement of things which would or might have happened", then the law does not apply the balance of probability test to the measurement of loss. Rather, the court must "evaluate the chances, great or small… taking all significant factors into account" (*Parabola CA* at [23]).[10]

42 The Plaintiff argues that his loss may be evaluated by adopting this multi-factorial approach. In this regard, the Plaintiff points to the Defendant's own submission that the position of a GFSD in Prudential is "the equivalent of a FSD in AXA",[11] and claims that he would have received a remuneration structure at Prudential broadly similar to what he was receiving when he was with the Defendant. Thus, his hypothetical remuneration should be evaluated based on the same factors which also had a bearing on his past remuneration: (a) the size of his agency organisation; (b) the production and persistency performances of the financial advisers and managers under his supervision, (c) the potential for growth of his agency organisation; and (d) the extent to which his agency organisation is recognised as a strong "brand".[12]

43 Taking these factors into account, the Plaintiff submits that:

(a) Prudential was making arrangements for most of the 47 advisers in the Ramesh Organisation to move to Prudential.

[10] Plaintiff's written submissions, para 28.

[11] Plaintiff's written submissions, para 21.

[12] Plaintiff's written submissions, para 22.

(b) The Ramesh Organisation had strong production and persistency ratios. In terms of persistency ratios, the Ramesh Organisation had an "undisputedly excellent" 19-month persistency ratio. In terms of production, the Ramesh Organisation had consistently placed "on top" in the Defendant's First Year Commission rankings (a direct measure of the sales performance of insurance products); and had furthermore achieved a production of $3,106,569.61 in 2010, well in excess of his targets.[13]

(c) The Plaintiff had built a strong brand, was greatly valued by the Defendant and its senior management, and was even described as a "pillar for [the Defendant]'s drive for growth"[14]

(d) The Ramesh Organisation had a strong growth trajectory. In 2011, the Defendant's senior management were in discussions with the Plaintiff for Ramesh Organisation to transition to the "GA model". I note that the evidence does not appear to set out what the abbreviation "GA" stands for. Nonetheless, to be eligible for this GA model, the agency organisation had to have 100 financial advisers and achieve $5m in annual first year premiums. This shows that the Defendant was "confident" that the Ramesh Organisation would grow to be a 100-adviser organisation.[15]

44 Based on the above factors, the Plaintiff argues that this Court should find that the Plaintiff and his organisation would have continued with their strong performance at Prudential, and moreover that the Plaintiff's organisation

13 Plaintiff's written submissions, paras 38–44.

14 Plaintiff's written submissions, paras 45–47.

15 Plaintiff's written submissions, paras 48–50.

would have grown to become a 100-adviser organisation within a year.[16] The Plaintiff also argues that a finding that he would have been very successful at Prudential leaves "no place" to discount his damages to reflect the chance that he may not have been successful.[17]

45 The Plaintiff also argues that he has mitigated his losses. After his application to Prudential proved unsuccessful, he applied to join Tokio Marine in the "considerably less senior role" of a financial adviser. The Plaintiff urges this Court to find that this application also failed because of the Defendant's negligence in preparing the requisite references. The Plaintiff therefore argues that he would face "insurmountable difficulties obtaining *any* position in the financial services industry".[18] Nevertheless, he "was not content to give up" and accepted work as a kitchen-hand in Tulasi. Thus, the Plaintiff maintains that no discount should be applied for any "failure" to mitigate his losses.[19]

The Plaintiff's estimate of his PADLE

46 To recapitulate, the Plaintiff's estimate of his PADLE is essentially based on the following factual assumptions: First, that he would have begun as a GFSD overseeing a 50-adviser organisation in Prudential, which would have grown to a 100-adviser organisation within a year. Secondly, that he would have received "similar levels of remuneration" as he did while he was an FSD with the Defendant.

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16 Plaintiff's written submissions, para 57.

17 Plaintiff's written submissions, paras 31–37.

18 Plaintiff's written submissions, para 60.

19 Plaintiff's written submissions, para 61.

47 The following table sets out the total remuneration which the Plaintiff received each year from 2009 up to the time of his departure from the Defendant in April 2011.[20]

Period	**Total Remuneration**
January 2009 – December 2009	$694,963.55
January 2010 – December 2010	$2,389,629.98
January 2011 – April 2011	$1,702,250.87

On the basis of these figures, the Plaintiff submits that a "fair estimate" of his earnings in his first year at Prudential overseeing a 50-adviser agency organisation is a figure of $3m. On the assumption that he would have grown his agency organisation to the strength of 100 advisers within one year, the Plaintiff submits that a "fair estimate" of his earnings in subsequent years would be a figure of $6m (this figure appears to be premised on the assumption that his total remuneration would have grown in direct proportion with the number of advisers within his organisation). The Plaintiff further submits that he should be compensated according to these figures from the period beginning August 2011 (assuming that but for the Defendant's negligence, he would have commenced work within about six weeks of his application) and ending in July 2016, when the Court of Appeal released judgment and allegedly "vindicated" his reputation. On this basis, the Plaintiff submits that his PADLE is $27m, according to the breakdown in the following table:

Period	**Remuneration**
August 2011 – July 2012	$3m
August 2012 – July 2013	$6m
August 2013 – July 2014	$6m
August 2014 – July 2015	$6m
August 2015 – July 2016	$6m
Total:	**$27m**

20 Exhibit D1.

The Plaintiff's estimate of his LFE

48 The Plaintiff claims that he is entitled to loss of future earnings because, even though the judgment of the Court of Appeal has "vindicated" his reputation as of July 2016, he is still not in the same position as he was in "*before* AXA's negligence" [emphasis added].[21] He submits that his reputation has been battered for years and that he would now need to re-build his organisation from scratch.

49 The Plaintiff further emphasises that he has been affected by recent changes introduced by MAS to the academic qualification requirements for persons who wish to be appointed as financial advisers. Under these changes, former financial advisers who do not possess the equivalent of a GCE A Level qualification and who have left the industry for more than one year (such as the Plaintiff) must take certain courses or modules if they wish to re-enter the industry. This would prolong the time which the Plaintiff would take to re-enter the industry.

50 Taking these facts into account, the Plaintiff submits that he would take about four years to rebuild the 100-adviser agency he would otherwise be operating but for the Defendant's negligence, assuming that he could recruit about 25 advisers a year. On that basis, the Plaintiff seeks a total LFE of $15m, according to the following breakdown:

Period	**Remuneration**
August 2016 – July 2017	$6m
August 2017 – July 2018	$4.5m
August 2018 – July 2019	$3m
August 2019 – July 2020	$1.5m
Total:	**$15m**

[21] Plaintiff's written submissions paras 80–82.

51 Again these figures are derived based on the assumption that but for the Defendant's negligence, the Plaintiff would be earning $6m a year leading a 100-adviser organisation. Although the Plaintiff does not explain this specifically, he presumably claims $6m in loss of earnings for the period of August 2016 to July 2017 as a result of the additional time he would need to take the relevant modules to meet MAS's requirements (see [49] above). The amount claimed for the subsequent years appears to be the difference between $6m and the remuneration which the Plaintiff predicts he will be receiving each year, based on the assumptions that he would add 25 advisers to his agency organisation each year, and that his compensation would be proportionate to the number of advisers he has within his organisation.

The Plaintiff's arguments on aggravated damages

52 Finally, the Plaintiff argues that he is entitled to aggravated damages for the Defendant's negligence. This submission relies heavily on the Court of Appeal's findings that the Defendant did not act in "an objective manner" in preparing the negligent references, and that Mr Williams was "attempting to paint [the Plaintiff] in as bad a light as possible" (see [30] above). The Plaintiff submits that, based on these findings, this Court should find that the Defendant had acted in bad faith.

53 The Plaintiff further argues that there is no sound reason why aggravated damages should not be available for negligence. As to the quantum, the Plaintiff submits that aggravated damages should be assessed at 50% of both PADLE and LFE.

54 Factoring in PADLE, LFE and aggravated damages, the Plaintiff asks this Court to award him a total of $63m in damages, with the normal interest rate of 5.33% per annum.

