

Asia Hotel Investments Ltd v Starwood Asia Pacific Management Pte Ltd and Another
[2003] SGHC 289

Case Number : Suit 961/2002/C
Decision Date : 27 November 2003
Tribunal/Court : High Court
Coram : Tan Lee Meng J
Counsel Name(s) : Alvin Yeo, SC and Tay Peng Cheng (Wong Partnership) for the plaintiff; Tan Kok Quan, SC and Marina Chin (Tan Kok Quan Partnership) for the defendants
Parties : Asia Hotel Investments Ltd — Starwood Asia Pacific Management Pte Ltd; Starwood Hotels and Resorts Worldwide INC

Contract – Breach – Non-circumvention agreement – Parties agree that they will not enter into a contract with any source introduced by the other party – Defendants enter into a contract with a third party which provides that the contract may be transferred to a source introduced by the plaintiffs – Whether such agreement constitutes a breach of the agreement.

Contract – Remedies – Remoteness of damage – Plaintiffs enter into negotiations with defendants – Defendants agree not to contract with any party introduced by the plaintiffs as part of the negotiations – Defendants breach their agreement with plaintiffs – Whether plaintiffs have shown that the defendants' breach caused them to lose a reasonable and measurable loss of a chance – Whether plaintiffs entitled to substantial damages.

1. The plaintiffs, Asia Hotel Investments Ltd (“Asia Hotel”), are in the business of investing in luxury hotels and golf courses in South East Asia. The first defendants, Starwood Asia Pacific Management Pte Ltd (“Starwood Asia”), provide hotel management and consultancy services. Starwood Asia’s parent company, the second defendants, Starwood Hotels & Resorts Worldwide Inc (“Starwood Hotels”), own brands such as St Regis, Westin, Sheraton and Four Points and are one of the largest hotel managers and owners in the world. Asia Hotel alleged that they suffered loss as a result of Starwood Asia’s breach of a confidentiality and non-circumvention agreement (“non-circumvention agreement”) in relation to their proposed acquisition of the majority stake in a company that owned a hotel in Bangkok, an allegation that was denied by Starwood Asia.

2. In their statement of claim, Asia Hotel also sought damages from Starwood Asia and Starwood Hotels for conspiracy and for unlawful interference with their economic interests. However, during the trial, Asia Hotel agreed to drop all their claims against Starwood Hotels and confine their claim to damages for Starwood Asia’s alleged breach of contract in return for Starwood Hotel’s undertaking that whatever damages or costs ordered in favour of Asia Hotel would be paid. For convenience, both Starwood Asia and Starwood Hotels will be referred to as “Starwood” in the rest of this judgment.

A. BACKGROUND

3. The facts in this case, shorn of details, are as follows. In the last quarter of 2001, Asia Hotel wanted to invest in the Grand Pacific Hotel (“Grand Pacific”), a well located four-star hotel at 259 Sukhumvit Road, Bangkok. This hotel was then owned by PS Development (“PSD”), which is now known as Grande Asset Development Public Co Ltd. PSD’s majority shareholders were Lai Sun Development Co Ltd, whose affiliated companies and nominees, Studyhome Holdings Limited and Upton Company Ltd (collectively referred to as “Lai Sun”) held 54.25% of the shares. The remaining 45.75% of the shares were held by PSD’s chairman, Mr Pongphan Samawakoop (“Pongphan”), and his nominees. By agreement, Lai Sun could not sell their stake in PSD to another party unless Pongphan

waived his right to buy it.

4. Lai Sun wanted to sell their 54.25% stake ("the Lai Sun shares") in PSD. Asia Hotel wanted to acquire the Lai Sun shares and upgrade the Grand Pacific from a four-star hotel to a five-star hotel run by an international hotel management company. On 7 November 2001, Asia Hotel, through their 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. Under the MOU, Lai Sun undertook not to enter into any binding agreement for the sale of their stake in PSD with any other entity until after 14 December 2001. Asia Hotel had until that date to sign the sale and purchase agreement for the Lai Sun shares and pay a deposit of US\$500,000.

5. Asia Hotel's next task was to secure a loan from a financial institution and to persuade an international hotel management company to run the Grand Pacific. The loan required by Asia Hotel was rather complicated as it envisaged the borrowing of 1.3m baht to restructure PSD's massive debts as well. Asia Hotel's president, Mr Gary Murray ("Gary"), negotiated with a number of financial institutions, including Lehman Brothers and Ekachart Finance, but no agreement was concluded with them or with any other financial institution at the material time.

6. Gary also had discussions with a number of international hotel management companies, including the Hyatt Group, Marriott International Inc, Six Continents Hotels, the Raffles Group, Shangri-la and Starwood, regarding the management of the Grand Pacific. As the 1.3m baht loan sought by him from a financial institution was only sufficient for the restructuring of PSD's debts and for the payment of a large portion of the purchase price of the Lai Sun shares, Asia Hotel required a hotel manager who could offer them not only management services but also a huge loan for the renovation of the Grand Pacific. He decided to focus his attention on Starwood as he sensed that they were very keen to have a Westin hotel in Bangkok.

