Asia Hotel Investments Ltd v Starwood Asia Pacific Management Pte Ltd and Another
[2007] SGHC 50

Case Number : Suit 961/2002

Decision Date : 10 April 2007

Tribunal/Court : High Court

Coram : Lai Siu Chiu J

Counsel Name(s) : Alvin Yeo SC, Tay Peng Cheng, Linda Wee and Linda Low (Wong Partnership) for the plaintiff; Tan Kok Quan SC, Kannan Ramesh, Marina Chin, Eddee Ng and See Chern Yang (Tan Kok Quan Partnership) for the defendants

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

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10 April 2007 Judgement reserved.

Lai Siu Chiu J:

Introduction

1 This is the third but by no means the final chapter in the litigation between the parties herein. In this chapter, the court's task was to assess the plaintiff's chances of acquiring a hotel in Bangkok, which opportunity it lost due to the defendants' breach of an agreement signed between the parties.

2 The plaintiff, Asia Hotel Investments Ltd, was incorporated in the Channel Islands in 1998 for the purpose of investing in luxury hotels and golf courses in South East Asia. What the plaintiff did was to secure a hotel and put together a programme whereby the hotel would be renovated and/or refurbished, rebranded and repositioned under the brand of an international chain of hotels. The plaintiff's president and its *alter ego* is one Gary Murray ("Murray") who is a Canadian national but who has resided for many years now in Bangkok, Thailand and is married to a Thai citizen. (References to the plaintiff in this judgment in effect are a reference to Murray.) Prior to coming to Asia in 1998, Murray worked for Larco Enterprises Ltd ("Larco"), one of Canada's largest privately-owned hotel investment and property development firms. During his ten-year tenure with Larco, Murray developed, or helped to develop, the Holiday Inn at Whistler, British Columbia, and the Marriott Hotel at Vancouver Airport.

3 The first defendant, Starwood Asia Pacific Management Pte Ltd, is in the business of providing hotel management and consultancy services whilst the second defendant, Starwood Hotels & Resorts Worldwide Inc, is the parent company of the first defendant. Amongst the hotel brands owned by the second defendant are, *inter alia*, Westin, St Regis, Sheraton, W Hotels and Four Points.

The background

4 The plaintiff wanted to invest in a four-star hotel known as Grand Pacific Hotel ("GPH") situated along the prestigious Sukhumvit Road in the central business district of Bangkok. At the material time GPH was owned by PS Development Co Ltd ("PSD"). PSD was in turn owned by a Hong Kong company, Lai Sun Development Co Ltd, and two of its associates, Studyhome Holdings Limited and Upton Company (collectively referred to as "Lai Sun" henceforth), together with a Thai gentleman, Pongphan Samawakoop ("Pongphan"), in the ratio of 54.25% and 45.75% shares respectively. (Henceforth, the

54.25% interest of Lai Sun in GPH will be referred to as "the Lai Sun stake" where appropriate.) Pongphan was also the chairman of PSD.

5 In the last quarter of 2001, Lai Sun wanted to sell its stake in GPH. Under a shareholders' agreement, Pongphan had the right of first refusal to the Lai Sun stake but he did not wish to buy the same as PSD was heavily indebted to its creditors (and Pongphan had guaranteed PSD's loans from its bankers). The plaintiff, however, was very interested to buy over the Lai Sun stake, convert GPH into a five-star hotel and also restructure PSD's debts. In 2001, the plaintiff had purchased the four-star Melia hotel situated at Hua Hin in the Gulf of Thailand and after renovations, had turned it into the five-star Hilton Hua Hin Resort & Spa ("HHH"), a top resort in the Hilton chain. As Murray so proudly put it, HHH was the "jewel" in the plaintiff's crown. In seeking to buy over the Lai Sun stake and rebrand GPH, the plaintiff intended to repeat its success with HHH. According to Murray, the plaintiff had bought and sold the Merlin Hotel (in Pattaya) as well as another hotel prior to the HHH deal.

6 With Pongphan's approval, the plaintiff (through its nominee, Siam Hotel Properties Co Ltd ("SHP")) entered into a memorandum of understanding dated 7 November 2001 ("the first MOU") with Lai Sun to buy over the Lai Sun stake for US$7.5m ("the purchase price"). Under the first MOU, the plaintiff 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 on its part undertook not to sell the Lai Sun stake to any third party during that period.

7 The plaintiff then looked for an international hotel operator to manage GPH. It also tried to secure loans from financial institutions to fund the purchase price, to pay for the upgrading of GPH and to restructure the debts of PSD. After approaching and holding discussions with various hotel operators including the first defendant, Hyatt International, Marriott International Inc, Six Continents Hotels (who owns the Crowne Plaza brand), the plaintiff decided to focus its attention on the defendants; Murray sensed that the defendants were keen to have a Westin Hotel in Bangkok, having recently lost the management of the Bangkok Banyan Tree Hotel/Resort under the Westin brand.

8 The first defendant offered the plaintiff its Westin brand. On 4 December 2001, the plaintiff and the first defendant signed a confidentiality cum non-circumvention agreement ("the NCA") under which each party 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. The NCA was backdated to 9 November 2001. The NCA was subject to the defendants resolving with Kirin Narula ("Kirin") and his family ("the Narulas"), who owned the Sheraton Grande Sukhumvit (a five-star hotel situated across the road from the GPH and managed by the first defendant), the issue of a restrictive covenant which prohibited the management by the first defendant of another hotel within a one-kilometre radius of the Sheraton Grande Sukhumvit.

9 In regard to financing, the plaintiff approached Lehman Brothers and Ekachart Finance but concluded no agreement with either institution. Upon expiry of the first MOU on 14 December 2001, the plaintiff did not have any financial arrangements in place. Neither did it pay the US$500,000 deposit required by Lai Sun. The plaintiff sought an extension of 45 days of the deadline to pay this deposit. Lai Sun rejected the request, as Lai Sun did not wish to be tied down to one potential buyer with no guarantee that the plaintiff would be able to conclude the deal.

10 Shortly thereafter, Kirin (who was acquainted with Pongphan) indicated to Pongphan that the Narulas were interested in buying the Lai Sun stake. After discussions with Lai Sun on 28 January 2002, a memorandum of understanding was concluded on 5 February 2002 ("the second MOU") between Lai Sun and the Narulas whereby the latter would be given, until 28 February 2002, the exclusive right to negotiate and purchase the Lai Sun stake. On 19 February 2002, Lai Sun extended

the second MOU indefinitely.

11 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 a loan from DBS Thai Danu Bank.

12 Although the plaintiff was aware that the Narulas were negotiating to buy the Lai Sun stake, Murray nevertheless continued to negotiate with the first defendant regarding a renovation loan of US$5m for GPH. He further sought to obtain an *ex-gratia* payment of US$2m termed "key money" from the defendants.

13 On 18 January 2002, the defendants forwarded their first draft letter of intent ("LOI") to the plaintiff. This was followed by a second LOI on 22 January 2002 and a term sheet. Although the defendants were not prepared to pay Murray the "key money", they increased the amount of the renovation loan requested by the plaintiff from US$5m to US$6m. The negotiations between the plaintiff and the defendants were inconclusive.

14 On and after 15 February 2002, the defendants showed their interest in assisting the Narulas to acquire the Lai Sun stake and in turn GPH. The Narulas' representative contacted the first defendant to explore the possibility of entering into an arrangement under which the first defendant would manage GPH on the Narulas' behalf. The first defendant reverted to the Narulas on 28 February 2002 on the basic terms of a management contract and offered the latter a US$5m renovation loan to upgrade GPH to a five-star hotel of Westin standard.

15 Despite the plaintiff's reminder to the first defendant of its obligations under the NCA, the first defendant continued its contacts and negotiations with the Narulas until 18 March 2002. On 16 March 2002, the plaintiff was informed by Lai Sun that the Narulas had not yet secured the deal.

16 Three days after the Narulas had signed the sale and purchase agreement to buy the Lai Sun stake, on 25 March 2002, the defendants signed (through their nominee, Westin Asia Management Company) with the Narulas and Pongphan, an LOI to manage GPH. This was followed by the execution of a management contract between Westin Asia Management Company and the shareholders of PSD on 15 May 2002. The defendants agreed to grant a US$5m loan to the shareholders for the upgrading of GPH. The Narulas paid US$7.7m for the Lai Sun stake.

The previous litigation

17 The plaintiff commenced this suit in 2002 seeking damages from the defendants for breach of the NCA. The plaintiff's original claim included the tort of conspiracy and unlawful interference with its economic interests. During the trial before Tan Lee Meng J, the plaintiff agreed to withdraw all its claims against the defendants save for damages for breach of contract, in return for the second defendant's undertaking that whatever damages or costs ordered in favour of the plaintiff would be paid by the second defendant. The plaintiff claimed the sum of US$54,913,011.00 by way of damages.

18 The plaintiff's claim was dismissed by Tan J (at [2003] SGHC 289). Although he found that the first defendant had breached the NCA as early as 15 February 2002, he held that the plaintiff's alleged loss of a chance to acquire the Lai Sun stake was too remote and was not caused by the first defendant's breach of the NCA. It was the judge's view (at [43] of his judgment) that the plaintiff was in no position to conclude any deal with Lai Sun before the Narulas ended its dream of owning GPH. He was not convinced that Murray had an "almost done" deal with Lai Sun before the Narulas came onto the scene, noting that when the MOU expired on 14 December 2001 (and was not

extended), the plaintiff had not yet resolved the twin issues of financial arrangements and a hotel manager for its purchase of GPH. The judge found at [42] that the plaintiff had failed to establish that the Narulas could not have completed their deal with Lai Sun without the defendants' agreement to manage GPH and offer a renovation loan. Accordingly, Tan J awarded nominal damages of $10.00 to the plaintiff.

19 The plaintiff appealed against Tan J's decision (in Civil Appeal No 143 of 2003). By a majority decision (Yong Pung How CJ dissenting), the Court of Appeal allowed the plaintiff's appeal (see report at [2005] 1 SLR 661) and held:

(a) Tan J had erred in treating the plaintiff's lack of progress in its negotiations with Lai Sun and with financial institutions as important in determining whether the loss by the plaintiff of the chance to acquire the Lai Sun stake was caused by the breach. The plaintiff knew that 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. Having locked the defendants in for a year up to 4 December 2002 through the NCA, the plaintiff knew that it had up to that same day to sew things up. Hence, the plaintiff was not as anxious as it should have been when Lai Sun refused to extend the first MOU and when it knew that the Narulas would be a competitor.

(b) The objective facts showed that the Narulas needed the defendants as the operator of GPH. The defendants' acts helped the Narulas to acquire the Lai Sun stake. The evidential burden of disproving that shifted to the defendants to show that the Narulas could have proceeded with the acquisition without the help of the defendants and the defendants did not discharge this evidential burden.

(c) Once causation had been established for loss of a chance, all that was needed to be shown was that the chance which was lost was real and substantial. What would constitute a real or substantial chance need not be proved on a balance of probabilities.

20 After Tan J's judgment was delivered, PSD was renamed Grande Asset Development Public Company Ltd ("GAD") by the Narulas and listed on the Stock Exchange of Thailand ("SET") on 10 February 2004. Murray alleged that the initial public offering ("IPO") share price was THB4.85. According to Murray, the public float was 24.9% of the issued shares and raised about THB722m. Based on this calculation, Murray contended[note: 1] that PSD at 100% would be worth THB2,888m. There is an error in his calculation. If 24.9% of the shares is valued at THB722m, then at 100%, the value ought to be approximately THB2,899m (THB722m ÷ 24.9%) and not THB2,888m. Murray then proceeded to contend that if PSD was worth THB2,888m (or more accurately, THB2,899m), the stake held by the Narulas (at 54.25%) would be valued at THB1,566,740,000 (or THB1,573,032,000 based on my calculation). If the original investment of the Narulas was THB100m for those shares, that meant (according to Murray's calculation) that the Narulas had made a profit of THB1,466,740,000 or US$37,179,000. Based on my calculation, the alleged profit ought to be THB1,473,032,000 or US$36,825,800 (at THB40 to US$1.00). It is my view that this argument is overly simplistic as, at the time of its flotation, PSD owned other assets (including the Crowne Plaza in Bangkok and the Hua Hin Blue Lagoon Resort) apart from GPH.

The assessment

21 In the light of the plaintiff's successful appeal, the question of assessing its loss of chance to acquire the Lai Sun stake had to be determined. The assessment exercise before me took a total of 25 days, far longer than the initial trial to determine the defendants' liability for breach of the NCA. A total of 15 witnesses testified, which included eight witnesses for the plaintiff – four experts and four

witnesses of fact, while the defendants called seven witnesses – four experts and three witnesses of fact including Thomas Monahan ("Monahan"), who is a director of the first defendant.

22 In the closing submissions tendered on the plaintiff's behalf after the assessment concluded, it was argued that the plaintiff had more than a 50% chance of acquiring GPH. It was further submitted that the plaintiff could have reaped substantial profits in the region of THB1.15bn had it acquired GPH, which sum is equivalent to US$28,750,000. The plaintiff initially claimed US$36,766,307.00 in Murray's affidavit of evidence-in-chief filed for the assessment. The defendants on the other hand submitted that the plaintiff had less than a 2.5% chance of acquiring the Lai Sun stake and quantified the plaintiff's loss at US$121,690.97. The gulf between the parties' figures is an irreconcilable 47.5% (or some US$36.6m), if not more.

23 Before I turn to the proceedings before me, it would be useful to look at the qualifications laid down by the majority judges of the Court of Appeal (at [130]) *vis-à-vis* assessing the plaintiff's loss, when it held that the defendants' breach had caused the plaintiff to lose a real chance of acquiring the Lai Sun stake and in turn GPH:

> We are not saying that the appellant [the plaintiff] would certainly have acquired the [Lai Sun] 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 [the defendants], 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. [emphasis added]

24 I should add that subsequently the Court of Appeal qualified the emphasised statement further as follows (at [141]):

> Of course, this is not to say that a new investor could not surface later.

It is too speculative to determine whether another contender for the Lai Sun stake would or would not have appeared on the scene had the Narulas not clinched the deal.

25 The assessment exercise required a two-fold analysis; the first pertained to the extent of the plaintiff's chance in procuring the Lai Sun stake while the second part related to the value of GPH. The quantum of the plaintiff's claim fell to be determined based on a function of those two values, namely, the percentage of chance multiplied by the value of GPH.

Evaluating the plaintiff's chance

26 Before I address the arguments and counter-arguments raised by the parties, I have a

preliminary observation to make on a point raised in the plaintiff's closing submissions[note: 2] where it stated:

> Starwood's submission that AHIL had a less than 2.5% chance of completing the deal is contrary to the views of the [Court of Appeal], who had found AHIL to have a real *and substantial* chance of completing the deal. ***A less than 2.5% chance can hardly be said to be "substantial" on the facts of this case***, and such submission again demonstrates Starwood's persistent attempts to disregard findings of the CA. [emphasis added in bold italics]

27 In the same vein, the plaintiff then submitted that because the Court of Appeal had held that it had a "real and substantial chance", that meant that this court should find that it had more than a 50% chance of securing the Lai Sun stake.

28 What then is a "real and substantial" chance? Does it mean, as the plaintiff contended, that the chance, as found by the Court of Appeal, has to be more than 50%? I think not. To come to such a conclusion ignores the following passage at [139] of the majority judgment of the Court of Appeal:

> 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.

