Asia Hotel Investments Ltd v Starwood Asia Pacific Management Pte Ltd and Another [2004] SGCA 37

Case Number : CA 143/2003

Decision Date : 20 September 2004

Tribunal/Court : Court of Appeal

Coram : Chao Hick Tin JA; Judith Prakash J; Yong Pung How CJ

Counsel Name(s) : Alvin Yeo SC, Tay Peng Cheng and Linda Wee (Wong Partnership) for the appellant; Tan Kok Quan SC and Marina Chin (Tan Kok Quan Partnership) for the respondents

Parties : Asia Hotel Investments Ltd — Starwood Asia Pacific Management Pte Ltd; Starwood Hotels and Resorts Worldwide, Inc

Contract – Breach – Loss of chance – Whether respondent's breach of contract causing appellant to lose chance in acquiring shares sold by third party

Contract – Breach – Nominal damages – Issue before trial judge concerning liability for breach of contract – Whether trial judge's award of nominal damages amounting to assessment of damages payable by respondent

Evidence – Proof of evidence – Onus of proof – Whether respondent's breach of contract causing appellant to lose chance in acquiring shares sold by third party – Whether evidential burden shifting to respondent to show its actions did not cause appellant's loss – Whether evidential burden discharged

Evidence – Proof of evidence – Standard of proof – Loss of chance contingent upon hypothetical action of appellant – Standard of proof required of appellant to prove own inaction did not cause loss of chance

Evidence – Proof of evidence – Standard of proof – Loss of chance contingent upon hypothetical action of appellant – Whether appellant having to prove hypothetical action on balance of probabilities or show "real and measurable chance"

20 September 2004 *Judgment reserved.*

Yong Pung How CJ (delivering the dissenting judgment):

1 The plaintiff-appellant, Asia Hotel Investments Ltd ("Asia Hotel") entered into a confidentiality and non-circumvention agreement ("the NCA") with the first defendant-respondent, Starwood Asia Pacific Management Pte Ltd ("Starwood Asia"). The trial judge below found that Starwood Asia had breached the NCA. However, he held that Asia Hotel's alleged loss was not caused by the breach. Consequently, he disallowed Asia Hotel's claim for substantial damages and awarded nominal damages of $10. Asia Hotel appealed against that decision. At the conclusion of the hearing, I had no doubt that the appeal was wholly unmeritorious and had to be dismissed with costs. With much regret, I found myself unable to agree with the majority decision. The following are my reasons.

The facts

2 The appellant, Asia Hotel, wanted to invest in a hotel formerly known as the Grand Pacific Hotel ("Grand Pacific") situated at a prestigious location on Sukhumvit Road in Bangkok. Grand Pacific was owned by a company known as PS Development Ltd ("PSD"). The majority shareholders in PSD were Lai Sun Development Co Ltd and its affiliates and nominees, Studyhome Holdings Ltd and Upton

Company Limited (collectively referred to as "Lai Sun"). They held 54.25% of the shares in PSD. The remaining 45.75% of the shares in PSD were held by one Mr Pongphan Samawakoop ("Pongphan") and his nominees. By agreement, if Lai Sun wanted to sell its shares in PSD, Pongphan had first right to purchase those shares. Lai Sun could only sell to others if Pongphan waived this right.

MOU between Lai Sun and Asia Hotel

3 In the last quarter of 2001, Lai Sun wanted to sell its shares in PSD. Asia Hotel expressed an interest in those shares. Asia Hotel's plan was to upgrade the Grand Pacific from a four-star hotel to a five-star one run by an international hotel management company. To do this, Asia Hotel had to raise a sum of 1.3bn Thai baht (approximately US$31m). This sum was required to finance the purchase of shares from Lai Sun, to settle the debts of PSD and to restructure the debts of the Grand Pacific.

4 On 7 November 2001, Asia Hotel, through its nominees (Siam Hotel Properties Co Ltd), entered into a Memorandum of Understanding ("MOU") with Lai Sun for the acquisition of the latter's stake in PSD for US$7.5m. The effective expiry date of this MOU was 14 December 2001. Asia Hotel had up to that date to complete its due diligence exercise. The parties had up to that date to conclude a sale and purchase agreement for the shares. Upon the execution of the sale and purchase agreement, Asia Hotel was obliged to pay a deposit of US$500,000. Lai Sun undertook not to enter into an agreement with any other entity during the period of the MOU, *ie* until 14 December 2001.

5 Subsequent to this MOU, Asia Hotel had to accomplish three tasks to implement its plan. First, it had to raise the sum of 1.3bn Thai baht (approximately US$31m) as mentioned earlier. In turn, it was required to secure a loan from a financial institution. This will be detailed below. Second, it had to procure an international hotel management company to run the Grand Pacific. It appeared that Starwood Asia was keen to manage the Grand Pacific because its Westin group had just lost two hotels in Bangkok around the same time. The Westin group was therefore keen to re-establish its presence in Bangkok. Third, it had to obtain Pongphan's waiver of his right of first refusal to purchase the Lai Sun shares.

The NCA between Asia Hotel and Starwood Asia

6 On or about 4 December 2001, Asia Hotel and Starwood Asia signed the NCA. This is the contract which formed the crux of the dispute. Even though the parties only signed the NCA on or about 4 December 2001, the document was backdated to 9 November 2001. Clause 5 of the NCA states:

> Each party agrees not to circumvent the other and abide by the following terms and conditions:
>
> (a) No party will *attempt to contract, deal with in any way or solicit* the source of any other of the disclosed parties at any time, or in any manner, without the written consent of the party introducing the said source. This shall include but not be limited to the current owner of the Hotel, any employees of the Hotel, and any contractors or suppliers of the Hotel.
>
> (b) None of the parties to this Agreement shall *enter into any negotiation, contract or agreement* with any of the sources introduced …
>
> It is agreed that this Agreement shall remain in effect for *12 months* from its execution, unless otherwise agreed by the parties.

[emphasis added]

Expiry of the Lai Sun-Asia Hotel MOU

7 Asia Hotel tried in vain to obtain a loan from a financial institution in time to meet the 14 December 2001 deadline so that it could conclude a sale and purchase agreement with Lai Sun. On 13 December 2001, Asia Hotel asked Lai Sun to extend the deadline under the MOU by 45 days. Lai Sun turned down the request in a letter dated 15 December 2001. The following extracts of this letter shed light on the context in which the Lai Sun-Asia Hotel MOU came to an end:

> In accordance with Clause 13.1 of the MOU, we confirm that all obligations in the MOU have ceased as a result of the parties failing to reach agreement by 14th December … *Please return all due diligence materials that you have obtained from us at once* …
>
> We have duly considered your request for an extension. *While your arguments are cogent, we doe [sic] not wish tie [sic] ourselves down with one potential purchaser without receiving any assurances or at least compensation for an extension. Under the circumstances, we feel we would best serve our group's interests by opening up ourselves to receive all opportunities.*
>
> Both parties have exerted efforts to negotiate the sale and purchase agreement in good faith. It is therefore regrettable that the efforts did not materialize in a transaction. *If and when you feel you have resolved all of your stumbling blocks,* please feel free to contact us again.
>
> [emphasis added]

It is undisputed that Lai Sun had asked to be compensated for an extension of time but Asia Hotel refused to pay such compensation.

8 Subsequent to this exchange of letters, Pongphan informed Gary Murray, the president of Asia Hotel, that he would have to look for alternative partners. Murray told him to go ahead. This evidence from Pongphan in his affidavit of evidence-in-chief was not challenged by Asia Hotel.

The Narulas step into the picture

9 The Narulas are one of the oldest Thai Indian families and they engage in a variety of businesses, including the hotel business. Pongphan knew one of the Narulas, Kirin Narula, through his membership at the Thailand chapter of the Young Presidents' Organisation. When the MOU between Lai Sun and Murray came to an end, Pongphan approached the Narulas around late December 2001 to early January 2002 to see if they were interested to purchase the Lai Sun shares in PSD. The Narulas were keen to purchase the shares in Lai Sun and own the Grand Pacific. Negotiations between Lai Sun and the Narulas commenced with haste. This was understandable, given that Lai Sun had wasted time in its negotiations with Asia Hotel.

10 On 18 January 2002, Pongphan wrote a letter to Lai Sun to formally waive his right of first refusal to the Lai Sun shares in favour of the Narulas. This paved the way for Lai Sun to sell its shares in PSD to the Narulas. The first paragraph of Pongphan's letter states:

> Further to our recent discussions, this letter confirms my *irrevocable approval* to the Group B Shareholders, consisting of Studyhome Holdings Ltd and Upton Company Limited, to jointly sell their 54.25% equity interest in the Company, represented by 2,445,500 shares (the "B shares") to Mssrs Suradej and Kirin Narula, and their related parties or affiliates (the "Approved

Purchaser"). [emphasis added]

11 On 5 February 2002, Lai Sun entered into an MOU with the Narulas, under which Lai Sun agreed to sell its shares in PSD to the Narulas for US$7.7m. The expiry date of this MOU was 28 February 2002. The parties had up to that date to conclude a sale and purchase agreement. However, prior to that, the Narulas were obliged to put up a deposit of US$500,000 under an escrow agreement to be completed within ten days from the date of the MOU. Under this MOU, Lai Sun undertook that it would deal exclusively with the Narulas until the date of completion, *viz* 31 May 2002, subject to the conclusion of the escrow agreement and the sale and purchase agreement by the end of the MOU expiry date.

12 More importantly, on 19 February 2002, Lai Sun agreed to extend the expiry date of its MOU with the Narulas indefinitely. This meant that from 19 February 2002, Lai Sun undertook to deal exclusively with the Narulas for the sale and purchase of its shares in PSD. The pertinent parts of this letter state:

> *We are now extending the MOU or due diligence period to you until our further notice*. In this connection, there is no need for you to put up an escrow deposit until we are ready to sign a binding S&P. [emphasis added]

13 The deal between Lai Sun and the Narulas for the former's shares in PSD went along smoothly. On 22 March 2002, the parties signed a sale and purchase agreement for the shares. Six days later, the Narulas made their first payment of some US$1.2m for the shares. The loan agreement between the Narulas and DBS Thai Danu Bank was executed on 22 May 2002 and, on the same day, the sale and purchase of the Lai Sun shares in PSD to the Narulas were completed.

Starwood Asia's negotiations with the Narulas

14 It is the evidence of Tom Monahan, Vice President-Finance, Acquisition and Development of Starwood Asia, that Starwood Asia was first approached by the Narulas' agent with regard to the management of the Grand Pacific on 15 February 2002. Starwood Asia first received news that the Narulas were interested in the Grand Pacific through a telephone call from one Kurt Rufli ("Rufli"), who was the Narulas' representative for another property. The appellant submitted that the breach of the NCA occurred as early as 15 February 2002 when Starwood Asia started negotiations with the Narulas to manage the Grand Pacific.

15 It is important to note that the first contact between Starwood Asia and the Narulas for the Grand Pacific took place *after* 5 February 2002, which was the date Lai Sun entered into an MOU to deal exclusively with the Narulas for the shares.

16 On 28 February 2002, Starwood Asia wrote to Rufli, informing the Narulas of the basic terms of what a management contract between Starwood Asia and the Narulas would entail. At the end of this letter, it was stated that "these terms are subject to Board Approval".

17 Subsequent to this letter, Serena Lim from Starwood Asia met up with the Narulas and Pongphan in Bangkok on 13 March 2002. A draft letter of intent was sent from Starwood Asia to the Narulas on 14 March 2002. This letter of intent was signed by the parties on 25 March 2002, which was three days after the sale and purchase agreement for the Lai Sun shares was signed between Lai Sun and the Narulas.

18 Eventually, a management agreement was signed between Starwood Asia's affiliate, Westin

Asia Management Co and the shareholders of PSD directly, *viz* the Narulas and Pongphan, through their affiliates on 15 May 2002. It was uncontested that the legal counsel for Starwood Asia had devised the management agreement in this way in an attempt to avoid breaching the NCA between Starwood Asia and Asia Hotel.

Murray's negotiations with the various parties

19 While the negotiations and deals were being successfully struck up between Lai Sun, the Narulas and Starwood Asia, Murray's lacklustre negotiations with the various parties offered a stark contrast.

Negotiations with Starwood Asia – request for "key money"

20 After Asia Hotel concluded the NCA with Starwood Asia in December 2001, Murray next met up with Tom Monahan and Serena Lim from Starwood Asia on 4 January 2002. It was during this discussion that Murray asked Starwood Asia for "key money" of US$2m. According to the evidence, "key money" is sometimes requested by a hotel owner from a hotel management company as a gift or "recommendation fee". Murray admitted under cross-examination that he required the "key money" of US$2m for himself. Murray's request for "key money" was turned down by Starwood Asia.