The Defendant's case

55 The Defendant emphasises that the burden is on the Plaintiff to prove his loss, and to prove not only the fact of damage but also the amount. The Defendant cites the case of *Robertson Quay Investment Pte Ltd v Steen Consultants* [2008] 2 SLR(R) 623 ("*Robertson Quay*") for the proposition that if no evidence is given as to the *amount* of damage such that it is virtually impossible to assess damages, then the Court will only award nominal damages (*Robertson Quay* at [27]).

56 The Defendant emphasises that the Court of Appeal *did not* hold that the Defendant's negligence had caused the Plaintiff to be unemployable in the financial advisory services industry. Rather, the Defendant characterises the Plaintiff's loss as the loss of a "reasonable chance" to join Prudential.[22] As regards quantification of that loss, the Defendant argues that the Plaintiff has simply adduced insufficient evidence for the Court to determine the pecuniary benefits that the Plaintiff has lost.

57 Specifically, the Defendant argues that the Plaintiff has failed to prove that he lost a real or substantial chance of being engaged by Prudential on the basis of the Establishment Package. To that end, the Defendant highlights Mr Tay's evidence that the offer of the Establishment Package to the Plaintiff was "not finalised", subject to management approval and only "a draft".[23] The

22 Defendant's written submissions, para 3.

23 Defendant's written submissions, para 28.

Defendant also notes that the Plaintiff did not lead evidence from Mr Tay about the extent of negotiations between himself and Prudential, which would otherwise have shed light on whether the Establishment Package was a good reflection of the eventual terms of the Plaintiff's engagement, or whether it was only a preliminary draft.

58 Even on the assumption that the Plaintiff would have been engaged on the basis of the Establishment Package, the Defendant argues that the Plaintiff has failed to prove that he would have met the conditions and requirements set out in the Establishment Package. For instance, the Establishment Package specified that the Plaintiff must successfully appoint 25 new financial advisers within the first six months, achieve "at least $2,400,000 AIPI unit production within six months from his appointment date" and hit certain "AIPI Milestones". However, the Plaintiff has failed to lead any evidence on what the term "AIPI" means, let alone evidence on whether he would have achieved these targets.[24]

59 The Defendant further argues that the Plaintiff has failed to provide full discovery of all the accounting documents such as the cash flow statements and balance sheets relating to Tulasi. According to the Defendant, this means that this Court is in no position to ascertain what the quantum of his actual loss is, or if any discount should be given to reflect the Plaintiff's pecuniary gains from investing in and operating Tulasi.

60 On this basis of the foregoing arguments, the Defendant argues that the Plaintiff is only entitled to nominal damages of $1.[25]

24 Defendant's written submissions, paras 30–33.

25 Defendant's written submissions, para 53.

The issues to be determined

61 The parties' submissions raise numerous issues that are relevant to the question of how much the Plaintiff is entitled to in damages. However, before any of those issues are considered, the threshold question is this: Has the Plaintiff adduced sufficient evidence to prove the fact and amount of his damage? This is a key issue because unless such damage is proved, the questions of quantification, remoteness and mitigation would not arise for discussion (*Robertson Quay* at [27]). Assuming that there was sufficient evidence for the court to ascertain the Plaintiff's loss, the issues to be determined are as follows:

(a) Should the Plaintiff's loss be characterised and evaluated as a "loss of chance"?

(b) How should the Plaintiff's loss be quantified?

(c) How long a period is the Plaintiff entitled to be compensated for?

(d) Should any discount be applied to account for the Plaintiff's employment since the unsuccessful application to join Prudential?

(e) Is the Plaintiff entitled to aggravated damages?

Decision and reasons

The threshold issue: Is there sufficient evidence to quantify the loss suffered by the Plaintiff?

General principles relating to the proof of damage

62 It is well-established that, in general, when a tortious wrong has been committed by a defendant, the plaintiff ought to be restored to the same position

as if the tort had not been committed (*ACES System Development Pte Ltd v Yenty Lily (trading as Access International Services)* [2013] 4 SLR 1317 at [14], citing *Livingstone v The Rawyards Coal Company* (1880) 5 App Cas 25 at 39). That is the aim of an award of damages.

63 It is equally well-established that a plaintiff claiming damages must prove his damage. Quoting the learned author Harvey McGregor QC of *McGregor on Damages* (Sweet & Maxwell, 17th Ed, 2003) ("*McGregor (17th Ed)*"), the Court of Appeal in *Robertson Quay* affirmed that it is necessary for the plaintiff to prove both the fact of damage *and* its amount (at [27]). A plaintiff cannot make a claim for damages without placing before the court sufficient evidence of the loss it has suffered, even if it is otherwise entitled in principle to recover damages (at [31]).

64 That said, the Court in *Robertson Quay* also observed that the law does not demand that the plaintiff prove with complete certainty the exact amount of damage that he has suffered (at [28]). The Court of Appeal therefore advocated adopting a "flexible approach" with regard to proof of damage (at [30]). Thus, the fact that a plaintiff's expectation may depend on a contingency or on contingencies does not necessarily preclude a court from awarding substantial damages even if the plaintiff's loss cannot be assessed with mathematical accuracy (*Robertson Quay* at [29], citing *Chaplin v Hicks* [1911] 2 KB 786).

65 The remarks of the Court of Appeal in *Robertson Quay* show that a court called upon to assess a claim for damages must carefully balance two competing principles. On one hand, the burden of proving the fact and *amount* of loss falls squarely on the plaintiff, who must give the court sufficient evidence with which it may quantify the damage. The court expects a plaintiff to do "its level best"

to prove its loss, and to provide cogent evidence thereof (*Robertson Quay* at [31]). On the other hand, the court must adopt a flexible approach and allow for the fact that in some cases, absolute certainty and precision is impossible to achieve (at [30]). The Court in *Robertson Quay* also gave the following guidance on how these two competing principles may be balanced: Where precise evidence is obtainable, the court expects to have it; where it is not obtainable, the court must do the best it can (*Robertson Quay* at [30], citing the remarks of Devlin J in *Biggin & Co Ltd v Permalite Ltd* [1951] 1 KB 422 at 438).

66 While the Court in *Robertson Quay* exhorted claimants to do their "level best" to adduce evidence of their loss (at [31]), the "flexible approach" which the courts adopt when faced with deficiencies in the evidence is demonstrated in a subsequent Court of Appeal decision, *MFM Restaurants Pte Ltd and another v Fish & Co Restaurants Pte Ltd and another appeal* [2011] 1 SLR 150 ("*MFM Restaurants*"). I note that this was a case concerning a claim for breach of contract (specifically, breach of a settlement deed), but the need to take a "flexible approach" certainly extends to awards of damages for *tortious* actions as well. In this case, the respondent was the owner of a chain of seafood restaurants, "Fish & Co", while the first appellant was the owner of another chain of seafood restaurants called "the Manhattan Fish Market" ("MFM"). The second appellant was a former employee of the respondent. A dispute arose when the respondent claimed that the second appellant had breached non-competition obligations in his contract of employment by copying certain concepts from the respondent's restaurants and reproducing them in the first appellant's restaurants. The parties settled this dispute and recorded a settlement deed, the terms of which stipulated that the appellants were to refrain from using: (i) certain slogans and phrases on MFM's menus and websites; (ii) certain

sauces in certain dishes; and (iii) serving pans identical or similar to those used in the respondent's restaurants.

67 The appellants breached the above terms of the settlement deed, and the respondent brought proceedings against the appellants in respect of these breaches. On the first day of trial, parties entered consent judgment, with damages to be assessed. The question was how to quantify the loss caused to the respondent's restaurants by the appellants' breaches. The court below had found that only one of the respondent's restaurants, the Glass House, had been affected by such breaches. That finding was not challenged upon appeal. Thus, the question was how to quantify the loss of profits suffered by the Glass House as a result of the appellants' breaches.