29 In my view, the phrase "real and substantial" was used or raised as a formula for suggesting that the *chance* that the plaintiff had alleged that it had lost must not have been merely speculative. It cannot however be interpreted as saying that the Court of Appeal must have meant that the chance was numerically substantive or more than 50%, as was suggested in the plaintiff's closing submissions. To do so would be to undermine if not contradict the earlier Court of Appeal decision in *Straits Engineering Contracting Pte Ltd v Merteks Pte Ltd* [1996] 1 SLR 227 ("*Straits Engineering*"). There, in one of the other rare cases in Singapore which involved evaluating the quantum of chance, the Court of Appeal saw no hesitation in evaluating the chance at 2.5% even though liability had been established. To accept the plaintiff's argument would be tantamount to a finding that the decision of the Court of Appeal in *Straits Engineering* was wrong. In any event, I am fortified in my view by another passage in the majority judgment of the Court of Appeal in the present case (at [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].

30 Hence, the context in which the phrase "real and substantial" was raised is, in my view, no more than a means to contrast against a situation where the chance was negligible or practically zero. It cannot or should not be a means to tie the hands of the judge assessing the quantum of that chance.

31 In the same vein, I cannot endorse without reservations the defendants' view that the plaintiff's chance was no more than 2.5%. It seemed to me that that figure was most probably plucked out of the decision in *Straits Engineering*. To do so would be to turn a blind eye to the facts and circumstances which were unique to this case; each case of assessing chance is wholly dependent on

its own set of facts. All the material facts have to be examined thoroughly and rigorously, in order to achieve a fair assessment of compensation. Against that backdrop, I move on to formulating a framework for determining the plaintiff's chance.

Framework for analysing the chance

32 In my view, there are three main components that the plaintiff must achieve in order to have acquired the Lai Sun stake:

(a) obtain sufficient cash and financing for the acquisition ("the financing element");

(b) obtain Lai Sun's and Pongphan's concurrence for the sale of the Lai Sun stake ("the shareholder element"); and

(c) obtain the defendants' approval to conclude the hotel management agreement ("the management element").

33 The crux boils down to the interaction between the three elements above. What weight should be ascribed to each of those three elements? It is only after the issue of the relative weight of the three elements is determined, that one is better able to determine the extent of the chance. Without determining the proportion to be ascribed to each of these three elements, there is a risk of placing undue emphasis on one of the elements, at the expense of the others. It also bears remembering that assessment of damages is an art, never an exact science.

34 Having evaluated the evidence, I am of the view that an appropriate apportionment of weight between the three elements would be:

(a) financing element – 40%;

(b) shareholder element – 30%; and

(c) management element – 30%.

35 As the Court of Appeal (both majority and dissenting decisions) have rightly identified, all three elements are inextricably interlinked. One cannot be assessed in isolation from the others. Hence, I have apportioned roughly similar percentages to the three elements, resulting in them hovering between 30% and 40%. However, the financing element stood out from the other two because it had a greater force in determining whether the plaintiff was going to clinch the Lai Sun stake. It was also the one element on which Murray had to do the most work in order to seal the deal with Lai Sun. To that end, I thought it was fair and reasonable to place on it a greater weight, albeit only slightly more, than the other two elements.

36 Ultimately, the extent of the chance which I will eventually determine will be the sum total of the product between the weights attached to each of the three elements (*eg*, 40% for the financing element) and my assessment of the likelihood of the plaintiff's securing that particular element. Lest parties think such an approach is arbitrary or unprecedented, authority to support my methodology can be found in case law: see *Harrison v Bloom Camillin* [2001] PNLR 7. In that case, the plaintiffs brought an action against a firm of accountants. The plaintiffs alleged that as a result of the accountants' negligence in failing to issue proceedings against a third party within the relevant time period, they lost the opportunity to pursue the action. Consequently, they sought damages from their lost chance or opportunity to bring an action against the third party.

37 In the course of coming to his judgment, Neuberger J in the English High Court laid down the following principles at [88] of the report:

> It may be that the court would not think it right to assess the likely level of damages which would be awarded and then apply a single fraction to those damages. The court may think that, although there is only one cause of action, the claimant, would, if successful, stand a very good chance of recovering, say, one of the two heads of damages which he seeks, but a significantly poorer prospect of recovering the other head of damages in such a case, I would have thought that the court would think it right to apply a higher discount to the second head of damages than to the first.

38 Thus, a nuanced approach towards the application to discounts arising out of different factors or elements, such as the framework I had proposed above, is not unfounded in the authorities. In fact, Neuberger J's decision has been cited with approval by Harvey McGregor, *McGregor on Damages* (Sweet & Maxwell, 17th Ed, 2003) at para 8-058:

> On a point of detail, but of importance, where in calculating the lost chance of success in the damages claim two discounts have to be made, *Harrison v Bloom Camillin (No 2)* shows the proper method to use. In that case Neuberger J. decided that there should be a discount of 35 per cent for the uncertainty of proving negligence and a further discount of 20 per cent for the uncertainty of proving causation. This gave a total discount *not of 55 per cent by the addition of the two percentages, but one of 48 per cent by applying the second discount to the damages after the first discount and not to the total damages*. This is undoubtedly the correct method. [emphasis added]

Whether the award should be in US dollars or Thai baht

39 Another preliminary issue relates to the issue of whether the award should be in US dollars or in Thai baht. Counsel for the defendants did not explicitly submit on this issue, though in their submissions, figures in both US dollars and Thai baht were presented. On the other hand, counsel for the plaintiff submitted in the plaintiff's closing submissions[note: 3]that "the appropriate currency of assessment should be the Thai Baht".

40 On this issue, I agree with the plaintiff's submissions. The case law in Singapore on this issue is fairly well established. In *Tatung Electronics (S) Pte Ltd v Binatone International Ltd* [1991] SLR 204, the Court of Appeal varied the orders of the trial judge and awarded the damages in pounds sterling instead of converting them to Singapore dollars. Yong Pung How CJ, in delivering the judgment of the court, opined at 210–211, [16]:

> In response to the form in which the claim was filed, the damages awarded to the respondent in the court below were expressed in Singapore currency, after converting them at the exchange rate prevailing at a certain date. As in the UK (see *Miliangos v George Frank (Textiles)* [*Ltd* [1975] QB 487]), a Singapore court in an appropriate case may make its award of damages in a foreign currency. In the present case, the loss to the respondent was incurred in the UK and in our view, it would be more appropriate in all the circumstances for the award of damages to be expressed in pound sterling without any conversion into its Singapore dollar equivalent. This would also avoid the additional problem in a case which has unfortunately taken so many years to reach this point, of having possibly to consider the implications of the great variations in rates of exchange in the intervening period.

41 Following from the above decision, Michael Hwang JC in *Indo Commercial Society (Pte) Ltd v*

Ebrahim [1992] 2 SLR 1041, gave a rather thorough summary of the position of the law on this issue. Hwang JC came to the conclusion that the plaintiff had no right of election between the foreign currency and the Singapore dollar and noted the following reasons at 1053–1054, [36] of his judgment:

> (1) The rationale for the *Miliangos* doctrine (as developed) is that it is right to allow judgment to be entered in a foreign currency where that currency is the relevant currency, either because it is the currency of the transaction or because it is the currency in which the plaintiff has most truly suffered his loss. If the court has ascertained those criteria apply to a currency other than the local currency, then, given that *Miliangos* has removed the legal obstacle to entering judgment in foreign currencies, there can be no logical justification for entering judgment in any currency other than the relevant currency. …
>
> (2) The oft-quoted words of Lord Wilberforce in *Miliangos* (at p 466):
>
>> The creditor has no concern with pounds sterling; for him what matters is that a Swiss franc *for good or ill* should remain a Swiss franc. (Emphasis added.)
>
> indicate that the House of Lords recognized that it was not giving the plaintiff an option to select his currency but was redefining the obligation of the debtor to pay the sum owed in the relevant currency after the court had determined what that relevant currency was.
>
> (3) The only reason why the plaintiff would want to make his claim in local currency although the relevant currency is foreign is where, because of the delay in payment, the relevant foreign currency has depreciated against the local currency. … [I]n the present case, it cannot be ascertained whether or not the plaintiff will suffer any loss from his judgment in United States dollars until such time as payment is made voluntarily or it becomes necessary to enforce his judgment, since no one can predict what the rate of exchange between United States dollars and Singapore dollars will be at that time. Since the plaintiff has theoretically at least six years in which to choose its time for execution, it would not be right for me to presume that such loss must necessarily occur.

42 The reasoning summarised by Hwang JC is applicable to the present facts. It is clear that the relevant currency in this case is the Thai baht. The plaintiff's loss of chance lies in the profits which could have been made through the purchase in the Lai Sun stake. The entire transaction would have been conducted using Thai baht. Hence, there was no doubt in my mind that the relevant currency on the present facts is the Thai baht. Further, I take judicial notice of the fact the Thai baht has appreciated by about 20% between 15 February 2002 (*ie*, the date of breach) and the present (the Thai baht has appreciated from THB43.5 to one US dollar as at 15 February 2002 to THB34.8 to one US dollar as at 31 January 2007). Any argument that an award in Thai baht will be unfavourable to the plaintiff cannot be sustained. I also agree with Hwang JC's observation that any plaintiff with a judgment theoretically has six years to enforce his judgment and, therefore, it may be premature for the court to come to any conclusion on whether there is a loss to begin with. In short, an award in Thai baht is both supported by the authorities and also one which would be favourable to the plaintiff.

The financing element

43 It was undisputed that the plaintiff needed to secure:

> (a) US$500,000 as the initial deposit to pay to Lai Sun;

(b) a loan of THB1.3bn to finance the Lai Sun stake and to restructure PSD's debts (this could be obtained from Lehman Brothers); and

(c) US$2.5m (THB100m) for the sponsor cash equity to be paid to Lehman Brothers to secure the term loan.

44 The plaintiff relied on its correspondence with Lehman Brothers as evidence to show that it had a good chance of securing the financing element through Lehman Brothers. However, in my view and contrary to the plaintiff's submissions, Lehman Brothers' term sheets (four versions collectively referred to hereinafter as "the term sheets") did not represent a firm commitment to lend to the plaintiff. Further, the terms proposed in the term sheets never reached the stage of final approval, which approval had to come from Lehman Brothers' Tokyo office. There was always a possibility that the Tokyo office might not have approved the proposed financing. The defendants referred to an e-mail from Blake Olafson ("Olafson"), the vice-president of Lehman Brothers Thailand at the material time, dated 31 January 2002.[note: 4]His e-mail suggested that the changes proposed by the plaintiff to the term sheets would not have been acceptable. In that e-mail to the plaintiff, Olafson had said:

> I don't think we have any room on the economics. As I told you it is what it is. We cut the back end fee by 1% and that's about all we can do.

In the documents produced in court and in Olafson's oral testimony, it was clear that Lehman Brothers would not have been prepared to reduce its origination fee of 2% of the loan amount amounting to THB26m or US$650,000.

45 However, when he was cross-examined, Olafson said that there was always room for negotiation.[note: 5] The defendants criticised Olafson's testimony. Although Olafson's role was to testify on whether the plaintiff could have secured financing for GPH (according to the plaintiff's application for leave to call him as an additional witness), the defendants pointed out that Olafson endeavoured to give favourable evidence for the plaintiff on unrelated aspects of the plaintiff's case. Instances cited by the defendants included Olafson's statements that the plaintiff renovated HHH for less than the original budget, that HHH's performance was in line with projections provided to Lehman Brothers and that the plaintiff could refinance the debts of HHH in mid-2003. In my view, these points raised by the defendants were red herrings and unhelpful for the purposes of assessing the financing element because the relevant time frame for determination is 2002 and not 2003, which was when the events raised in these submissions occurred. Hence, I found it unnecessary to attach much weight to what Olafson had to say with regard to these events which took place outside the material andrelevant time.

46 It should be noted too that under the term sheets, the plaintiff was required to inject "sponsor cash equity" of THB100m (US$2.5m) into GPH, pledge 100% of the shares in PSD to Lehman Brothers and inject US$2m (or THB80m) into PSD. Under the term sheets, a maximum sum of THB1bn from the loan amount of THB1.3bn was to be allocated for repayment of PSD's debts with Bangkok Bank and Bank Austria Creditanstalt. The plaintiff would therefore have to fund the shortfall of THB480m (THB300m + THB100m + THB80m) from other sources.

47 The defendants pointed out that at the trial before Tan J, Murray had admitted he only had US$250,000 (THB1m) in his bank account. It was also in evidence from the defendants' witness, Monahan, that Murray made no less than six attempts to procure "key money" from the defendants. Additionally, it was revealed that the plaintiff tried and failed to borrow THB100m from another bank (HSBC).

48 The defendants were equally critical of the report of Keith Andrew Rowley ("Rowley") from KPMG Thailand. In his written testimony, Rowley[note: 6] deposed he was an expert appointed by the plaintiff to analyse and review the cash and other assets of the plaintiff in 2002 as well as the proceeds from refinancing activities in 2003. At the hearing, counsel for the plaintiff conceded that the scope of Rowley's evidence was to show that the plaintiff had some cash in the bank and not to identify the funds available for procuring the Lai Sun stake.

49 At the assessment hearing before me, it was Murray's assertion that he had previously borrowed THB90m (US$2.25m) from his brother Scott Murray ("Scott") and could borrow again from his brother. Murray added he had repaid Scott's loan by relying on a statement[note: 7]of the plaintiff's Citibank account which showed a payment of THB97m. That statement, however, did not show to whom the payment was made and why it was made. Neither was Scott called as a witness. As far as I was aware, there was no impediment in calling Scott to testify. There was therefore no credible or any evidence that the plaintiff borrowed and returned US$2.25m to Scott, let alone that Scott could have lent further sums to the plaintiff when the need for funding arose.

The defendants' arguments

50 The defendants argued that refinancing of HHH in 2003 could not have been achieved in 2002 for the following reasons:

(a) There were several external factors according to the evidence of Vipoota Trakulhoon ("Vipoota"), the managing director of Turnaround Co Ltd, a financial advisory company, and formerly the head of capital markets with HSBC Thailand, who had been engaged for the refinancing of HHH.

(b) The income and consequently the cash flow of HHH did not stabilise in 2002. Indeed, HHH's performance deteriorated from January 2002 to November 2002 and it failed to meet its budget for a number of months.

(c) No reliance could be placed on Andrew Langdon's valuation of HHH which was done in November 2002.

(d) The factors which led to the refinancing by Lehman Brothers of HHH were absent if the refinancing had taken place in 2002. A primary factor was the increase by THB36m to THB100m of the guarantee from Hilton International ("Hilton") of the gross earnings before tax (hereinafter referred to as "EBITDA") of HHH in June 2003.

51 It was further argued by the defendants that financing could not have been completed within the period of the NCA. Further, that the proceeds of the financing could not have gone to the plaintiff to secure the Lai Sun stake.

52 The defendants contended that the plaintiff's ability to meet its obligations under the financing by Lehman Brothers was highly questionable.

The plaintiff's arguments

53 Olafson had testified that he never expected Murray to accept all the terms in the 15 January 2002 draft term sheet because he knew Murray to be a "typical hard-nosed negotiator". Olafson said he expected the term sheets to have been finalised around April to May 2002. He maintained that there was still leeway and flexibility for both sides to finalise acceptable terms, namely the origination

fee, debt service coverage, cash sweep, securitisation for the defendants' US$5m renovation loan and THB100m for "sponsor cash equity". Olafson was confident that his Tokyo office would "typically" give final approval in such matters and he considered the outstanding issues to be "minor".

54 What was striking was Murray's silence after Olafson's e-mail of 31 January 2002 (see quotation in [44] above). In response to this, counsel for the plaintiff submitted that Murray did not chase Lehman Brothers for a binding commitment after his 4 February 2002 e-mail because the plaintiff thought that the financing was in good shape.