21 On 22 January 2002, Starwood Asia sent a draft letter of intent to Asia Hotel. This was an opportunity for Asia Hotel to move one step closer towards the deal with Lai Sun before Lai Sun subsequently signed the MOU with the Narulas. In this draft letter of intent, Starwood Asia unilaterally offered to increase the amount of a renovation loan under the proposed terms from the original US$5m to US$6m. However, consumed by his own greed, this kind offer from Starwood Asia went unnoticed in Murray's eyes. I found his explanation under cross-examination most unsatisfactory:

Q: Did you not see the offer of US$6m in the term sheet?

A: I had not gone into details with Starwood following the 22 January proposal.

22 I could not see how a businessman could have overlooked such an important clause in the term sheet. To my mind, Murray was blinded by his obsession to obtain the "key money". With the higher renovation loan, he was given an opportunity to move one step closer towards securing the deal with Lai Sun.

23 However, instead of taking up the offer, Murray continued to pester Starwood Asia for more money. In an e-mail from Murray to Tom Monahan on 2 February 2002, Murray became even more audacious, demanding that US$2m be given to him and suggesting that this sum be offset against management fees of the hotel in the future years:

> I wanted to run an idea by you on this deal to see if this is workable. We need to find the US$2m, either upfront or over time. If it is upfront, it makes it easier for me. However, you've indicated that upfront is difficult, however, *what if it came over time thus could be offset against management fees. Perhaps over a 3 year period.* [emphasis added]

24 To my mind, this meant that Murray (through Starwood Asia) would receive the benefit of the US$2m and the shareholders of PSD would have to bear the higher cost of management fees for three years. It must be remembered that Pongphan held 45.75% of the shares in PSD. As such, if Murray's scheme had gone through, Pongphan would have had to bear almost half the increase in management fees in exchange for a benefit derived solely by Asia Hotel. Such a scheme would have been highly

detrimental to Pongphan. This happened prior to Starwood Asia's breach of 15 February 2002. To my mind, as early as 2 February 2002, some two weeks prior to Starwood Asia's breach of the NCA, Murray demonstrated a callous disregard of Pongphan's interests in order to advance his own. My learned colleagues take a different view because they found no suggestion in the e-mail that the management fees would be increased to pay for the key money. They then postulated what Murray's position was, *viz* that the
e-mail meant that the "key money" was to be paid over three years by *subtracting* it against the management fees which would be due to Starwood Asia from PSD. I found such a conclusion to be against the weight of evidence. When cross-examined, Murray claimed that he could not remember how the "key money" could be offset against management fees. If his device of "offsetting" the fees was something which did not harm the interests of Pongphan, and amounted to a discount of sorts in the management fees payable by PSD as my learned colleagues found, I could see no reason why he had conveniently forgotten about the details of the "offsetting" mechanism under cross-examination, since that would paint him in a good light. Moreover, I found that on the evidence, Murray's overwhelming desire was for the "key money" to be paid upfront despite his use of the word "offset" in the e-mail. It must be remembered that in the draft term sheet from Lehman Brothers dated 15 January 2002, Lehman Brothers required Asia Hotel to inject 100m Thai baht (or the equivalent of about US$2.2m at the exchange rates then) into the transaction *prior to* the funding by Lehman Brothers. This sum was to be maintained throughout the term of the loan. One of the reasons why Murray was insistent on the US$2m in "key money" from Starwood Asia could be to meet this requirement. This came out during the cross-examination. Bearing in mind that the injection of cash was to be done *prior* to the disbursement of the loan by Lehman Brothers under the proposed term, I could not agree with my learned colleagues that the e-mail necessarily meant that the "key money" was to be paid to Starwood Asia over three years and without detriment to Pongphan.

25 On 21 February 2002, a few days after Starwood Asia commenced negotiations with the Narulas on managing the Grand Pacific, Tom Monahan called Murray and informed him about the Narulas' interest in the Grand Pacific. In the same conversation, Murray repeated his request for more money but his request was turned down once again. This telephone conversation was followed up by a facsimile from Murray to Tom Monahan. In this facsimile, Murray told Tom Monahan that "we [Asia Hotel] continue to work the Grand Pacific, Bangkok deal and are committed to try to work out a deal with Starwood to re-brand this property as the Westin Bangkok. *As you know, we have secured the principal financing commitment from Lehman Brothers*." [emphasis added]

Asia Hotel's negotiations with the financial institutions

26 The objective evidence shows that Murray's statement in the facsimile was a blatant and complete lie. Murray approached a number of financial institutions but I found that only his negotiations with Lehman Brothers and Ekachart Finance were material for the purposes of the present appeal.

27 Murray's negotiations with Lehman Brothers culminated in a draft term sheet being forwarded from Lehman Brothers to Asia Hotel on 15 January 2002. Murray replied to this draft term sheet with a facsimile on 4 February 2002. In the cover sheet, he claimed that there were only "wording issues" which he had marked up. However, a perusal of the items he had marked up on the draft term sheet revealed that he did not agree with Lehman Brothers' proposal to a 2% originating fee. As noted by the trial judge, this amounted to US$580,000. This was only the tip of the iceberg, as there were other outstanding issues. Lehman Brothers proposed that the renovation loan was to be fully subordinated to the senior financing provider and governed by an inter-creditor agreement drawn up by the senior financing provider. As the trial judge found below, there was no evidence that Starwood Asia had been approached to discuss this issue, much less evidence that Starwood Asia would have

consented to this term. Further, Lehman Brothers required Asia Hotel to inject US$2m into PSD before it would disburse the loan. There was no evidence that Asia Hotel or Murray could raise or commit to this sum. Finally, in order for the deal with Lehman Brothers to go through, Asia Hotel would have required Pongphan to accept those terms as well, since it was a loan to be given to PSD. However, there was no evidence that Pongphan would have been amenable to the terms proposed by Lehman Brothers. It has to be noted that the overall interest rates of the loan offered by Lehman Brothers were higher than those offered by DBS Thai Danu Bank to the Narulas. If Pongphan had been approached with the terms in the DBS Thai Danu Bank loan (brought to him by the Narulas) and the terms in the Lehman Brothers loan, I had no doubt in my mind that Pongphan, or for that matter any other reasonable businessman, would have preferred the terms in the DBS Thai Danu loan.

28 More importantly, Murray conceded under cross-examination that the issues with Lehman Brothers were never resolved. Instead, any further negotiation with them came to a halt after 4 February 2002:

Q: Effectively, whole process of Lehman loan stopped on 4 February 2002.

A: As far as paperwork, yes.

Q: As at early February, loan documentation/financing came to a halt.

A: Yes.

29 On 28 February 2002, a representative from Lehman Brothers e-mailed Murray to enquire about the status of the loan. However, there was no evidence that Murray replied to this e-mail.

30 Apart from Lehman Brothers, Murray had a discussion with the representatives from Ekachart Finance on 28 January 2002. By 1 February 2002, Murray retreated in his negotiations with Ekachart Finance. Murray was cross-examined on the progress of his negotiations with Ekachart Finance. His reasons for pulling out of negotiations with Ekachart Finance demonstrate his lack of faith in securing the deal with Lai Sun as early as early February 2002:

Q: Page 1004. Ekachart Finance PLC.

A : *I pulled loan back*. Pongphan going out to look for finances to take out loan at end of January. …

Q: Pongphan was not talking to other financiers on your deal.

A: Correct.

Q: 4AB1017. What is "this transaction"?

A: *I believe Pongphan talked to them about another majority partner in PS Group.*

Q: As at 1 February 2002, you believe you lost the deal?

A: No. I put it on hold. It is clear I did not have contract for sale of shares. I did not want to cloud water. *I stepped back. I did nothing following this letter.* …

Q: Suggest you know you lost the deal.

A: No. In a marriage scenario, I believe they were seriously dating.

[emphasis added]

31 In short, the evidence showed that, as at early February 2002, he had either halted or retreated from all negotiations with the financial institutions to raise the requisite loan for the Lai Sun deal.

Negotiations with Lai Sun and Pongphan after lapse of the Lai Sun-Asia Hotel MOU

32 In his affidavit of evidence-in-chief, Murray stated that he continued to negotiate with Lai Sun and Pongphan for the purchase of the Lai Sun shares even after the Lai Sun-Asia Hotel MOU had lapsed. Murray exhibited several correspondences in an attempt to demonstrate that Asia Hotel kept the channels of communication open with Lai Sun and Pongphan in this regard. However, I found that these correspondences did not go so far as to prove, as Asia Hotel had asserted and as my learned colleagues had found, that Lai Sun and Pongphan still had the intention for Asia Hotel to acquire those shares.

33 As for communication between Murray and Pongphan, Pongphan stated in his affidavit that after 5 February 2002, Murray called to ask him whether there was a chance that he could still secure the deal. Pongphan told him that the MOU with the Narulas had already been signed and that the first right of refusal to buy the shares was granted to them. In any event, under cross-examination, Murray conceded that he did not make any progress with Lai Sun after the lapse of Asia Hotel's MOU with Lai Sun:

Q: On Lai Sun's side, no progress except talk.

A: Yes.

Q: How many times?

A: 2 meetings.

Q: Your communication with Lai Sun only to ask about availability of their shares?

A: Yes.

34 There is no evidence at all that on or after 15 February 2002, Lai Sun had informed Murray that Asia Hotel was still in the running for the shares.

Asia Hotel's claims against the respondents

35 Asia Hotel alleged that it had suffered losses as a result of Starwood Asia's breach of the NCA in relation to its proposed acquisition of the majority stake in PSD. In its statement of claim, Asia Hotel claimed from Starwood Asia the breathtaking sum of US$54,913,011.00 which incredibly included profits presently being made by the refurbished Grand Pacific as well as the capital gains it would have made if it had acquired the Lai Sun shares and sold the Grand Pacific in 2006. During the trial, Asia Hotel apparently reconsidered its position and amended its claim to one for damages for the loss of the chance to purchase the Lai Sun shares.

36 Asia Hotel also sought damages from Starwood Asia and Starwood Hotels & Resorts Worldwide, Inc ("Starwood Worldwide") for conspiracy and for unlawful interference with its economic

interests. However, during the trial, Asia Hotel agreed to drop its claims against Starwood Worldwide and confine its claim to damages for Starwood Asia's alleged breach of contract, in return for Starwood Worldwide's undertaking that it would pay any damages and costs awarded in Asia Hotel's favour.

Issues raised on appeal

37 Asia Hotel raised four issues in this appeal:

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

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

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

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

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

Whether the trial judge was correct in dealing with the issue of quantum

39 I found that the appellant's arguments under the first issue had no merit whatsoever. By raising this point, counsel for the appellant not only misapprehended the essence of the trial judge's decision, but also obfuscated the fundamental issue of causation. The learned editors of *Anson's Law of Contract* (28th Ed, 2002) state in no uncertain terms, at p 600:

> In order to establish a right to damages the claimant must show that the breach of contract was a cause of the loss which has been sustained in the sense that the breach of contract is the 'effective' cause of the loss, as opposed to an event which merely gives the opportunity for the claimant to sustain the loss.

40 In *Galoo Ltd v Bright Grahame Murray* [1995] 1 All ER 16, Glidewell LJ held at 29:

> [I]f a breach of contract by a defendant is to be held to entitle the plaintiff to claim damages, it must first be held to have been an *'effective'* or *'dominant'* cause of his loss. The test in *Quinn*'s case, that it is necessary to distinguish between a breach of contract which causes a loss to the plaintiff and one which merely gives the opportunity for him to sustain the loss, is helpful but still leaves the question to be answered, 'How does the court decide whether the breach of duty was the cause of the loss or merely the occasion for the loss?'
>
> … The answer in the end is 'By the application of the court's common sense'.

[emphasis added]

41 I found that the trial judge was perfectly entitled to examine the issue of causation when he was asked to adjudicate on the issue of liability. Having found that Starwood Asia's breach did not cause Asia Hotel's loss, he awarded nominal damages of $10. Contrary to the appellant's assertions, the trial judge did not make this award of nominal damages as part of an assessment of Asia Hotel's loss of chance. It is a fundamental principle in contract law that an innocent party in a breach of contract is entitled to nominal damages even if he did not suffer loss as a result of the breach: see *Chitty on Contracts* (29th Ed, 2004) at
para 26-008. To my mind, counsel for Asia Hotel misapprehended the trial judge's motivation behind the award of nominal damages. He had awarded nominal damages because causation had not been proved, not because he went on to assess Asia Hotel's damages. To that end, I agree with my learned colleagues on this issue.

Whether the trial judge erred in the application of the principles of loss of chance

42 Under this second issue, the appellant argued that the trial judge, in assessing whether the appellant had a "real and measurable chance", had erred because he had proceeded to assess the probability or prospect of Asia Hotel's chance being realised. In doing so, counsel submitted, the trial judge had stepped into the realm of assessment of damages.