68 In the court below, both the respondent and the appellants in *MFM Restaurants* proposed different methods of computing the respondent's loss, supported by the evidence of two different expert witnesses. For present purposes, it is unnecessary to delve into the details of these methods. The Court of Appeal ultimately found that it was not necessary to employ either method to estimate the level of sales that the Glass House would have achieved but for the appellants' breaches. Instead, the Court noted that, based on three data points representing the gross sales of the Glass House between certain historical periods, the Glass House had been seeing a general upward trend in actual gross sales just prior to the period during which breaches were committed by the appellants. On the basis of this upward trend, the Glass House had a predicted or projected percentage change in expected gross sales of -0.38% for the period between February 2006 and January 2007. Based on the data, the Court concluded that but for the appellants' breaches, the respondent would have achieved gross sales of $2,803,911.82. The Court then subtracted from this

figure the *actual* gross sales which the respondent achieved during that period, finding that, but for the appellants' breaches, the respondent would have achieved $121,738.55 more in gross sales. Since the variable profit margin of the restaurant was 52.38%, the Court found that the Glass House's loss of profits as a result of the appellants' breaches was $63,766.65 (being 52.38% of $121,738.55) for the period between February 2006 and January 2007 (*MFM Restaurants* at [68]).

69 What is worth noting about *MFM Restaurants* is that the Court of Appeal used the above method to quantify the loss despite recognising that there were deficiencies in the evidence. The Court's assessment of the evidence was that "the available evidence on which to base an award of damages in the present proceedings is far from satisfactory" (at [65]), and that "three data points are, from a strict statistical perspective, inadequate for predicting a *precise* trend" [emphasis in original] (at [68]). Nevertheless, the Court found as follows (at [62]):

> …*[S]ome* educated guesses *have* to be made – regardless of the precise methodology ultimately adopted by the court. To state this is merely to acknowledge the very real fact that **life is far more complex than simple law school hypotheticals and even textbooks would have us believe. However, that has never prevented the courts from awarding what, in their view, were just and fair sums to plaintiffs if the legal rules and principles justified them.** Indeed, as we have acknowledged (realistically) above…, the court will simply do the best that it can, having regard to all the circumstances before it.
>
> [emphasis added in bold]

70 It follows that even where the court has difficulties in ascertaining the precise extent of a plaintiff's losses, it must "do the best that it can" based on the evidence, so far as this may be justified by reference to legal rules and

principles. My decision as to damages in the present case is guided by the above observations.

Cases involving damage claims for loss of business and professional profits

71 In cases where a plaintiff seeks compensation for the loss of earnings or profits it would otherwise have received but for the defendant's tortious action, the courts have been willing to engage in the "hypothetical exercise" of estimating the loss, provided that the plaintiff adduces sufficient evidence. The evidence is not assessed on the basis of a balance of probabilities. Rather, the court does its best to evaluate the chances, taking all significant factors into account. This is demonstrated in several authorities cited by the Plaintiff.

72 The first of these authorities is *Parabola CA*, in which the English Court of Appeal affirmed the approach and findings of the English High Court in *Parabola Investments Ltd & Anor v Browallia CAL Ltd & Ors* [2009] EWHC 901 (Comm) ("*Parabola HC*"). The claimant in that case was a company which had been set up by a trader, Mr Gill, for the purpose of trading in stocks, shares and derivatives. For the large part of more than ten years, Mr Gill had consistently made profits from his trading. At times he had even made "extraordinarily good profits" despite poor market conditions. However, for a period of seven to eight months, Mr Gill was defrauded by a broker ("Mr Bomford") who was employed by the defendant financial institution ("Man"). Mr Bomford had misrepresented to Mr Gill (and thereby to the claimant) that Mr Gill was trading profitably and that there was a certain amount of money remaining in a trading fund which the claimant maintained with Man. As a result of these fraudulent misrepresentations, the trading fund was depleted by several million pounds ("the depleted funds") over the seven to eight-month period while the fraud continued (*Parabola HC* at [1]-[2]).

73 One of the heads of loss claimed was the profits that Mr Gill *would* have made if the depleted funds had been available for trading both during the months while the fraud continued ("stage 1"), and also during the period from discovery of the fraud until trial ("stage 2") (*Parabola HC* at [121]).

74 The matter was decided at first instance by Flaux J in the English High Court, who found that Mr Bomford and Man were liable to the claimant in deceit. Flaux J allowed the claim for loss of profits in stage 1 and accepted the claimant's estimate that Mr Gill would have made profits at a rate of 50% per annum during this period. The claim for loss of profits was also allowed in respect of stage 2. For this period, Flaux J assessed the amount of trading profits that would have been made in a given year by applying to the opening fund in each year the percentage profit which Mr Gill had in fact made from his trading that year (*Parabola HC* at [192]).

75 A significant amount of evidence and material was adduced concerning the likely level of profits that the claimant would have earned by trading with the depleted funds. The Court had before it Mr Gill's trading results for the period from 1995 to 2008 (*Parabola HC* at [19] and [89]). The claimant had made submissions regarding how exactly Mr Gill would have invested the depleted funds (at [169]). The court also heard evidence from several expert witnesses (at [9]), and it was based on this evidence that the Court reached the conclusion that "if Mr Gill had had more trading capital at his disposal, the probable result would have been that he would have made more profits, with the increase in profits being at least proportional to the increase in the capital fund" (*Parabola HC* at [169] and [189]). The expert witness whose view Flaux J ultimately preferred had also given evidence specifically on what he thought of the 50% figure which was proposed to be used as a basis for calculating the

claimant's loss of profits in stage 1 (*Parabola HC* at [188]). Ultimately, taking all of this evidence into account, the Court decided to award damages for loss of profits on the basis of "appropriately conservative" estimates (*Parabola HC* at [188] and [192]).

76 On appeal, counsel for the defendants argued that it was "unproven" that Mr Gill would have earned a specific amount of profits, and that Mr Gill had not provided an adequate explanation of how he would have traded during the relevant period. The 50% figure awarded by Flaux J in respect of stage 1 was criticised by the appellants as being "plucked out of the air", "unjustified", and "a phenomenal rate of return for real world stock market trading" (*Parabola CA* at [21]).

77 The English Court of Appeal did not agree, observing that where quantifying a claimant's loss involves a hypothetical exercise, the court does not apply the "balance of probabilities" test but rather estimates the loss as best as it can. Toulson LJ held as follows (at [22]–[24]):

> … Other forms of consequential loss are not capable of similarly precise calculation because they involve the attempted measurement of things which would or might have happened (or might not have happened) but for the defendant's wrongful conduct, as distinct from things which have happened. In such a situation the law does not require a claimant to perform the impossible, *nor does it apply the balance of probability test to the measurement of the loss.*
>
> … *Where* [*quantifying the claimant's loss*] *involves a hypothetical exercise, the court does not apply the same balance of probability approach as it would to the proof of past facts. Rather, it estimates the loss by making the best attempt it can to evaluate the chances, great or small* (unless those chances amount to no more than remote speculation), taking all significant factors into account.
>
> The appellants' submission, for example, that "the case is that a specific amount of profits would have been earned in stage 1

> was unproven" is therefore misdirected. It is true that by the nature of things the judge could not find as a fact that the amount of lost profits at stage 1 was more likely than not to have been the specific figure which he awarded, but that is not to the point. The judge had to make *a reasonable asses*sment and different judges might come to different assessments without being unreasonable.
>
> [emphasis added]

78 Another authority cited by the Plaintiff is the decision of *Vasiliou v Hajigeorgiou* [2010] EWCA Civ 1475 ("*Vasiliou*"). The claimant in that case had leased certain premises from the defendant landlord for the purpose of operating a restaurant on those premises. The defendant had in various ways breached the landlord's covenant of quiet enjoyment, with the result that the operation of the restaurant became "a legal impossibility" (*Vasiliou* at [23]). The claimant sought to recover the lost profits which he would have received from operating the restaurant had it not been for the landlord's breach.

79 It fell to the trial judge to decide what level of profits the claimant would have made if he had operated the restaurant from April 2002 to December 2003. The trial judge held that the issue of damages should be assessed taking into account the claimant's personal characteristics – namely, that he was an accomplished restaurateur and that he would, on a balance of probabilities, have succeeded if not for the difficulties caused by the defendant (*Vasiliou* at [14]).