The court's analysis

55 With regards to Olafson's testimony, I reject the plaintiff's argument in [54] above. The plaintiff was attempting to sweep Olafson's inconsistencies under the carpet. The various inconsistencies between contemporaneous documents and Olafson's written testimony as well as oral testimony undermined his credibility. It is difficult to believe Olafson's claim that his Tokyo office would "typically" give final approval, given what was said in his e-mail to Murray quoted in [44] above. It was also illogical that, on the one hand, Olafson would describe Murray as a "hard-nosed negotiator" and, on the other hand, claim that the deal was close to finality. I cannot overlook the fact that none of the provisions in the term sheets (including Lehman Brothers' 2% origination fees) were agreed, or came close to agreement, by the time the second MOU was signed on 5 February 2002. This was the state of affairs even when the Narulas signed the sale and purchase agreement on 22 March 2002.

56 Equally, I reject the submission of plaintiff's counsel that there was only an excess of THB61m to be funded by his client, after obtaining the loan of THB1.3bn from Lehman Brothers. By my calculations at [46] above, the plaintiff needed to fund THB480m, not THB61m. By his own admission at the earlier trial, Murray said the plaintiff only had cash in hand of US$250,000. His claims of being able to obtain a loan from his brother are, for the reasons already given above, incapable of substantiation. Consequently, I cannot accept that the plaintiff could (as Murray said under cross-examination[note: 8]) "have come up with the money by the end of the expiration of the [NCA]". I accept the defendants' submission that there is no credible evidence at all of THB97m having been borrowed from and/or returned to Scott. Scott could and should have been called to testify but was not.

57 Now for Vipoota's[note: 9] evidence. In his affidavit of evidence-in-chief, Vipoota deposed that he was engaged by the plaintiff in October 2002 to refinance its debt of THB921m for HHH which Vipoota did, to THB1.25bn in June 2003, thereby enabling the plaintiff to obtain THB329m (or US$8.2m) for investment purposes, one of which was to buy out the minority interest (25%) of Tipco Hua Hin Hotel Co Ltd ("Tipco") in HHH. Vipoota testified that had he been engaged earlier by the plaintiff, he could have raised the requisite additional funds in the last quarter of 2002.

58 Vipoota said the tourist market had started recovering in the second quarter of 2002. As such, the performance of HHH improved from the second quarter of 2002 onwards and correspondingly its earnings and cash flow.

59 During cross-examination,[note: 10]Vipoota revealed that in December 2002 Murray told him the refinancing was to include the Hilton Kingdom, the hotel in Bangkok which Murray was then negotiating to buy from its owners, CNC Co Ltd. The Hilton Kingdom was then known as the Plaza Hotel and was managed by the Mandarin Hotel chain. It was Murray's intention to rebrand and reposition the hotel after its acquisition.

60 According to the affidavit filed by Khun Boontuck Wungcharoen ("Boontuck") from Thai Farmers'

Bank, there was plenty of liquidity in the capital markets in 2002. This evidence is to be contrasted with Murray's letter dated 18 April 2003 to CNC Co Ltd where he said, "As you can appreciate, hotel funding in Asia is extremely difficult at the present time (due to SAR's [*sic*] and the Iraq War)", seeming to suggest that in a matter of six months (October 2002 to April 2003), the liquidity in capital in Bangkok had dried up due to extraneous factors. I should point out that Boontuck was not called to testify and therefore I could place no reliance on what was stated in his affidavit.

61 It was the plaintiff's case that it would have taken three to four months for the refinancing of HHH. This was based on Vipoota's testimony that lenders he procured were willing to lend THB1.25bn which was 66% of the valuation of HHH done by Andrew Langdon ("Langdon") amounting to THB1.9bn. Vipoota's testimony contained an inherent weakness which will be elaborated upon later when I deal with Langdon's valuations.

62 I find Murray's explanation as to why he did not chase Lehman Brothers around February 2002 for a binding commitment as too incredible to be true. On my overall assessment of the contemporaneous evidence around the material time, and contrary to his bold claims, he did not have a "done deal" or even a nearly "done deal".

63 While it is true that Murray had until 4 December 2002 to resolve outstanding issues relating to the term sheets, one has to assess the likelihood of his securing financing, in the light of his inaction and complete lack of progress with Lehman Brothers as of February 2002. The fact that he tied the defendants by the NCA did not mean he could literally wait until the last day of the NCA, *viz* 4 December 2002, to obtain financing. As of February 2002, there were too many elements then that were not resolved. Yet, Murray, the self-proclaimed "hard-nosed negotiator", who pressed for "key money" on no less than six occasions with the defendants, was content to let the negotiations with Lehman Brothers – his only probable source of funding – come to such an abrupt and sudden halt after 4 February 2002. If he had indeed thought (as he had testified during the trial before Tan J) that he was waiting by the sidelines to see the deal between Lai Sun and the Narulas fall through, why did he not take a single step with Lehman Brothers post-4 February 2002? His deafening silence and inaction speaks for itself. To grant Murray the benefit of the doubt (as the Court of Appeal did) by saying that he had up to the very last day (14 December 2001) under the MOU to secure the necessary loans and therefore he had a good chance of securing financing, would, in my opinion, be overcompensating Murray for his inaction and his lack of seriousness in pursuing this element.

64 The plaintiff's evidence with regard to certain important issues was also unsatisfactory. I cite, in this connection, Lehman Brothers' requirement of sponsor cash equity amounting to THB100m. There was no clear commitment from Olafson that there was scope for further negotiations on this requirement and/or on the amount.

65 In addition, the contemporaneous documentary evidence seemed to suggest that Lehman Brothers' requirement of a full pledge by the plaintiff of all the shares in PSD would have been another real obstacle. In an e-mail from Lehman Brothers' Charles Rubin ("Rubin"), Olafson's superior in the Tokyo office, to Murray dated 24 January 2002,[note: 11] Rubin informed Murray that a partial pledge of shares "won't cut it for several reasons" before proceeding to set out the reasons in his e-mail. Under cross-examination, Olafson tried to explain away this e-mail by saying that Rubin (who did not testify) was not saying that a 100% share pledge was the only way forward.[note: 12] Such an explanation is lame, to say the least. In the absence of Rubin as a witness, I find it impossible to give any weight to Olafson's alleged explanation of what Rubin intended to say. Simply put, I do not accept Olafson's explanation.

66 One also cannot overlook the fact that Lehman Brothers appeared to be the only financier willing

to lend, following the plaintiff's failed attempt to borrow THB100m from HSBC (reflected in a fax from Murray to HSBC dated 16 January 2002[note: 13]).

67 THB1.3bn is not an insignificant sum. Granted, Murray could have looked elsewhere for funding, but what was the chance of his procuring the same during the relevant time frame?

68 I do not place any weight on Murray's statement that the plaintiff "had the wherewithal to come up with the money". Self-corroboration is simply no corroboration. Attempted self-corroboration, in the light of contemporaneous documents which point the other way, is worse. What is clear is, on top of the US$500,000 deposit to be made to Lai Sun, THB100m sponsor cash equity was required by Lehman Brothers. Against that, the plaintiff (according to Murray) only had US$250,000 or THB1m.

69 Earlier at [48] above, I had already discounted the possibility of the plaintiff taking a loan from Scott. Even if I am wrong in my finding and Scott did previously lend US$2.25m to the plaintiff, there was no indication that Scott would have been able and willing to extend a similar or larger loan to his brother, if he had been approached.

70 I turn now to the second aspect of the financing element – an aspect which the plaintiff placed heavy reliance on, namely the valuation done by Langdon, who was not called as a witness either in these proceedings or at the trial on liability.

71 In the plaintiff's final submissions, it was submitted that Langdon had a good and valid reason not to testify, *viz*, the imminent delivery of his first child coupled with his Thai wife suffering from a rare form of blood disease which could be passed onto the baby if she went into unplanned labour. Counsel had produced a letter from Mrs Langdon's doctor, which relevant extracts state:

> My plan is to take her to full term and deliver by caesarean to minimize the medical risks.
>
> … I am sure you can appreciate that this is a very trying time both emotionally (mentally) and physically for both Kaew [Mrs Langdon] and Andrew [Mr Langdon]. *The medical health of Kaew and their unborn baby has and will consume the focus of Andrew's attention*. I would kindly ask that you give leave to Andrew to be with Kaew so as he may provide her with his full attention and support.
>
> [emphasis added]

72 The defendants, on the other hand, had submitted that the court should draw an adverse inference for Langdon's absence, citing *Cheong Ghim Fah v Murugian s/o Rangasamy* [2004] 1 SLR 628 as the authority. The facts of that case, however, are easily distinguishable from our case. I can appreciate the medical predicament faced by Mrs Langdon and her baby. Nevertheless, I found it strange that a gynaecologist was asked to provide an assessment of her husband's *psychological* state of mind. Even so, I am prepared to accept that there was a reasonable explanation for Langdon's inability to travel to Singapore for cross-examination. Therefore, in my view, an adverse inference should not be drawn against his absence under s 116(*g*) of the Evidence Act (Cap 97, 1997 Rev Ed).

73 However, that is not the end of the matter. The court still has to determine what *weight*, if any, should be placed on Langdon's valuation. Even if a valid reason was given for his inability to fly to Singapore from Bangkok to testify, there was no reason why Langdon could not have done so by video-link. Indeed, this alternative was proposed by counsel for the defendants. Given the present state and prevalence of video conference technology, and the state-of-the-art facilities in the

Supreme Court, the practice of foreign witnesses providing testimony by way of video-link has become fairly commonplace in the Singapore High Court. Video-linking from Bangkok would have enabled Langdon to remain close to his wife and yet assist this court with his evidence. Counsel even offered to interpose Langdon's evidence at and after the close of the defendants' case. Both offers were not taken up by counsel for the plaintiff. Instead, the constant refrain from counsel for the plaintiff was simply that Langdon was not in a proper frame of mind to be cross-examined.

74 The rules of evidence and procedure are very clear. Under O 38 r 2(1) of the Rules of Court (Cap 322, R 5, 2006 Rev Ed), if a proposed witness fails to appear in court, his affidavit of evidence-in-chief is to be disregarded unless the opposing party is willing to admit it as evidence without the need for cross-examination. In our case, not only did Langdon *not* appear for cross-examination, his valuation report appeared in the plaintiff's bundle of documents.[note: 14] These reports were not even part of the agreed bundle of documents, for which formal proof would have been dispensed with. Further, his affidavit of evidence-in-chief, prepared for the trial on liability which took place about four years prior to this assessment hearing, did not exhibit his valuation of the HHH; it merely exhibited his valuation of the renamed Westin Grande Sukhumvit as at 1 January 2006.

75 Counsel for the defendants had highlighted that no application was made by the plaintiff to admit the 21 November 2002 valuation of HHH.[note: 15] On the other hand, counsel for the plaintiff submitted that his client did not have to make an application for admission of Langdon's valuation of the HHH because O 38 r 2 only applies to the *evidence-in-chief* of a witness. Since Langdon's valuation of the HHH did not form part of his *evidence-in-chief*, there was no requirement for the plaintiff to make an application to admit the valuation.

76 The plaintiff's argument was an exercise in semantics. The rationale behind O 38 r 2 of the Rules of Court is clear: it embodies the age-old principle behind the adversarial process that a person should not be allowed to put forth evidence if such evidence cannot be challenged by the opposing side. It was well within the plaintiff's right and capability to make an application for Langdon's valuation of the HHH to be admitted when it became clear that he was unable to be cross-examined, even via video-link; the application was simply not made. It is also noteworthy that Langdon's report was dated 21 November 2002. As Langdon was not a witness, there was no primary evidence of the valuation of HHH, nor any explanation of the discrepancy between the date of his valuation (23 August 2002) and the date of his report (21 November 2002).

77 For the same reason, the court cannot attach any weight to the success of the HHH project. On the facts, it is pertinent to note that HHH was the only jewel in Murray's crown, not the plaintiff's. Further, the HHH project was not on the same scale as GPH. Murray had testified that HHH was purchased in the year 2000 for THB1bn with a deposit of only US$1m. The quantum of financing required in that project paled in comparison to that required for GPH. There were also fewer complications in terms of the shareholding element, an issue which I will address below.

78 In any event, one past success, however resounding, does not necessarily mean that Murray would have been equally successful with GPH. As a matter of law, the arguments on the success of HHH are akin to asking the court to draw inferences from similar fact evidence. While similar fact evidence may be generally admissible in civil cases, it was not appropriate to do so here. As the saying goes, one swallow does not make a summer. Further, fate can always take a hand, in the best-laid plans of mice and men.

79 I had touched on Vipoota's testimony briefly at [59] above. I now return to his evidence to address the inherent weakness I referred to earlier. Vipoota's testimony on the refinancing exercise he carried out for Murray for HHH was based on Langdon's valuation of THB1.9bn as at 23 August 2002. I

would add that during cross-examination, Vipoota vacillated when he was questioned as to whether he was told by Murray of the purpose for which the refinancing was required.[note: 16]

80 I had other difficulties in relation to Vipoota's testimony on the refinancing of the HHH. First, it bears remembering that Vipoota was engaged as early as October 2002 for the refinancing of HHH but it was only completed in June 2003. Those dates were provided by Vipoota and I have no reason to doubt them. This meant that the plaintiff took eight months to put through the refinancing.

81 More importantly, the plaintiff attempted to rely on Vipoota's cross-examination, Murray's testimony[note: 17] and Boontuck's affidavit[note: 18] to assert that there was plenty of liquidity in the Thai financial market around April/May 2002 because the market was picking up from the September 11, 2001 incident.[note: 19] Its counsel then sought to rely on this to assert that it would have taken the plaintiff only three to four months to refinance HHH. There is no logical or evidential basis to suggest that just because the market was recovering around April/May 2002, the plaintiff could have commenced the refinancing of HHH for the purposes of financing the Lai Sun stake. There is also no logic for the assertion that if the plaintiff had commenced refinancing around April/May 2002, it could have completed the refinancing within three to four months. On the contrary, even as late as October 2002 when the Thai economy demonstrated stronger signs of recovery, the plaintiff still took eight months to complete the refinancing.

82 Even if I were to accept the plaintiff's argument at face value, that it could have refinanced HHH from around April/May 2002 and completed the exercise within three to four months thereafter, the court is still faced with the difficulty of what value to put on HHH, bearing in mind that Langdon's valuation was not admissible evidence.

83 The matter did not end there. In the plaintiff's closing submissions,[note: 20] counsel went on to provide four reasons why it was not necessary for the plaintiff to call Langdon to testify on the HHH valuation. First, the valuation of HHH as at 23 August 2002 was relied on in carrying out the refinancing in 2003 and, therefore, counsel submitted that it could not be disputed. This argument is misconceived – just because the valuation had been relied on for the purpose of the refinancing does not mean that it cannot be challenged by the defendants or that it was beyond dispute. There were any number of reasons (some of which may be irrelevant for this litigation) as to why the debenture holder of HHH chose to accept Langdon's valuation. The defendants were not a party to that decision. Just because the debenture holder was willing to accept Langdon's valuation did not mean that the defendants were obliged to accept the same for the purpose of determining whether the plaintiff could have raised sufficient funds to secure the Lai Sun stake. There was nothing on record to show that the defendants had at any time accepted or relied on Langdon's valuation.

84 Second, counsel submitted that Murray, Olafson and Vipoota had all testified that the market and lending conditions in the second quarter of 2002 would not have been markedly different from the last quarter of 2002. This argument conflates the general (*ie*, the general market and lending conditions surrounding the Thai economy) with the specific (*ie*, the specific valuation done by Langdon, of HHH in Hua Hin, as of 23 August 2002 but dated 21 November 2002). The testimony of the other witnesses as to the general state of the Thai economy cannot be used to plug the hole caused by the lack of an opportunity to cross-examine Langdon on his very specific valuation of HHH.