7. On 4 December 2001, Asia Hotel signed a Confidentiality/Non-Circumvention/Non-Disclosure Agreement ("non-circumvention agreement") with Starwood without informing the latter that the deadline under their MOU with Lai Sun was fast approaching. Under this agreement, the parties 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. This agreement was subject to Starwood resolving an outstanding issue with the Narula family (the "Narulas"), which owned the Sheraton Grande Sukhumvit, a five-star hotel managed by Starwood. There was a restrictive covenant prohibiting the management of another hotel within a one kilometre radius and the Grand Pacific was just across the road. In due course, this issue was resolved after Starwood agreed to compensate the Narulas if they managed a hotel within the affected area but not if such a hotel is owned by the Narulas.

8. On 13 December 2001, Asia Hotel, which had not finalised any arrangement with a financial institution or hotel management company, asked Lai Sun to extend the deadline under their MOU by 45 days. However, Lai Sun replied on 15 December 2001 that they "did not wish to tie [themselves] down to one potential purchaser without receiving any assurances or at least compensation for an extension". The termination of the MOU was a setback for Asia Hotel as they lost their exclusive right to purchase the Lai Sun shares. Asia Hotel never went back to Lai Sun to make any offer for the acquisition of the Lai Sun shares.

9. PSD's minority shareholder, Pongphan, who had been supportive of Asia Hotel's efforts to acquire the Lai Sun shares thus far, was rather concerned about the termination of the MOU. His unchallenged evidence is that he informed Gary that he would have to look for alternative partners and that Gary told him to go ahead. Pongphan's friend, Mr Kirin Narula ("Kirin"), had indicated to him earlier on that the Narulas would be interested in acquiring the Lai Sun shares if Asia Hotel failed to

conclude a deal with Lai Sun. When told that Asia Hotel's MOU with Lai Sun had lapsed, the Narulas stepped into the picture immediately.

10. Gary, who knew about the Narulas' moves, thought that the latter lacked the financial muscle to acquire the Lai Sun shares. Without informing Starwood that his MOU with Lai Sun had already lapsed or that Pongphan was looking for another partner, Gary continued his discussions with them. Initially, he also did not disclose to Starwood that he required a loan of US\$5m for the renovation of the Grand Pacific. It was only at a meeting on 4 January 2002 with Mr Tom Monahan, Starwood's Vice-President of Acquisitions and Development, Asia Pacific, that he sought not only a US\$5m renovation loan but also an ex gratia payment of between US\$1m to US\$2m, which was termed "key money". Starwood's witnesses claimed that they were shocked that Gary wanted a personal gift but the latter insisted that the key money was not a personal bribe as it was intended for his company. Gary's request for key money was rejected but on 22 January, Starwood sent Asia Hotel a sweetener in their draft letter of intent, which included an offer of US\$6m for a renovation loan, which was \$1m more than what Gary had asked for. In the face of the threat from the Narulas, Gary should have made a concerted effort to conclude a deal with Starwood. Instead, he made further demands for more money in the form of a gift or loan from Starwood. Gary's protracted negotiations with Starwood came to nought because, contrary to what he had expected, the Narulas did not fail in their bid to acquire the Lai Sun shares.

11. In the meantime, the Narulas acted with a great sense of urgency. On 18 January 2002, Kirin Narula had discussions with Lai Sun. Not surprisingly, Pongphan agreed to waive his right to purchase the Lai Sun shares. Shortly thereafter, on 5 February 2002, the Narulas entered into an MOU with Lai Sun, which gave them the exclusive right until the expiry of the MOU to enter into an agreement for the sale and purchase of the latter's 54.25% stake in PSD for US\$7.7m. On 19 February 2002, Lai Sun effectively shut out other persons who might have had an interest in the Lai Sun shares by extending the expiry date of the MOU indefinitely.

12. On 22 March 2002, the Narulas entered into an agreement with Lai Sun for the sale and purchase of the Lai Sun shares. On 28 March 2002, they paid Lai Sun US\$1.2m. The Narulas arranged for a massive loan from DBS Thai Danu Bank and on 22 May 2002, the sale of the Lai Sun shares was completed.

13. As for the management of the Grand Pacific, the Narulas, like Gary, also had discussions with a number of international hotel management companies, including Six Continents Hotels, Marriott International Inc, Accor and the Starwood group, and received proposals from a number of them. For instance, Six Continents Hotels offered to manage the Grand Pacific as a Crowne Plaza Hotel and also offered a renovation loan of US\$3m in exchange for a management contract of 15 years. Although the Narulas thought that the offer from Six Continents Hotel was good enough for them to work on, they and Pongphan finally decided to have the Starwood group manage the Grand Pacific. On 15 May 2002, Starwood's affiliated company, Westin Asia Management Co, entered into a management agreement, not with PSD, but with the shareholders of PSD, namely the Narulas and Pongphan. Another company in the Starwood stable, Starwood Hotels (Thailand) Co Ltd, agreed to furnish a US\$5m loan for the renovation of the Grand Pacific.

14. Although Asia Hotel never got their own act in order in time to beat the Narulas in the race for the Lai Sun shares, they claimed that they lost the race only because Starwood breached the non-circumvention agreement by failing to stop their affiliated companies from managing the Grand Pacific for the new owners and from giving them a renovation loan of US\$5m. Starwood, which denied breaching the said agreement, added that even if they were in breach, Asia Hotel had suffered no loss as they had already lost their chance to purchase the Lai Sun shares by the time they co-

operated with the Narulas. Starwood's position was supported by the Narulas, who contended that they would have acquired the Lai Sun shares with or without Starwood's co-operation as they would have obtained the requisite financing for the purchase of the Lai Sun shares and would have had another international hotel manager run the Grand Pacific for them.