43 For that proposition, counsel relied on *Chaplin v Hicks* [1911] 2 KB 786. He submitted that, if the purpose of an agreement was to enable the appellant to have a chance, a breach of that agreement presented the appellant with an unchallengeable case of injury. Here, the purpose of the NCA was to provide the appellant with a chance to realise its investment plan. Starwood Asia breached that agreement within the 12-month period and therefore, it must have deprived the appellant of the opportunity. The prospects of success should be properly left to the quantification of damages stage. Further, once a plaintiff had entered into a contest and was not disqualified in any way, that would be sufficient to demonstrate a real chance. Counsel submitted that the elements of uncertainty presented by third party elements (*eg* Lai Sun and the Narulas) should form part of the contingencies relevant only in the assessment stage. Finally, it was pointed out that, even though the plaintiff in *Chaplin v Hicks* had a roughly one in four chance of winning the contest, the court there was prepared to hold that that was an "unchallengeable case of injury". Here, it was emphasised that there were only two potential purchasers, Asia Hotel and the Narulas, and therefore, the appellant's chances of succeeding were actually one in two.

44 I found the arguments raised by the appellant under this issue to be fraught with difficulties. At the very least, I found that counsel's attempt to show that the appellant had a 50-50 chance simply because it was one of the two contenders for the Lai Sun shares to be naïve and over-simplistic. Counsel failed to recognise that in any business transaction, the evaluation of "chance" is never static and certainly not simply contingent on the number of contenders in the race. It is a dynamic exercise, dependent on not just the actions of third parties, but also on the actions of the immediate parties themselves.

45 On the facts of the present appeal, I found that Asia Hotel's chances of securing the Lai Sun shares depended on a combination of four factors: (a) Starwood Asia's breach of the NCA; (b) Asia Hotel's own course of action either prior to or after the breach; (c) the decision of Lai Sun on whether to sell those shares to Asia Hotel; and (d) whether Pongphan would have given the right of first refusal to Asia Hotel. With this in mind, the central flaw in the appellant's theory of its case is unveiled. Counsel failed to understand that any loss of chance was contingent not just upon the respondents' breach, but also on the appellant's own actions (or lack thereof) and those of Lai Sun.

The important question is to determine which test (*ie* balance of probabilities or "real or measurable chance") applies to which of these factors. In *Bank of Credit and Commerce International SA v Ali (No 2)* [2002] 3 All ER 750, Parker LJ observed at 778:

> Where the financial loss alleged takes the form of, or includes, loss of a chance, *causation of damage is not to be confused with assessment of damage*. On ordinary principles**,** *causation must be proved on the balance of probabilities* … [emphasis added]

46 In *Allied Maples Group Ltd v Simmons & Simmons* [1995] 1 WLR 1602 ("the *Allied Maples* case"), the plaintiffs wanted to take over certain assets and businesses from the Gillow group of companies ("Gillow"), including four properties under one of Gillow's subsidiaries. The deal was struck in such a way that the four properties would be acquired by way of purchase of shares in that particular subsidiary. The plaintiffs instructed the defendant solicitors to act for them. The defendants drafted an agreement which included a warranty by the vendor that the subsidiary had no outstanding contingencies or liabilities. During the course of negotiations, the defendants negligently allowed the clause to be amended in such a way that it no longer had its effect as a warranty as originally intended by the plaintiffs. After the agreement was entered into, the subsidiary (now belonging to the plaintiffs) faced substantial liabilities which would have been covered by the warranty had the defendants not negligently allowed the amendment. The plaintiffs therefore brought an action against the defendants.

47 The plaintiffs succeeded at first instance and the appeal by the defendants was dismissed by a majority of the English Court of Appeal. Stuart-Smith LJ, in his judgment, set out a useful framework for analysing the issue of causation in a situation of loss of chance that merits reproduction at length. He held at 1609–1611 and 1614:

> [W]here the plaintiffs' loss depends upon the actions of an independent and third party, it is necessary to consider as a matter of law what it is necessary to establish as a matter of causation, and where causation ends and quantification of damage begins.
>
> (1) What has to be proved to establish a causal link between the negligence of the defendants and the loss sustained by the plaintiffs depends in the first instance on whether the negligence consists of some positive act or misfeasance, or an omission or non-feasance. In the former case, the question of causation is one of historical fact. The court has to determine on the balance of probability whether the defendant's act, for example the careless driving, caused the plaintiff's loss consisting of his broken leg. Once established on balance of probability, that fact is taken as true and the plaintiff recovers his damage in full. There is no discount because the judge considers that the balance is only just tipped in favour of the plaintiff; and the plaintiff gets nothing if he fails to establish that it is more likely than not that the accident resulted in the injury. …
>
> (2) If the defendant's negligence consists of an omission, for example to provide proper equipment, [give] proper instructions or advice, causation depends, not upon a question of historical fact, but on the answer to the hypothetical question, *what would the plaintiff have done if the equipment had been provided or the instruction or advice given?* This can only be a matter of inference to be determined from all the circumstances. *The plaintiff's own evidence that he would have acted to obtain the benefit or avoid the risk, while important, may not be believed by the judge, especially if there is compelling evidence that he would not.* …
>
> Although the question is a hypothetical one, *it is well established that the plaintiff must prove on balance of probability that he would have taken action to obtain the benefit or avoid the risk*.

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

(3) In many cases the plaintiff's loss depends on the hypothetical action of a third party, either in addition to action by the plaintiff, as in this case, or independently of it. In such a case, does the plaintiff have to prove on balance of probability … that the third party would have acted so as to confer the benefit or avoid the risk to the plaintiff, or can the plaintiff succeed provided he shows that he had a *substantial* chance rather than a speculative one, the evaluation of the substantial chance being a question of quantification of damages? …

…

[T]he plaintiff must prove as a matter of causation that he has a real or substantial chance as opposed to a speculative one. If he succeeds in doing so, the evaluation of the chance is part of the assessment of the quantum of damage, the range lying somewhere between something that just qualifies as real or substantial on the one hand and near certainty on the other. …

All that the plaintiffs had to show on causation *on this aspect of the case* is that there was a *substantial* chance that they would have been successful in negotiating total or partial (by means of a capped liability) protection.

[emphasis added]

48 I found this three-category approach to provide useful guidance on the thorny issue of drawing a line between causation on the one hand, and evaluation of loss of chance on the other, and the burdens of proof required of each. However, I have one caveat. As pointed out by the learned editors of *McGregor on Damages* (16th Ed, 1997) at para 381, Stuart-Smith LJ's distinction between positive act and omission for the first and second categories respectively is a difficult one to draw:

[T]he only respect in which one might cavil with Stuart-Smith LJ's valuable analysis is with his method of division of his first two categories, namely the division between acts and omissions of the defendant generating liability. *It is thought that the essence of the second category is not liability based upon omission but the need to ascertain how the plaintiff will react*; the first category does not concern itself with actions after the occurrence of the wrong, whether of the plaintiff or third party, and seems equally relevant for acts and omissions. A defendant may be liable for an omission which does not involve subsequent acts of the plaintiff … Conversely, an act as well as an omission may result in action or inaction by the plaintiff; thus specific wrong advice, which can hardly be classified just as a failure to give the right advice, will generally require an investigation into the reaction thereto of the plaintiff. [emphasis added]

49 I found that the distinction between the two categories really lies in whether any action is required on the plaintiff's part. Where action is required of the plaintiff towards realising that chance, the plaintiff has to prove on a balance of probabilities that he would have taken that step to put

himself on course to realise the chance. This was satisfied in the *Allied Maples* case because there was sufficient evidence at the trial to convince the trial judge that, on a balance of probabilities, the plaintiffs would have negotiated with the vendor further with regard to the warranty clause. Hobhouse LJ reiterated this and stated at 1620:

> It is the case of the plaintiffs, supported by evidence, that effective negotiations would have taken place and there was a basis for believing that further negotiation would have led to a worthwhile amelioration of the plaintiffs' position.

50 Millett LJ, although dissenting, agreed with most of the majority's analysis of the law and reasoning. The material passage from his judgment (at 1623), which for present purposes does not turn on his reason for his dissent, offers a concise summary of the issues at hand:

> That left the second head of loss: the chance that, if properly advised, the plaintiffs might have succeeded in persuading the defendants to agree to reinstate warranty 29 or to provide some other total or partial protection against the risk of first tenant liability. This depended on *(i) whether the plaintiffs would have sought to reopen the negotiations to obtain such protection and (ii) whether and if so how far they would have been successful*. *The first of these again depended on what the plaintiffs themselves would have done in a hypothetical situation and accordingly had to be established on a balance of probabilities*. The judge thought that it had been so established, and I agree with Stuart-Smith LJ that there was evidence to support his conclusion. [emphasis added]

51 Although Millett LJ dissented on the facts, I found that the approach in all three judgments in the English Court of Appeal in the *Allied Maples* case was consistent throughout: Where the plaintiff has to prove a hypothetical action on his part which is needed to put him on course to obtain the benefits of the chance, he has to prove that he would have done that act on a balance of probabilities. To my mind, all three decisions (namely from Stuart-Smith, Hobhouse and Millett LJJ) from the Court of Appeal demonstrate that when it comes to proof that the plaintiff would take the hypothetical steps to realise the chance, the law has required a high threshold: The plaintiff must prove this on a balance of probabilities.

52 In contrast, the English Court of Appeal reached the opposite conclusion on the facts in *Sykes v Midland Bank Executor & Trustee Co Ltd* [1971] 1 QB 113 ("*Sykes v Midland Bank*"), which was another case in the second category. There, the defendant solicitor failed to advise the plaintiffs that, while their immediate landlords could not withhold consent from sub-letting the premises, the superior landlord could. In the event, the superior landlord did withhold such consent. The plaintiffs sued the defendant. The English Court of Appeal awarded only nominal damages to the plaintiffs because it found that the plaintiffs could not establish that they would probably not have entered into the lease or at least not on the terms which they did, had they been properly advised.

53 In *Normans Bay Ltd v Coudert Brothers* [2003] EWCA Civ 215 ("the *Normans Bay* case"), the English Court of Appeal was again faced with the question of causation in a loss of chance scenario. There, the plaintiff tendered for shares in a Russian company. The tender provided for investment over five years. The plaintiff was represented by the defendant solicitors in the share purchase agreement. Subsequently, upon the challenge of the Russian public prosecutor, a Russian court declared that the plaintiff's tender for the shares was invalid because it had contravened a decree of the Russian authorities which stated that investments in Russian companies could not be for more than three years without prior approval. This was referred to by the English Court of Appeal as the "three-five year point". Further, the Russian court also found that the requisite approval had not been obtained from the anti-monopoly committee. This was referred to as the "anti-monopoly point".

54 The plaintiff brought a claim against the defendants seeking to recover its losses or part thereof. The plaintiff asserted that the defendants failed to investigate the provisions of the Russian local law which any competent solicitor would have. In response, the defendants argued that even if they had breached their duty on the "three-five year point", the plaintiff would still have required the anti-monopoly permission and, on that ground, the tender would still have been declared invalid, thereby breaking the chain of causation.

55 The trial judge found for the plaintiff, rejected the defendants' argument on the issue of causation and assessed the loss of chance to be at 70%. The English Court of Appeal upheld the trial judge's finding on liability but lowered the assessment of the chance to 40%. The reasons why the percentage was reduced are not relevant for the purposes of the present appeal. What is relevant, however, is the trial judge's findings of fact which have been neatly summarised by Waller LJ at [15]:

> He [the trial judge] found in summary, (1) that IML [the plaintiff] had established that it was a 3 year investment plan that was approved by GKI; (2) that Coudert [the defendants] [were] negligent in failing to discover that 3 year Investment Plan; (3) that if Coudert had found out about the three year plan, and its impact on the tender in Russian law, they would not have advised IML that the position was irredeemable; *they would have advised IML to negotiate the terms of the SPA and the IA [the agreements for the tender] on the basis of the 3 year plan*; *that IML would have done that;* and that MPF and Bolshevichka [the vendors] would have accepted that; ... [emphasis added]

In short, the trial judge found that it had been established on the facts that if the defendant solicitors had properly advised the plaintiff on the "three-five year point", the plaintiff would have re-negotiated the terms of the agreement with the vendor.

56 Waller LJ held at [30] of his judgment:

> There is an obvious tension between the fundamental rule that a plaintiff must prove on the balance of probabilities that the loss he claims has been suffered, and the court allowing the recovery of a percentage of that loss because the claimant cannot establish that the full loss would have been suffered. At all times however, the root question has to be what damage has the claimant suffered, what damage is the claimant claiming, *and can the claimant establish on the balance of probabilities that the damage or loss he is claiming has been caused by the defendant's breach of duty?*

57 Waller LJ then cited Stuart-Smith LJ's three-category approach in the *Allied Maples* case with approval. Eventually, turning to the facts of the *Normans Bay* case itself, Waller LJ observed at [33]:

> [I]f the proper advice would have been that the transaction would have been safe, if the agreements were amended in a certain way, and it could be proved, on the balance of probabilities, that as a matter of Russian law any attack on the transaction was bound to fail, *then if IML could establish on the balance of probabilities that they IML would have been prepared to so amend the agreements,* they would still have had to deal with whether Bolshevichka and MPF and indeed GKI would have agreed. This (as it seems to me) would be assessing the hypothetical action of third parties within the third principle in *Allied Maples*. [emphasis added]

58 From this, I found that it is established as a matter of English law that, even when one is in the realm of the third category of cases where the loss of chance is contingent on the hypothetical actions of third parties, the plaintiff still has to prove *on a balance of probabilities* that it would have

conducted itself in such a way that it would have put itself on track to secure the benefits of that chance.