85 Third, counsel argued that the plaintiff had produced (and Murray had been cross-examined on) HHH's monthly summary statement of income from January 2001 to December 2003. Again, this argument is fallacious because it conflates the basis of, or "raw material" for, Langdon's valuation (*viz* the income statement) with the final product which was the valuation. Various assumptions and theses appeared to have gone into Langdon's valuation of HHH. Counsel for the defendants has the

right under our adversarial system to cross-examine and challenge those assumptions and theses.

86 Finally, counsel argued that the defendants could not complain about the lack of opportunity to cross-examine Langdon because their counsel had earlier given up an opportunity to adduce further evidence from the defendants' valuer, Chee Hok Yean, in the form of an updated valuation, to challenge Langdon's valuation. This tit-for-tat argument is unhelpful and has no merit. A party's fundamental right to challenge the testimony of a witness is not extinguished merely because it chooses not to challenge the evidence by putting forward a positive case.

87 Therefore, I am unable to agree with the arguments put forth by counsel for the plaintiff as to why the court should admit Langdon's evidence and valuations. I am fortified in my view on this issue by the recent Court of Appeal decision in *Jet Holding Ltd v Cooper Cameron (Singapore) Pte Ltd* [2006] 3 SLR 769 at [76]–[78], [80] and [81]. In that case, the trial judge Belinda Ang Saw Ean J (see report at [2005] 4 SLR 417) found at [149] that the documents in the damages bundle had not been properly admitted in evidence because the plaintiff in that case failed on at least two counts: (a) to adduce primary evidence of the documents or prove that the exceptions for adducing secondary evidence applied; and (b) to prove the truth of the contents of these documents through admissible evidence that was not hearsay. Accordingly, the trial judge refused to consider any part of the damages bundle when assessing the extent of the loss caused by the defendants' breaches.

88 The Court of Appeal provided a loose framework for consideration of such issues. First, the court should consider whether there had been an agreement on the authenticity of the documents. Even if there was no agreement, the court had to determine if there were objections raised by the other side as to the documents' authenticity. Next, even if there was no objection as to authenticity, and the documents had been placed into an agreed bundle, the court had to determine whether the truth of their contents were nevertheless in issue. On the facts in that case, the Court of Appeal found that the damages bundle contained hearsay evidence and that the requirements to prove an exception against the hearsay rule had not been met.

89 Translating those principles to the facts of the present case, Langdon's valuation of HHH formed part of the plaintiff's bundle of documents and not the agreed bundle of documents. Therefore authenticity was not even admitted by the defendants let alone the truth of Langdon's valuation report. I can find no exceptions to the hearsay rule in this regard which, under the Evidence Act, would assist the plaintiff. Section 32(*b*) of the Evidence Act would not help. It reads:

> **Cases in which statement of relevant fact by person who is dead or cannot be found, etc., is relevant**
>
> **32.** Statements, written or verbal, of relevant facts made by a person who is dead or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense which under the circumstances of the case appears to the court unreasonable, are themselves relevant facts in the following cases:
>
> …
>
> **or is made in course of business;**
>
> (*b*) when the statement was made by such person in the ordinary course of business, and in particular when it consists of any entry or memorandum made by him in books kept in the ordinary course of business or in the discharge of professional duty, or of an acknowledgment written or signed by him of the receipt of money, goods, securities or property of any kind,

> or of a document used in commerce, written or signed by him, or of the date of a letter or other document usually dated, written or signed by him[.]

I find that the plaintiff has not provided sufficient evidence to show that Langdon's attendance in court "cannot be procured without an amount of delay or expense which under the circumstances of the case appears to the court unreasonable".

90 Even if I am wrong on the issue of admissibility, I am unable to attach any weight to Langdon's valuation of HHH dated 21 November 2002 as I entertain considerable doubt on the methodology employed by Langdon in arriving at his valuation.

91 Even if the court were able to attach *some* weight to Langdon's valuation report, it would be an irrelevant piece of evidence. In order to show that the plaintiff had the means and capacity to complete the financing element by refinancing HHH (and given that the exercise took eight months to complete), a reasonable date for the valuation of the hotel would have been about eight months from the expiry of the NCA, *viz*, eight months before 4 December 2002. This would mean that a valuation should have been done in or around April 2002; no such evidence was available. Without Langdon's taking the stand, there was no expert testimony to explain or support the plaintiff's argument that the market conditions – in so far as the property market in the hotel industry was concerned – would have remained largely the same or, if it differed, to what extent it would have differed. Langdon's valuation of HHH did not assist the plaintiff in showing that it could have secured financing to purchase the Lai Sun stake. As I mentioned earlier at [78] above, one past success does not prove that the plaintiff or Murray would necessarily be successful in the present project.

92 There is another factor which would have affected the plaintiff's abilities to secure financing for GPH. The management contract for the Hilton Kingdom was only entered into on 24 December 2002. One of the terms of the debenture for HHH was that Hilton had to provide a guarantee of THB100m for the EBITDA. It was Vipoota's evidence that the guarantee was intended to address the creditors' and/or the lenders' concerns about the ability of HHH to meet its debt servicing. He also said that this assisted the plaintiff in securing the refinancing. According to Vipoota, the guarantee had a bearing of about 10% to 20% in the refinancing and "a little bit more"[note: 21] if the refinancing was sought in the first half of 2002 when HHH's cash flow had yet to stabilise. The plaintiff did not produce any evidence to show Hilton would have extended a guarantee of equal quantum in year 2002 or that the plaintiff would have been able to secure the refinancing without the benefit of the guarantee.

93 Far more important is the fact that the increase in the Hilton guarantee to THB100m was given because of the Hilton Kingdom. The importance of the Hilton Kingdom to the refinancing of HHH is evident from the fact that its post-renovation valuation was THB1.43bn. Accepting at face value Langdon's valuation (only for the sake of analysis and argument) of the HHH at THB1.9bn, the two hotels would have represented a total value of THB3.33bn. The financing and refinancing proposed for both hotels was then THB1.85bn. However, the Hilton Kingdom could only have been offered by the plaintiff as collateral after 24 December 2002, which date is after the expiry of the NCA, when Hilton agreed to manage the hotel and to provide the guarantee of THB100m. In this regard the plaintiff produced no evidence to prove that the refinancing of HHH could have proceeded in 2002 without the Hilton Kingdom.

94 I am aware (and the plaintiff relied on it heavily in its closing submissions[note: 22]) that I had ruled that the defendants were not entitled to discovery of documents relating to Hilton Kingdom on the basis of irrelevancy. My above findings do not contradict my ruling made in Summonses Nos 3692 of 2005 and 3607 of 2005 and in Registrar's Appeals Nos 178 of 2005. The documentation proper on the Hilton Kingdom would be irrelevant to the assessment exercise but the Hilton Kingdom itself had

an impact on the financing of HHH as set out above.

95 In addition there was no evidence (save for Murray's word) that Tipco would have agreed to the refinancing of HHH in 2002. It was Murray's evidence that Tipco sold HHH because it needed money in 2002 to put into its asphalt business and its business in China. Without any corroborative evidence, what Murray said was pure hearsay and I accordingly reject it as inadmissible.

96 Even if HHH could have been refinanced in 2002, the plaintiff would not have been entitled to the full proceeds because Tipco then owned 25% of SHP (see [6] above). Rowley's report[note: 23] stated that the plaintiff had available funds of THB259m for investment in PSD. However the figure of THB259m included the plaintiff's then alleged cash balance of THB86m as of 11 June 2003. Even if this cash balance was correct, it would not have been available to the plaintiff in 2002 and the plaintiff could not have relied on this sum for its acquisition of the Lai Sun stake. Further, Rowley reached his conclusion that the plaintiff would have had *net current assets of THB2m as of 31 December 2002* without taking into consideration and deducting therefrom the plaintiff's purchase of Tipco's 25% share in SHP.

97 Rowley's report further overlooked and failed to take into account the repayment of long-term loans and interest items. That being the case, his report gave an incorrect picture of the amount of funds that would have been available to the plaintiff for investment in PSD. Consequently, I do not accept his figure of THB173m as being the available cash balance for investment purposes. It is noteworthy that in his engagement letter addressed to the plaintiff, Rowley stated:

> The sufficiency of procedures performed is solely the responsibility of [the plaintiff]. Consequently, we will make no representation regarding the sufficiency of the procedures either for the purposes for which they are intended or for any other purpose.

In other words, Rowley relied *solely* on the plaintiff for information and figures as the basis of his report. At the risk of stating the obvious, any inaccuracies in whatever information he received from the plaintiff would be carried over into his report.

98 Finally on this topic, it bears mentioning that Murray could only have afforded one option; he could have:

(a) refinanced HHH to buy out the minority interest of Tipco; or

(b) refinanced HHH to buy the Lai Sun stake.

The plaintiff could not possibly do both. In or around October 2002, when Murray appointed Vipoota to assist him in the refinancing exercise, it was clear that Murray would have preferred to pursue the Hilton Kingdom deal and Tipco's minority share. My finding is that, based on Murray's level of interest at the material time, the plaintiff would have proceeded with the Hilton Kingdom deal and would have bought out Tipco's share in SHP as opposed to purchasing the Lai Sun stake. It bears mentioning that when Monahan spoke to Murray on or about 21 February 2002[note: 24] to say that the Narulas would be taking over the Lai Sun stake, Murray did not even seem surprised. His only comment was that he did not think the Narulas had the financial muscle to pull off the deal, but he did nothing. Against this background, I find it exceedingly hard to accept that the plaintiff could have put together a financing package by the expiry date of 14 December 2001 under the MOU. Murray's conduct was uncharacteristic of someone who was anxious to complete the deal, especially after he found out there was a rival bid.

99 Based on my above analysis, I am of the view that the financing element would work out at best to 10% based on the following computation:

Likelihood of securing	Weightage	Percentage of chance
10%	40%	4% (10% x 40%)

The shareholder element

100 The shareholder element, *viz*, obtaining the approval of Lai Sun and Pongphan, is the second component (see [32] above) that the plaintiff must secure in order to acquire the Lai Sun stake.

101 I should first make some observations on Pongphan's evidence. While he did testify for the defendants at the assessment hearing, Pongphan[note: 25] did not take the stand at the trial on liability. Having checked the notes of evidence of the trial below, I noted that Pongphan's written testimony was admitted as part of the evidence before the court but the plaintiff chose not to cross-examine him at all on his affidavit (an omission noted by Tan J at [30] of his judgment ([18] *supra*)). Instead, counsel for the plaintiff informed Tan J that he would make submissions on Pongphan's evidence at the close of the case.

102 In its closing submissions,[note: 26] the plaintiff criticised Pongphan, pointing out that his objections to the shareholding and financial terms proposed by the plaintiff and the purported mistrust of Murray as his partner (which the defendants contended would have resulted in Pongphan deciding against dealing with the plaintiff) were never raised in Pongphan's affidavit of evidence-in-chief at the trial below. The plaintiff further asked that the court should disregard Pongphan's comments on what Lai Sun's purported position would have been as they were hearsay and inadmissible, since Lai Sun's representative did not testify.

103 I accept the second objection on Pongphan's testimony as valid. Whatever Pongphan said in relation to Lai Sun was hearsay. However, I reject the plaintiff's first criticism. It did not lie in the mouth of the plaintiff to make adverse comments on the alleged omissions in Pongphan's trial affidavit when the plaintiff's counsel made a conscious choice *not* to cross-examine Pongphan on the same. It may well be that had he been questioned, Pongphan could have given a perfectly acceptable and/or valid explanation for the alleged omissions in his trial affidavit.

104 In any event, the two affidavits of evidence-in-chief filed by Pongphan served different purposes. For the trial on liability, Pongphan narrated how Murray failed to secure the Lai Sun stake, because he failed to make payment of the deposit required by Lai Sun and how the Narulas came to step into the plaintiff's shoes as the purchaser. What Pongphan deposed to in his affidavit of evidence-in-chief for the assessment before me was *irrelevant* to the trial on liability but very relevant for my purpose – would he have dealt with Murray and accepted him as a fellow shareholder in PSD? For this consideration, the personal relationship between Pongphan and Murray was critical and Pongphan's unhappiness with Murray's conduct[note: 27] when they were in Hong Kong for the purpose of introducing Murray to the then Senior Vice President of Lai Sun, Simon Szeto, was a relevant factor for my consideration.

105 It was the defendants' case (corroborated by Pongphan) that Murray's desire to have board control of PSD would have prompted Pongphan to refuse to agree to the plaintiff's purchase of the Lai Sun stake. This too was disputed by the plaintiff who pointed to the fact that the Narulas too originally wanted board control of PSD. Indeed, the Narulas' request for majority representation on the board went further than Murray's request to have one director representing each side and unanimity

on the board. The Narulas also wanted management control of the company, which had previously been undertaken by Lai Sun. The Narulas' negotiation for control on their initial terms did not prevent them from eventually reaching an agreement with Pongphan. Consequently, the plaintiff's original proposals would not have been a deal breaker.

106 One of Pongphan's complaints was that Murray lied to him and/or told him half truths. It was the defendants' submission that once these lies and/or half truths were uncovered, they would have affected Murray's ability to continue and to conclude negotiations with all parties necessary for the deal and that would include Pongphan. The defendants submitted that Pongphan had the first right of refusal in respect of the Lai Sun stake, which he did not waive in the plaintiff's favour. Instead, by 18 January 2002, Pongphan was unhappy enough with the plaintiff as to waive this right in favour of the Narulas.

107 The defendants added that the first seeds of distrust in Pongphan against Murray were sown when the duo visited Hong Kong in November 2001 for the purpose of introducing Murray to the Lai Sun group. Murray had gone off on his own to meet Simon Szeto even though Pongphan had arranged for them to go together to the meeting.

108 Another incident cited by the defendants to prove that Pongphan was unlikely to agree to having the plaintiff as his co-shareholder in PSD and in the hotel was Murray's apparent attempt to mislead Pongphan into thinking that the plaintiff's related company, Asia Hotel Investment Fund Ltd, was jointly owned by the plaintiff and Apollo Real Estate Advisors LP ("Apollo"). Murray had also misrepresented to Miguel Ko (the second defendant's president) in November 2001 about a joint venture with Apollo.

109 The plaintiff not surprisingly took a contrary stand. The plaintiff pointed out that it was Pongphan who had initially invited Murray to acquire the Lai Sun stake, provided Murray with the documentation to enable the plaintiff's lawyers to do due diligence, accompanied Murray to meetings with Lai Sun representatives and then joined Murray at meetings with potential financiers (AIG and Lehman Brothers).

110 The plaintiff contended there was therefore no truth in the defendants' allegation that Pongphan was not kept informed of developments by Murray. The plaintiff had forwarded to Pongphan all the draft term sheets of Lehman Brothers. Consequently, Pongphan's *volte-face* (that Murrray's failure to pay the deposit by the deadline of 14 December 2001 meant that Murray could not be trusted and Murray could not be his fellow shareholder) was clearly an afterthought.

111 Further, Pongphan's view that Lehman Brothers' terms of financing were too expensive and/or onerous as compared to DBS Thai Danu's did not hold water. This was because the two loans were structured differently. While Lehman Brothers' origination fee (US$608,000) was admittedly higher than DBS' (US$233,000), this was balanced against PSD's additional costs of engaging the MCL Group as refinancing advisers whose fees amounted to THB32.27m (equivalent to US$806,750). The higher interest rates charged on the Lehman Brothers' loan was due to the fact that the loan was a short-term loan for three years and was an asset-financing exercise whereas the DBS loan was for ten years secured by a mortgage with personal guarantees as additional security. In addition, the DBS loan carried significant pre-payment penalties which were absent from the Lehman Brothers' loan. The latter only required a limited recourse guarantee from Pongphan, which would only be triggered by acts of insolvency, fraud, misrepresentation or misconduct, as opposed to default by simple cash deficiency in the case of the loan from DBS.