80 Having decided this, the trial judge then dealt with the amount of profit that the restaurant would have earned with the assistance of expert evidence. The experts were tasked with assessing the level of profitability which the restaurant would have achieved on the assumption that it operated successfully (*Vasiliou* at [15]). The experts' assessments were based on comparisons with the turnover and profit margins of other similar restaurants. The calculations of

both experts took into account several key variables including the restaurant's customer capacity, the number of "cover turns" per week (this refers to the number of successive seatings in a restaurant) and the average "cover price" (the average price paid for a given meal). Having considered and assessed the expert's evidence, the trial judge awarded the claimant £221,721 by way of damages for loss of profit.

81 On appeal, the defendant took issue with the fact that the trial judge had made no discount in his award for the possibility that the restaurant may not have been a success. The Court of Appeal dismissed the appeal and upheld the trial judge's decision, finding that there was no need for the trial judge to factor in a general discount to take into account the statistical possibility of failure (*Vasiliou* at [24]), because he had already found that the claimant was an accomplished restaurateur and that the restaurant would have been a success. The Court also endorsed the holding in *Parabola CA* that the court must "[estimate] the loss by making the best attempt it can to evaluate the chances, great or small…, taking all significant factors into account" (*Vasiliou* at [25]), and observed that the trial judge had "[carried] out this sort of exercise in relation to the issues about cover turns and increases in profitability" (*Vasiliou* at [26]).

82 I pause to note that the Plaintiff relies quite heavily on this decision and has sought to draw parallels between himself and the claimant in *Vasiliou*. Given the Court of Appeal's findings in *Ramesh v AXA* that the Plaintiff had been very successful in his job and was clearly valued by the Defendant, the Plaintiff argues that, as in *Vasiliou*, there should be no discount to his loss of earnings to factor in the possibility that he may not have done well at Prudential.

83 Another relevant authority which the Plaintiff has cited (albeit only in passing) is the English High Court decision of *XYZ v Portsmouth Hospitals NHS Trust* [2011] EWHC 243 (QB) ("*XYZ*"). The claimant in this case brought a claim in medical negligence against the defendant for negligent advice and performance of a kidney transplant operation. The defendant admitted liability and the parties had agreed on the quantum of damages for most of the claimed heads of loss (*XYZ* at [1]). However, one area in dispute was the claim for compensation for loss of future earnings. The claimant alleged that when he suffered from his injuries as a result of the defendant's negligence he was on the cusp of a new stage in his career. Having reached a very senior position within the pharmaceutical industry, he had resigned in order to set up his own pharmaceutical market research agency, which purportedly would have been highly profitable. The claimant thus sought compensation for the loss of his prospects of setting up and developing this business for several years and, upon retirement, selling that business (*XYZ* at [42]-[45]).

84 The matter was heard by Spencer J, who noted that where there cannot be certainty as to the way in which the claimant's business would have developed, the court may assess damages by evaluating the chance that particular events would have happened at particular times (*XYZ* at [54], citing *Davies v Taylor* [1974] AC 207). Spencer J proceeded to quantify the claimant's loss by expressing in percentage terms the likelihood that the claimant would have reached certain milestones (for example, the chances that the business would have reached a turnover of £2m, £5m and £10m per annum), and the likelihood that the claimant would have sold the business for a certain amount at a certain age (*XYZ* at [43]).

85 It is worth noting that in assessing the chances and probabilities that the claimant would have achieved these milestones, Spencer J had before him an extensive amount of evidence which had been led by the parties on this issue. In particular, the court had heard the testimony of witnesses who had themselves set up businesses similar to the ones the claimant had intended to establish ("the comparator witnesses"). Spencer J noted that the financial performance of these witnesses had provided "useful comparison[s]" (*XYZ* at [48]). One of these comparator witnesses, "OA", had expressed in percentage terms his own estimates of the claimant's likelihood of reaching certain levels of turnover (*XYZ* at [49]). In addition, the claimant had also adduced the evidence of a forensic accountant, who had examined the financial accounts of the comparator witnesses' with a view to analysing the prospects of the claimant's business and its likely profitability (*XYZ* at [51]).

86 The cases demonstrate that courts have been prepared to delve into evaluating the chances to quantify a plaintiff's loss where they are equipped with an "adequate (and reasoned) basis" (see *MFM Restaurants* at [67]) for determining what the plaintiff might have gained but for the defendant's tortious wrong. What amounts to "sufficient evidence" will vary according to the context, since proof of damage is "intensely factual" (*Robertson Quay* at [27]) and the particular circumstances can take a myriad of forms. It should not be assumed based on the cases described above that it will always be necessary for a plaintiff to call on expert witnesses, or to produce market reports, or to rely on the projections of forensic accountants (these happen to be some of the features in *MFM Restaurants*, *Parabola*, *Vasiliou* and *XYZ*). In some cases the court may be in a position to quantify the plaintiff's loss based on a smaller amount of material, or based on less sophisticated projections and calculations. In yet other

cases the plaintiff may only be able to produce a limited amount of evidence in spite of its best efforts.

87 In deciding whether there is sufficient evidence, the courts adopt a pragmatic approach which takes into account a plaintiff's difficulties in proving the exact amount of damage with complete certainty. Indeed, the Court of Appeal in *Robertson Quay* (at [28]) endorsed the statement in *McGregor (17th Ed)* at para 8-002 that "where it is clear that some substantial loss has been incurred, the fact that an assessment is difficult because of the nature of the damage is no reason for awarding no damages or merely nominal damages."

88 Bearing the above principles in mind, the question that arises is whether there is sufficient evidence before this Court to provide an adequate basis for estimating the Plaintiff's loss. That question is closely intertwined with the issue of how exactly the Plaintiff's loss should be quantified. Before turning to those issues, however, I address the preliminary issue of whether the Plaintiff's loss should be characterised as a loss of chance. This determines whether this Court should be concerned with quantifying the *chances* that the Plaintiff would have been engaged by Prudential, in addition to quantifying how much he would have earned if he was engaged by Prudential.

Whether the Plaintiff's loss should be assessed as a "loss of chance"

89 As mentioned, the Plaintiff has emphasised the Court of Appeal's finding that "Prudential ultimately decided not to hire [him] not because of the conditions that MAS intended to impose on [his] RNF licence or for any other reasons" (*Ramesh v AXA* at [146]) but because of the delays and the lengthy process of clearing the Plaintiff's job application, which, in turn were attributable to the Defendant's negligence (*Ramesh v AXA* at [147]). Thus, the

Plaintiff argues that *but for* the Defendant's negligence, Prudential would have hired him, and damages should not be assessed on the basis that this is a "loss of chance" case.[26]

90 The Defendant, however, characterises the Plaintiff's loss precisely as the loss of a chance. In this regard, the Defendant emphasises the Court of Appeal's observation that, in the context of a claim in negligence on the part of a former employer in preparing a reference for an employee, the plaintiff only has to show that by reason of that negligence he has lost a *reasonable chance* of employment and has thereby sustained loss (*Ramesh v AXA* at [143] citing the remarks of Lord Lowry in *Spring*).[27] The Defendant goes on to say that, in a loss of chance scenario, the claimant's chance must be evaluated, which requires proof of (a) the likelihood of the chance occurring; and (b) the value to the claimant if the chance occurs.[28]

91 Having considered the arguments, I am of the view that it would not be appropriate to characterise and assess the Plaintiff's loss on the basis that it is a "loss of chance". I recognise that the Court of Appeal found that the Plaintiff only had to show that he had lost a "reasonable chance" of being employed by Prudential. I also note that the learned author of *McGregor on Damages* (Sweet & Maxwell, 19th Ed, 2014) ("*McGregor (19th Ed)*") at para 10-047 discusses the decision of *Spring* (which was cited by the Court of Appeal in *Ramesh v AXA*) as an example of a case "in which the law is prepared to recognise the loss of a chance as itself an identifiable head of loss, as itself constituting compensatable damage".

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26 Plaintiff's written submissions, para 6.

27 Defendant's written submissions, para 9(a).

28 Defendant's written submissions, para 20.

92 That does not mean, however, that the Plaintiff's loss *should* be characterised as a loss of chance. The Court of Appeal found that Prudential decided not to hire the Plaintiff because of the Processing Delays, and *not because* of any other reason. Given the strength of these findings on causation, I agree with the Plaintiff that this was effectively a finding that *but for* the Defendant's negligence, Prudential would have hired him (*Ramesh v AXA* at [146]). It follows that the basic question before this Court is not so much "what are the chances that the Plaintiff would have been engaged" by Prudential as it is "what would have been the Plaintiff's entitlements (remuneration) under the contract?" Bearing this in mind, I turn now to assess the state of the evidence.