59 All three judges of the Court of Appeal in the *Normans Bay* case rejected the defendants' argument that there had been a break in the chain of causation. There was, however, nothing on the facts of the present appeal pertaining to that issue. Here, the respondents are not relying on their own breach to claim a break in the chain of causation. As I will demonstrate below, the failure to prove causation was instead occasioned by the lack of action on the *appellant's* part, which led to my conclusion that the appellant failed to prove, on a balance of probabilities, that its hypothetical actions were such that it would have put itself on track to secure the Lai Sun shares.

60 It is clear from the cases that, where the alleged loss is contingent upon the hypothetical acts of the plaintiff, the plaintiff has to prove that he would have acted in such a way as to put himself on track to obtain the benefits of the chance. The plaintiff has to prove this on a balance of probabilities, and not (as the appellant contended) on a mere "loss of real or measurable chance" standard. This is in accordance with common sense: where the loss of chance is contingent on the plaintiff's own actions, he is in the best position to bring forth evidence to support his claim. In that regard, he has to be put to the same standard of proof as a plaintiff in any other action. One cannot take the plaintiff's word alone as proof of this intention. The surrounding facts and objective evidence have to be scrutinised to see if he would have proceeded to take that necessary step or steps to put himself on course to secure the chance which he allegedly lost. The fact that his claim is for a loss of chance should not place him on a better footing compared to plaintiffs for other claims.

61 It is on this issue, both in law and on the facts, where I depart from my learned colleagues. They found that this case fell within the third of Stuart-Smith LJ's three categories. With respect to them, I could not agree. To my mind, this case was as much a case in the second category as it was in the third category. Any alleged loss suffered by Asia Hotel as a result of losing out in the race for the Lai Sun shares was caused by a combination of (a) the actions (or lack thereof) on Asia Hotel's part in securing the deal; and (b) the hypothetical action of Lai Sun and/or Pongphan in selling those shares to Asia Hotel. While Asia Hotel only had to prove that there was a "real or measurable chance" of the latter occurring, it had to prove the former on a balance of probabilities. Put another way, when assessing the actions of the appellant, one has to use the balance of probabilities approach. It is only when one asks whether *third parties* (*eg* Lai Sun and Pongphan) would have conferred the benefit of the chance (in this case, the shares in Lai Sun) on the appellant, that one adopts a less stringent approach. In the *Allied Maples* case, the plaintiffs had to prove on a balance of probabilities that they would have negotiated further with the vendor. The trial judge found that they managed to prove this on a balance of probabilities and this was upheld by all three judges on appeal. In *Sykes v Midland Bank*, the plaintiffs could not prove that they would have negotiated with the third parties and hence, causation was not proved.

62 I found that by placing this case within the third category *simpliciter*, my learned colleagues had unduly lowered the bar required for a plaintiff to prove his case in a claim for loss of chance. They take the view that there is no real difference between *Chaplin v Hicks* on the one hand and the *Allied Maples* and the *Normans Bay* cases on the other. With great respect, I beg to differ. The crucial difference lies in the fact that for the former, there was no hypothetical action on the part of the plaintiff to speak of. The contestant did not have to do something to advance her chance – all she had to do was to turn up at the competition for her charm and beauty to be assessed by the judges. In contrast, in the *Allied Maples* case, *Sykes v Midland Bank* and the *Normans Bay* case, the chance was *contingent* on the hypothetical acts of the plaintiff in negotiating with the vendor or third party. In such circumstances, the law has demanded that the plaintiff proves *that* on a balance of probabilities. To this extent, he is no different from a plaintiff in any other case. After all, when a

plaintiff brings an action for loss of chance, he has to show that he has lost a "real and measurable, not speculative" chance. One cannot take the word of the plaintiff at face value. Being an interested witness, his evidence has to be corroborated against the objective evidence. As the cases illustrate, the law demands a high threshold from the plaintiff when he comes forth to prove that he would have done certain hypothetical acts which would have put him on course to secure that chance.

63 With the greatest respect to my learned colleagues, I am afraid they may have conflated the legal issues. They are of the view that "what would constitute a real or substantial chance need not be proved on the balance of probabilities". That statement is only true to the extent that it is the formula to be used when the court has to assess the hypothetical conduct of third parties, who are not privy to the legal proceedings. In my view, that cannot be equated with the threshold required of the plaintiff when he has to prove his case. As with any other plaintiff in a civil matter, he has to prove his case on a balance of probabilities. The fact that a loss of chance case involves hypothetical actions of the plaintiff in the factual matrix does not and should not make his burden any easier. On the facts of the present appeal, as will be evidenced in the discussion below, I found that the trial judge was correct in his assessment of how the appellant had failed miserably to take steps to put itself on course to secure the chance of Lai Sun conferring the shares on it. Any loss, if at all, is the result of the appellant's own inaction. In a situation where Murray, who was acting on behalf of the appellant, was evidently sitting on his own laurels after securing the NCA, I failed to see how a court of law should bend over backwards and create a case for the appellant when it had absolutely no case to begin with.

Whether the trial judge erred in finding that the Asia Hotel "had no real or measurable chance" of securing the Lai Sun shares if Starwood Asia had not breached the NCA

64 To my mind, there was ample evidence to show that the appellant had not crossed the high threshold that the law required. The appellant submitted that, in order to show that it had a "real" chance of securing the Lai Sun shares, it only needed to show that up to 22 May 2002, which was the date of the completion for sale and purchase of the shares between Lai Sun and the Narulas: (a) Lai Sun had not shut the appellant out of the deal; and (b) that the appellant still had every intention of securing the deal and was still continuing to negotiate the financing arrangements and the management agreement with Starwood Asia. Despite the appellant's claim that it had "every intention" of securing the deal with Lai Sun, I found that the facts revealed a completely different picture.

Murray's negotiations with Lai Sun

65 The Lai Sun-Asia Hotel MOU lapsed because Asia Hotel wanted an extension of time but was unprepared to pay Lai Sun compensation for the extension of time. Asia Hotel could not even afford to pay the US$500,000 deposit by the deadline of the MOU as required by Lai Sun. After the Lai Sun-Asia Hotel MOU lapsed, Pongphan told Murray that he had to look for another partner and Murray told him to carry on. This evidence from Pongphan was not challenged. If Murray was really interested in pursuing the deal with Lai Sun, I would have expected Murray to be less acquiescent when he was told by Pongphan that he had to search for a new buyer. I would also have expected him to be more forthcoming in paying the compensation to Lai Sun for the extension of time. That would have been evidence that he had every intention to pursue the deal with Lai Sun.

66 Next, the appellant referred to Murray's communication with Lai Sun after the lapse of the Lai Sun-Asia Hotel MOU. Counsel tried to rely on this communication to show that the appellant had not been shut out of the deal by Lai Sun. I found that the contact between Murray and Pongphan/Lai Sun was minimal, if not superficial, after the lapse of the MOU. Murray conceded that he had met up with

the representatives of Lai Sun on only two occasions merely to ask about the availability of the shares. In my opinion, there is a quantum leap between asking about the availability of the shares and saying that Lai Sun had not kept Asia Hotel out of the race. The fact that Lai Sun was prepared to, and did, enter into an MOU with the Narulas on 5 February 2002, which was subsequently extended indefinitely on 19 February 2002, spoke volumes about Lai Sun's confidence in selling the shares to the appellant.

67 My learned colleagues take the view that the appellant, having secured the NCA with Starwood Asia for one year, was entitled to "stay by the sidelines" to wait for the deal with the Narulas to fall through. They justified the appellant's inaction *vis-à-vis* Lai Sun on the ground that the appellant wanted to avoid a price war with the Narulas for the Lai Sun shares. I could not come to the same conclusion. I have perused the evidence and could find nothing from either Murray or the appellant to support such a startling finding. It must be remembered that the law requires the appellant to prove that it would have taken steps to negotiate with Lai Sun for the purchase of the shares, such that it would have been put on course to secure the benefit of the chance. This has to be proved on a balance of probabilities. Through the minimal contact with Lai Sun, and the reticence with which Murray greeted the rejection for an extension of the MOU, it simply could not be said that the appellant had proved on a balance of probabilities that it would have put itself on course for negotiating with Lai Sun if there had not been a breach by Starwood Asia.

Murray's negotiations with the financial institutions

68 I found the evidence on Murray's negotiations with the financial institutions even more unsatisfactory. Murray conceded under cross-examination that he retreated from the negotiations with Ekachart Finance as early as February 2002. He "stepped back" and "did nothing" following the letter to Ekachart Finance on 1 February 2002 because he knew that Pongphan had talked to Ekachart Finance about another majority partner and he did not want to "cloud water". Further, he conceded that from 4 February 2002, his attempts at loan documentation and financing for the deal came to a halt. I found it crucial that Murray had this state of mind in early February 2002, weeks before Starwood Asia breached the NCA. Counsel for the appellant submitted that Murray had intended to go with Lehman Brothers but for some "minor wording issues" with regard to the proposed term sheet. If that were true, a question arises as to why Murray did not reply to an e-mail from Lehman Brothers at the end of February 2002 when it enquired about the status of the Grand Pacific deal.

69 I agree with my learned colleagues that any purchaser would require a loan from a financial institution to pull through the purchase of the Lai Sun shares. This is simply one of the four tasks which a purchaser would need to accomplish, the other three being securing the agreement to sell by Lai Sun, Pongphan waiving his right of first refusal, and the management contract with a hotel operator. That being the case, the appellant had to prove on a balance of probabilities that it would have been in a position to at least proceed with the negotiations with either of the financial institutions at the date of the breach. To my mind, not only has the appellant failed to prove this on a balance of probabilities, there is clear objective evidence to show that as at the date of Starwood Asia's breach, the appellant had in fact retreated from negotiations with the financial institutions.

70 My learned colleagues take the view that the trial judge erred in treating the two factors, *viz* the appellant's lack of progress in its negotiations with Lai Sun and with the financial institutions, as important factors in determining whether the loss of chance by the appellant was caused by the breach. They are of the opinion that, having locked Starwood Asia till 9 November 2002, the appellant had up to that same day to "sew things up". They opine that the appellant was entitled to "stay by the sidelines" to wait and see if the deal with the Narulas would fall through. They also opine that, if

the Narulas had not succeeded in the purchase, the appellant *could* have tied up the rest of the pieces, *viz* negotiate with Lai Sun and the financial institutions, in which case Lai Sun *may* have agreed to sell the shares to the appellant. With respect, I could not arrive at the same view. It flew in the face of the evidence of the appellant's earlier total inability to raise even the preliminary funding to embark on a purchase. The law requires a high threshold of the plaintiff in proving his case that he had lost a "real and substantial, not speculative chance". I found the majority's approach to be speculative and overly indulgent towards the appellant. There is no evidence that it *could* or *would* have tied up the rest of the pieces if the Narulas had failed. On the contrary, there was evidence from Murray himself that he had retreated in the face of the Narulas' advance. I failed to see how, under such circumstances, this Court could have come to a conclusion of what the appellant *would* have done *if* the deal with the Narulas had failed. Such a conclusion obviates the consideration of the law which requires the plaintiff to prove its case on a balance of probabilities. In light of the evidence, I came to the conclusion that the appellant had not proved causation.

Murray's conduct vis-à-vis Pongphan's interests

71 In addition to the above, there was another fact which persuaded me that the appellant did not prove causation on a balance of probabilities. This pertained to Murray's conduct *vis-à-vis* Pongphan's interests. During the negotiations for "key money" with Starwood Asia, Murray wanted the sum of US$2m for himself. When Starwood Asia refused (but instead increased the renovation loan by US$1m), Murray proposed that the US$2m be "spread out" over three years by offsetting the "key money" against an increase in management fees for the first three years. The net effect of this scheme, if it had gone through, is that Pongphan as the minority shareholder in PSD would bear almost half of the higher management fees in exchange for a benefit solely accruing to the appellant. This would be highly detrimental to Pongphan. It must be remembered that in order to secure the deal, the appellant would have to obtain the right of first refusal from Pongphan. As at the date of the breach, this was the state of the proposal that it had with Lehman Brothers. Lehman Brothers did not agree to this proposal. Even if one gave the benefit of the doubt to the appellant and found that Lehman Brothers would have been amenable to this proposal if the appellant had negotiated with it further, I could not see how Pongphan or any other reasonable businessman could have been persuaded to suffer the detriment inherent in the scheme and waive his right of first refusal in favour of the appellant. The state of affairs must be assessed as at the date of the breach and that was the state of affairs. I could not see how, on the issue of causation, any court of law could speculate in the appellant's favour to find that the appellant would have been able to negotiate with Pongphan if Murray had displayed a reckless disregard of Pongphan's business interests.

