Introduction

1 For the purposes of this advice, the types of damages potentially claimed against WKG are as follows:

a. Revenue of $50 million ("**Lost Revenue**") and expected profit of $7.5 million ("**Lost Profit**") over the period the plant could not commence operations and costs of $5 million to keep the plant viable ("**Mothballing Costs**");

b. Cost of $5 million to fit the filters ("**Filter Costs**");

c. Cost of $8 million to clean up the reservoir ("**Clean-up Costs**").

2 As a threshold question, while Auld King (International Projects) Ltd ("**AKIP**"), Auld King (Power Generation) Ltd ("**AKPG**") and Auld King (Terminal Operations) Ltd ("**AKTO**") are all wholly owned subsidiaries of Auld King (Holdings) PLC, the proper party who can claim against WKG is only the party who has suffered the damage. In the case of the Lost Revenue, Lost Profit and Mothballing Costs, these appear to have been suffered by AKPG; while the Clean-up Costs were likely incurred by AKTO as the relevant owner-operators of the plant and sea terminal respectively.

3 It is also apposite to state here that Auld King (Holdings) PLC will not be able to claim on behalf of any or all of its subsidiaries since it is a separate legal entity from its subsidiaries and any duty of care owed (discussed below) must be specific to the party claiming damage.

4 Generally, in order to successfully claim against a party in negligence, the following must be shown[1]:

a. That the defendant owed a duty of care to the claimant;

b. That the defendant breached this duty of care; and

c. The defendant's breach must have caused the damage suffered by the plaintiff; and such damage is not too remote.

5 In order for WKG to defend against any claims in negligence, it thus must show that either of the above conditions are not met.

The Lost Revenue, Lost Profit and Mothballing Costs

Whether WKG owes a duty of care to AKPG

6 As WKG's letter of engagement was with AKIP, WKG owed a duty of care to AKIP both in contract and in tort to ensure that the advice it provided pursuant to that letter of engagement was accurate. However, AKIP was not the party who suffered the damage and thus cannot claim the same against WKG.

7 The first question to be answered is therefore whether WKG owes a duty of care to AKPG despite WKG not having any contractual relationship with AKPG. To this, we would answer in the affirmative.

[1] Gary Chan Kok Yew and Lee Pey Woan, *The Law of Torts in* Singapore (Academy Publishing, Second Edition, 2016) at 03.006

8 A duty of care would arise to a third party in the case of a professional relationship if, the professional provides information which he knows is likely to be communicated to a third party, and for the benefit of that third party.

9 This was found to be the case in *Law Society v KPMG Peat Marwick,*[2] where the defendant auditors were found liable to the Law Society for the consequences of their negligent advice, despite being engaged by a separate law firm to prepare such report in which the advice was contained.

10 The Court of Appeal found that KPMG owed the Law Society a duty of care and affirmed the preceding Judge's reliance on the following passage from *Caparo Industries Plc v Dickman,*[3] in listing the circumstances in which a necessary relationship arises between the person claiming to be owed a duty and the adviser:

> "*... (1) the advice is required for a purpose, whether particularly specified or generally described, which is made known, either actually or inferentially, to the adviser at the time when the advice is given; (2) the adviser knows, either actually or inferentially, that his advice will be communicated to the advisee, either specifically or as a member of an ascertainable class, in order that it should be used by the advisee for that purpose; (3) it is known either actually or inferentially, that the advice so communicated is likely to be acted upon by the advisee for*

[2] [2000] 1 WLR 1921
[3] [1990] 2 AC 605 at 638, reproduced *ibid* at 1925H

that purpose without independent inquiry, and (4) it so acted upon by the advisee to his detriment."

11 The same principle applied in *Smith v Eric S Bush*.[4] The defendant therein was a valuer of properties engaged by a building society to assess a property for which the plaintiff was applying for a mortgage. Lord Templeman found that a duty of care arose between the defendant and the plaintiff as the valuer "*knew or ought to have known that the purchaser would only contract to purchase the house if the valuation was satisfactory and that the purchaser might suffer injury or damage or both if the valuer did not exercise reasonable skill and care*".[5]

12 The above requirements have been met on the present facts. The letter of engagement provided that WKG's report would be made available to AKPG, and the report was addressed to AKPG. WKG thus knew that the report to be prepared was to be communicated to AKPG as the owner operator of the power plant, and that any action to be taken in reliance on that report would have been taken by AKPG.