15. To determine whether or not Asia Hotel's claim against Starwood has any merit, two questions are relevant. First, did Starwood breach the terms of the non-circumvention agreement with Asia Hotel? If they did, the second question which arises is whether or not Asia Hotel's alleged loss of profits is too remote a consequence of Starwood's breach of the non-circumvention agreement. If it is, Asia Hotel would only be entitled to nominal damages.

B. WHETHER STARWOOD WERE IN BREACH

16. Asia Hotel's case is that Starwood breached clause 5 of the non-circumvention agreement, which provides as follows:

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)

17. Clause 5 of the non-circumvention agreement must be read with clause 4, which provides that each party agrees that in the event of any threatened or actual breach by their officers, directors, employees, agents or *affiliates*, such party will notify the other party and shall co-operate as reasonably requested by the other party to prevent or curtail such a threatened or actual breach.

18. Starwood asserted that they were not barred from dealing with the Narulas for two reasons. First, the non-circumvention agreement prohibited them from dealing with a source introduced by Gary and the Narulas were not such a source. Secondly, it was an implied term of the non-circumvention agreement that it was no longer effective once Asia Hotel lost their chance of acquiring the Lai Sun shares.

19. The term "source" is defined as including the current owners of the hotel, namely PSD. Starwood's witnesses, and in particular, their legal counsel, Mr William Snipes, were honest enough to admit that they had anticipated that Gary would object if they entered into any contract with PSD. That is why they went through the elaborate process of having a subsidiary enter into a management contract not with PSD but with the shareholders, namely Pongphan and the Narulas. The fact that the management agreement contained a clause enabling the contract to be transferred by Pongphan and the Narulas to PSD, presumably after the expiry of the 12-month period referred to in the non-circumvention agreement, showed that the true intent of the management agreement was to benefit

PSD. I thus hold that there was, without more, a breach by Starwood of the non-circumvention agreement when their affiliated company, Westin Asia Management Co, entered into a management contract with Pongphan and the Narulas and when another affiliated company, Starwood Hotels (Thailand) Co Ltd, offered a renovation loan of US\$5m to them.

20. A question arises as to whether this conclusion is affected by Starwood's second argument that it is an implied term of the non-circumvention agreement that it lapsed when Asia Hotel lost the chance to acquire the Lai Sun shares. There is no basis for implying such a term. Apart from the fact that such an implication is not necessary to give business efficacy to the contract between Starwood and Asia Hotel, it was expressly provided that the non-circumvention agreement was to be effective for a period of 12 months. It is also clear that one should be disinclined to make such an implication where the contracting parties have entered into a carefully drafted written contract that contains detailed terms (see, for instance, *Shell UK Ltd v Lostock Garages Ltd* [1976] 1 WLR 1187).

21. I thus hold that the second argument of Starwood failed to alter the conclusion that they breached clause 5 of the non-circumvention agreement by not preventing their affiliated companies from managing the Grand Pacific and offering a renovation loan. Whether this breach caused Asia Hotel's loss is, of course, another matter altogether and this will next be considered.

C. WHETHER ASIA HOTEL ARE ENTITLED TO SUBSTANTIAL DAMAGES

22. To be entitled to substantial damages, Asia Hotel had to prove that their alleged losses are not too remote a consequence of Starwood's breach of the non-circumvention agreement because damages are intended to allow the innocent party, so far as money can do it, to be placed in the same situation as if the contract had been performed (see *Robinson v Harman* (1848) 1 Exch 850, 855). In their statement of claim, Asia Hotel claimed from Starwood the preposterous sum of US\$54,913,011.00, which included profits presently being made by the refurbished hotel as well as the capital gains which would have been theirs if they had acquired the Lai Sun shares and sold the Grand Pacific in 2006. During the trial, they wisely reconsidered their position and accepted that all they could claim from Starwood are damages for the loss of a chance to purchase the Lai Sun shares. This alteration of position does not affect the application of the rules on remoteness of damage. In *Bank of Credit and Commerce International SA (in liquidation) v Ali and Others (No 2)* [2003] 3 All ER 750, 778, Parker LJ explained:

Whether 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

23. Persons seeking damages for loss of a chance often rely on *Chaplin v Hicks* [1911] 2 KB 786. In that case, a newspaper's readers helped the defendant, a theatrical manager, select ladies to whom he would give engagements. The plaintiff was one of 50 ladies selected from a group of 6,000 ladies for an interview with the defendant. The letter inviting her to attend the interview arrived late. After failing to get another date for an interview, the plaintiff sued the defendant. The English Court of Appeal, which noted that 12 of the 49 ladies who were interviewed were offered engagements, upheld Pickford J's decision that she was entitled to damages for loss of a chance.

24. In *Bank of Credit and Commerce International SA v Ali (No 2)* [1999] 4 All ER 83, 115, Lightman J rightly stressed that *Chaplin v Hicks* "does not offer a free pass to claims that the loss of practically any chance will be sufficient to found a claim to recoverable loss". It is now very clear that a plaintiff who is claiming damages for loss of a chance must establish that he had a real and measurable chance. In *Allied Maples Group Ltd v Simmons & Simmons (a firm)* [1995] 1 WLR 1602,

1614, Stuart-Smith LJ explained:

[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.