Relevance of whether Narulas could have completed the deal without Starwood Asia's assistance

72 My learned colleagues place emphasis on the fact that the Narulas could not have completed the deal without Starwood Asia's assistance. As a matter of law, having found that the appellant could not prove on a balance of probabilities that it would have re-negotiated with both Lai Sun and the financial institutions, the appellant necessarily failed on the issue of causation. Therefore, to my mind, the question of whether the Narulas could have completed the deal without Starwood Asia's assistance is a moot point.

73 In any event, there was insufficient evidence to show that the Narulas could not have completed the deal without Starwood Asia's assistance. Kirin Narula's evidence under cross-examination was that Westin was not the Narulas' first choice of hotel operator when they were contemplating the ownership of the hotel. The following passages from Kirin Narula's cross-examination shows that the Narulas did give serious thought to having other hotel operators manage the hotel:

Q: Starwood natural choice as first runner. They managed your hotel and they had restrictive covenant. They are first runners.

A: One. We had not made a decision. It took us quite some time to conclude our decision. We have a lot of property on that strip, 3-4 star. We must be sure that we are not cannibalising our own business. …

Q: You mentioned there were considerations to be taken into account before deciding on hotel operator and you did not want any cannibalising of yourself. What were Narulas' considerations?

A: The major thing was that the Grand Pacific Hotel was just across the road from our flagship hotel, Sheraton Grande Sukhumvit. The price for Lai Sun's 54.25% in PSD was quite cheap for us. The opportunity to find a good international hotel management company to operate the hotel was quite high. As such, we had to conclude the sale of Lai Sun's stake in PSD as soon as we can.

Q: Opportunity to have international flag. Did you get international chains interested?

A: We had 4 groups: Six Continents, Marriott, Starwood, Accor Group (Novotel Sofitel Group).

Q: Taking Six Continents.

A: Six Continents Hotels offered us the Crowne Plaza brand for the Grand Pacific Hotel. They also had the Intercontinental brand but they wanted to reserve this brand for a bigger hotel. *We also thought that we wanted Crowne Plaza as it was good enough for us*.

Q: Terms of Crowne Plaza?

A: They inspected property and said a renovation budget of US$3m required to convert it to a Crowne Plaza. We noted this. …

Q: Next was Marriott? What was their offer?

A: They inspected property. Believed it could be a Marriott without major renovations. …

Q: Accor?

A: Came politely but they had committed themselves to a new property 100 metres from our site.

Q: What is "cannibalising yourself" by putting Westin across the road?

A: All hotels get businesses from reservations. Each hotel chain has its own strengths and weaknesses. We were concerned that if the Grand Pacific Hotel was managed by Starwood as a Westin hotel, then our Sheraton Grand Sukhumvit and the Grand Pacific Hotel would be feeding on the same reservation resources of Starwood. This might affect the business of our Sheraton, especially since both hotels are across each other. We were concerned about diluting ourselves.

[emphasis added]

74 The Narulas did not merely stop at initial oral negotiations with the other operators. They went as far as obtaining letters of offer from not just Six Continents for the Crowne Plaza but from Marriott Hotel as well. In contrast to Murray's spurious claims that the appellant "*felt* the four star brands … would not be sufficient", Kirin Narula's assertions were backed by contemporaneous letters of offer from these other operators. Further, Kirin Narula also stated categorically that having the hotel managed as a five-star hotel was no guarantee of higher returns, compared to it being run as a four or four-and-a-half-star brand (*eg,* the Crowne Plaza):

> Q: Can you explain to his Honour the difference in returns from a 4-star and a 5-star hotel?
>
> A: Normally, a 4-star hotel has a higher occupancy rate. It also has higher gross operating profit because it requires less money to run. There are fewer expatriates and a less costly general manager can be recruited. The quality and cost of its amenities, including soap and towels, are also lower. In contrast, while a 5-star hotel has higher room rate, its occupancy rate is less and the costs are higher. There are more expatriates. So a 4-star hotel may have a higher gross operating profit.
>
> Q: What you are saying is that by charging higher room rates, there is no guarantee of higher profits?
>
> A: Yes.

75 It must also be remembered that the credibility of the Narulas, and in particular, that of Kirin Narula, was never impeached or doubted. This is in stark contrast to the trial judge's finding that Murray "convinced [him] through his evasiveness, contradictions, unsubstantiated claims and generally *unsatisfactory evidence* that Asia Hotel had no real or measurable chance of securing the Lai Sun shares". The trial judge went so far as to find that at times, Murray's evidence "bordered on the absurd" and that he "undermined whatever case his counsel tried to build for his company".

76 To my mind, there was strong evidence to demonstrate that it was not critical for the Narulas to go with Starwood Asia. It was certainly not their first choice. In fact, to go with Starwood Asia could, to borrow their words, give rise to concerns that they would be "cannibalising" themselves because of the Sheraton hotel which they owned along the same Sukhumvit Road in Bangkok. At the point of choosing the hotel operator, they could have gone with a four-and-a-half-star brand, or they could have gone with Westin. In fact, the Narulas thought that the Crowne Plaza brand was "good enough" for them. It is true that at the end of the day, the Narulas decided on Starwood Asia but this does not necessarily lead to the conclusion that Starwood Asia was absolutely critical to securing the Lai Sun shares. The uncontroverted evidence from the Narulas was that they could have gone with other brands and they did give the other brands serious thought. This demonstrated clearly that the Narulas had a real choice among the various brands, and at the very least, between the Crowne Plaza (a four-and-a-half-star brand) and Westin.

77 My learned colleagues highlight the fact that the Narulas' loan agreement with DBS Thai Danu Bank included a condition precedent that the hotel was to be managed as a Westin. Relying on that, they found that a *prima facie* case, that DBS Thai Danu Bank required the hotel to be a Westin before it disbursed the loan, had been established. Consequently, they took the view that the evidential burden shifted onto Starwood Asia to show that DBS Thai Danu Bank did not require the hotel to be managed as a Westin. To my mind, there was insufficient evidence to prove a *prima facie* case.

78 While it is true that there was a condition precedent in the loan agreement to the effect that

the hotel was to be managed as a Westin, that had to be viewed in light of the other agreements signed around that time. In my opinion, it was important to note that the loan agreement with DBS Thai Danu was signed on 22 May 2002. This came *after* the management agreement had been signed between the Narulas and Starwood Asia on 15 May 2002 and way after the conclusion of the sale and purchase agreement between the Narulas and Lai Sun on 22 March 2002. Bearing that context in mind, I found that it would have been natural for DBS Thai Danu Bank to state in its loan agreement that the hotel was to be managed as a Westin. That would have provided an assurance of sorts that there would be *a* hotel operator, the one which the Narulas had engaged, to run the hotel. If the Narulas had gone with another brand, I could not see why or how DBS Thai Danu Bank would not have included that other brand as a condition precedent in the loan agreement. The fact that it was included as a condition precedent, bearing in mind the sequence of the different agreements, was, in my opinion, neither here nor there. Bearing in mind these surrounding circumstances, I could not see how a *prima facie* case had been established for the evidential burden to shift.

79 Moreover, I found that there was insufficient evidence to show that the Narulas did not have the financial muscle to proceed with the purchase of the Lai Sun shares without the assistance of the renovation loan from Starwood Asia. In his affidavit of evidence-in-chief, Kirin Narula gave evidence to show that the Narulas had the means to proceed with the renovation loan prior to Starwood Asia disbursing the loan to them under the management agreement:

> Under the Management Agreement [with Starwood Asia] the operators have agreed to give a renovation loan of US$5 million pursuant to a Loan Agreement dated 16 May 2002. However, the loan was not disbursed until in or about April 2003. During the period between October 2002 and April 2003, the renovations were paid from loans by the Narulas to PSD and by funds from the GPH [*viz* Grand Pacific Hotel] operations.

The evidence was that for about six months between October 2002 and April 2003, the Narulas were able to fund the renovations from their own resources. I also found it pertinent to note that Kirin Narula's credibility was never doubted at the trial below, and the trial judge made no adverse comments on his testimony. On the contrary, the trial judge found that Murray convinced him "through his evasiveness, contradictions, unsubstantiated claims and generally unsatisfactory evidence" that Asia Hotel had no real or measurable chance of securing the Lai Sun shares.

80 Further, the fact that the Narulas had the money to fund the costs of renovation can be gleaned from the fact that they pumped in their own money when it increased from US$5m to US$8m, without the assistance of Starwood Asia:

> Q: You wanted to borrow money to fund renovations.
>
> A: We wanted to have facility available.
>
> Q: Did you want to borrow?
>
> A: We wanted it available to help decision-making process. Renovation loan facility will complete renovation in a shorter period of time rather than spending a long period of time for internal cash flow. …
>
> Q: That was why this was one of the key factors in selecting operator.
>
> A: Totally disagree. The family had more than enough reserves to buy the Lai Sun stake. We also had reserves to fund the renovation on a short-term basis. We did not wish family funds

be stuck for a longer period of time and wanted renovation funding be made by a financial institution on a commitment by the hotel operator.

Q: To fund renovation, you needed loan from Westin.

A: Partly, to finish in time.

Q: If you could not renovate in one go, it would affect earning capacity of hotel.

A: Right.

Q: Longer renovation went on, longer effect on earning capacity affected.

A: If I allow it to go on, I may go on to raise capital.

Q: Renovation not completed.

A: On-going.

Q: Not completed because of hold-up of Starwood loan until April 2003.

A: But we started renovation on time.

Q: *You funded by operating funds.*

A: *Plus loan from family, 30 million baht up to 50 million baht. US$800,000 to US$1.2m.* We went phase by phase. Instead of 2 floors for 45 days, it took 2 floors for 65 days. That is why there is delay. Not because we did not have funds.

Q: You did not do it in one go because you did not have money.

A: We did not want to close hotel.

Q: Why did renovation start late? Because of problem with loan?

A: No, because we could not get renovation plans in time …

Q: What is now total cost of renovation?

A: We decided to renovate 100% of rooms, add spa and health club. We did not want to extend renovation period into future. The total cost on completion – US$8m.

Q: Where to find US$3m extra?

A: From internal reserves and directors' loan.

Q: You were asked about Narula finances. Suggested it was a stretch to buy Lai Sun. Explain your statement, family had enough reserves.

A: My family is one of the oldest Thai Indian families. The hotel business is only a part of our business. We are involved in the fast food industry and we have more than 600 Dunkin Doughnuts stores and kiosks in Thailand. We also have more than 25 [Au Bon Pain] stores, which

> are similar to Delifrance stores in Singapore. Apart from the fast food industry, our family operates the biggest retail store for compact discs in Bangkok and we have 7 stores in Thailand. Furthermore, we are also the largest exporter of baby feeding bottles since 1965. Apart from these, we have apartments and retail space for rent in Thailand. … We also have property in India.
>
> [emphasis added]

81 While the evidence showed that the Narulas did use the renovation loan of US$5m from Starwood Asia to renovate the hotel, I found that that was not the end of the investigation. The critical issue here was whether it was *absolutely essential* for them to have that loan in order to purchase the shares from Lai Sun. On balance, I found that the evidence demonstrated that the Narulas had sufficient funds and that if they were required to go through the renovation without the help of Starwood Asia, or with another four-and-a-half-star brand, they would have been able to do so. If Starwood Asia had offered the renovation loan on the plate as part of the deal, it would have been foolish of reasonable businessmen like the Narulas not to take up the offer. That is a far cry from saying that the Narulas required it in order to purchase the shares.

Effect of Murray's warning e-mail and letters to Starwood Asia

82 Apart from placing reliance on the fact that the Narulas could not have proceeded with the purchase of the Lai Sun shares without Starwood Asia's assistance (with which I disagree for the abovementioned reasons), my learned colleagues also place emphasis on a series of warning letters and e-mails from Murray to Starwood Asia. These started with an e-mail from Murray to Starwood dated 14 March 2002. This was followed by a letter from the appellant to Starwood Asia wherein it stated that the appellant "hold[s] that Starwood has violated the Agreement [the NCA] on several occasions" and put Starwood on notice that the appellant reserved all rights under the NCA to pursue damages and injunctive relief against Starwood and its directors. My learned colleagues appear to be swayed by this correspondence in concluding that Starwood "blatantly disregarded its obligation in spite of warnings issued by the appellant" and that it was "Starwood's very own deliberate wrongful acts which shattered the appellant's dream".

83 With respect, I could not see how this consideration was material or relevant to the issue of whether the appellant had proved on a balance of probabilities that it was in a position to negotiate with either Lai Sun/Pongphan or Lehman Brothers or both, to put itself on track to secure the shares. It has to be remembered that on 19 February 2002, Lai Sun had indefinitely extended its MOU with the Narulas. That effectively snuffed out any chances that Lai Sun would get together with the appellant again, short of a miracle. The appellant's warning and letters were, at best, overtures that it intended to pursue its legal remedies against Starwood Asia for breach. To my mind, they did not go towards assisting the appellant in showing that it had put itself on course to re-negotiate with Lai Sun/Pongphan and/or Lehman Brothers. That was the crucial question which the appellant had to prove as a matter of causation. With respect, I failed to see how the warning letters could have assisted the appellant's otherwise hopeless case on this issue.