13 Accordingly, a duty of care would arise between WKG and AKPG.

The scope of WKG's duty of care

[4] [1990] 1 AC 831
[5] *Ibid* at 844

14 The recent decision in *Manchester Building Society v Grant Thornton UK LLP* ("**MBS**") asks the following questions to assess the extent of a professional's liability for negligence:[6]

a. Is the damage claimed actionable in negligence?

b. What is the scope of the defendant's duty of care?

c. Did the defendant breach such duty by his act or omission?

d. Is the damage claimed the consequence of the defendant's act or omission?

e. Is there a sufficient nexus between the harm caused for which the defendant seeks damages and the subject matter of the defendant's duty of care?

f. Is any part of the damage irrecoverable because it is too remote, or because there is a different effective cause, or because the claimant has mitigated his or her loss or has failed to mitigate such loss?

15 The Supreme Court in *MBS* further determined that the scope of the defendant's duty of care is determined by the purpose of the duty, judged on an objective basis by reference to the reason why the advice is being given and paid for.[7] The crux is thus the scope of instruction given to WKG in the letter of engagement and the purposes for which WKG was engaged to give advice.

16 WKG was engaged to advise on environmental issues in connection with the construction of a coal-fired power plant and an associated sea terminal, including the environmental permits required for the operation of the power plant. WKG was presumably aware that the reason for their engagement was specifically because AKIP

[6] [2021] 3 WLR 81 at [6]
[7] MBS at [13]

/ AKPG intended to construct a power plant, for which AKPG would be the owner operator.

17 It is thus reasonable to state that WKG's engagement was to include actions that AKPG can possibly take, or are required to take, to mitigate any environmental issues identified, specifically so that AKPG may take the necessary steps to construct such power plant. In doing so, WKG had assumed responsibility for the consequences of such advice being inaccurate.

18 In contrast, had WKG been engaged purely to provide *information* on general environmental issues that may arise in the construction of a coal-fired power plant e.g. the environmental impact on its surroundings, without further more on any specific requirements for AKPG to construct such power plant, then it would be arguable that WKG's advice about the permits required would not fall within the scope of WKG's engagement and the consequences of the same would not fall on WKG.

19 The distinction between such information and advice was discussed in *South Australia Asset Management Corp v York Montague Ltd* ("**SAAMCO**")[8] which has been endorsed in Singapore.[9] *SAAMCO* involved a property valuer who had provided incorrect information to a lender. It was held therein that the duty of the valuer was construed as that of supplying information such that the lender could decide whether to make the loans, rather than to render advice to the lender on whether it should make such loans. Accordingly, the recoverable damages were limited to the difference

[8] [1997] AC 191 at 211
[9] JSI Shipping (S) Pte Ltd v Teofoongwonglcloong [2007] 4 SLR(R) 460 at [143]

between the negligent valuation and the actual value of the property (i.e. the consequence of the information being wrong), but not losses attributable to the fall in the property market.

20 Applying the *SAAMCO* principles, it could be arguable that WKG would be liable for the information regarding the permits being inaccurate such as, for example, if AKPG commenced operation of the plant without the necessary permit and incurred fines for the same, but not all the related financial impact e.g. of the delay caused. However, this is entirely fact specific, and it is likely that the Court in Singapore will also adopt the approach in *MBS* in time to come, given that it is common law precedent.

21 Given that WKG has accepted that it should have identified the required permit in its report, it is clear that WKG has breached its duty of care.

Whether the damage claimed is the consequence of WKG's breach of its duty of care

Lost Revenue / Lost Profit

22 It cannot be denied that the Lost Revenue and Lost Profit was a result of WKG's failing to identify the permit in its report at first instance. As explored above, it was within WKG's scope of engagement to advise specifically on the steps required to construct the power plant. It was thus foreseeable to WKG that AKPG would have accordingly taken such steps, including applying for all the permits necessary. Had WKG identified the necessity for the permit, AKPG could have applied for and obtained the permit much earlier, avoiding any delay to the plant's commencement of operations.