(emphasis added)

25. In cases such as the present, where the actions and omissions of third parties are involved, it is certainly less easy for a plaintiff to prove that a real and measurable chance to enter into a contract had been lost. *Anson's Law of Contract*, 28th ed, p 59, explained:

What must ... be shown is a real and measurable (and not merely a speculative) chance. This will be more difficult to show where, by contrast to the position in *Chaplin v Hicks*, the claimant's loss depends upon the actions of an independent third party, for example, where the breach of contract is said to have caused the loss of the chance of obtaining a job. The decision as to whether to offer a job depends ... on the unrestricted volition of the prospective employer. In the absence of evidence that the claimant had a real chance of getting the job and that the chance was lost because of the breach of contract, it is unlikely that a Court will be able to conclude that a real and measurable chance has been lost.

My findings

26. If one were to ask why Asia Hotel failed to acquire the Lai Sun shares, the obvious answer would, without more, be that the Narulas beat them to it. To appreciate the speed at which the Narulas edged Asia Hotel out of the picture, one must understand why they were so keen on acquiring the Lai Sun shares. Kirin Narula testified as follows:

The major thing was that the Grand Pacific Hotel was just across the road from our flagship hotel, the 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 with the selling party as soon as we can.

27. To bolster their claim that the Narulas could not have been able to purchase the Lai Sun shares if Starwood had not offered to manage the Grand Pacific and provide a renovation loan, Asia Hotel made the following assertions:

- (a) The Narulas did not have sufficient funds to acquire the Lai Sun shares ;
- (b) No other hotel operator could have offered the Narulas a deal that was viable enough for them to purchase the Lai Sun shares;
- (c) The Narulas could not have obtained a loan for the purchase of the Lai Sun shares unless the Grand Pacific was a five-star hotel operated by Starwood Hotels; and
- (d) If the Narulas had failed to acquire the Lai Sun shares, they would have succeeded in taking over the said shares.

28. 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. However, Asia Hotel's only witness was their president, Gary. Surely his views cannot be the last word on these matters. Indeed, I found much of his evidence totally unsatisfactory. Far too often, he was evasive, contradictory and unhelpful. At times, his evidence bordered on the absurd. In short, he undermined whatever case his counsel tried to build for his company.

29. As has been mentioned, Pongphan's unchallenged evidence is that he notified Gary that he had to consider alternative partners after Asia Hotel failed to close the deal with Lai Sun in December 2001 and that Gary told him to go ahead. Gary knew the way in which the cards were stacked once the Narulas signed their MOU with Lai Sun. Pongphan put the position clearly as follows in para 15 of his affidavit of evidence-in-chief :

[After the Narulas had signed their MOU with Lai Sun], Gary called me to say whether there was a chance he could still secure [the Lai Sun shares]. I told him that the MOU with the Narulas was already signed, and that the first right of refusal to buy the shares was granted to them.

30. Although Pongphan was called as a witness, Asia Hotel decided not to have him cross-examined. Notwithstanding this, Asia Hotel continued to allege that he did not, as was stated in his letter waiving his right to purchase the Lai Sun shares, give the Narulas the green light in January 2002. It was asserted that Pongphan's letter was backdated to put Starwood in a better light. Pongphan could have been but was not cross-examined on this issue or on anything that he had stated in his affidavit of evidence-in-chief. As such, this assertion, which was not proven, need not be considered any further.

31. For all his bravado, the truth is that Gary had already started to retreat in the face of the Narulas' advance even before the latter's MOU with Lai Sun was signed on 5 February 2002. Gary had been negotiating with Ekachart Finance regarding the financing of his own bid to purchase the Lai Sun shares. After the Narulas became his potential partner, Pongphan also asked Ekachart Finance for a loan on their behalf. Gary wrote to Ekachart Finance on 1 February 2002 to withdraw his own application for a loan. When cross-examined, he admitted that it was embarrassing for him, a non-shareholder of PSD, to make an application for a loan when Pongphan, a shareholder of PSD, was negotiating with Ekachart Finance for a loan to facilitate the Narulas' acquisition of the Lai Sun shares. Gary agreed with Starwood's counsel that one of the reasons for his withdrawal was that he did not want Ekachart Finance to work on his application and finally offer him a loan which he was in no position to accept because he had no contract with Lai Sun.

32. Although the Narulas finally concluded a deal with Starwood, it cannot be assumed in the absence of credible evidence to the contrary that they could not have taken over the Lai Sun shares without the co-operation of Starwood. There is no evidence that the discussions that the Narulas had with other hotel operators could not have borne fruit if their negotiations with Starwood had been deadlocked. After all, Six Continents Hotels had offered to run the Grand Pacific under the Crowne Plaza brand for 15 years and to provide a renovation loan of US\$3m. Kirin Narula, who testified that his family was prepared to have the Grand Pacific run as a Crowne Plaza hotel, testified as follows:

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.*

(emphasis added)

33. In fact, although the Narulas finally concluded a deal with Starwood, they were initially rather hesitant about having the latter manage the Grand Pacific as this might affect the business of their flagship hotel, the Sheraton Grande Sukhumvit, which was being managed by Starwood. Kirin Narula, who was worried about “cannibalising” the Sheraton Grande Sukhumvit, explained:

All hotels get business 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 Grande 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.