Conclusion

84 For the above reasons, I would have dismissed the appeal. I agreed with the trial judge that the appellant could not and did not prove causation on the available facts. The law is clear in exacting a high threshold of the appellant when proving that its own hypothetical conduct would have been such that it would have been put on course towards obtaining the lost chance. On the available objective evidence and the testimony of Murray himself, I found that the appellant did not have the

intention to recommence negotiations with Lai Sun and/or the financial institutions which are necessary to proceed with the deal.

85 My learned colleagues have come to a different conclusion, reasoning that the appellant had up to 9 November 2002 to pull through the deal. Therefore, the appellant was entitled to "stay by the sidelines" and wait till the deal with the Narulas fell through. *If* the deal with the Narulas fell, the appellant *could* have then come in and restart negotiations with Lai Sun and the financial institutions. I found such an approach to be speculative and unnecessarily indulgent towards Murray, who was, on the evidence including that of the appellant's financial resources, probably little more than an opportunistic speculator. With the greatest respect, the decision of the majority cannot be supported both in law and on the evidence.

86 By coming to the conclusion that I did, I do not mean to condone Starwood Asia's breach of the NCA. What it did was wrong and it realised this, through its use of affiliated companies to enter into the agreement with the Narulas. However, what I found incredible and abominable was Murray's claim that the breach had caused the loss and in this, I had to depart from my learned colleagues. In the end, despite Murray's fervent claims that he intended to pursue the deal, I noted that he did not pay a single cent towards bringing the deal to its conclusion when he was asked to do so at various points in time. He was asked to put up a deposit of US$500,000 during the period of the appellant's MOU with Lai Sun and he could not raise this. He asked for an extension of time to raise the funds and Lai Sun requested, and quite reasonably so, for compensation but he simply refused to pay. This was the state of affairs even *before* the Narulas came into the picture.

87 His stubborn unwillingness to make payment to advance the appellant's deal with Lai Sun has to be juxtaposed against his insatiable demands from Starwood Asia: First, he demanded "key money" which would invariably go into his pocket and subsequently, he made the preposterous suggestion to have Starwood Asia pay him "key money" and claim part of it back from Pongphan in subsequent years. Finally, I found that Murray, in a supreme example of shady tactics, used this suit as leverage against Starwood Asia to extort compensation for what was a technical breach. Seen in this light, I failed to see how it could be said that Murray had done anything concrete towards the procurement of the Lai Sun shares.

88 In my view, a court of law in Singapore should not be used as an instrument for a person as undeserving as Murray to advance his financial position by relying on a technical breach of contract. It is impossible to say that the breach had caused the appellant to lose a real and substantial chance to acquire the Lai Sun shares without indulging in unnecessary speculation. Therefore, I have no doubt in my mind that the appeal should be dismissed with costs.

20 September 2004 *Judgment reserved.*

Chao Hick Tin JA (delivering the judgment of the majority):

89 This appeal essentially raises two questions, one procedural and the other substantive. The procedural question is whether, in a case where the parties, with the approval of the court, had proceeded at the trial on the basis that the judge should only decide the question of liability with damages to be assessed later by the Registrar (if necessary), the judge was correct, having found that the defendant-respondents were in breach of their contractual obligations, to proceed nevertheless to determine that the plaintiff-appellant was only entitled to nominal damages. The substantive question is whether, having found that the respondents were in breach of the contract,

the judge was correct to have further found that, on the facts, the breach on the part of the respondents did not effectively cause the appellant to lose a real and substantial chance of obtaining a certain asset.

The facts

90 The appellant, Asia Hotel Investments Ltd, who was the plaintiff in the action below, is in the business of investing in luxury hotels and golf courses in South East Asia, by putting together a programme to renovate, re-brand, reposition and secure professional management for the hotels and golf courses. The two respondents were the defendants in the action below. The first respondent, Starwood Asia Pacific Management Pte Ltd, is in the business of providing hotel management and consultancy services. The second respondent, Starwood Hotels & Resorts Worldwide Inc, is the parent company of the first respondent.

91 The respondents own and operate international hotel chains such as St Regis, Westin, Sheraton and Four Points. At the commencement of the trial, the parties agreed that the appellant would not pursue its claim in conspiracy against the respondents and that the case would proceed on the basis that it was a contractual claim and that any damages awarded against the first respondent would be honoured by the second respondent. In view of this, there is no necessity in this judgment to differentiate between the two respondents. Accordingly, for convenience, we shall refer to the two respondents as "Starwood".

92 Sometime in the last quarter of 2001, the appellant was eyeing a four-star hotel, the Grand Pacific Hotel ("Grand Pacific" or "the hotel" as may be appropriate), which was located in Sukhumvit Road in the central business district of Bangkok, Thailand. Grand Pacific was then owned by PS Development ("PSD"), a company in which Lai Sun Development Co Ltd, a Hong Kong company, and its associates (collectively referred to as "Lai Sun") held 54.25% of the shares. The remaining shares in PSD were held by one Mr Pongphan Samawakoop ("Pongphan") who was also the chairman of the board of PSD. Under a shareholders' agreement between Lai Sun and Pongphan, the latter had a right of first refusal if Lai Sun should wish to dispose of its shares in PSD. It was quite clear on the evidence that Pongphan was not interested in taking over the shares in PSD held by Lai Sun. At the time, PSD owed substantial debts to creditors. The appellant hoped, upon acquisition, and with the concurrence of Pongphan, to convert the Grand Pacific into a five-star hotel, and to restructure the debts of PSD.

93 On 7 November 2001, the appellant, through a nominee, entered into a memorandum of understanding ("MOU") with Lai Sun to buy over the latter's stake in PSD ("the Lai Sun stake") for US$7.5m. Under this MOU, the appellant had until 14 December 2001 to enter into a contract to buy over the Lai Sun stake and pay a deposit of US$500,000. Lai Sun undertook not to sell its stake to any third party during that period. Pongphan supported the appellant buying over the Lai Sun stake. He even accompanied the chief executive of the appellant, Mr Gary Murray ("Murray"), when he went to Hong Kong to talk to Lai Sun.

94 Towards that end, the appellant sought an international hotel operator to manage the hotel. It also tried to obtain loans from financial institutions which would in part enable the appellant to pay for the Lai Sun stake and in part upgrade the hotel and restructure PSD's debts.

95 Starwood was keen to be the operator of the hotel and offered its five-star "Westin" brand. On 4 December 2001, Starwood signed a non-circumvention agreement with the appellant under which Starwood undertook not to "solicit any source introduced by the other party" or enter into any agreement with such a source for a period of 12 months from the date of execution, *ie*, until

4 December 2002 ("the N-C Agreement"). "Source" was defined as including the current owner of the hotel.

96 However, on the expiry of the MOU on 14 December 2001, the appellant had not managed to put in place the financial arrangements and other requirements necessary for the purchase of the Lai Sun stake and sought an extension of the deadline by 45 days. Lai Sun refused the request as it did not want to tie itself down to only one potential buyer. Lai Sun wanted to have the option of dealing with as many potential investors as there were available since there was no guarantee that the appellant would be able to conclude the deal.

97 Soon thereafter, Mr Kirin Narula ("KN"), who knew Pongphan, indicated to the latter that he was interested in buying over the Lai Sun stake. On 18 January 2002, KN discussed with Lai Sun and this led to the conclusion on 5 February 2002 of a memorandum of understanding with Lai Sun ("the second MOU") under which the Narula family was, until 28 February 2002 (a period of 23 days), given the exclusive privilege to negotiate for and purchase the Lai Sun stake. On 19 February 2002, Lai Sun extended the second MOU indefinitely. Of course, this extension did not mean that the Narulas could take their time. If no progress was made, Lai Sun would certainly be entitled to introduce a new deadline and open the stake to others.

98 On 22 March 2002, the Narulas entered into an agreement with Lai Sun to purchase the Lai Sun stake. The transaction was completed on 22 May 2002, with the Narulas obtaining a loan from DBS Thai Danu Bank.

99 The appellant was aware of the Narulas' moves to purchase the Lai Sun stake. At the time, Murray continued to negotiate with Starwood regarding a renovation loan of $5m for the hotel. He also sought an *ex gratia* payment of US$2m, called "key money", from Starwood to the appellant. On 18 January 2002, Starwood forwarded its first draft letter of intent to the appellant. On 22 January 2002, Starwood provided the appellant with its third draft letter of intent and term sheet. Starwood was not prepared to make any key money payment although it was willing to increase the amount of the renovation loan to US$6m.

100 The negotiations between Murray and Starwood did not lead to any conclusion. However, on and after 15 February 2002, Starwood showed a clear interest in co-operating with the Narulas by assisting them in acquiring the Lai Sun stake and, in turn, the Grand Pacific. On that day, the Narulas' representative contacted Starwood about managing the hotel on behalf of the owners. On 18 February 2002, Starwood reverted to the Narulas to pursue the matter. On 28 February 2002, Starwood informed the Narulas of what the basic terms of a management contract would entail and also offered them a US$5m renovation loan to be used in upgrading the hotel to the five-star "Westin" brand standard.

101 During the first half of March 2002 there were further contacts between the Narulas and Starwood. Notwithstanding the appellant's reminder of 14 March 2002 to Starwood of its obligation under the N-C Agreement, Starwood forwarded, on 14 and 18 March 2002, letters of intent and draft term sheets to the Narulas. It was on 22 March 2002 that the sale and purchase agreement of the Lai Sun stake was executed between the Narulas and Lai Sun. Three days later, Starwood, through a nominee, signed a letter of intent for the management of Grand Pacific with the shareholders of PSD, namely, the Narulas and Pongphan.

102 In the meantime the appellant still kept in touch with Lai Sun who, on 16 March 2002, informed the appellant that the Narulas had not yet secured the deal.

103 On or about 14 March 2002, the appellant learnt from Pongphan that Starwood had offered to manage the Grand Pacific. Murray reminded Starwood by e-mail of its obligations under the N-C Agreement. The appellant followed this up on 1 April 2002 by writing to Starwood stating, *inter alia*:

> We hold that Starwood has violated the Agreement on several occasions, and most recently you have signed a Letter of Intent to manage this hotel.
>
> We hereby put you on notice. We view your violation as serious and has caused us significant financial losses. We therefore reserve all of our rights under such Agreement to pursue damages and injunctive relief against Starwood and its directors on this matter.

104 Nevertheless, on 15 May 2002, through an affiliated company, Starwood executed a management contract with the shareholders of PSD. On the next day, through another affiliated company, a loan agreement was executed with the same shareholders whereby Starwood would grant a US$5m loan to them, which was to be used for the upgrading of the hotel. The purchase of the Lai Sun stake was completed on 22 May 2002 with the loan from DBS Thai Danu Bank.

105 Obviously concerned about a lack of response, the appellant instructed its solicitors who on 15 May 2002 wrote to Starwood's solicitors chasing for a reply. Thereafter the solicitors of the parties corresponded. Nothing turns on the subsequent correspondence.

The appellant's case

106 Originally, in its statement of claim, the appellant had formulated its claim very widely. However, at the trial, the claim was amended to only a claim in damages for the loss of a chance to purchase the Lai Sun stake, which loss was brought about by Starwood's breach of the N-C Agreement.

107 The appellant's case is that the N-C Agreement effectively bound Starwood to work exclusively with the appellant for a period of 12 months in connection with the appellant's proposed acquisition of the Lai Sun stake and, in turn, the hotel. The effect of the N-C Agreement was that during that period, Starwood could not deal with a third party in relation to the management of the hotel. However, before the expiry of the said period, and in breach of its obligations under the N-C Agreement, Starwood negotiated with and supported the Narulas in acquiring the controlling stake in PSD by agreeing with the Narulas and Pongphan to manage the hotel under the "Westin" brand and to grant the Narulas and Pongphan a US$5m renovation loan to upgrade the hotel. By so agreeing, and thus helping the Narulas to acquire the Lai Sun stake, Starwood had deprived the appellant of a real and substantial opportunity to acquire the Lai Sun stake and, in turn, the hotel.

The issues

108 The appellant submitted that there were four issues which this court should address. We have merged the second and third issues into one and the three issues are:

> (a) In the light of the fact that the parties had agreed that the trial should only determine the question of liability, whether the judge was correct to have proceeded to deal with the issue of quantum.
>
> (b) Whether Starwood's breach had caused the appellant to lose a chance of acquiring the Lai Sun stake and whether the chance lost was a "real and substantial" one.

(c) Assuming that the judgment below should stand, whether, in view of the fact that the judge had found that Starwood had breached the N-C Agreement, the costs of the trial below should, in any event, have been awarded to the appellant.