112 The plaintiff sought to draw a fine distinction between Pongphan's right to waive his first right

of refusal to the Lai Sun stake in favour of the Narulas and Pongphan's transfer or assignment of that right to the Narulas. With respect, I do not appreciate the fine distinction the plaintiff attempted to highlight.

113 Counsel for the plaintiff had suggested to Pongphan in cross-examination,[note: 28] but which Pongphan denied, that Pongphan was testifying for the defendants because he had agreed to indemnify the defendants against any damages payable to the plaintiff, under cl 6 of the defendants' LOI dated 25 March 2002[note: 29] addressed to Kirin and Pongphan. For that reason, the plaintiff submitted, it was in Pongphan's (and the Narulas') interest to have as low as possible the damages awarded to the plaintiff. I do not accept this unfounded submission.

114 The one submission of the plaintiff which I do accept is that even if Pongphan mistrusted and/or disliked Murray, the fact remained that Pongphan did not have the financial wherewithal to purchase the Lai Sun stake himself. Accordingly, I believe his first right of refusal was meaningless to him. However, given a choice between the Narulas and Murray, there is no doubt in my mind that Pongphan would have chosen to deal with the former, as the Narulas were a respected and reputable family in Thailand.

The decision on shareholding element

115 It is therefore my view, based on the facts at the material time, that however reluctant or unhappy he may have been with Murray or the plaintiff, Pongphan would likely have agreed to the sale of the Lai Sun stake to the plaintiff, if there was no competing purchaser. Consequently, in relation to the shareholder element, I am of the view that the plaintiff had a 60% chance of obtaining the approval of Pongphan to its purchase of the Lai Sun stake. Based on a 30% weightage for this second element, one would arrive at the following:

Likelihood of securing	Weightage	Percentage of chance
60%	30%	18% (60% x 30%)

The management element

116 I now come to the last of the three elements in this assessment exercise, *viz*, would the defendants have signed a management agreement with the plaintiff?

117 Determining this third element requires a review of the testimony of Monahan, which I had briefly touched on earlier at [47] above. Monahan was the first defendant's director who negotiated with Murray (along with Serena Lim, the second defendant's director of development) on the NCA.

118 In his written testimony, Monahan deposed that the defendants were at a very preliminary stage of negotiations with Murray when the Narulas secured the Lai Sun stake and the hotel. Monahan said the defendants had 11 stages for the conclusion of the process from negotiations to signing of an agreement. Murray was then only at stage 4 – he had a draft LOI and term sheet. Key terms under stage 5 had yet to be discussed, let alone agreed to under stage 6, while stage 7 required all terms to be agreed upon, before execution of the finalised LOI and term sheet. Stage 8 required a probity check to be conducted on Murray. At that stage, because of the information which the defendants discovered about Murray, Monahan deposed that the defendants would have decided against dealing with Murray; they would not have lent him money (the key money) and the defendants would not have sought approval for the deal from their head office at White Plains, New York.

119 It would be appropriate at this juncture to elaborate on the information which the defendants had obtained in their probity checks on Murray, on which Murray was cross-examined and for which he gave his explanations.

120 The defendants discovered the following information on Murray:

(a) There was a default order against him for US$2,277.46 in the Provincial Court of British Columbia on 30 September 1992 for dishonoured cheques.

(b) There was a notice of claim against him for $355.00 in 1996.

(c) There was an order dated 25 February 1993 for $153,664.75 and costs against him, for defaulting on a mortgage granted by Richmond Savings Credit Union.

(d) There was a default order dated 10 February 1993 against him for $6,785.24 in relation to a Visa account with the Royal Bank of Canada.

(e) There was an order of seizure and sale dated 12 February 1998 for $4,368.89 against him for moneys owing on a promissory note.[note: 30]

(f) There was a writ of summons dated 11 January 1993 against him for purporting to take over a business already sold to the claimant and for assaulting the claimant.

(g) Neither Murray nor the plaintiff had any arrangement with Apollo contrary to Murray's claim that he had backing from Apollo.

121 I should, in fairness, point out that Murray was not cross-examined on items (a), (b), (e) or (f) above. In fact, it was the plaintiff's case that the defendants had the wrong "Gary Murray" in relation to those instances of misfeasance.

122 As for (c), Murray had explained[note: 31] that he was then three to four years out of university and had overstretched himself by buying a property which he could ill afford and which he tried unsuccessfully to rent out. Eventually Murray sold the property and paid back Richmond Savings Credit Union in full. With regard to (d), Murray explained that he had a dispute over a sum of $1,000 with Royal Bank of Canada. He ultimately lost this dispute so he repaid the Visa credit card debt in full. As for (g), Murray flatly denied[note: 32] he had mentioned the Apollo deal to Miguel Ko in November 2001; the Apollo deal had been dead a year before he met Miguel Ko. It was the plaintiff's case (which Monahan did not accept) that Murray never misled the defendants into thinking that he had backing from Apollo at the meetings he had with their representatives.

123 The plaintiff submitted that it was unbelievable that the defendants would not have dealt with the plaintiff because of two outdated claims against Murray whereas they were willing to deal with the Narulas who (according to their searches) had claims or judgments against them for far more substantial sums of THB290m (excluding interest) or to deal with Pongphan (who had claims against him of about THB28m excluding interest).

124 Monahan had explained that the defendants would not do probity checks on the Narulas because the latter were known to the defendants as the owners of the Sheraton Grande Sukhumvit which was managed by the defendants. Monahan reiterated that no probity checks would be conducted on the Narulas even though the second defendant "inherited" the Narulas as a business partner after the second defendant acquired the ITT Sheraton group.

125 Monahan's attention was drawn by plaintiff's counsel to the fact that the defendants' probity check on Pongphan and the PSD group was initiated on 21 May 2002,[note: 33] well after the defendants had signed the LOI with the Narulas on 25 March 2002 and after the defendants had signed the management agreement on 15 May 2002 with the shareholders of PSD. Monahan testified it was the defendants' normal practice to do probity checks after issuing the LOI but before signing the management contract. He candidly admitted he could not explain why the defendants had departed from their normal practice in this case; he hazarded a guess that it could be due to the tight time frame involved.

126 What was even more surprising was the fact that the defendants' probity check actually recommended the defendants not to do business with PSD based on the company's losses for 1999 to 2001. Yet, according to Monahan, the defendants made a decision to proceed with the deal with PSD. He explained it was for three reasons:

(a) Both PSD and Pongphan had good commercial reputations.

(b) Pongphan had a very good reputation with the social elite in Thailand.

(c) Although PSD had reported losses, the defendants knew through the deal that the Narulas would be refinancing the company. Hence, the company's past financial condition was no longer going to be an issue for the defendants.

127 Another reason why the defendants (according to Monahan) would not have dealt with the plaintiff was Murray's request for key money of US$1–$2m; Monahan testified that Murray persisted in his request despite the defendants turning him down more than once. Monahan deposed that he and Serena Lim were shocked when Murray first raised his request for key money.

128 The plaintiff argued that key money was not uncommon in the hotel industry. It was Murray's testimony at the trial[note: 34] before Tan J that such a payment in the hotel industry was a "non-repayable loan" to the owner to secure the management contract. That description of key money is a contradiction in terms as a "loan" implies repayment is required, unlike a gift (which was what counsel (Mr Tan) for the defendants suggested to Murray (who did not disagree) was what Murray actually wanted. The plaintiff's counsel pointed out that Marriott International Inc ("Marriott") in its proposal to reposition the hotel as a Renaissance hotel had offered the plaintiff key money of THB50m (or US$1.2m) in its letter dated 7 December 2001.[note: 35] That submission is not entirely correct because what Marriott offered was the following:

> Renaissance shall make a payment to Owner in the amount of Fifty Million Thai Baht (TBt50,000,000) upon the delivery by Renaissance to Owner of a certification that the Hotel has been fully renovated pursuant to the Renovation Schedule in accordance with Renaissance standards.

If the plaintiff had done the deal with Marriott instead of the defendants, Murray would not have received THB50,000,000 until *after* completion of renovations to the hotel in accordance with Renaissance standards.

129 The above term should be contrasted with what Murray asked of Monahan in his e-mail of 2 February 2002:[note: 36]

> 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.

130 At the trial before Tan J,[note: 37] Murray had justified his request for key money on the basis that he believed he could squeeze more money for the deal out of the defendants in his negotiations. I note, however, that Monahan had explained[note: 38] that he understood key money in the hotel industry to mean a contribution made by the operator directly into the cost of the project whereas in this case, Murray asked for a personal payment upfront (if possible).

131 Counsel for the plaintiff questioned the defendants' reaction of being "shocked" by Murray's request for key money when Miguel Ko had opined at the trial below that the requirement of a finder's fee (which was essentially the same) was acceptable. This submission is an inaccurate interpretation of Miguel Ko's testimony before Tan J; indeed, it was the very opposite of what Miguel Ko meant. This can be seen from the following extracts from Miguel Ko's cross-examination:[note: 39]

Q: Aren't the plaintiffs instrumental in bringing Starwood to manage [the] hotel?

A: Yes.

Q: Quid pro quo for key money to party bringing in[?]

A: That is different. This is finder's fee. Very seldom is owner the finder. *Highly unusual for owner to ask for finder's fee. Cannot come with no money to buy hotel and ask for finder's fee.*

[emphasis added].

132 If indeed the defendants claimed they had decided against paying key money by 4 January 2002, counsel for the plaintiff questioned why the defendants continued to negotiate with the plaintiff by issuing their draft LOI on 18 January 2002, which terms included payment of key money.

133 As with Pongphan's complaints against Murray, the plaintiff submitted that the defendants' claim, that they would ultimately not have entered into a management contract with the plaintiff due to Murray's lack of probity, was an afterthought. The plaintiff submitted that the Narulas and Pongphan were in a far worse position than Murray when it came to probity checks and yet, the defendants had no qualms about entering into a management contract with PSD.

134 In the course of his cross-examination, it was put to Monahan (who disagreed) that the defendants were so desperate to do the deal and re-establish the Westin brand in Bangkok that they would not have been deterred by unfavourable probity checks on Murray or the plaintiff. He pointed out that the second defendant was aware for some time that the Westin contract for the Banyan Tree was going to expire. Even without the Banyan Tree Resort, the defendants still had a presence in Bangkok by way of the Sheraton Grande Sukhumvit and the Royal Orchid Sheraton in which the second defendant held a 44% interest. Monahan pointed out that with regard to the second defendant's portfolio, it increased its stable of hotels by five to six throughout Asia from 2000 to 2001. Consequently, he did not think the defendants were desperate in the manner described by counsel for the plaintiff.

135 Monahan also denied counsel's suggestion that the defendants struck a deal with the Narulas so as to circumvent the restrictive covenant that prevented the defendants from managing or owning any other hotel within a one-kilometre radius of the Sheraton Grande Sukhumvit. Monahan drew the court's attention to the management agreement that the Sheraton group had with the Narulas for the Sheration Grande Sukhumvit. For each Westin or W hotel that the defendants managed and/or owned

within the restricted area, the second defendant would have to pay the Narulas (through the defendants' Quality Inn Company) compensation of either US$400,000 by the third quarter of the first full operating year, or US$500,000 by the end of the third quarter of the second full operating year of the Sheraton Grande Sukhumvit. Monahan expressed doubts that the defendants would make a commercial decision to go into a contract with one party (the Narulas) for the sake of US$400,000 to US$500,000. I believe for a company like the Starwood group, such sums would not be considered so substantial as to prompt the defendants to contract with the Narulas instead of with the plaintiff.

136 I should add that Monahan had explained that the defendants' judgment call to go with the Narulas on the deal instead of with the plaintiff was because the latter were quite a prominent business family in Thailand. When he was asked to look at the dates of the claims made against the Narulas as shown in the plaintiff's litigation searches, Monahan noted that many of the debts arose during the 1997 financial crisis in Asia. The Narulas, like other Thai business families, were not spared the adverse effects of that financial meltdown which largely affected Thailand, South Korea and Malaysia.

137 A significant piece of evidence in the dispute relating to the issue of key money emerged during Monahan's cross-examination[note: 40]when he denied the suggestion of counsel for the plaintiff that he was "embroidering" his evidence to try and prejudice this case. After referring to Murray's e-mail to him of 2 February 2002,[note: 41]Monahan said:[note: 42]

> And I think something else that would certainly support the intimation and the conclusion we came to was the fact that on January 22nd, after we had been around this topic so many times and tried to bring it to finality, the final sheet we issued to Mr Murray, we did not offer the payment that he wanted, but we did offer to increase the loan by 1 million, which, by definition, would have gone into the project cost, and that was not accepted.

138 Why did Murray reject the defendants' increased renovation loan of US$6m? The following revealing evidence was adduced from Murray during cross-examination on 2 August 2005:[note: 43]

> Q: You needed 5 million. But I mean, if you needed 5 million, you used 5 million, you pay for the 5 million. But if you do not need the 5 million, then you do not need to use all. That is a line for you to use. Right?
>
> A: Why borrow money if you do not need it?
>
> Q: Yes, you do not –
>
> A: If I needed $5million, your Honour, to renovate the hotel and Starwood was making a concession by taking away the key money and giving me an extra million dollars, well, why would I do that? Because I only needed 5 million. So from a negotiating point of view, I would obviously want to go back and try and get the key money into the deal because I did not need the 6 million, I only needed 5 million.
>
> Q: Yes. You did not need the 6 million, you only needed 5 million, but you did need the key money, did you not?
>
> A: No, I –
>
> Q: You did not need the key money?

> A: I could have done the deal without the key money.
>
> Q: You do not need that?
>
> A: I felt that Starwood was prepared to and would pay me the money.
>
> Q: Mr Murray, you did not need the key money, you could have done the deal without the key money, is that your evidence?
>
> A: Yes. If I had the time, I could have completed this deal without the key money at the end of the day.

139 In its submissions, the plaintiff had played down Murray's request for key money by referring to [141] of the majority judgment of the Court of Appeal ([19] *supra*) where Chao Hick Tin JA said:

> At no time did the [plaintiff] 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.

140 Unlike the appellate judges, I (and Tan J) had the advantage of seeing Murray in the witness box and assessing his testimony. I find the above extracts in [137] to [138] from the evidence of Monahan and Murray most telling. It reinforced my view that Murray had no independent financial means of his own and most certainly did not (as he had represented to the defendants) have a wealthy background that would have enabled him to pay the deposit to PSD with his own funds. Contrary to his claim, I am of the view that Murray needed the key money badly and upfront at that. It is another telling factor that at the trial before Tan J, Murray made no reference whatsoever to the issue of key money in his affidavit of evidence-in-chief. It was only raised when counsel for the defendants cross-examined him.

141 Basically, what Murray wanted to do was to have a leveraged buyout ("LBO") of the hotel. According to Wikipedia, the online encyclopaedia (see <http://en.wikipedia.org/wiki/Leveraged_buyout> (accessed 29 March 2007)), an LBO, also known as a highly-leveraged or "bootstrap" transaction, occurs when a financial sponsor gains control of a majority of a target company's equity through the use of borrowed money or debt. Wikipedia described an LBO as a strategy involving the acquisition of another company using a significant amount of borrowed money (bonds or loans) to meet the cost of acquisition. Often, the assets of the company being acquired are used as collateral for the loans, in addition to the assets of the acquiring company. The purpose of LBOs is to allow companies to make large acquisitions without having to commit a lot of capital. In an LBO, there is usually a ratio of 70% debt to 30% equity.