34. In due course, the Narulas changed their minds for whatever offers they may have received, they were in an advantageous position vis-à-vis Starwood because they knew the limits to which the latter would go as their partner, Pongphan, must have told them about the terms that Starwood had offered Asia Hotel, including a huge renovation loan for refurbishing the Grand Pacific. Tom Monahan testified that knowledge of the terms already offered to Gary by Starwood gave the Narulas a great advantage in their negotiations with Starwood. They used it to the hilt and were able to extract concessions that Starwood were initially unwilling to give. Initially, Starwood turned down the Narulas’ request for a renovation loan. However, after the Narulas made it clear that they were prepared to make a deal with other hotel managers if the renovation loan was not offered, Starwood gave in.

35. Asia Hotel asserted that the negotiations that the Narulas had with other hotel operators could not have been fruitful because the latter required a five-star brand, such as Westin, and not a four-star hotel such as the Crowne Plaza, in order to be able to service the loan required for the acquisition of the Lai Sun shares. However, in his affidavit of evidence-in-chief, Gary had merely said that “the Plaintiffs *felt* the four star brands ... would not be sufficient” and there was no evidence that a Crowne Plaza hotel would not have been a feasible proposition. After all, whatever increase in room rates there might have been with a five-star Westin, as compared to a Crowne Plaza, the eventual cost of renovating the Grand Pacific, which has to be borne by the Narulas and Pongphan, is over US\$8m, whereas the Narulas and Pongphan would have had to pay less than half that amount for converting the Grand Pacific to a Crowne Plaza Hotel. Furthermore, Kirin Narula testified it cannot be assumed that a five- star hotel would always generate more profits than a well managed four-star hotel. When questioned by Starwood’s counsel, he explained:

Q Can you explain to his Honour the difference in returns from a four-star and a five-star hotel?

A Normally a four-star hotel has a higher occupancy rate. It also has a 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 five-star hotel has a higher room rate, its occupancy rate is less and the costs are higher. There are more expatriates. So a four-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.

36. Asia Hotel also asserted that the Narulas required Starwood's renovation loan of US\$5m because Starwood's Ms Serena Lim had stated in an internal e-mail dated 19 February 2002 to Tom Monahan that Mr Kurt Rufli ("Kurt"), the Narulas' representative, had claimed that the Narulas were already "stretched" because their own funds were committed for the purchase of the Lai Sun shares. To begin with, it is worth noting that Asia Hotel had merely asserted in their statement of claim that without Starwood's renovation loan and offer of management services, it would have been "*extremely difficult*" for the Narulas to conclude their deal with Lai Sun. This is very different from saying that the Narulas could not have closed the deal without such a loan. Secondly, Starwood were not the only hotel operators who offered the Narulas a renovation loan. Six Continents offered them a renovation loan of US\$3m. Thirdly, Kurt was not called to explain whether or not he had indeed said that the Narulas were stretched and if he did, what he meant by it. Kirin was not aware of Kurt's remark and Starwood's Tom Monahan conceded that the remark could have been a negotiating ploy. Fourthly, Kirin Narula testified that the Narulas had sufficient financial resources for the renovation of the hotel but they did not want to tie up their funds for too long a period. He explained:

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 Anbonpain stores, which are similar to the Delifrance food 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. We have been manufacturing baby feeding bottles since 1965. Apart from these, we have apartments and retail space for rent in Thailand.... We also have property in India.

37. Asia Hotel complained that the Narulas did not furnish any documents to prove that they had funds to renovate the hotel if Starwood did not offer a renovation loan of US\$5m. It is pertinent to note that even before Starwood started to disburse the renovation loan, the Narulas had spent their own money on renovating the Grand Pacific. To date, they have loaned PSD more than US\$1m for renovation work. Furthermore, the renovation budget for the Grand Pacific has since been increased from US\$5m to US\$8m, with the consent of the Narulas. This additional US\$3m was funded by directors' loans and internal reserves.

38. As for Asia Hotel's assertion that a financial institution would only be willing to re-finance PSD if the Grand Pacific was re-branded as a five-star hotel, this need not be considered for the simple reason that it was not proven. The Narulas arranged for a loan from DBS Thai Danu Bank without difficulty and no one from that bank or from any other financial institution corroborated Asia Hotel's assertion that without Starwood in the picture, the financing required by the Narulas would have been impossible.

39. Asia Hotel's case centres around Gary's assertion that based on his own "research with the alternative operators", if he locked up Starwood in a non-circumvention agreement for 12 months, no one else could have made arrangements with any other hotel management company or financial institution to complete a deal for the purchase of the Lai Sun shares. It is important to note that Gary did not testify that it was impossible for someone else to acquire the Lai Sun shares while he negotiated with Starwood. He had merely said that he believed that in January 2002, "it was *difficult* for anyone else to do this deal". He further testified that although he knew that others may be interested in the Lai Sun shares, he took a "calculated risk" that no one else would beat him to the Lai Sun shares and that he believed he had the "deal" merely because he did not expect Starwood to breach the non-circumvention agreement.