The first two issues are the same as those we have identified at the opening paragraph of this judgment.

109 On the substantive issue, the arguments submitted by the respondents are essentially to support the approach taken by the trial judge, with further factual details.

Our consideration

110 We will address the substantive issue first as our conclusion thereon may well render the procedural issue academic. Clause 5 of the N-C Agreement reads:

> Each party agrees not to circumvent the other and abide by the following terms and conditions:
>
> (a) No party will attempt to contract, *deal with in any way or solicit the source* of any other of the disclosed parties at any time, or in any manner, without the written consent of the party introducing the said source. This shall include but not be limited to the *current owner of the Hotel*, any employees of the Hotel, and any contractors or suppliers of the Hotel.
>
> (b) None of the parties to this Agreement shall enter into any negotiation, contract or agreement with any of the sources introduced …
>
> (d) It is agreed that this Agreement shall remain in effect for 12 months from its execution, unless otherwise agreed by the parties.
>
> [emphasis added]

111 The trial judge held that Starwood had breached the N-C Agreement when an affiliated company entered into a management contract with the shareholders of PSD (that took place on 15 May 2002) and when another affiliated company agreed to give a US$5m renovation loan to them (that took place on 16 May 2002). This holding is not being challenged by the respondents. Starwood also admitted that the two arrangements were entered into in that manner with the aim of avoiding detection and getting round the N-C Agreement. On the evidence before him the judge could also have found that Starwood was in breach as early as 15 February 2002 when its representative first spoke to the Narulas about managing the hotel for them.

112 However, the judge went on to hold that the alleged loss of a chance by the appellant to acquire the Lai Sun stake was too remote. He said at [26] of his judgment ([2003] SGHC 289) that "[i]f one were to ask why [the appellant] failed to acquire the Lai Sun shares, the obvious answer would, without more, be that the Narulas beat them to it". The judge concluded that it was not established that the appellant's failure to acquire the Lai Sun stake was caused by Starwood's breach of the N-C Agreement.

113 From the evidence, it is quite clear that any investor who wished to buy over the Lai Sun stake would not be interested in the stake as such but the hotel which was owned by PSD and the business opportunities which the hotel offered. Acquisition of the Lai Sun stake would give the investor a majority stake in PSD and, in turn, the hotel.

114 Under the N-C Agreement, Starwood was precluded from negotiating with or entering into any contract with PSD, the owner of Grand Pacific. Nor could it negotiate with anyone for or on behalf of the owners of the hotel. The effect of the agreement was that Starwood, as accepted by the respondents in their Case, was restrained from liaising with others with the object of entering into any arrangement to manage the hotel with such third party. It is therefore vitally important that the Narulas' proposal to buy over the Lai Sun stake should not be viewed in isolation, but in its proper context. The aim of the Narulas was to obtain a majority stake in PSD and, in turn, convert Grand Pacific into a top class hotel with the help of a leading international hotel operator.

115 To make a success of the investment, it would be necessary for the investor to upgrade the hotel to an appropriate level in accordance with the adopted brand. In its own interest, no bank would lend money to a person to make the investment unless such plans were in place. This is evident from what the appellant tried to do and what the Narulas did, in fact, do. No sensible investor would want to purchase the Lai Sun stake for its own sake. The facts in the present case speak for themselves.

116 Thus, besides reaching an agreement with Lai Sun on the purchase, two other essential prerequisites had also to be put in place. First, there had to be an acceptable international hotel operator, with an appropriate brand, to run the hotel. Second, financial arrangements had to be made with a bank to finance the purchase of the Lai Sun stake as well as to restructure the debts of PSD. Of course, the second condition need not be fulfilled if the investor was so cash-rich that he did not require any loan. But that was not the case with either the appellant or the Narulas. The non-fulfilment of either of these conditions would mean that the Narulas would not have been able to proceed with or complete the purchase of the Lai Sun stake.

117 Starwood, by agreeing to manage the hotel and grant to PSD a renovation loan of $5m (which acts were breaches on Starwood's part of the N-C Agreement), in effect helped the Narulas to buy over the Lai Sun stake. As pointed out above, breach of the N-C Agreement by Starwood first occurred on 15 February 2002, well before any purchase agreement had been executed between the Narulas and Lai Sun. At that point, the Narulas had only obtained Lai Sun's commitment not to sell the stake to others during the 23 days' period. The judge held that the Narulas beat the appellant to it in acquiring the Lai Sun stake. This is true only if we ignore the breach and the effect of the assistance rendered by Starwood. The appellant would have had no basis to complain if the Narulas had completed the purchase of the stake without the involvement of Starwood.

118 While it is true that the appellant's negotiations with financial institutions to purchase the Lai Sun stake did not reach any conclusion, and indeed after 4 February 2002, the negotiations seemed to have come to a halt, we do not think this fact is in any way material to the question whether Starwood's acts in agreeing to manage the hotel and to offer to PSD (through the Narulas and Pongphan) a US$5m renovation loan did, in any way, assist the Narulas in acquiring the Lai Sun stake, and thus deprive the appellant of the chance of acquiring the stake. If the Narulas had not acquired the stake, the appellant would have had up to 4 December 2002 to make all the arrangements, including the financial ones, unless in the meantime another potential investor should surface. The Lai Sun stake had been on the market for some time and there is no evidence in the record of any other interested investor.

119 The same comment can be made with regard to the state of the appellant's negotiation with Lai Sun. After the expiry of the MOU on 14 December 2001, the appellant did not do more other than keep in touch with Lai Sun. However, even after Murray was told of the interest of the Narulas in the Lai Sun stake, he was not terribly anxious as he knew that he had the crown jewel in his pocket, the Starwood name and its "Westin" five-star brand, and did not think that any other international hotel

operators would be likely to offer to run the Grand Pacific as a five-star hotel. He had made a study of the situation.

120 In our view, the judge erred in treating the two factors, *ie*, the appellant's lack of progress in its negotiations with Lai Sun and with the financial institutions, as important in determining whether the loss by the appellant of the chance to acquire the Lai Sun stake was caused by the breach. Having locked up Starwood till 4 December 2002, the appellant would have known that it had up to the same day to sew things up. If the Narulas had not succeeded in the purchase, the appellant would have had a chance to acquire the stake. As indicated before, there is no evidence of any other interested investor. The appellant had repeatedly warned Starwood that it was in danger of breaching the N-C Agreement. These warnings would have reminded Starwood of the appellant's continued interest in the Lai Sun stake. There would have been no basis for Starwood to think that, after January 2002, the appellant did not have any further interest in the hotel.

121 At [43] the judge said that the appellant "[was] in no position to conclude any deal with Lai Sun before the Narulas ended [the appellant's] dream of owning the [hotel]." With respect, we think that is taking too narrow a view of things. The crucial question is, did Starwood, in breach of the N-C Agreement, help the Narulas to beat the appellant to it? If Starwood did, and that is not in doubt as will be elaborated later, the appellant's loss of a chance to acquire the Lai Sun stake would have been due to the wrongful acts of Starwood.

122 What we see here were some shrewd business moves on the part of the appellant, acting through Murray. In Murray's mind, to successfully wrap up the deal to purchase the Lai Sun stake, the most critical factor was an international hotel operator with a five-star brand. He knew that such an operator would be necessary to facilitate the obtaining of loans from the bank to finance the purchase, including the restructuring of the debts of PSD. He considered, as an experienced investor in the luxury hotel business, that the five-star "Westin" brand owned by Starwood was ideal. Thus, he sought out Starwood and entered into the N-C Agreement with it. That effectively bound Starwood for a period of one year, during which period Starwood would be precluded from talking to anyone about managing the Grand Pacific. This would mean that any other investor who might have succeeded in buying over the Lai Sun stake would not be able to get Starwood to manage the hotel unless he was prepared to wait until after 4 December 2002. This explains why Murray was not as anxious as he should have been when Lai Sun refused to grant him an extension of the MOU and when he learnt that the Narulas would be a competitor. Instead, he stayed by the sidelines observing how the Narulas would conclude the deal with Lai Sun without Starwood's involvement. He did not think that the chances of the Narulas succeeding in doing so were great. Any bank from whom the Narulas would seek to obtain a loan to finance the purchase and the restructure of the PSD debts would naturally want to know what grade of hotel Grand Pacific would become, who the international hotel operator would be and the projected cash flow, *etc*. Satisfactory answers on such matters would be necessary to safeguard the bank's own interest.

123 The indisputable fact is that Starwood, in breach of the N-C Agreement, agreed to manage the hotel and to give a US$5m renovation loan to the hotel. It was a condition of the loan by DBS Thai Danu Bank that the hotel would be a "Westin" hotel and that there would be no change of the hotel operator without the consent of the bank. A clause under "security arrangement" even required the "[a]ssignment of the hotel management contract with Westin Asia Management Company". It was also noted in the offer letter from the bank that Starwood would be giving a US$5m renovation loan to the hotel. Both aspects, namely, that the bank loan was conditional on the hotel being a "Westin" and that the loan was offered on the understanding that Starwood would be giving a US$5m renovation loan, were unfortunately overlooked by the judge.

124 Therefore, the objective facts show that the Narulas needed Starwood as the operator of the hotel and also needed Starwood's renovation loan. Thus, Starwood's acts helped the Narulas to acquire the Lai Sun stake, and in turn the Grand Pacific. The evidential burden of disproving that thus shifted to Starwood who had to show that the Narulas could have proceeded with the acquisition without the help of Starwood.

125 Evidence should have been adduced to show that even without Starwood, the Narulas could have acquired the Lai Sun stake because there was another five-star hotel operator who was prepared to manage the hotel and offered the same kind of renovation loan. The evidence adduced showed only that four international hotel operators were prepared to offer their four-star brands and, of the four offers, only one, Six Continents Hotels, was prepared to offer a loan of US$3m for upgrading costs. While we recognise that running the hotel as a four-star establishment was, theoretically, a possibility open to the Narulas, Starwood had to show that the Narulas had the financial muscle to acquire the hotel on that basis. Evidence should also have been adduced to show, therefore, that DBS Thai Danu Bank would still have been prepared to offer the loan of 1.3bn baht to the Narulas to purchase the Lai Sun stake and to restructure the debts of PSD on the basis that the hotel would remain a four-star hotel. We have pointed out above that DBS Thai Danu Bank's offer of a loan was clearly conditional on the hotel being a "Westin". There was nothing at the trial to refute this. All the court had by way of evidence was KN's assertion that the "Westin" brand was not essential for the loan. There was no letter from the bank saying that. Neither did any officer of the bank come forward to testify. KN could not speak for the bank. At best, what he said was hearsay.

126 We would reiterate that there is no evidence that the Narulas could have proceeded with the purchase of the stake without any loan from DBS Thai Danu Bank. We appreciate that when the Narulas entered into the contract to purchase the Lai Sun stake, DBS Thai Danu Bank had probably not come into the picture and certainly had not yet agreed to grant a loan to the Narulas. But the indisputable fact is that the Narulas could not have proceeded with the purchase without a bank loan. At the time when the sale and purchase contract with Lai Sun was signed, Starwood had already given to the Narulas and Pongphan the second draft of the letter of intent. Starwood would have assured the Narulas that it would manage the hotel. Thus the letter of intent was signed three days later. Starwood's management of the hotel was an important piece in the jigsaw puzzle and it was effectively in place when the Narulas executed the sale and purchase agreement.

127 With respect, the approach taken by the judge showed that he failed to appreciate that the evidential burden to prove otherwise fell on Starwood. He said at [28] and [42]:

> In view of the complexity of the hotel investment business in Thailand, Asia Hotel ought to have provided independent testimony regarding their allegations that the Narulas could not have acquired the Lai Sun shares without Starwood's help, that the Narulas could not have reached a deal with another hotel manager if their deal with Starwood fell through, and that the Narulas could not have obtained the requisite loan from a financial institution if the Grand Pacific was not managed as a five-star Westin Hotel. …
>
> I am satisfied that it was not established that the Narulas could not have completed their deal with Lai Sun if Starwood had not agreed to manage the Grand Pacific and offer a renovation loan. As such, it was not established that Asia Hotel had a reasonable or measurable chance to acquire the Lai Sun shares if Starwood had not breached the non-circumvention agreement. That being the case, the question of awarding them substantial damages for Starwood's breach of the non-circumvention agreement does not arise.

128 It does not lie in the mouth of Starwood, a party who was in blatant breach of its contractual

commitment, to make bald assertions that its involvement was inconsequential when the objective facts show that the purchase of the Lai Sun stake by the Narulas was completed only with Starwood, in breach of its contractual obligation, agreeing to be the operator and offering its five-star "Westin" brand.

129 At this juncture, we should perhaps point out what appears to us to be a misconception of an e-mail which Murray had sent to Mr Monahan of Starwood on 2 February 2002, where in reference to the question of the US$2m "key money", Murray stated:

> I wanted to run an idea by you on this deal to see if this is workable. We need to find the US$2m, either upfront or over time. If it is upfront, it makes it easier for me. However, you've indicated that upfront is difficult, however, what if it came over time thus could be offset against management fees. Perhaps over a 3 year period.