142 The only problem with Murray's intended LBO of the hotel was that he did not have the means, let alone 30% funding, for the acquisition. It appeared that he intended Lehman Brothers and the defendants to entirely finance his purchase of the Lai Sun stake. My belief is reinforced by another event referred to later (see [145] to [146] below). Hence, Murray insisted on securing key money from the defendants. Murray's plan to sell the hotel by 2006 was also typical of LBOs which usually incorporate an exit strategy after a certain time frame.

143 The crucial question which then arises is: Would the defendants have given in to Murray's demands to key money had the Narulas not entered into the picture or would they (as Monahan asserted) have withdrawn from the deal altogether?

144 To answer that question, I need to consider other aspects of the evidence adduced from Monahan. The defendants had accused Murray of not acting in good faith. This complaint centred on several incidents, one of which was the misrepresentation regarding the plaintiff's supposed joint venture with Apollo to which I referred to earlier at [120(g)].

145 The defendants alleged that Murray had attempted to pledge the plaintiff's credit with HSBC, referring to a fax dated 16 January 2002 from the plaintiff to Shiraz Poonevala of HSBC[note: 44]where Murray wrote:

> I would like to meet with you to go over a few items regarding the Baht 100m loan for the [GPH] project. In particular, there [are] a few things that have changed since we last spoke before Xmas.
>
> 1. The hotel will be a Westin Hotel, not Renaissance. Hence, the Baht 100m will be paid by Starwood Hotels & Resorts Ltd.
>
> 2. The loan will be repaid in 12 months rather than 36 months as previously discussed. Rather than renovate the hotel from cash flow, we have secured a loan from Starwood for the full renovation costs.
>
> This eliminates the potential risk of not having enough cash flow to complete the renovation.

Monahan testified[note: 45] that the defendants were never informed about the above fax. However, it would have come to the defendants' attention at some point of time and when it did, the fax would have raised further doubts to the defendants about Murray's probity.

146 In its closing submissions,[note: 46]the plaintiff sought to explain away the plaintiff's fax of 16 January 2002 as "sounding HSBC out on lending [the plaintiff] Baht 100 million for the sponsor cash equity requested by Lehman as a back-up plan". With respect, I disagree. That is not what the fax stated on a plain reading. What was very clear therefrom was that Murray wanted to rob Peter in order to pay Paul – get US$2m from the defendants in order to help pay off HSBC's loan of THB100m (equivalent to US$2.5m) which he needed in order to meet Lehman Brothers' requirement of US$2m sponsor cash equity from the plaintiff, as part of Lehman Brothers' financing terms. Murray was a man without any substance whatsoever.

147 Taking into consideration all the facts referred to earlier in relation to the third element, I am doubtful that the defendants would have been prepared to sign a management agreement with the plaintiff. It bears remembering too that the Narulas would not (according to Kirin) have waived the restrictive covenant if the plaintiff had purchased the Lai Sun stake. Why would they allow the defendants to manage a Westin hotel, to compete with their Sheraton Grande Sukhumvit which was just across the road? It would not make commercial sense.

148 Consequently, I am of the view that the plaintiff's chances of securing a management contract with the defendants would have been less than 50%. It would, in my opinion, at best be 40%. As I had allocated 30% to this third element (see [34] above), it meant that the plaintiff's chance can be computed as follows:

Likelihood of securing	Weightage	Percentage of chance
40%	30%	12% (40% x 30%)

The value of the hotel

149 I move on to deal with another aspect of the assessment, *viz*, the value of GPH or the Westin Grande Sukhumvit. (Where it is not necessary to identify the hotel as either GPH or the Westin Grande Sukhumvit, I will refer to it simply as "the hotel"). This issue turns on the evidence of four valuers who were called to testify as experts, two for the plaintiff and two for the defendant. Pichitra Betty Mahaphon ("Mahaphon") [note: 47] and David Simister ("Simister") [note: 48] were the experts for the plaintiff while Chee Hok Yean ("Chee")[note: 49] and Ling Kiong Ong David ("Ling")[note: 50] were the experts called by the defendant.

The hotel

150 Before analysing the valuations provided by these four experts, it would be necessary to make some observations about the hotel. The hotel (built in 1993) sits on 8,222.8m² of land under five titles which are partly freehold and partly leasehold. The 30-year leasehold title (for which payment of THB286m was made to the landlord in 1992) commenced in April 1992 and upon its expiry on 17 April 2022, there is an option to renew for another 20 years until 16 April 2042. The leasehold portion takes up 8,060m² or 98% of the hotel's area.

151 Although it is conveniently located within Bangkok's business district, the hotel suffers (in my view and from my observations) from a distinct disadvantage which even its five-star repositioning and rebranding by the defendants cannot overcome. In the words of Monahan, GPH was not a purpose-built five-star hotel, unlike its competitors.

152 Besides its odd boat shape (narrow at both ends), the lowest floors (basement to level 3) of the hotel are occupied (and thereby encumbered) by a mid-market department store called Robinson (on a sub-lease of 30 years which can be renewed for a further 20 years upon its expiry in April 2022). The fifth and sixth levels are parking floors with the result that the hotel's main entrance is located on the seventh floor; guest rooms take up the remaining floors up to the topmost level. Despite its five-star status, the Westin Grande Sukhumvit cannot be considered comparable with other five-star hotels in its league simply because it is saddled with a department store for almost the entire duration of its leasehold title.

153 My view is reinforced by the testimony of Simister where he acknowledged that the ground floor presence of Robinson department store may separate the Westin Grande Sukhumvit from the very top quality hotels like The Peninsula, The Four Seasons and The Sukhothai. My view is also supported by Murray's trial evidence where he deposed (in his affidavit of evidence-in-chief) that his approaches to other hotel chains such as Hilton International, Carlson Hospitality Worldwide (operators of The Regent and Radisson brands), Raffles International/Swissôtel, Six Continents Hotel & Resorts and Four Seasons to use their five-star brands were rebuffed; these chains were of the opinion that the hotel was not grand enough for a five-star label and could only be converted to a four-star brand.

154 GPH had 388 rooms and 620 restaurant seats when the plaintiff intended to acquire it. As the Westin Grande Sukhumvit, the hotel now has 364 rooms and 466 restaurant seats. When Monahan[note: 51] testified, he explained that in order to attract the corporate market, the defendants had to enlarge the rooms to the minimum size required of a Westin hotel. Consequently, the defendants combined 22 small corner rooms with adjacent rooms and converted them into suites. As GPH, the hotel had about five restaurants which underperformed. The defendants reduced or eliminated restaurant space when the hotel became the Westin Grande Sukhumvit but created a business centre, a health club and state-of-the-art meeting rooms.

155 In Monahan's opinion, hotels in Bangkok like The Oriental, The Peninsular, The Grand Hyatt, The Four Seasons and The Sukhothai would be at the top end of five-star hotels, followed by The Sheraton Grande Sukhumvit, The JW Marriott and The Plaza Athenee. The Intercontinental Hotel and the Westin Grande Sukhumvit would be at the lower rung of the five-star segment. Simister had agreed that not all five-star hotels are homogenous. According to Monahan, when the defendants negotiated with the plaintiff on turning GPH into a Westin, the projections they gave to Murray positioned the hotel to perform equal to or slightly better than the Sheraton Grande Sukhumvit across the road. In reality, as the Westin Grande Sukhumvit, the hotel did not and would never achieve that goal. This statement appeared to be borne out by the defendants' figures for the average daily room rates of the two hotels[note: 52] for the years 2004–2005:

	Sheraton	Westin
2004	THB4,545	THB3,898
2005	THB5,102	THB4,392

156 As the three-star GPH, the hotel catered to the mass tourist market, particularly to Asian tour groups and airline crew, which sectors yielded low room rates. As the five-star Westin Grande Sukhumvit, the hotel focused on the higher yielding corporate travellers and the meetings, incentive travel, conventions and exhibitions (or "MICE") segment. Whilst tourists would welcome having a department store on the doorstep of their hotel, I have grave doubts that business travellers would share the same sentiment. Indeed, having to bypass a department store to get to the main entrance of one's hotel could be an off-putting factor to a business traveller. It does not help the hotel's image that a McDonald's outlet is another tenant adjoining Robinson's department store on the ground level. According to Chee,[note: 53] the Westin has a small area on the ground level for guests to go through to the lifts and to wait for transport pickups and taxis. Given a choice, I would imagine that a "corporate individual traveller" or a "leisure individual traveller" (both descriptions came from Mahaphon's report) would opt to stay at the Sheraton Grande Sukhumvit just across the road, which (according to Simister) had more facilities for functions like weddings although there would be little significant difference between the rooms at the Westin Grande Sukhumvit and the Sheraton Grande Sukhumvit. Ling had also testified that as the Westin Grande Sukhumvit, the hotel was not the best amongst its competitors in terms of MICE facilities. Despite its rebranding as the Westin Grande Sukhumvit in order to attract a corporate clientele, the hotel's share of the group leisure segment of the market actually increased to 88% in 2005 against a forecast of 78%.

157 With this backdrop in mind, I now move on to evaluate the detailed valuations of each expert. It was not in dispute that the plaintiff intended to sell its shares in PSD after a period of five years. Hence, all four valuations of the hotel were based on its value as at 31 December 2006. Notwithstanding its physical constraints which I have described and noted above, Mahaphon valued the hotel at THB3.4bn as of 31 December 2006 whilst Simister valued it at THB3.5bn. Their values are to be contrasted with those of the defendants' experts which were THB2.85bn and THB2.695bn from Ling and Chee respectively. The average of the four valuations is THB3.11bn rounded down.

158 In summary, the values ascribed by each of the four experts (in decreasing order of value) can be found in the table below:

Expert	**Value as at 31 December 2006**

Simister (plaintiff's expert)	THB3.5bn
Mahaphon (plaintiff's expert)	THB3.4bn
Ling (defendant's expert)	THB2.85bn
Chee (defendant's expert)	THB2.695bn
Average of four values	THB3.11bn

159 Five key differences in the experts' valuations warrant mention at the outset. First, the four experts based their valuations on different numbers of rooms. Essentially, the plaintiff's experts deemed the hotel to have 388 rooms, while the defendants' experts based their calcalations on the basis of the actual number of rooms that the hotel had, *viz* 364 rooms. Second, they differed in their assessment of the average daily rate ("ADR") or average room rate ("ARR") (used by the different experts to denote the same thing) of the hotel. Third, they differed on the stabilised occupancy rate of the hotel post-2006. Fourth, they had differing views on whether a capital expenditure ("CAPEX") deduction should be made to their valuation. Fifth, the defendants' experts took into account demolition costs while the plaintiff's experts did not. Each of these five factors has a significant impact on the valuation provided by each expert. For the reasons to follow, after I have analysed each of the four experts' evidence, I will explain why I took a certain course for each of these five key factors.

Mahaphon's evidence

160 Mahaphon was educated and trained in the US and had over 19 years of experience in real estate valuation and in the hospitality industry by the time she testified. She had formidable credentials and her experience was no less impressive. That is not to say that the defendants' valuers were any less qualified.

161 Mahaphon's brief from the plaintiff was to analyse and advise on:

(a) the anticipated cash flow and financial estimates that would have been achieved if GPH was converted into a four-star Crowne Plaza hotel instead of the Westin Grande Sukhumvit in 2003;

(b) the market value of the Westin Grande Sukhumvit as of 31 December 2006, if GPH had been converted into a Westin in 2003 after undergoing a US$5m renovation; and

(c) the management fees that the defendants would have earned from the Westin Grand Sukhumvit over a 15-year management contract.

162 At the hearing, the plaintiff's counsel informed the court that they would be withdrawing the report in relation to issue (a) above. Certain pages of her report in relation to issues (b) above were also amended. These amendments were, to my mind, minor.

163 What was interesting and materially important about Mahaphon's report was the methodology that she used. Unlike the other experts who relied only on the income approach of valuation, Mahaphon was perhaps the most detailed in that she went out of her way in considering all three approaches to valuation of a hotel, namely (and in the order presented in her report): (a) the sales

comparison approach; (b) the cost approach; and (c) the income approach. With respect to the income approach, she further went on to consider not only the discounted cash flow ("DCF") methodology (used by Chee and Ling) but also the direct capitalisation method (used by Simister).

164 The differences in these approaches can be gleaned from her affidavit:[note: 54]

> Under the guidelines issued by the Appraisal Institute, appraisers are typically required to use three approaches in valuing real property: the Cost Approach, the Sales Comparison Approach, and the Income Approach. …
>
> The Sales Comparison Approach is based on an estimate of the value derived from comparison of similar type properties, which have recently been listed for sale or sold. … In this case, we have identified 5 hotel sales over the past few years. …
>
> In the Cost Approach to value, accrued depreciation is deducted from the cost new [*sic*] of the improvements and the balance is added to the land value. The resulting figure indicates the value of the whole property. …
>
> The Income Approach analyzes a property's capacity to generate future benefits and capitalizes the income into an indication of present value. The principle of anticipation is fundamental to the approach. The reliability of the Income Approach depends upon whether investors actively purchase the subject property type for income potential, as well as the quality and quantity of available income and expense data from comparable investments.
>
> In this approach, we would first determine the income-producing capacity of a property by comparing market room rates and occupancy rates from comparable hotels. Deductions then are made for departmental costs, undistributed operating expenses and fixed charges. The resulting streamline of net operating income is discounted to arrive at an indication of value.

165 I have quoted in greater detail on the income approach because that is also the approach relied upon by the other experts. Except for immaterial and minor differences in the description, the approach so described by Mahaphon also reflects the approach used by the other experts.

The direct sales comparison approach

166 Under this approach, Mahaphon identified five other hotel (asset) sales in Thailand from 1999 to 2002. These were the Monarch Lee Garden in Bangkok, the Melia in Hua Hin, the Karon Villa and Karon Wing in Phuket and the Garden Beach and the Merlin in Pattaya. Mahaphon acknowledged in her report[note: 55] that "[t]he latter four hotels are situated in beach resort communities, which would reflect different market segments than comparable". Further, she also noted [note: 56] that "the availability of truly comparable sales data was limited" and that "[i]t would be extremely difficult to make adjustments on the physical characteristics and location of the hotels due to the fact that each hotel has very unique physical characteristics and location". Nevertheless, using this approach, she arrived at the leasehold value of the Westin Grande Sukhumvit as of 31 December 2006 to be THB4bn.[note: 57]

The cost approach

167 For this approach, Mahaphon first valued the land and then valued the current replacement cost of the improvements. The value of the land was then added to the value of the improvements. She then made deductions for depreciation resulting from physical deterioration, and from functional and

external obsolescence. For the valuation of the land, she relied on the sale of five comparable properties along the Ploenchit-Sukhumvit corridor and the Silom-Sathorn corridor between 2002 and 2003. She then made adjustments which she felt were necessary and arrived at the land value of THB800m. Adding her evaluation of the direct construction costs for the land as well as the indirect costs (such as architectural fees and financing costs), she arrived at the figure of THB4.55bn being the total leasehold value of the land using the cost approach.

The income approach

168 Mahaphon then moved on, in her report, to value the hotel using the income approach which, as she noted, was "a method of converting the anticipated economic benefits of owning the property into a value through capitalization".[note: 58] Under this approach, the potential income and expenses have to be projected and the cost appropriate capitalisation has to be selected. She noted in her report that "[t]he two most common methods of converting net income into value are direct capitalization and discounted cash flow analysis". She was the only one out of the four experts to have employed both methods under the income approach.