23 However, AKPG would at best, only be able to claim the Lost Profit and not the Lost Revenue. The purpose of awarding damages to a claimant for a tortious inaccurate representation are to put the victim into the position in which he would have been had such misrepresentation not been made.[10] Accordingly, AKPG should only be compensated for its profit, being the expected earnings lost due to the delay caused by the inaccurate report. The burden would also be on AKPG to show its expected costs of running the plant and justifying its breakdown of how it arrived at an expected profit of $7.5 million.

Mothballing Costs

24 As for the Mothballing Costs, it would similarly be arguable that WKG would be liable for such costs. In law, a claimant has a duty to mitigate its damages suffered, and this applies equally to a claim for damages for negligence. The Mothballing Costs were incurred to ensure that the equipment and machinery in the power plant remained viable upon the power plant's eventual opening, avoiding any additional costs. It is assumed that should AKPG not have kept the power plant "mothballed", it would have incurred even higher costs to restart the power plant eventually. That being the case, AKPG has mitigated its damages to be suffered and should be allowed to claim such costs.

25 However, it would be AKPG's burden to show, on a balance of probabilities, that it would have taken steps that would have ensured it could have opened the plant as planned even if they knew of the particular permit. In *Perry v Raleys Solicitors*,[11] the Supreme Court held at [20] that "*to the extent (if at all) that the question whether the*

[10] Edwin Peel, *Treitel on the Law of Contract* (Sweet & Maxwell, Fifteenth Edition, 2020) at 20-024
[11] [2020] AC 352

client would have been better off depends upon what the client would have done upon receipt of competent advice, this must be proved by the claimant upon the balance of probabilities".

26 It would thus be open to WKG to raise any issues that resulted in the plant commencing operations 12 months late that were unrelated to the late application for the permit – for example, if AKPG had issues obtaining approval which caused further delay in the opening. If so, then WKG cannot be held liable for the full 12-month period of delay and the associated costs incurred.

Fitting Costs

27 As a result of the delay in the plant's commencement of operation, the Environmental Protection (Cleaner Power) Act (the "**Act**") applied to the power plant, requiring AKPG to pay $5 million for fitting additional filters. Had operations for the power plant commenced as planned in March 2019, the Act would not have applied and the Fitting Costs not incurred.

28 However, WKG can argue that the Fitting Costs were due to an intervening and coincidental event (the passing of the Act), and thus not attributable to WKG's breach.

29 In *Carslogie Steamship Co Ltd v Royal Norwegian Government*,[12] the claimant's ship was damaged in a collision for which the defendant was to blame. After temporary repairs making the ship seaworthy, the claimant set out on a voyage which she would

[12] [1952] AC 292

not have made had the collision not occurred. During the voyage, the ship suffered extensive damage due to heavy weather. The House of Lords held that the defendant was not liable for the heavy weather, despite the fact that had the collision not taken place, the storm damage would also not have occurred.

30 Similarly, while WKG's negligence resulted in the circumstances for the Act to apply to the power plant, it was the passing of the Act that caused the Fitting Costs, for which WKG should not be liable.[13]

31 Further and/or alternatively, the Fitting Costs can also be defended on the ground that they are too remote to be claimed.

32 WKG can only be liable for damage of a kind that is reasonably foreseeable and not too remote.[14] The passing of the Act was not a natural consequence of WKG's breach of its duty and not reasonably foreseeable. Accordingly, the damages related to the passing of the Act are too remote to be claimed.

The Clean-up Costs

Whether WKG owes a duty of care to AKTO

33 In the present case, the letter of engagement was between WKG and AKIP, and also stated to be prepared for the benefit or shared with AKIP. While no mention of AKTO

[13] James Goudkamp and Donal Nolan, *Winfield and Jolowicz on Tort* (Sweet & Maxwell, Twentieth Edition, 2020) at 7-049
[14] *Overseas Tankship (UK) Ltd v Morts Dock & Engineering Co Ltd* (The Wagon Mound) [1961] AC 388 at 423 and 426

was made anywhere at the time of the preparation of the report, WKG was aware of AKTO's incorporation and had met representatives of AKTO at the Q&A session in April 2017.