The evidence concerning the amount of damage suffered by the Plaintiff

93 What the Plaintiff has lost is the remuneration which he would have enjoyed if he had been hired by Prudential, had it not been for the Defendant's negligence. Yet the evidence adduced by the Plaintiff as to how to quantify such lost remuneration is indeed rather thin. I note that there are two possible methods of quantification. The first of these methods was proffered by the Plaintiff, and involves estimating how much the Plaintiff would have earned at Prudential based on evidence concerning the remuneration he was receiving while engaged by the Defendant. The second possible method is to estimate how much the Plaintiff would have earned at Prudential based on the terms of the Establishment Package which was offered conditionally to the Plaintiff on 16 June 2011. As I shall explain, I found that the first method was not a satisfactory means of quantifying the loss, but the second method, whilst far from perfect, offers an adequate basis for making an award of damages.

(1) Estimation based on the Plaintiff's earnings while engaged by the Defendant

94 In written submissions, the Plaintiff has characterised his proposed method of quantification as one that "takes all significant factors into account", including the qualities of the Plaintiff, his historical performance while engaged by the Defendant, the persistency ratios and production of the Ramesh Organisation, and Prudential's alleged plans to recruit the majority of the Ramesh Organisation advisers (see [42]–[43] above). Yet, distilled to its essence, the Plaintiff's method is basically to project what he would be earning at Prudential based on two key assumptions: first, that the Plaintiff would have earned remuneration comparable to what which he enjoyed when working with the Defendant; and secondly, that he would have grown to his agency organisation to a 100-adviser organisation within a year. I find that there is insufficient evidence to support either of these assumptions.

95 As for the assumption that the Plaintiff would have earned remuneration comparable to that which he had earned with the Defendant, there was no direct evidence to substantiate such an assertion. The Plaintiff has sought to rely on the fact that the Defendant itself has described the "GFSD" position the Plaintiff was offered at Prudential as being "the equivalent of a FSD in AXA".[29] The thinness of the evidence on this point was recognised by the Plaintiff with his statement that there was an "absence of evidence that a Prudential GFSD was remunerated far less than a FSD in AXA".[30] The difficulty is that the absence of such evidence cannot take the Plaintiff very far. It is for the Plaintiff to adduce evidence suggesting that a GFSD's remuneration is comparable to that of an FSD in AXA, and not for the Defendant to prove otherwise. Whilst I note that

[29] Plaintiff's written submissions, para 18.

[30] Plaintiff's written submissions, para 73.

the Defendant accepted the ranks were similar, there is no evidence that the remuneration levels were also the same or similar.

96 The Plaintiff also argues that the remuneration *structure* that he would have received at Prudential would have been broadly similar to what he had received when engaged by the Defendant.[31] I was not persuaded. The Plaintiff asserts that counsel for the Defendant established in the course of cross-examining the Plaintiff "that the norms of the financial services industry are such that the bulk of the remuneration [the Plaintiff] received as a Financial Services Director came not from a fixed salary, but rather variable income such as… commissions, bonuses, business allowance and cash incentives."[32] That seems to be an inaccurate description of the oral evidence cited in support of the Plaintiff's point. Whilst it is accepted that the Plaintiff's remuneration at the Defendant largely comprised commissions, bonuses, allowances and incentives,[33] there was no evidence that this was the norm in the industry. Accordingly, I saw no basis for concluding that the remuneration structure the Plaintiff would have received at Prudential would have been similar to that he had previously received from the Defendant. Added to this, there is the further problem that the Plaintiff has only adduced evidence of the remuneration he received from the Defendant for a very short period of two and a half years. During that time, the Plaintiff's annual income increased rapidly and drastically from $694,963.55 in the whole of 2009 to $1,702,250.87 within the first four and a half months of 2011 alone. It remains questionable whether such a limited amount of historical data can allow the court to safely draw the conclusion that the Plaintiff would have continued receiving rates of remuneration similar to

[31] Plaintiff's written submissions, para 21.

[32] Plaintiff's written submissions, para 21.

[33] Certified Transcript for 7 June 2014, pp 12–19.

what he received in 2010 and 2011 *even if he had remained with the Defendant*, let alone after his move to Prudential.

97 I note also the Plaintiff's projection was that he would have received $6m in remuneration annually from August 2012 to July 2016. This projection was based on the second assumption that he would have grown his agency organisation to the strength of 100 financial advisers or consultants within one year of joining Prudential. The Plaintiff's projection was largely premised on (a) the fact that the Plaintiff had grown the Ramesh Organisation over the years (it seems the organisation grew from 25 advisers to about 47 advisers in a span of about one and a half years);[34] (b) the fact that he had been in talks with the Defendant's management to transition to the GA model in early 2011; and (c) the fact that it had been a term of the Establishment Package that the Plaintiff recruit 25 new advisers within the first six months of his employment (see [43(d)] above).

98 Whilst I have no doubt that the Plaintiff would have strived to meet the targets, it is not possible on the evidence before me to come to the conclusion that the Defendant would essentially have doubled the number of advisers within his agency organisation in the span of a year. In any case, even if I had thought otherwise, the problem remained that the estimate of $6m was based on assumptions that (a) his remuneration at Prudential would have been similar to that he received from the Defendant; and (b) the quantum of his remuneration would have grown in direct proportion to the number of advisers within his organisation. The more assumptions and contingencies there are in the projection, the more careful the Court must be.

[34] Plaintiff's written submissions, para 48.

99 It is not enough for the Plaintiff to point to the fact that he had performed very well and was greatly valued while engaged by the Defendant. There is certainly ample evidence to that effect, but it cannot ground an estimation of the Plaintiff's loss, just as the mere fact that the claimants in *Parabola*, *Vasiliou* and *XYZ* were competent and/or outstanding individuals with strong performance records did not form a basis for estimating their losses. The courts in those cases utilised facts and figures to "mak[e] a realistic and reasoned assessment" (*Vasiliou* at [25]) of the claimants' losses. For all of the above reasons, I did not feel that there was sufficient evidence to make a "realistic and reasoned assessment" using the Plaintiff's proposed method of projecting his lost remuneration based on his remuneration while engaged by the Defendant. That did not mean, however, that there was no material with which this Court could make an award of damages. The evidence does at least establish that the Plaintiff had a substantial remuneration package at the Defendant. Indeed, the Plaintiff's remuneration appears to have risen rapidly and substantially between 2009 and mid-2011. Further, notwithstanding the uncertainties, it is also clear that the Plaintiff had applied for and was being considered for a senior position at Prudential. As I explain below, I found that the Establishment Package offered an adequate basis for quantifying or estimating the loss suffered by the Plaintiff.

(2) Estimation based on the Establishment Package

100 It is worth stating from the outset that quantification based on the Establishment Package is certainly not without its difficulties. Indeed, whilst the Plaintiff does refer to the Establishment Package to substantiate his view that he would have received levels of remuneration from Prudential comparable to what he received from the Defendant,[35] he himself does not argue that his loss

of earnings should be estimated based on these terms as such. The Defendant goes so far as to submit that the Establishment Package does not provide *any* basis to attempt to assess the loss. It was only a "conditional offer" representing the starting point for negotiation and discussion. I have already mentioned Mr Tay's evidence that it was "not finalised" and probably intended "for the first few cuts" of discussions between the Plaintiff and Prudential and that it was "a draft" because it had not been signed by Prudential's CEO (see [16] above). The Court of Appeal in remitting the matter for assessment of damages noted the Defendant's arguments in this regard and stated that this was a matter to be considered at the assessment of damages stage (*Ramesh v AXA* at [157]).