169 Mahaphon has described the DCF method to involve the following steps:

> 1. Anticipated future net income streams and expense estimates over a holding period for the subject is prepared.
>
> 2. A reversionary analysis is made when the anticipated cash flows are expected to continue into perpetuity or if a lump sum amount exists at the end of the holding period. Reversionary proceeds are calculated by capitalizing the last year's or the following year of the holding period and deducted by sales expenses and commissions. In the situation of the subject as a leasehold interest, a 36-year remaining cash flow was prepared be [*sic*] discounted to the end of the lease.
>
> 3. A market supported discount rate is determined in the DCF approach. The discount rate should reflect an investor's hurdle rate to obtain a reasonable return for the investment. The discount rate consists of an adequate return on capital. It should reflect a degree of perceived risk, market attitudes, rates of return on other investment alternatives and availability and cost of financing.
>
> 4. The forecasted income streams after expenses are discounted at the above selected discount rate. The sum of the discounted cash flows is translated to a present value of the property at the value date.

170 The first step involved making an assumption about the ARR for the hotel. For this exercise, Mahaphon relied on factors such as the historic ARR of the competitive hotel market, ARR trends on a property-specific basis, current performance and market mix of existing comparable hotels and the subject hotel's competitive attributes and estimated prospective market segmentation. Relying on these factors, she estimated that the hotel will achieve an ARR of THB3,600 during the first year of operation in 2003. Comparing the ARR for the hotel against the projected performance of other competitive hotels, she projected the ARR of the hotel from 2002 (Year 1) to 2006 (Year 5) to be a follows:[note: 59]

	Year 1	Year 2	Year 3	Year 4	Year 5
ARR	3,600	4,140	4,260	4,690	4,830

171 Mahaphon then needed to project the occupancy rate of the hotel. In her view, "[t]he occupancy for the subject hotel is estimated to penetrate at a level lower than the competitive market during the first 2 years of operation due largely to the launching periods for the newly opened subject hotel coupled with the projected huge number of future competitive supply".[note: 60] According to Mahaphon, the occupancy rate for 2002 (Year 1) to 2006 (Year 5) is as follows and she expected the hotel's stabilised occupancy rate to be at 76% after Year 5:

	Year 1	Year 2	Year 3	Year 4	Year 5
Occupancy rate	54%	67%	74%	77%	76%

172 Mahaphon proceeded to explain, in her report, her projections and assumptions for other line items such as food and beverage revenue, telecommunications revenue, minor operated department revenue (which includes spas, mini-bar, *etc*), undistributed expenses (*eg* credit card services) and fixed expenses (such as insurance premium, management fee and property tax). She also included, in her analysis and assumptions, a line for fixtures, fittings and equipment ("FF&E") reserve which she estimated to be at 0% for 2002 and 2003, but at 3% per year for 2004, 2005 and 2006. In her report, she had this to say about the FF&E reserve:[note: 61]

> Fixtures, Fittings & Equipment (FF&E) are essential to the operation fo a hotel and their quality often influences the standard of grading of a property. Periodic replacement of furniture, fixtures and equipment (FF&E) is essential to maintain the quality, image and income of the lodging facilities. *Capitalized expenditures are not included in the operating statement but they do affect an owner's cash flow.* We have assumed an FF&E reserve of 0% of total revenue in the first 2 years of operation increasing to 3% in the stabilized year. [emphasis added]

173 Mahaphon then explained her choice of the discount rate and, based on her analysis,[note: 62] she assessed the discount rate to be 12%. She also made other assumptions such as the inflation rate (at 3%) and the transaction costs of selling the hotel at the end of the period (to be at 1%).

174 Using these assumptions and factors, she worked out the value of the property to be THB3.3bn as at 31 December 2006. A summary showing her calculations and projections through to the year 2042, but capitalised at 2006, can be found at Annex A of this judgment.

175 Mahaphon did not stop at the DCF method under the income approach. She went on to assess what the value of the hotel would be if she had used the direct capitalisation method under this approach. In her affidavit, she had this to say about the direct capitalisation method:[note: 63]

> Direct capitalization is a method used to convert an estimate of a single year's income expectancy into an indication of value in one direct step, by dividing the income estimate by an appropriate rate. The rates extracted from comparable income-producing transactions that would appeal to the same category of prospective purchase provide the most compelling indication of investor expectations. A market-derived rate for use in direct capitalization must be applied using a consistent measure of net operating income (NOI).
>
> The cash flows (NOI) generated annually by the subject property comprise the cash flow an investor will receive. The second component to this investment return is the pre-tax cash proceeds from the resale of the property at the end of a projected investment-holding period. Typically, investors will structure a provision in their analyses in the form of a rate differential over a going-in capitalization rate in projecting a future disposition price. The going-in

> capitalization in year 2003 for the subject is not relevant in this analysis because the property was assumed acquired and renovated. Thus, the occupancy rate in 2003 reflects that of a starting position, or an unstabilized status at the time. As the occupancy builds up over a period of 3-4 years, the terminal capitalization rate (for disposition purposes) would anticipate a higher rate in view of the increasing age of the improvements and the uncertainty to project a future rate.

176 Using the figures which she had arrived at under the direct sales comparison approach, she came to the view that a direct capitalisation rate would be 9%. Taking the cash flow of the hotel as at 31 December 2006 to be THB294.9bn, she calculated the value of the hotel using the direct capitalisation method as follows:

	Baht: million
Cash Flow as of 2007	294.9
Cap rate	9%
Value indication	3,276.3
Add: Retail subleasehold	255.7
Transaction Value	3,532.0
Less: transaction cost of 1%	35.3
Leasehold value	**3,500.0**

177 Faced with these two figures using the two different methods, Mahaphon had to reconcile the two different figures, which were about THB200m apart. In her report, she had this to say about the reconciliation:[note: 64]

> We have placed equal reliance on the Discounted Cash Flow (DCF) and the Direct Capitalization analysis as both techniques reflect investor perception for an income producing property. The Direct Capitalization reflects a one-year stabilized occupancy scenario in calculating a sale price. This is simplistic in its view of expectations and may not reflect the change in economic climate of future investor expectations. On the other [hand], the DCF was developed with future projections of cash flow over the remaining 36 years of the lease where various growth assumptions on revenues and expenses would have to be estimated. However, DCF is a well accepted technique by all institutional investors for an investment vehicle such as the subject where assumptions would have to be derived from market findings.

178 Taking the average of the two figures, Mahaphon opined that the value of the hotel would therefore be THB3.4bn under the income approach.

Reconciling the three approaches

179 The figures which Mahaphon arrived at under the three different approaches can be summarised as follows:

Approach	Value (THB)
Sales comparison approach	4.00bn
Cost approach	4.55bn
Income approach	3.40bn

180 As poignantly noted by Mahaphon in her report, "[r]econciliation is the process of deriving a single point value estimate for the subject property from the indications provided by the approaches at hand."[note: 65] She proceeded to evaluate the pros and cons of each of the three approaches. What was most significant was her comment that "[t]he subject hotel is highly suited to analysis by the discounted cash flow method (DCF) as it will be bought and sold in investment circles".[note: 66] She also noted that "[p]articular emphasis is placed on the results of the discounted cash flow analysis because of the applicability of this method in accounting for the specific characteristics of the property, as well as being the tool used by many investors".[note: 67] She then came to the conclusion that, relying on the income approach and the DCF method within that approach, the value of the hotel would be THB3.4bn.

The defendants' critique of Mahaphon's evidence

181 The defendants criticised Mahaphon's valuation. They submitted that Mahaphon's valuation was flawed because the direct capitalisation approach she used was incorrect (just as Langdon's application of the methodology was questionable). Using the direct capitalisation approach incorrectly inflated her valuation to THB3.40bn when the figure should be THB3.30bn, they argued. One reason for the inaccuracy was the fact that Mahaphon used a capitalisation rate of 9% per annum, which she said was to reflect a holding period of four years for the hotel, prior to disposal in 2006. She was of the view that because of the (largely) leasehold title of the hotel with 36 remaining years, a prudent investor would expect a higher yield than the five comparative transactions (freehold) which she had used for comparison: see [166] above (hereinafter referred to collectively as "the comparables"). The comparables reflected capital rates as low as 4.2% (the Monarch Lee Garden because it was a distressed sale) to as high as 8.3% (for the Merlin).

182 Mahaphon's use of hotels at beach resorts and freehold hotels as comparables was also criticised by the defendants as inappropriate as the Westin Grande Sukhumvit is a city hotel.

183 The defendants argued that Mahaphon's valuation was unreliable as her report contained computational errors as follows:

(a) The ADR or ARR of THB4,700 from the comparables she used was incorrect. She admitted it should have been THB4,400 (this is incorrect as Mahaphon subsequently[note: 68] retracted her earlier concession and explained that her figure of THB4,700 was based on weighted average, not average room rates).

(b) She computed the percentages of projected revenue and expenses extracted from the comparables inconsistently and incorrectly by taking, in some instances, percentages of total revenue and, in other instances, percentages of room revenue.

(c) She failed to take into account the base management fees and central marketing distribution fees in every year of her DCF analysis, thus overstating the net operating income ("NOI") and consequent value of the hotel by 9.7%.

(d) She was wrong to average out the two valuations she had obtained using different approaches.

184 Further, Mahaphon's report only took into account events and market data up to 2002, leaving out significant events such as the SARS crisis in 2003, the Iraq war and avian influenza epidemic, as well as Thailand's economic performance and hotel occupancy rates since 2003. She failed to take into account other hotels that were being renovated at the same time as the hotel and would have been competitors, *viz* Plaza Athenee, JW Marriott, Grand Hyatt Erawan and Swissôtel Nai Lert Park. Mahaphon had also failed to take into consideration the supply of hotel rooms coming on-stream in 2006/2007 including the Sofitel Sukhumvit, Crowne Plaza, Le Meridien Surawong and Imperial Queen's Park. The defendants could not understand why Mahaphon valued the hotel based on 2002 information when her task was to value it as if it was sold in 2006.

Evaluation of Mahaphon's evidence

185 I am of the view that the defendants' critique of Mahaphon's direct capitalisation approach was unfounded. One has to remember that, eventually, when she reconciled the figures from the different approaches that she had used, she placed reliance on the DCF method under the income approach. Hence, I see her calculations using the direct capitalisation approach as no more than a guide to allow her to check her final valuation figure against other methods.

186 As for the computational errors, I do not find them to be a hindrance nor to make Mahaphon an unreliable expert witness. However, in the course of her cross-examination, Mahaphon revealed that, unlike Simister, she did not accept and use the defendants' projections that were given to Murray; she moderated some of the numbers in the defendants' projections and attempted to "grow" the Westin Grande Sukhumvit's income from 2003 to 2006 based on market forces and based on her own information and/or knowledge of the supply and demand situation with a cut-off year of 2002. However, if, as she said, she was "growing" the income of the hotel as the Westin Grande Sukhumvit from 2003 to 2006, she cannot, as she did, ignore actual data and information after 2002. Overall however, Mahaphon's projections of future occupancy, room rates and EBITDA for the Westin Grande Sukhumvit were more conservative than the defendants' own projections. As Mahaphon is a Thai national resident in Bangkok, some credence must be given to the fact that she would know the local situation better than non-resident valuers, although I am mindful that Chee spent two days in Bangkok in October 2004 visiting the hotel and its 15 or so competitors, while Ling revisited Bangkok in mid-January 2006. As a result of these visits, both valuers revised their valuations upwards.

187 What is significant to note about Mahaphon's calculations is the fact that she had relied on 2002 actual figures from the defendants to project the figures for the period from 2003 to 2006, rather than used the defendants' projected figures for the same period. This differs quite significantly in approach from Simister as well as the defendants' experts' approach, to which I will come to below.

188 Apart from these general observations, I do find Mahaphon's calculations, based on 388 rooms, a stabilised ARR of THB4,830 and exclusion of CAPEX, to be questionable. I will deal with these three factors globally later on in the judgment, after I have finished analysing the other experts' evidence.

Simister's evidence

189 Simister was the second expert witness called by the plaintiff. He was the chairman of CB Richard Ellis (Thailand) Co Ltd when he gave evidence before the court. In a career spanning almost 30 years, Simister had worked in London and Hong Kong before moving onto Thailand in 1991 where, 14 years later, he assumed the role of Chairman. Interestingly, his *curriculum vitae* stated that he was "one of only two foreign valuers in Thailand listed by the Securities & Exchange Commission to conduct valuations for public purposes" since 1995.

190 Simister used what he termed the income capitalisation approach to arrive at his valuation of the hotel. He stated:[note: 69]

> A set of basic information comprising both operating income and expenses of the subject premises in the last few years is provided by the client. A comparable of income generated from other similar properties in the market is also gathered from both internal and external sources, to consider whether any adjustment of the information provided is needed. The capitalization rate applied to this valuation is based on our discussions with both local and international real estate investors and developers. Interest rates earned from Government bonds are also a factor in considering the most appropriate capitalization rate applied to specific property. The overall investment climate of the real estate market sector, as at the date of valuation, is taken into account as a risk factor, to consider a reasonable capitalization rate. The factor is based on our previous experience in the real estate market sector.
>
> Secondly, the annual cash flows may be discounted for the holding period and the reversion made at a specified yield rate. ...
>
> ... The discount rate applied to this cash flow is based on the lending rate, marketability of the property and other risk factors, i.e. overall economic climate, investment potential etc. as at the date of valuation.

191 While ostensibly using the same income approach as Mahaphon, Simister differed from her analysis in the following ways. First, Simister commenced his DCF analysis from 2007 onwards, while Mahaphon started her analysis from 2002 onwards. Second, unlike Mahaphon who used the actual figures from the defendants for 2002 and projected the hotel's income from 2002 to 2006, Simister merely took the defendants' projections, done in 2002, for the year 2007 onwards.

192 Consequently, what Simister did was to calculate the hotel's projected income for the period from 2007 to 2015 (a period of nine years). Subsequently, he took the hotel's income in 2015 to be what he termed the "reversion year". Based on his calculations, the hotel's net operating income in 2015 (or the reversion year) would be THB422,488,000. Next, he applied a terminal capitalisation rate of 10% to this income over the remaining term at reversion, *viz*, for the period from 2015 to 2042. (Mahaphon subsequently explained that a termination capitalisation rate meant that an investor who sold the hotel or exited from his investment in the hotel in ten or more years from now would want a higher yield of at least 10% to reflect the greater risks involved; the hotel would have aged more and economic conditions could be very different ten years hence.)

193 Simister calculated this income, or what he termed the "terminal value" or "reversional value" to be THB3.88bn. However, that was not the end of his inquisition. Simister then applied a discount rate of 12% to arrive at the net present value of the terminal value or reversional value, which he calculated to be THB1.399bn. He had to add this terminal or reversional value to the income of the hotel for the period between 2007 and 2015. He then arrived at the total capital value of the hotel of THB3.406bn.

194 After arriving at the total capital value, he had to take into account the capital value of the department store (since this was a leasehold interest in the land which included the department store as mentioned earlier). Next, he had to exclude the present value of the existing land lease, the present value of the deposit of the land lease for another 20 years, and the present value of the rent for the land lease for another 20 years. With these additions and deductions made, he arrived at the final figure of THB3.5bn.