On this e-mail, the judge observed at [58]:

> What is alarming about Gray's e-mail is that he wanted the loan of US$2m for Asia Hotel to be offset against an increase of management fees. This means that Pongphan, who owns 45.75% of the stake in PSD, would have had to bear part of the cost of repaying to Starwood a loan that had nothing to do with him or PSD. This was most unfair to Pongphan.

But nowhere in his e-mail did Murray talk about a loan of US$2m. He seems to be referring to his own idea of the key money of US$2m being paid over a period of three years by Starwood. There was no suggestion that the management fees should be increased to pay for the key money. The suggestion, which was tentative, was one of offsetting: Instead of paying the US$2m upfront to the appellant, the suggestion was that it be paid over three years by subtracting it against the management fees which would be due to Starwood from PSD, the owner of the proposed new Westin. What was subtracted would then be paid over to the appellant. There would be no question of other shareholders of PSD being adversely affected on this account. In any case, even if a loan was contemplated, the loan would be from Starwood to the appellant, to be deducted from the management fees which would be due from PSD to Starwood. There would, again, be no question of an increase in management fees on account of this proposal. In this connection, we ought to mention that in cross-examination Murray said that he could not remember how the offsetting was to be done. We do not wish to speculate why he answered in that way. But whatever may be the reason, it cannot change the fact that in the e-mail no suggestion was made for the enhancement of the management fee. We note that Monahan understood it correctly when he said that the suggestion meant "we would have to give US$2m through management fees over three years".

130 In our opinion, on the evidence, Starwood's breach had caused the appellant to lose a real chance of acquiring the Lai Sun stake and in turn the Grand Pacific. We are not saying that the appellant would certainly have acquired the stake. The appellant would have to find a banker who would offer loans on terms which it and Pongphan could accept. The appellant and Pongphan would also have to agree on the question of control of PSD because taking over the Lai Sun stake would give the appellant a majority shareholding in PSD. Furthermore, the appellant would have to finalise the management contract with Starwood, including the question of the renovation loan. But these were matters which any investor in the Lai Sun stake would, in any event, have to put in place. Lai Sun wanted to get out and if the Narula offer had not gone through, it would have been prepared to consider a further offer from the appellant. As late as 16 March 2002, Lai Sun informed the appellant that the Narulas had not yet secured the deal. Obviously, it was keeping the line of communication with the appellant open. All said, the appellant would have had a chance, certainly not a speculative chance, considering that there is no evidence of a third potential investor waiting in the wings and

having an interest in the stake. Another important aspect, which would have had a bearing on the appellant's chances, is the fact that the market had already known for some time that Lai Sun had intended to divest its stake in PSD. It is in respect of this loss of a chance that an assessment of damages must be carried out to determine the proper compensation.

131 We would reaffirm that this is a case of a party who, having brazenly disregarded its contractual obligation to a second party and helped a third party to acquire an asset which the first party had agreed to co-operate with the second party to acquire, has the temerity to allege that its acts did not cause the second party to lose a real chance of acquiring the asset.

The law

132 The *locus classicus* on claims for the loss of a chance is that of *Chaplin v Hicks* [1911] 2 KB 786. There, the plaintiff was selected for an interview as one of 50 finalists in a competition. The finalists were chosen from a total of 6,000 applicants. As a result of the defendant's omission, the plaintiff received the notification late and thus missed the interview. The plaintiff then commenced an action against the defendant for the loss of a chance of winning the competition. Although it was impossible to determine if she would have won had she attended the interview, she succeeded in her claim for the loss of a chance to win the prize. The Court of Appeal ruled that the damages claimed were not too remote. Here, we would quote a passage from Fletcher Moulton LJ (at 795):

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

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

134 In *Normans Bay Ltd v Coudert Brothers* [2003] EWCA Civ 215 ("*Normans Bay*"), the defendant solicitors were retained to advise the claimants in relation to the purchase of shares in a Russian company and in respect of which the claimants submitted their tender for the shares. The tender was subsequently declared as invalid due to a legal issue on which the defendant solicitors should have advised the claimants but did not. The claimants instituted proceedings in negligence against the defendants. One of the defences raised by the defendants was that even if they had rendered proper advice, it did not follow that the claimants would have secured the contract as there were other bidders too. In a bifurcated hearing, the trial judge first held the defendants liable as there was no break in causation. While his award for damages was reduced by the Court of Appeal, the latter reaffirmed its decision in *Chaplin v Hicks* that damages were payable for the loss of a chance.

135 Once causation is established for the loss of a chance, all that is needed to be shown is that the chance which was lost was real or substantial. It is not the loss of practically any chance which will give rise to a remedy: see *Bank of Credit and Commerce International SA v Ali (No 2)* [1999] 4 All ER 83 at [80].

136 In *Allied Maples Group Ltd v Simmons & Simmons* [1995] 1 WLR 1602 ("*Allied Maples*"), the defendant solicitors, in advising the plaintiff buyers of a property, negligently allowed the sellers to delete a warranty from the draft contract. Subsequently, liability arose and the plaintiffs could not sue the sellers in view of the deletion. They sued the defendant solicitors instead. At the trial of a

preliminary issue on the question of liability, Turner J found that on a balance of probabilities there was a real and not a mere speculative chance that the plaintiffs would have successfully re-negotiated with the sellers to obtain proper protection and held the defendants liable for their breach of duty. On appeal, Stuart-Smith LJ said all that was needed to be proved by the plaintiffs on a balance of probabilities was that if they had been given the right advice, they would have sought to negotiate further to obtain protection. He affirmed the judge's finding that causation had been proved. Stuart-Smith LJ further identified three types of situations where the question of causation could arise. For the purposes of the present case we need only be concerned with the third situation which, in his words (at 1611), is:

> In many cases, the plaintiff's loss depends on the hypothetical action of a third party, either in addition to action by the plaintiff, as in this case, or independently of it. In such a case, does the plaintiff have to prove on balance of probability, as Mr Jackson submits, that the third party would have acted so as to confer the benefit or avoid the risk to the plaintiff, or can the plaintiff succeed provided he shows that he had a substantial chance rather than a speculative one, the evaluation of the substantial chance being a question of quantification of damages?
>
> Although there is not a great deal of authority, and none in the Court of Appeal, relating to solicitors failing to give advice which is directly in point, I have no doubt that Mr Jackson's submission is wrong and the second alternative is correct.

137 However, what would constitute a real or substantial chance need not be proved on the balance of probabilities. On this, Stuart-Smith LJ said (at 1611 and 1614):

> … Mr Jackson submitted that the plaintiffs can only succeed if in fact that chance of success can be rated at over 50 per cent. … [T]here is no reason in principle why it should be so.
>
> [I]n my judgment, the plaintiff must prove as a matter of causation that he has a real or substantial chance as opposed to a speculative one. If he succeeds in doing so, the evaluation of the chance is part of the assessment of the quantum of damage, the range lying somewhere between something that just qualifies as real or substantial on the one hand and near certainty on the other. I do not think that it is helpful to seek to lay down in percentage terms what the lower and upper ends of the bracket should be.

138 We recognise, and this was argued by counsel for Starwood, that in *Chaplin v Hicks* the plaintiff contracted for a chance to win a benefit in a competition. There, the defendant in breach of contract deprived the plaintiff of the chance. While there is this difference we do not think it is of any consequence. We have explained above why the breach by Starwood caused the appellant to lose a real chance to acquire the Lai Sun stake. It is clear that the appellant had, at all material times, maintained its intention to acquire the stake. Having secured Starwood for a year, it deliberately adopted the strategy of watching how the Narulas would wrap up a deal on their own.

139 Interestingly, while the fact situation in *Normans Bay* is also different from that in *Chaplin v Hicks*, the respondents accepted (in para 67 of their Case) that it was akin to that of *Chaplin v Hicks*. The truth of the matter is that while the circumstances of two cases may be different, it does not thereby follow that the principles established in the earlier case cannot be applicable to the later case. The important thing to consider is: Are the differences material? At the end of the day, in a case like the present, two questions should be asked and answered. First, did the breach on the part of the defendant cause the plaintiff to lose a chance to acquire an asset or a benefit? Second, was the chance lost a real or substantial one; or putting it another way, was it speculative? While, as a rule, the plaintiff always has the burden of proof, the question as to who has to prove a particular

fact, and whether in a particular fact situation the evidential burden shifts, are matters dependent wholly on the circumstances. In our opinion, this case is as much akin to *Normans Bay* and *Allied Maples* as it is to *Chaplin v Hicks*, although in none of those cases did the party in default deliberately breach its commitment.

140 In the present case, the position of the appellant is further strengthened by the fact that, unlike the other cases where the act or omission was due to inadvertence, here Starwood blatantly disregarded its obligation in spite of warnings issued by the appellant. It was Starwood's very own deliberate wrongful acts which shattered the appellant's dream.

141 As regards the question whether the chance lost was a real or substantial one, we would emphasise that there was no other party who was known then to be interested in acquiring the Lai Sun stake. Of course, this is not to say that a new investor could not surface later. At no time did the appellant abandon its decision to acquire the stake. Business or bargaining strategy must not be confused with a lack of interest. Neither should Murray's attempt to drive a hard bargain with Starwood with regard to the "key money" be viewed in any other light. If the appellant were to have actively pursued the matter with Lai Sun when the Narulas were also hot at it, that would only drive up the price which Lai Sun would demand, which, in fact, happened when Lai Sun demanded US$7.7m from the Narulas for the stake. This was US$200,000 more than what Lai Sun had asked of the appellant. The appellant had "Westin" tied up for a year. We cannot see how it could be said that if the Narulas had failed to wrap things up, the appellant could not have had a real chance of tying up the pieces together when it had up to 4 December 2002 to do that. It was not necessary for the appellant to show, on a balance of probabilities, that it would succeed in clinching the deal if the Narulas had failed.

Judgment

142 In the premises, and with the utmost respect to the Chief Justice who is dissenting, we would allow the appeal and enter judgment on liability in favour of the appellant. We order that damages for the loss of a chance to acquire the Lai Sun stake be assessed. We would hasten to add that what would have been the appellant's chances in acquiring the stake, had the Narulas not successfully acquired it with the help of Starwood, and the value to be placed on them, are matters entirely to be decided by the judge or Registrar, in the light of the evidence placed before him and bearing in mind the various imponderables.

The procedural point

143 In view of our determination above, the first issue on the procedural point has become quite academic. Nevertheless, we shall briefly give our views on it. It seems to us that the appellant's contention arose out of a misapprehension of what the judge had decided when he awarded the appellant only nominal damages for the breach by Starwood of the N-C Agreement. What the judge had ruled was that the loss of the chance by the appellant to purchase the Lai Sun stake was not caused by the breach; it was too remote a loss: see [22] of the judgment below. In view of the fact that causation had not been established, and this had to be established on the civil burden of balance of probabilities, the judge accordingly awarded nominal damages for the breach. The judge did not make this award as part of an assessment of damages relating to the appellant's loss of the chance to acquire the Lai Sun stake.

144 Breach of a contract *per se* does not give rise to damages. Loss must be shown to have arisen from the breach and in this case the loss of the chance to purchase the Lai Sun stake must be shown to have been caused by the breach or, putting it another way, the loss must not be too

remote. As the learned authors of *Anson's Law of Contract* (28th Ed, 2002), state at p 600:

> In order to establish a right to damages the claimant must show that the breach of contract was a cause of the loss which has been sustained in the sense that the breach of contract is the 'effective' cause of the loss, as opposed to an event which merely gives the opportunity for the claimant to sustain the loss.

145 The same distinction was brought up by Farwell LJ in *Chaplin v Hicks* when he referred to remoteness of damages and assessment (at 797):

> The fallacy of [the defendant's counsel's] argument consists, in my opinion, in his failing to distinguish between the remoteness of the damage claimed and its assessment; the question of remoteness is for the judge; the assessment of the damages is for the jury. I agree in thinking that the contention that the damages in the present case are too remote is unarguable …

146 Similarly, in *Bank of Credit and Commerce International SA v Ali (No 2)* [2002] 3 All ER 750, Parker LJ observed at 778:

> Where the financial loss alleged takes the form of, or includes, loss of a chance, causation of damage is not to be confused with assessment of damage. On ordinary principles, causation must be proved on the balance of probabilities.

147 While the judge was right to embark on a consideration of the question of causation in the context of a trial on liability, where he went wrong, in our view, was to find, in the circumstances of the case, that the appellant's loss of a chance to acquire the Lai Sun stake was not brought about by the actions taken by Starwood in breach of the N-C Agreement.

Costs

148 The appellant shall have the costs of this appeal (excluding the getting-up for the procedural point) and of the trial below. The security for costs, together with any accrued interest, shall be refunded to the appellant.

Appeal allowed.