40. Gary clearly miscalculated the risk involved when he did not make an offer for the Lai Sun

shares while it was still open for him to do so. He should not have assumed that the terms offered to him by those he had contacted would necessarily apply to his competitors. After all, while Marriott Hotels had offered to manage the Grand Pacific for Gary on the basis of a base fee of 2.5% and an incentive fee of 8%, they offered the Narulas much better terms. Marriott quoted the Narulas only 2% for the base fee and 6% for the incentive fee. Furthermore, the difference in the manner in which Lai Sun treated the Narulas and Asia Hotel shows how much more seriously they took the Narulas than Asia Hotel. While Lai Sun had refused to extend the deadline in their MOU with Asia Hotel, they readily extended the deadline indefinitely for the Narulas. In fact, Lai Sun even waived the requirement for the Narulas to pay a deposit until the signing of the Sale and Purchase agreement. Finally, the terms of the DBS Thai Danu Bank loan obtained by the Narulas were much more attractive than those offered by Lehman Brothers to Gary.

41. Actions speak louder than words. Unlike Asia Hotel, the Narulas did not allow their MOU with Lai Sun to lapse. They were able at every stage to pay for what was required and they completed their arrangements for acquiring a loan from DBS Thai Danu Bank without difficulty. Not surprisingly, the Narulas' deal was completed with Lai Sun ahead of schedule on 22 May 2002.

42. 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.

Plaintiffs were not in a position to conclude a deal with Lai Sun

43. Another reason for dismissing Asia Hotel's claim for substantial damages is that they were in no position to conclude any deal with Lai Sun before the Narulas ended their dream of owning the Grand Pacific. In his closing submissions, their counsel argued:

The plaintiffs were in a position (and continued to have the opportunity) to purchase the shares of Lai Sun and had the necessary financial means to do so. The Plaintiffs were further in advanced negotiations for financing with Lehman Brothers... The last piece of the puzzle was to secure the Defendants' commitment to provide management to the Hotel and the US\$5million renovation loan.

44. Gary failed to convince me that his counsel's assertion that he had an "almost done" deal with Lai Sun was anywhere near the real position. In his letter to Lai Sun on 13 December 2001, in which he sought an extension of the MOU, Gary stated that many matters, including financing and the choice of a hotel manager for the Grand Pacific, had not been resolved. Notwithstanding his outlandish claims, Gary did not resolve these matters by the time the Narulas edged him aside with their MOU with Lai Sun in early February 2002 or at any time before the sale of the Lai Sun shares to the Narulas was completed.

45. Gary emphasised that Lai Sun did not close the door to him when Asia Hotel's MOU with them expired in mid-December 2001. Of course Lai Sun kept an open door policy for all serious investors until this door was shut by their exclusivity arrangement with the Narulas on 5 February 2002 and

shut even more tightly when they extended the deadline for this arrangement indefinitely. Gary claimed that he continued to “negotiate” with Lai Sun after the expiry of Asia Hotel’s MOU with them in mid-December 2001. This was blatantly untrue as he admitted during cross-examination that the only communication that he had with Lai Sun in February and March 2002 concerned the progress of the negotiations between Lai Sun and the Narulas.

46. As for the financing required for acquiring the Lai Sun shares, Gary relied on his e-mail to Lehman Brothers (“Lehman”) on 4 February 2002 to show that he had the required financing in hand. In his e-mail, Gary stated that he agreed to the terms of the latter’s draft term sheet of 15 January 2002, save for minor wording issues. This was totally untrue as crucial business issues regarding, inter alia, the origination fee of 2% proposed by Lehman, which amounted to a whopping US\$580,000, had not been settled by that date or by the time the Narulas edged Asia Hotel out of the picture. Gary had removed the originating fee from the proposed agreement and there was no evidence that Lehman would have agreed to this major change of terms. When cross-examined on the Lehman loan, Gary’s answers illustrate how unsatisfactory his evidence was:

Q. By 4 February, you said in your letter to Lehman that you accepted the business issues and only wording issues need to be worked out?

A. Yes.

Q. *Did you accept the business issues?*

A. Yes.

Q. However, you had taken off the 2% origination fee [proposed by Lehman]?

A. Yes.

Q. *So you had not accepted all the business issues?*

A. Yes.

(emphasis added)

47. After having removed the 2% originating fee proposed by Lehman, Gary suggested during cross-examination that he had hoped that he could knock this fee down to 1%. If one is not sure whether or not the originating fee is payable and if payable, whether it is 1% or 2%, a major bone of contention had not been resolved between Gary and Lehman.

48. Another unresolved issue in the Lehman loan was the securitisation for Starwood’s renovation loan, which had been offered on the premise of a second mortgage. Lehman had proposed that “the renovation loan was to be fully subordinated to the senior financing and will be governed by an inter-creditor agreement drawn up by the senior financing provider”. There is no evidence that Starwood had consented to or would have consented to an inter-creditor agreement for the renovation loan in place of a second mortgage. As such, Gary cannot say that the loan agreement with Lehman was in the bag.

49. It is also worth noting that Lehman required Asia Hotel to inject US\$2m into PSD before they would disburse the loan. Asia Hotel either could not raise this sum or did not want to commit such a large amount of money before they were ousted by the Narulas. More will be said about this later on.