34 It was held in *Cramaso LLP v Ogilvie-Grant* that a change in the identity of the prospective contracting party does not affect the continuing nature of the representation or the defendants' continuing responsibility for its accuracy. [15] In that case, party E reached out to the defendants about leasing the defendant's grouse moor. During discussions, the defendant gave a misleading figure for the estimated grouse population. Party E later informed the defendant that he intended to use a new limited liability partnership as a vehicle to enter into the lease transaction. Discussions between party E and the defendant continued until the partnership was incorporated and the lease was signed. The partnership brought proceedings against the defendant which were allowed.

35 In the present case, while the report was prepared for AKIP, discussions continued even after it had become apparent that AKTO was to be the vehicle for operating the sea terminal. In further representing to AKTO the contents of its report at the Q&A session, WKG had continued to assert the accuracy of its report, with the knowledge that AKTO would be acting in reliance on the same. WKG would only be able to defend against this if they had disclaimed liability towards AKTO or sought assurance from AKIP that its report would not be relied on by AKTO. The facts have not borne this out thus far. Accordingly, WKG would owe AKTO a duty of care.

[15] [2014] AC 1093 at [30]

The scope of WKG's duty of care and whether WKG breached such duty

Whether the Clean-up Costs are the consequences of WKG's breach (if any)

36 A party who is under a duty to provide information on which someone else will decide upon a course of action is, if negligent, responsible only for the consequences of the information being wrong.[16]

37 WKG was engaged to carry out an environmental survey of the land which the plant and terminal were to be built. Had the land already been purchased for the intention of building the plant and terminal, then any relevant Clean-up Costs would have been incurred by AKTO *regardless* of whether the pollution had been identified in WKG's report at the start. To this end, the Clean-up Costs were *not caused* by WKG's breach of its duty and/or is not a consequence of WKG's report being inaccurate.

38 Alternatively, it can be said that the Clean-up Costs did not fall within the scope of WKG's duty of care as defined by the purpose for which they were engaged. WKG's preparation of its report was not for the intention of advising AKIP/AKTO whether to purchase such land since the land had already been purchased. In other words, the scope of duty owed by WKG to AKTO could not possibly include ensuring that the land on which the terminal is to be built was not polluted. WKG's scope of duty was just to survey the land.

39 To this end, if applying the *SAAMCO* principles, it could be said that WKG's duty was only to provide *information* and the Clean-up Costs are not a consequence of such

[16] *Banque Bruxelles Lambert SA v Eagle Star Insurance Co Ltd* [1997] AC 191 at 214

information being wrong. It would also satisfy *MBS* in that the Clean-up Costs were not caused by the breach of its duty to provide accurate advice.

40 On the contrary, had WKG's scope of engagement been to carry out the environmental survey in order for AKIP/AKTO to determine if it should purchase the land / if the land were suitable for the plant and terminal, then the consequences would be different. In that event, the Clean-up Costs would have been caused by WKG's negligence as if it were not for WKG's failure to identify the pollution, AKIP/AKTO would not have purchased the land and would not have incurred the Clean-up Costs. Further, it would also have directly fallen within the scope of WKG's engagement.

41 If that were the case, WKG can then only defend against the full quantum of costs that AKTO seeks. As the claimant, AKTO must show on a balance of probabilities that they would have taken steps to avoid the Clean-up Costs had they known of the pollution.[17] This means that AKTO must show, for example, that there were other alternative and comparable land options that they could have considered and would have purchased for the construction of the plant and terminal had they known of the pollution. WKG can then seek to disprove this upon review of any evidence AKTO shows.

Conclusion

42 In conclusion and for easy reference, we summarize our view on WKG's liability in negligence to the various parties and for the respective claims are set out hereunder:[18]

[17] See [20] and [21] above
[18] See also the questions listed in MBS at [6]

Damage claimed	**Who was the damage suffered by**	**Does WKG owe a duty of care to the party who suffered the damage**	**Did WKG breach such duty of care**	**Was the damage suffered caused by WKG's breach**	**Is the damage suffered otherwise not claimable because it is too remote, or caused by some other factor?**
Lost Revenue	AKPG	Yes	Yes	Yes	Yes
Lost Profit				Yes	No
Mothballing Costs				Yes	No
Fitting Costs				No	Yes
Clean-up Costs	AKTO	Yes	Yes	Arguably no, depending on the scope of WKG's engagement	Arguably yes.

43 Based on the above, WKG will have a strong case of defending against the Lost Revenue and Fitting Costs, and an arguable case against the Clean-up Costs.