101 Aside from the fact that the Establishment Package appears to have been "not finalised", another difficulty arises from the *conditional* nature of the offer. The Establishment Package is expressly stated to be "subject to" six conditions:

> 1. Submission of certified-true copy of income statements and production statements;
>
> 2. A face-to-face interview;
>
> 3. Having no outstanding Medisave liability to the Central Provident Fund Board;
>
> 4. Clearance of reference check(s) with ex-principal(s);
>
> 5. [Fulfilment] of all requirements under "Fitness and Propriety"; and
>
> 6. Final management approval
>
> (collectively, "the Six Conditions").

102 Apart from the Six Conditions, it appears that the terms of remuneration reflected in the Establishment Package may be subject to certain other requirements. The offer sheet contains a table which suggests that there are

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35 Plaintiff's written submissions, para 72.

certain "AIPI Milestones" which the Plaintiff would have had to meet by the end of certain "Accounting Periods". As mentioned, the offer sheet also states the following:

> The GSFD [*sic*] rank is offered to your candidate on a special case basis. Provided that he successfully appoints 25 new FCs and achieves at least $2,400,000 AIPI unit production within 6 months from his appointment date, the company reserves the rights to review his GFSD title.

103 As I have mentioned (see [58] above), the Defendant argues that the Plaintiff had led no evidence on the meaning of the term "AIPI". I note, however, that the Plaintiff in response to a request for Further and Better Particulars did state that "AIPI" refers to "Awards and Incentive Premium Income".[36] Nevertheless, the difficulty remains that even the meaning of the term "Awards and Incentive Premium Income" was not explored or explained in evidence, and it is unclear what exactly this term refers to.

104 To summarise, the difficulties that I have with awarding the Plaintiff damages for loss of earnings on the basis of the Establishment Package are as follows:

> (a) First, it was questionable whether the Establishment Package reflected terms that would eventually have been offered to the Plaintiff. It was a "draft" and not finalised. In this regard, I agree with the Defendant that the Plaintiff could have, but did not, adduce any evidence concerning the extent of the negotiations between Prudential and the Plaintiff at the stage when this "conditional offer" was made.

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36 Plaintiff's Particulars served Pursuant to Request dated 7 February 2013, p 12.

(b) Secondly, it is not clear what the terms, conditions and requirements of the Establishment Package actually are. It can fairly be said that the terms of the Establishment Package are not drafted with great precision and, predictably, the parties have taken different positions on how it should be construed. The Plaintiff says that recruiting 25 new financial advisers was a "term" of the offer, whereas the Defendant describes this as a "condition" of the offer. Even putting those issues of legal definition aside, the more significant problem was that no evidence was adduced concerning what terms such as "AIPI Milestones" referred to, or what exactly the "accounting periods" were.

(c) Thirdly, I have no basis upon which to estimate the Plaintiff's chances of meeting the conditions and requirements set out in the Establishment Package, if he had been hired by Prudential. It is not surprising that no evidence was adduced on this point because, indeed, no evidence was even adduced on what exactly the conditions and requirements of the Establishment Package were, or what its terms meant.

(d) Finally, it was not known whether the Plaintiff would still have received the remuneration set out in the Establishment Package if he had failed to meet the targeted AIPI milestones (whether they were terms or conditions). It would appear that the offer sets out the remuneration that the Plaintiff would receive *assuming* that he was a GFSD, but the offer also suggests that the title of GFSD is subject to review if the Plaintiff fails to meet certain targets. Whether or not the compensation offered in the Establishment Package would also correspondingly have been subject to similar review is not clear.

105 I accept that the Plaintiff could have done more to put the appropriate evidence before the court. The Plaintiff could, for instance, have led evidence from an appropriate officer of Prudential concerning the meaning of terms such as "accounting period" and "AIPI Production". The Plaintiff could also have led evidence concerning whether the targets set out in the Establishment Package were equivalent to any targets which the Plaintiff had previously met in the course of his employment with the Defendant, which may have shed more light on the Plaintiff's chances of meeting those targets and receiving the remuneration in the Establishment Package. The Plaintiff might have led evidence that the remuneration was not subject to any of these targets at all, and that he would have received it regardless of whether he had met the "AIPI Milestones". In the event, however, such evidence was not put before the Court.

106 Nevertheless, bearing in mind the need to take a "flexible approach" (*Robertson Quay* at [30]), the question is whether, notwithstanding the above difficulties, the Establishment Package could nevertheless constitute an adequate basis for assessing, at least on a conservative basis, what the Plaintiff would likely have earned if he had been hired by Prudential. I was satisfied that it did.

107 First, notwithstanding the fact that the Establishment Package was only a "draft" and was still subject to final management approval, I have come to the view that it is not unreasonable to assume that its terms were reflective or could be used as conservative estimates (see *Parabola HC* at [188] and [192]) of the Plaintiff's likely remuneration had he been hired by Prudential. The package was offered to the Plaintiff as early as June 2011. In the following months, Mr Tay's evidence was that Prudential's personnel "[tried] to assess and *help to see*

how we can bring [the Plaintiff] *back to Prudential*" [emphasis added].[37] Prudential then took steps to apply for an RNF licence for the Plaintiff in August 2011 (see [17] above). Although the Plaintiff's application to join Prudential appeared to have been progressing, there was no suggestion that any other terms of engagement were discussed during this period, or that either the Plaintiff or Prudential suggested varying the terms of the Establishment Package.

108 The Defendant accepts that the position the Plaintiff was seeking at Prudential was similar to his FSD position at the Defendant. As noted already, there is no doubt that what was in discussion with Prudential was a senior position of some status and responsibility. In light of this, I am satisfied that Prudential would not likely have made an initial offer on terms that were drastically less favourable than what the Plaintiff would be entitled to receive upon being hired. Thus, despite being "preliminary" in nature, the Establishment Package offered a good approximation of the basic terms that would eventually have been offered to the Plaintiff.

109 Secondly, I acknowledge that the terms of remuneration in the Establishment Package may be tied in some way to the Plaintiff reaching certain targets (AIPI Milestones). However, notwithstanding the uncertainties relating to what those targets actually were, whether or not the Plaintiff would have achieved them, and how his pay would have been affected if he had not, I was satisfied that the monthly remuneration figures in the Establishment Package could be taken as conservative estimates (see *Parabola HC* at [188] and [192]) of what the Plaintiff would have received.

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37 Certified Transcript for 14 January 2014, p 21, lines 13–19.

110 While it is not clear what sort of remuneration structure the Plaintiff would have received from Prudential, the evidence relating to his remuneration structure while engaged by the Defendant offers some basis for concluding that the monthly remuneration in the Establishment Package would not have been the only form of compensation the Plaintiff would have received. He would likely also have received some combination of commissions and/or bonuses. It might even be argued that, on one view, this Court in awarding damages based on the Establishment Package would be under-compensating the Plaintiff for the various other types of remuneration he would have achieved if he had been hired by Prudential. Given the state of the evidence, however, there is no evidential basis for this Court to delve into the imponderable question of how much exactly the Plaintiff would have received over and above the fixed monthly pay.

111 That said, given that the Plaintiff would likely have received *some* additional form of compensation, it is not unreasonable to assume that even if the Plaintiff would have difficulties reaching the targets set out in the Establishment Package, the monthly pay rates of $65,625 for the first 12 months and $43,750 for subsequent months may serve as conservative estimates of the total compensation he would have received, including any additional components such as bonuses or commissions. I further note that the Establishment Package consists also of a "Commencement Allowance" of $675,000, which, presumably, was not contingent upon the hitting of any targets.

112 That being so, I find that the Establishment Package offers some reasoned basis for assessing the loss which the Plaintiff has suffered by reason of the Defendant's negligence. In accepting this method of calculation, I stress

that this Court can only do the best that it can having regard to the evidence before it (*MFM Restaurants* at [57]). The estimation of the level of compensation which the Plaintiff would likely have received under a contract with Prudential is however only a starting point. The question that follows is how long a period the Plaintiff is entitled to claim damages for.

Period of time for which the Plaintiff is entitled to damages

113 The question of the period of time for which the Plaintiff is entitled to compensation is inevitably intertwined with another issue which is whether the Plaintiff has fulfilled his obligation to mitigate his losses. If the court finds that the Plaintiff ought to have mitigated his losses, for instance, by taking measures to obtain alternative employment, this would necessarily limit the period for which the Plaintiff is entitled to compensation and/or the quantum. For that reason, it is worth saying something about the issue of mitigation.