50. Apart from the aforesaid, as far as the negotiations for the Lehman loan was concerned, the whole exercise would have been futile unless Pongphan was prepared to accept the terms. Pongphan was then fully supportive of the Narulas' bid for the Lai Sun shares and he had already given his written consent in January 2002 for them to take over the said shares. There is no evidence that he would have reneged on his deal with the Narulas or that he would have agreed to accept Lehman's terms, which were not as favourable as those offered under the DBS Thai Danu Bank loan that he obtained together with the Narulas. Under the Lehman loan, the minimum interest payable from the third year onwards was 4% plus the minimum lending rate or 6%, whichever is higher. In short, the minimum rate was 10%. In contrast, the interest rate under the DBS Thai Danu Bank loan stabilised at the minimum lending rate from the third year onwards. There is no reason for Pongphan or any reasonable businessman to have preferred Lehman's terms over DBS Thai Danu Bank's terms.

51. To sum up, without the business issues between Asia Hotel and Lehman being resolved, without Starwood's consent for the inter-creditor arrangement with respect to their renovation loan, without Pongphan's consent to Lehman's terms, Gary's claim that he had the financing arrangements almost wrapped up with Lehman was merely a mirage that quickly receded the moment it was closely examined. After the Narulas concluded an MOU with Lai Sun on 4 February 2002, nothing more was done by Gary with respect to the Lehman loan. When cross-examined, he meekly conceded that the only conversations he had with Lehman after that date was with respect to "where the deal had gone".

52. It is now time to consider Gary's protracted negotiations with Starwood. Before getting Starwood to commit themselves to signing the non-circumvention agreement, Gary did not disclose that his MOU with Lai Sun was about to lapse or that he required a renovation loan of US\$5m. Whether Starwood would have signed the non-circumvention agreement had they known that they were dealing with a man who was losing his exclusive right to the Lai Sun shares within 10 days and who held back the crucial information that they had to fork out a renovation loan of US\$5m is an interesting question.

53. Gary undermined his credibility once again when he said that he had informed Starwood about the expiry date of his MOU with Lai Sun. When cross-examined, he made the absolutely ridiculous assertion that he had done so when he mentioned the deadline to one Mr Martin Jones, the Food and Beverage Manager of Westin Singapore, who had nothing to do with his negotiations with Starwood and who was then looking for a job in Bangkok as he was losing his job in Singapore. How such a communication, if made, can be regarded as notice to Starwood is beyond imagination. To make matters worse, Gary finally admitted that Mr Jones did not know about the expiry of the said deadline. The following answers that Gary gave to questions regarding the lapsing of his MOU with Lai Sun show how inaccurate and contradictory he was:

Q Please expand [on whether you told Starwood about the expiry of the MOU with Lai Sun].

A I made known to Starwood that my contract with Lai Sun would expire on 21 December. I indicated this to a gentleman who was in charge of Food & Beverage that 21 December was the deadline. Starwood knew that we hadn't closed the deal on 21 December.

Q How would they know?

A I sent an e-mail to one guy in Starwood indicating that the closing would be on 21 December.... I indicated to Martin Jones that we would be closing on 21 December 01....

Q Martin did not know what was happening and that you lost the deal.

A I was dealing with Tom and Serena.

Q Do you agree that Martin does not even know that you lost the deal?

A It appears that way, yes.

54. On 4 January 2002, Gary surprised Starwood's Tom Monahan when he finally revealed that apart from a management agreement, he required a US\$5m renovation loan as well as a gift, termed "key money", amounting to between US\$1m and US\$2m. "Key money" is sometimes demanded by a hotel owner in return for a management contract. If Starwood was willing to pay key money, this sum should be paid to the owners of the Grand Pacific, namely PSD, and not to Gary or Asia Hotel. Gary made no reference whatsoever to the key money issue in his lengthy affidavit of evidence-in-chief. His deafening silence is rather telling. When cross-examined, he admitted that he had asked for key money but could not explain why he did not, as he ought to have done, ask for key money on behalf of PSD so as to benefit the minority shareholder, Pongphan, as well.

55. If, as Asia Hotel's counsel submitted, the last piece of the puzzle was to secure Starwood's commitment to manage the Grand Pacific and provide a US\$5m renovation loan, this was within grasp by 22 January 2002, some two weeks before the Narulas signed an MOU with Lai Sun for the exclusive right to purchase the latter's stake in PSD. On that day, Starwood sent Asia Hotel a draft letter of intent, in which the renovation loan sought by Gary was unilaterally increased by Starwood to US\$6m. Apparently, the only outstanding items to be agreed upon were the technical services fee, which Starwood suggested should be US\$150,000, the base fee and the incentive fee for the renovation of the Grand Pacific during the renovation period. Knowing that the Narulas were closing in, Gary should have worked hard to close the deal. When cross-examined, Gary's answers regarding the increased renovation loan offered by Starwood were most unsatisfactory. He said as follows:

Q You asked but did not get key money. Starwood instead worked it into the renovation loan and offered US\$6m.

A I can't recall that US\$6m was being discussed. I only recall asking for a renovation loan of US\$5m.

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.