114 As stated in *The Asia Star* [2010] 2 SLR 1154 at [24], the burden of proving that the aggrieved party has failed to fulfil its duty to mitigate falls on the defaulting party. In a similar vein, the learned author of *McGregor (19th Ed)* at para 9-019 observes that if a defendant fails to show that a claimant ought reasonably to have taken certain mitigating steps, then the normal measure of damages will apply. The Privy Council in *Calix v Attorney General of Trinidad and Tobago* [2013] 1 WLR 3283 ("*Calix v AG*") held that an alleged failure to mitigate *must be pleaded*. If a claimant's entitlement to damages is to be affected by a possibility that some action could have been taken to avoid the loss, this is a matter which is required to be pleaded and examined through admissible evidence, and which should be put to the claimant (at [19] and [21]).

115 Bearing this in mind, the only point I need make in relation to the issue of mitigation is that the Defendant has not pleaded that the Plaintiff failed to mitigate his losses. The Defendant has stressed in its written submissions that the Court of Appeal did *not* hold that the Defendant had caused the Plaintiff to be unemployable in the financial advisory services industry,[38] but it has never suggested that the Plaintiff *could have* or *would have* found alternative employment to mitigate his loss. As I have mentioned, the Defendant also did not challenge the Plaintiff's claim that between May 2011 and August 2012, he unsuccessfully made enquiries with numerous other insurance companies including Manulife, AVIVA, HSBC, and AIA (see [24] above).

116 If a failure to mitigate *had* been pleaded and adequately examined at trial, it would have been relevant to note that between the failure of his application to Tokio Marine and the trial of the action it appears that the Plaintiff made no further efforts to obtain a position in the insurance industry or indeed any position in the commercial or financial sector. Instead, he decided to work for his wife's restaurant business as a "kitchen-hand." The reasonableness of that decision would have been a factor for discussion if the matter had been properly pleaded and examined in the evidence. Numerous points would have arisen for consideration, including:

(a) the claim that the Plaintiff had already made enquiries with several other insurance companies unsuccessfully from May 2011 to August 2012;

(b) the fact that the Plaintiff did at least make enquiries as to the reason for MAS's decision to issue him a conditional RNF licence (see [22] above);

[38] Defendant's written submissions, para 10.

(c) the fact that any other application for a job within the insurance industry would also have required the prospective principal to conduct a reference check with the Defendant;

(d) the likelihood of the Plaintiff being able to obtain a position in the insurance industry (Prudential and Tokio Marine aside) with a conditional RNF licence and the prospects of any conditions being lifted over time.

117 The Defendant did not, however, plead that there had been a failure to mitigate, and the question of mitigation has not been put to the Plaintiff or tested properly against admissible evidence (*Calix v AG* at [19]). In view of this, it was not open to this Court to find that there had been a failure on the Plaintiff's part to mitigate his losses. It follows that the period of time for which the Plaintiff is entitled to compensation was not to be limited by any suggestion that, in the intervening years, he could have obtained alternative employment comparable to that which he would have had at Prudential. I thus accept the Plaintiff's submission that he ought to be compensated for his loss of earnings for the period between mid-August 2011 and July 2016, when the Court of Appeal released its judgment.

118 The Plaintiff makes a further submission that he should be compensated for LFE in respect of the period from August 2016 to July 2021. As noted above, it seems that the Plaintiff seeks compensation for the period of August 2016 to July 2017 as a result of the additional time he would need to take the relevant modules to comply with the new MAS requirements (see [51] above). He further seeks compensation for the period between July 2017 to August 2021 because it would take him four years to "re-build a 100-FSA agency organisation" which

is "the position he would have been in, had [the Defendant's] negligence not occurred."[39]

119 As for the submission that I should take into account the time the Plaintiff would require to comply with MAS's new academic requirements, I was of the view that any additional loss to the Plaintiff by reason of the new academic requirements was too remote and not reasonably foreseeable by the Defendant (see *Man Mohan Singh s/o Jothirambal Singh and another v Zurich Insurance (Singapore) Pte Ltd (now known as QBE Insurance (Singapore) Pte Ltd) and another and another appeal* [2008] 3 SLR(R) 735 at [45] and [55]).

120 I accept that the Plaintiff would require time to re-build an agency organisation. However, as I have mentioned, I felt that there was insufficient evidential basis for me to find that the Plaintiff's agency would have grown to the strength of 100 advisers (see [98] above). Using the Plaintiff's own estimation that he would grow his own agency organisation at a rate of 25 advisers per year, I thus awarded damages for loss of future earnings for the period between August 2016 to July 2018, which is how long the Plaintiff would take to grow his agency organisation to the strength of 50 advisers (roughly the size of the Ramesh Organisation immediately before the breach occurred). Using an annual compensation of $525,000 ($43,750 multiplied by twelve months) as a baseline, damages are discounted by 50% for the period from August 2016 to July 2018 on the assumption that the Plaintiff would within this period rebuild his organisation to the strength of 50 advisers.

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39 Plaintiff's written submissions, paras 84–85.

Whether any discount should be applied for the Plaintiff's employment since the unsuccessful application to join Prudential

121 As mentioned (see [23] above), the Plaintiff made the decision to assist in Tulasi, the restaurant business co-owned by him and his wife. The Plaintiff claims he was a kitchen-hand earning $12,300 per year, and that he did not receive any other employment income from any other sources since his departure from the Defendant in May 2011.[40] The Defendant, on the other hand, argues that the Plaintiff was not just a kitchen-hand earning a meagre wage – he was in fact the co-proprietor of the business.

122 Against this, the Plaintiff points to Tulasi's income statement for the period ending 30 April 2013 as reflecting a loss of $301,290 for 2012 and another loss of $338,505 for 2013. However, the Defendant's position is that the Plaintiff has not been forthcoming with his pecuniary gains from investing in and operating Tulasi as a shareholder, director and employee. The Defendant argues that the Plaintiff had failed to provide full discovery of "all the accounting documents, such as the cash flow statements, balance sheets etc" that would enable this Court to ascertain the true financial status of Tulasi.[41] The Defendant argues that an adverse inference ought to be drawn against the Plaintiff on that basis.

123 The difficulty I have with the Defendant's argument, however, is that the Defendant did not raise the issue of the Plaintiff's pecuniary gains from Tulasi until 9 January 2014, which was the third day of trial.[42] In this regard, it

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40 Certified Transcript for 10 Jan 2014, p8, line 13 – p 9 line 1; p 11 lines 14–16.

41 Defendant's written submissions, para 41.

42 Certified Transcript for 9 January 2014, pp 128, 129, and 136; Certified Transcript for 10 January 2014, pp 2–3.

was not surprising that the Plaintiff was only able to adduce Tulasi's Statement of Comprehensive Income for 2012 and 2013 as evidence of the financial status of Tulasi. I thus felt it would be inappropriate to draw any adverse inference from the Plaintiff's failure to adduce more evidence in this regard. Added to this, it may be said that even if the Plaintiff had secured a position at Prudential (or indeed at Tokio Marine) there was no reason why he could not have invested in Tulasi and become a shareholder or director. The award of damages should, therefore, only be discounted for the annual remuneration of $12,300 that the Plaintiff was receiving for his work at Tulasi.

Aggravated damages

124 I turn now to the Plaintiff's claim for aggravated damages. I start with the observation that the claim is for aggravated damages – not punitive or exemplary damages. As noted by the Court of Appeal in *Koh Sin Chong Freddie v Chan Cheng Wah Bernard and others and another appeal* [2013] 4 SLR 629 ("*Koh Sin Chong Freddie*") at [75], aggravated damages are compensatory in nature (see also Gary Chan Kok Yew, *The Law of Torts in Singapore* (Academy Publishing, 2nd Ed, 2016) ("*The Law of Torts in Singapore*") at para 20.10). More recently in *ACB v Thomson Medical Pte Ltd and others* [2017] 1 SLR 918 ("*ACB*") at [156], the Court of Appeal emphasised that aggravated damages are to be distinguished from punitive damages:

> Punitive damages… are meant to punish, deter, and condemn; **aggravated damages, on the other hand, serve a compensatory function – they are awarded to *augment* a sum awarded in general damages to compensate for the enhanced hurt suffered by the plaintiff due to the aggravation of the injury by the manner in which the defendant committed the wrong or by his motive in so doing,** either or both of which might have caused further injury to the plaintiff's dignity and pride…
>
> [emphasis added in bold italics]

125 It has been noted that the question of whether aggravated damages are available in Singapore for a claim in negligence has not yet been authoritatively decided (see *AYW v AYX* [2016] 1 SLR 1183 ("*AYW*") at [117]). The Plaintiff submits that this is an appropriate case to address the question, and argues that aggravated damages should be available in appropriate cases in the tort of negligence where there has been exceptional or contumelious conduct or motive.[43]

126 In English law, *Kralj and another v McGrath and another* [1986] 1 All ER 54 ("*Kralj*") stands as an authority for the proposition that aggravated damages are not awarded for negligence claims. *Kralj* was an action for medical negligence against an obstetrician. The method employed by the obstetrician to assist delivery of the baby was described as "horrific" and "completely unacceptable" as it caused excruciating pain to the mother (*Kralj* at 59). The baby was eventually delivered by Caesarean section with severe injuries and died some days later. Liability was admitted. Two of the issues before the court concerned the claims for (i) aggravated damages for the obstetrician's conduct; and (ii) damages for grief (*Kralj* at 54-55).

127 Woolf J held that it was wholly inappropriate to introduce the concept of aggravated damages into claims for negligence. He reasoned that if the concept did apply, it would be a departure from the general approach to damages with regard to negligence, which was to compensate a plaintiff for the loss that he had actually suffered by the award of monetary compensation, "and not to treat those damages as being a matter which reflects the degree of negligence or breach of duty of the defendant" (*Kralj* at 61).

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[43] Plaintiff's written submissions, para 88.

128 In *AYW,* this Court considered the argument that aggravated damages would sit uneasily with the tort of negligence because aggravated damages are usually only awarded where there is a degree of deliberate and intentional conduct (*AYW* at [118]), whereas claims in negligence usually connote carelessness and a lack of intention. The difficulty with this argument, however, is that the tort of negligence is concerned with breach of a duty to take reasonable care. Whilst the breach is usually due to inadvertence, there does not appear to be any reason in principle that the breach cannot sometimes involve a degree of intentional behaviour.

129 In this regard, learned counsel for the Plaintiff in the present case has rightly drawn attention to the criticism of the *Kralj* decision by the English Law Commission in The Law Commission, *Aggravated, Exemplary and Restitutionary Damages* Report EWLC 247(2) 1997 at [1.36]. In a similar vein, Andrew Burrows*, Remedies for Torts and Breach of Contract*, OUP, 3rd Ed at p 339 argues that once it is accepted that aggravated damages are not punitive in nature, there is no reason why aggravated damages cannot be awarded in negligence as a form of mental distress damages where the defendant's conduct is especially reprehensible. Indeed, the learned author questions whether the continued link to especially bad conduct is necessary. I note, however, that the view of the Law Commission that aggravated damages are just a special form of compensation for mental distress has also been criticised (see John Murphy & Christian Witting, *Street on Torts*, 14th ed at p 675). The view that aggravated damages should not be available in the tort of negligence was also repeated by the English Court of Appeal in *AB v South West Water Services Ltd* [1993] 1 All ER 609 at 629.

130 In principle, I am of the view that aggravated damages can be awarded in appropriate negligence claims. Having said that, however, I also agree with the *dicta* expressed in *Tan Harry and another v Teo Chee Yeow Aloysius and another* [2004] 1 SLR(R) 513 ("*Tan Harry*") at [82] and [83] that exceptional or contumelious conduct or motive in committing the wrongdoing is necessary. I note that *Tan Harry* was recently cited by Belinda Ang J in *Li Siu Lun v Looi Kok Poh and another* [2015] 4 SLR 667 at [138]. Ang J also observed that the defendant must have suffered some kind of intangible loss, whether in the form of distress, injury to personality, or injury to feelings (at [164]). Aggravated damages would only be awarded where the adequacy of the amount of damages calls for augmentation of the general damages (at [156]). The question, therefore, is whether these requirements are met in the present case.

131 The Plaintiff places great reliance on the observations of the Court of Appeal in allowing his appeal and finding negligence. The Court of Appeal at [138] referred to the "very strong words" used to describe the conduct of the Plaintiff in the communications with MAS, the seriousness of the allegations and the allusions to possible ethical violations without "any basis for, or any attempt to substantiate, those views." The Court of Appeal at [140] also found that the Defendant and in particular, Mr Williams, was attempting to paint the Plaintiff in as bad a light as possible. The communications "highlight[ed] as much negative information about the [Plaintiff] as possible, even when such information was not asked for by the recipient." Even though some of the communications were made in respect of the application to join Tokio Marine, the Court of Appeal found that the correspondences were relevant to the assessment of the overall state of mind of the Defendant (at [140]).

132 The Court of Appeal did not, however, find it necessary to decide whether the Defendant had acted in bad faith. This was not necessary since what was at issue was the question of liability (breach). It was enough for the purposes of liability to find that the Defendant through Mr Williams did not act in an objective manner (at [140]).

133 It bears repeating that in the context of considering the Plaintiff's claim in defamation, the defence of qualified privilege and the issue of malice, I held that the Defendant genuinely and honestly believed in the truth of the statements made on persistency and compliance (*Ramesh HC* at [211]). I also found that there was no proof that the Defendant's dominant motive was to injure the Plaintiff (at [214]-[216]). In the context of the tort of malicious falsehood, I found that the Defendant did not make the statements with a reckless disregard as to the truth (at [223]–[225]). I acknowledge, however, that while my decision on defamation and malicious falsehood was not appealed, the comments made in respect of malice – to the extent that they may have been relevant to the issue of aggravated damages – must now be taken in light of the Court of Appeal's holding that Mr Williams wanted to paint the Plaintiff in as bad a light as possible and that he did not act in an objective manner.

134 In the end, notwithstanding the Court of Appeal's findings regarding the Defendant's lack of objectivity, I have come to the decision that even if aggravated damages are awardable in the tort of negligence, this is not an appropriate case for an award. Despite the finding that Mr Williams was seeking to "paint the [Plaintiff] in as bad a light as possible", I find that the Defendant's conduct does not rise to the level of "exceptional or contumelious conduct or motive". I also find that the amount awarded in general damages is adequate and does not call for augmentation.

Conclusion

135 To summarise my decision so far:

(a) I have assessed the damages to be awarded to the Plaintiff on the basis of the Establishment Package that was conditionally offered to him by Prudential.

(b) I have found that the Plaintiff is entitled to receive compensation for the period from August 2011 to July 2018, with damages discounted by 50% for the period from August 2016 to July 2018.

(c) I deduct from the final figure the total remuneration which the Plaintiff has earned from his work in Tulasi from August 2011 to July 2016 ($12,300 multiplied by five).

136 On this basis, the Plaintiff is entitled to the following sums representing his loss of earnings:

Commencement Allowance under the Establishment Package	$675,000
Annual loss of earnings	
August 2011 – July 2012	$787,500 (12 x $65,625)
August 2012 – July 2013	$525,000 (12 x $43,750)
August 2013 – July 2014	$525,000 (12 x $43,750)
August 2014 – July 2015	$525,000 (12 x $43,750)
August 2015 – July 2016	$525,000 (12 x $43,750)
August 2016 – July 2017	$262,500 (50% of $525,000)
August 2017 – July 2018	$262,500 (50% of $525,000)
Deduction of Plaintiff's income from Tulasi	- $61,500
Total	$4,026,000

137 The Court also awards interest at the usual rate of 5.33% from 7 June 2011 to the date of this judgment. Costs of the assessment proceedings to be taxed, if not agreed.

George Wei
Judge

Eugene Singarajah Thuraisingam, Cheong Jun Ming Mervyn and Suang Wijaya (Eugene Thuraisingam LLP) for the plaintiff;
Pillai K Muralidharan, Luo Qinghui, Mark Foo and Andrea Tan (Rajah & Tann Singapore LLP) for the defendant.