56. Starwood's counsel suggested that Gary did not even notice that the renovation loan had been increased by Starwood from US\$5m to US\$6m in the draft letter of intent because he was preoccupied with getting an additional US\$2m, either as key money or in some other form, from Starwood because this amount was required to clear the way for his financing arrangements with Lehman. This was denied by Gary, who claimed that his company had a large kitty. If Gary had the money, a question arises as to why he did not produce the US\$2m in time and tie up loose ends relating to the Lehman loan and Starwood's management contract to stay ahead of the Narulas.

57. On 2 February 2002, Gary continued to pester Starwood for more money when he sent the following e-mail to Tom Monahan:

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 set off against management fees..... Perhaps over a 3 year period.

58. What is alarming about Gary'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.

59. On 25 February 2002, Gary switched tactics and asked whether Starwood would be prepared to put in capital for equity. On 7 March 2002, he raised the issue again when he e-mailed Tom Monahan to ask whether Starwood's headquarters had "given them capital to play with". When asked why he was badgering Starwood to invest in PSD, Gary made the startling claim that he was in fact trying to make money from Starwood by selling them some of the Lai Sun shares at a premium. He admitted that he did not disclose this to Starwood, which had previously looked into the question of investing in the Grand Pacific and had discarded the idea. Tom Monahan declared that Starwood were not interested in the Lai Sun shares, whether at par value or at market price, and would be insulted if Gary had offered to sell them any shares in PSD at a price that included a profit element for himself. Undoubtedly, the whole idea of selling shares at a premium to Starwood is so unworkable that one cannot believe that Gary meant what he said. This is one of the many instances when his evidence was totally unsatisfactory.

60. Having failed to close a deal with Starwood in time to ward off the Narulas, Gary had the temerity to claim that Starwood lost interest in Asia Hotel because they had decided to help the Narulas acquire the Lai Sun shares. He alleged that Starwood had an ulterior motive for doing this because under their settlement with the Narulas on the restrictive covenant issue regarding the Sheraton Grande Sukhumvit, no compensation is payable if Starwood managed another hotel owned by the Narulas. He even went so far as to assert that Starwood must have negotiated the management of the Grand Pacific with the Narulas when they discussed the restrictive covenant issue in December 2001 and January 2002. All these assertions did not make any sense. To begin with, I believe Tom Monahan's evidence that the Narulas contacted him only on 15 February 2002. If Asia Hotel's allegation that Starwood had wrapped up matters regarding the management of the Grand Pacific with the Narulas in December 2001 or January 2002 is true, Starwood would not have sent Gary a draft letter of intent on 22 January 2002. Furthermore, Tom Monahan would not have commented in an internal e-mail on 19 February 2002 that there was a great likelihood that the Narulas' deal would fall apart. It must not be overlooked that preliminary proposals sent by other hotel operators to the Narulas were dated 21 and 22 February 2002 and Starwood's basic terms were sent to the Narulas only on 28 February 2002. I am convinced that the Narulas and Starwood did not conclude a deal on managing the Grand Pacific when they were discussing the restrictive covenant issue.

61. Evidently, Gary had not pulled all the pieces together before the Narulas began to seal Asia Hotel's fate by signing an MOU with Lai Sun, which gave them an exclusive right to take over the latter's stake in PSD. He did not make any further progress in the days ahead. As it was not established that Asia Hotel were in any position to beat the Narulas in the race for the Lai Sun shares, this is another reason for holding that they never had a real and measurable chance of securing the Lai Sun shares before the Narulas won the coveted prize.

D. CONCLUSION

62. Asia Hotel's claim for substantial damages from Starwood for breach of the non-circumvention agreement fails for the simple reason that it was not established that their failure to acquire the Lai Sun shares was caused by the said breach. Asia Hotel's case was badly handicapped by the lack of independent and knowledgeable witnesses to support their many assertions, which if not established,

totally undermined their case. Their only witness, Gary, convinced me 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 if Starwood had not breached the non-circumvention agreement. Asia Hotel and Gary were clearly outclassed by the Narulas in the race for the Lai Sun shares and were hoping to find a convenient scapegoat to unjustifiably fill their coffers. I thus hold that Asia Hotel are not entitled to substantial damages for Starwood's breach of the non-circumvention agreement and award them nominal damages of \$10.

63. As for the question of costs, in *Anglo-Cyprian Trade Agencies Ltd v Paphos Wine Industries Ltd* [1951] All ER 873, 874, Devlin J, while referring to the position of a plaintiff who has only been awarded nominal damages, said as follows:

No doubt, the ordinary rule is that, where a plaintiff has been successful, he ought not to be deprived of his costs, or, at any rate, made to pay the costs of the other side, unless he has been guilty of some sort of misconduct. In applying that rule, however, it is necessary to decide whether the plaintiff really has been successful, and I do not think that a plaintiff who recovers nominal damages ought necessarily to be regarded in the ordinary sense of the word as a "successful" plaintiff. In certain cases, he may be, e.g., where part of the object of the action is to establish a legal right, wholly irrespective of whether any substantial remedy is obtained. To that extent a plaintiff who recovers nominal damages may properly be regarded as a successful plaintiff, but it is necessary to examine the facts of each particular case.

64. In *Hilborne KE v Tan Tiang Quee* [1972-74] SLR 85, Wee Chong Jin CJ, while referring to *Anglo-Cyprian Trade Agencies Ltd v Paphos Wine Industries Ltd*, reiterated that each case must depend on its own facts. After taking all the circumstances in this case into account, I order the parties to bear their own costs.