195 Quite importantly, during cross-examination, he admitted that the calculations done in his report were inadvertently based on an incorrect exchange rate assumption. The relevant passage from the notes of evidence is as follows:[note: 70]

> Q: In working out your valuation, Mr Simister, did you attempt to grow the performance of the hotel from 2002 to 2006 based on the supply situation in Bangkok?
>
> A: In my valuation I have actually taken a discounted cash flow starting in 2007. So I have not actually modelled the income between 2002 and 2007.
>
> Q: Your 2007 number is a number taken from the Starwood projection; is that not correct?
>
> A: It is actually broadly correct. It is actually discounted from the Starwood projections, as *we had misunderstood the basis on which the projections were calculated.*
>
> Q: What is the discount that you put into place?
>
> A: If I can explain that. I understand subsequently that the Starwood projections were based on Thai Baht rates which were then converted to US dollars at a rate of 47. When we came to take these figures for the valuation in April 2005, we multiplied the US dollar figures by 39.
>
> So to – the difference in the exchange rate, that has actually discounted our cash flow quite significantly from Starwood's projections, although it was not our intention to do so.
>
> Q: So the only discount that you took on board, if you call it a discount, is a currency difference; would that be correct?
>
> A: That is correct. *It arose out of a misunderstanding or an error.*
>
> [emphasis added]

196 In short, the defendants' projections were based on US dollars, but the defendants had converted the Thai baht rates to US dollars at the rate of THB47 to the dollar. However, when Simister took those base figures from the defendants for the purposes of his valuation, he had erroneously assumed that the exchange rate used by them was THB39 to the dollar and so, he had multiplied the US dollar figure by 39 (instead of 47) to get the rates in Thai baht.

197 Like Mahaphon, Simister made assumptions for other line items in the DCF analysis, such as the operating costs and expenses, department profit, undistributed operating expenses, management fee and other deductions. Nothing much turned on the assumptions that he had made because these assumptions were essentially a judgment call which Simister, as an expert, was entitled to make. However, what is pertinent is his assumptions made for the following key factors:

> (a) total number of guests rooms: 388;

(b) stabilised ARR (for the year ending December 2006): THB 4,680; and

(c) stabilised occupancy rate: 76%.

198 Simister's calculations are summarised in Annex B of this judgment (spread out over three pages due to constraints of space).

199 Of these three factors, the only one worth highlighting would be the stabilised ARR which he assumed to be THB4,680 based on the projections provided by the defendants. However, as stated earlier, Simister acknowledged that he had used the wrong exchange rate (*ie*, 39 instead of 47, which was what the defendants had used to convert the figures from Thai baht to US dollars). If this error was corrected, and assuming that Simister's intention was to use the defendants' own projections for 2007 onwards all along, one would have to say that the stabilised ARR that Simister should have used was THB5,640 (or US$120 x 47).

The defendants' critique of Simister's evidence

200 Although the defendants accepted the DCF method of valuation which Simister used, they would not accept his actual valuation, citing his lack of independence as a witness. The defendants complained that Simister was the chairman of CBRE Thailand and that his firm had previous commercial dealings with the plaintiff as it had carried out a valuation for GPH as of 31 December 2001.

201 As with Mahaphon's evidence, the defendants' counsel submitted that Simister did not take into account deductions for capital expenditure (or CAPEX) and demolition costs – two line items which the defendants' own experts took into account.

Evaluation of Simister's evidence

202 Simister's evidence raises two issues. First, his alleged lack of independence as an expert witness and second, the accuracy of his assumptions. On the first issue, one is reminded of V K Rajah J's judgment in *Vita Health Laboratories Pte Ltd v Pang Seng Meng* [2004] 4 SLR 162. There, Rajah J (at [79] to [90]) had to deal with a similar issue of evaluating the expert's evidence. Rajah J noted at [86] that:

> All said and done, it must be acknowledged that no amount of legislation or protocols can secure the integrity of an expert. In the final analysis, it must be the expert's professionalism that illuminates and buttresses his opinion.

203 In *Kaufman, Gregory Laurence v Datacraft Asia Ltd* [2005] SGHC 174 ("the *Kaufman* case"), Judith Prakash J was faced with a similar objection regarding the independence of the opposing party's expert witness. The court there had to determine the true meaning and effect of a particular agreement. This, in turn, required reliance on expert evidence pertaining to Japanese law. The plaintiff in that case objected to the defendants calling one Mr Okada as expert on the ground that Mr Okada was a partner of Freshfields Law Office in Tokyo and that Freshfields had been engaged to advise the defendants on the negotiations on the wording of that particular agreement.

204 At [31] of her judgment, Prakash J referred to the English cases of *Field v Leeds City Council* [2000] 1 EGLR 54 and *Armchair Passenger Transport Limited v Helical Bar Plc* [2003] EWHC 367 (QB) for the proposition that:

> [W]here an expert witness has a connection with one of the parties or otherwise has an interest

> in the outcome of the proceedings, then, *although such interest does not automatically render his evidence inadmissible, the interest may nevertheless affect the weight of the evidence*. [emphasis added]

205 Prakash J admitted the evidence of Mr Okada, but went on to discuss the weight to be attributed to his evidence. She noted at [33] of her judgment:

> [W]hilst Mr Okada's independence cannot be impugned, I cannot dismiss the possibility of a conflict of interest entirely. The defendants might say that there is no question of a suit by them against Freshfields should they lose this case because the case is only about documents, but that is not the whole picture. The defendants must have incurred substantial costs in defending this action and, if they lost it, they will have to pay the plaintiffs' costs as well. If that situation arises and the defendants judge that the advice given to them on the interpretation of the Letter Agreement caused them to defend the case and unnecessarily incur costs, they might then consider whether they may be able to recover those costs by taking action against Freshfileds. This may be a remote possibility but it is a distinct one. Whilst this potential conflict of interest is not sufficient for me to rule out Mr Okada's evidence entirely, bearing in mind that he does have the requisite expertise, *it does mean that I should scrutinise his evidence with care where it conflicts with that of Mr Abe* [the plaintiff's expert] *and should accept such conflicting opinions only where I find them to be reasonable, measured and backed by authority or where Mr Abe's contrary opinion was clearly unsound or had not been properly arrived at after consideration of all relevant factors.* [emphasis added]

206 Counsel for the plaintiff rightly cited the case of *Macro v Thompson (No 3)* [1997] 2 BCLC 36 in support of their contention that it is actual partiality, rather than the appearance of partiality, that is the crucial test in deciding whether the evidence of an expert witness should be discounted. In that case, although the expert-auditor had been found to have been extremely imprudent in his dealings with the solicitor acting for the companies and the first defendant, it had not been shown that the auditor had yielded sufficiently to the solicitor's influence for the valuation to have been invalidated on the ground of lack of impartiality: see 64–67 of the report.

207 Several guidelines can be gleaned from these authorities. First, no amount of legislation and procedural safeguards can ensure the integrity of an expert witness. It boils down to the expert witness's professionalism and his ability to let his opinion stand up to scrutiny in an adversarial court. Second, an allegation of lack of independence does not warrant an expert's evidence to be inadmissible (and certainly, counsel for the defendants are not going to that extent) but it may affect the weight of his evidence. Third, I found Prakash J's treatment of the witness, as highlighted in the passage above, to be particularly useful. As with the treatment of Mr Okada, the court in the present case has to scrutinise the evidence given by Simister to evaluate his evidence with care and to accept any conflicting opinion from him only where it is "reasonable, measured and backed by authority".

208 On the whole, I am satisfied that Simister's evidence as an expert witness was not improperly tainted by a lack of independence despite his past connection with the plaintiff through CBRE. Unlike the strong degree of nexus between the witness and Freshfields in the *Kaufman* case ([203] *supra*), Simister's past brush with the plaintiff was in the ordinary course of business and I see no reason to paint a more sinister picture than that. Moreover, the incident over the exchange rate further assured me that Simister was not a witness who had been swayed by his past connection with the plaintiff. As explained above, the reliance on a lower exchange rate inadvertently resulted in a *lower* valuation than would have been the case. Even though this was not in the plaintiff's favour, Simister did not retract his evidence (although he was given a chance to do so).

209 However, for reasons I shall elaborate below in my findings on the five key factors, I find (as I did with Mahaphon's evidence) his reliance on 388 rooms, an ARR (or ADR) of THB4,680 and the exclusion of a CAPEX deduction to be doubtful.

Chee's evidence

210 Chee was the first of two valuers called upon by the defendants. Even though she is based in Singapore (just as Ling is), her resumé is no less impressive. She is the Senior Vice President of Jones Lang LaSalle's Hotels Corporate Advisory Services and has had over 18 years of experience in the Singapore and South Asia property markets providing advisory services to clients that cover a wide spectrum of property assets.

211 As with Simister and part of Mahaphon's analysis, Chee used the DCF method to arrive at her valuation. Chee made the following assumptions in her DCF analysis:

(a) that the number of available rooms is 364;

(b) that the stabilised occupancy rate is 76%;

(c) that the ADR as at 1 January 2007 is THB4,640 and is growing at between 2.9% and 3% from 2007 to 2042; and

(d) that the discount rate is 12.5%.

212 Based on the DCF approach, Chee valued the hotel at THB2.566bn. She then added THB293m being the value of the leasehold interest in the retail space for the remaining ground lease and renewal period of 35.29 years. Chee then summed up these two values and made the following deductions to the combined value of the hotel and the retail space:

(a) total ground lease payments that will be incurred for the remaining period of the existing ground lease and the renewal option period, which discounted to 2007 dollars amount to a total of THB43.1m;

(b) the cost of renewing the lease upon the expiry of the original lease on 16 April 2022, discounted back to 2007 dollars (based on a review of the current land values for Bangkok as well as the existing statutory value of the subject land parcels, Chee estimated the cost of renewing the lease at THB86.0m); and

(c) demolition costs incurred at the expiry of the lease renewal on 16 April 2042, which discounted to 2007 dollars amount to a total of THB35.5m.

213 Based on the above exercise, she arrived at the final value of THB2.695bn: see Annex C of this judgment for a summary of Chee's calculations in the DCF analysis (spread out over two pages due to constraints of space).

214 What is interesting about her evidence is that, and unlike the plaintiff's experts, Chee made deductions for CAPEX and for demolition costs. For demolition costs, and as stated above, Chee made a provision of THB35.5m discounted to 2007 values. She made CAPEX provisions of THB222m, THB488m and THB400m for 2014, 2024 and 2034 respectively in her DCF analysis. Under examination-in-chief, Chee gave the following explanation for her CAPEX provisions:[note: 71]

Q: I would like your comments on this CAPEX item, your views on whether these amounts are reasonable, and if so why, and if you have any comments on that document that we just introduced, which is the ISHC report. You might have a copy.

A: Your Honour, with reference to the CAPEX deduction that I have made in my cash flow analysis, you will note that the total capital expenditure that I have deducted out of the whole cash flow against the total revenue for the entire period, it is only 2.7 per cent. Whereas if you – if I refer to this document here, I think on page [53] in the middle of the paragraph, it says specifically a full service hotel span [*sic*], an annual average of 6.1 per cent of total revenue.

So, I mean, my estimate is only 2.7 per cent of the total revenue of the entire period. So I believe my estimation or the deduction of the capital expenditure in my cash flow analysis is rather conservative.

...

Q: Would you like to explain how you went about arriving or determining the figures ... for capital expenditure?

A: This amount of capital expenditure is derived from the total renovation cost which the subject property incurred in the period 2002 to 2004. What I have taken is that to assume for the first 10 year period the capital expenditure to be adopted or to be deducted, it is about 50 per cent of what was spent in – between the years 2002 and 2004. And then this number is actually grown by inflation from the year 2004, a number which is about 370 million, and I have taken 50 per cent of that.

Then you find on page 56, 2024, 20 years after the initial major renovation is done, I have just adopted the 100 per cent, but grown at inflation.

And then the next one will be 2034, which is again 50 per cent.

Q: These are adjusted figures, including inflation?

A: Yes. These are adjusted figures.

Q: What inflation rate have you used, Ms Chee?

A: 3 per cent.

…

Q: Have you used any other renovations in Bangkok as a reference point, and, if so, which?

A: I have also made reference to some of the other renovations carried out in the other 5-star hotels in Bangkok. I think I have made reference to some of them in my report, one of which I recall is JW Marriott, where they plan to spend about 300 million renovation.

Another one is Dusit Thani, where they are spending 650 million.

215 Documents were tendered in the course of the hearing to support those figures cited by Chee under the examination-in-chief with regard to the other hotels' expenditure on renovations. For ease

of reference, the other hotels' estimated or reported renovation costs are as follows:[note: 72]

Hotel	**Year**	**Estimated total renovation cost**	**No of Rooms**	**Average renovation cost per room (US$)**
Swissôtel Nai Lert Park	January 2004	THB650m	338	48,077
JW Marriott	NA	THB300m	440	17,045
Four Seasons Hotel	December 2004	THB245m	338	18,121
Chee's CAPEX projections	2014	THB222m	364	15,247
Chee's CAPEX projections	2024	THB488m	364	33,516
Chee's CAPEX projections	2034	THB400m	364	27,473

216 From the above table, one sees that the three CAPEX deductions (*viz,* THB222m, THB400m and THB488m) made by Chee either fall between, or below, the sums incurred for renovation by the other hotels (*viz,* THB245m to THB650m). On a per room basis, her CAPEX deductions (US$15,247 to US$27,473) are also within (or below) the US$17,045 to US$48,077 range incurred by the other hotels.

217 On the issue of demolition costs, Chee had this to say under examination-in-chief:[note: 73]

Q: You have deducted 35.5 million Thai Baht, discounted in [2007 dollars] –

A: Yes.

Q: – as the demolition cost of the subject property at the end of its ground lease?

A: Yes. Correct.

Q: Can I ask you to explain why you have done this, and how you have arrived at this figure of 35.5 million?

A: Why I have done this is that in the lease agreement there is the obligation from the lessee to return the property, or rather to demolish whatever existing buildings they have on site when they return the land back to the lessor.

As for the amount of 35.5 million, this is an estimate by our company as to what the demolishing costs of that building will be – actually, the estimates done today, and then we have grown it to year 2007 assuming that that will be the amount that they –

Q: Have you had reference to any demolition numbers in arriving at this figure?

A: That would have been based on advice from my Thailand colleagues who handle such matters in our Thailand office.

218 It is worthy to note that a clause in the lease[note: 74] states:

The Lessee agrees to remove the building and other dominant Lessee from the lease land and deliver the lease land in a good state of repair to the Lessor and/or the Lessor's assignee on the time of expiration of such lease land or consent to revert the ownership to the building with any structure, public utilities, equipment, and facilities to the Lessor and the Lessor's assignee.

219 Under cross-examination, Chee was invited to change her evidence that it was mandatory for the building to be demolished before the land was returned to the landlord.[note: 75] Chee stood firm on her testimony and explained to the court that under that term, the lessor's consent was necessary if the land was to be returned together with the building, and whether or not the lessee could obtain the lessor's consent was an unknown.

220 Subsequently, under cross-examination, Chee was asked about whether there was a need for demolition costs in the first place. Counsel for the plaintiff informed Chee that Mahaphon had earlier given evidence that, in Thailand, if a contractor was asked to demolish a building, the contractor would in fact pay for the right to demolish the building because there was salvage value in the construction materials and in the FF&E which remained on site. Reference was then made by counsel to two letters from a company called Nawarat Patanakarn Public Company Limited ("Nawarat") to the plaintiff in relation to the demolition issue (dated 31 December 2005 and 10 January 2006).[note: 76] The letters essentially stated that Nawarat would pay a minimum of THB25.2m, being the "desktop" valuation of the movable items on site, for the right to salvage the moveable items in the building. In addition, the letter stated that Nawarat would pay THB4m for the right to demolish the building. When asked for her opinion on this letter, Chee roundly stated, "I mean, it is stated in the letter. I do not know what the brief is given to them."[note: 77]

Ling's evidence

221 The final of the four experts to give evidence on the valuation of the hotel was Ling who is the managing director of Hospitality Valuation Services International ("HVS International"). Like Chee, Ling is based in Singapore but his credentials do not pale in comparison to the plaintiff's experts either. He is a member of both the Australian Property Institute and the Singapore Institute of Surveyors and Valuers. He has had experience and competency in a wide range of markets and areas, including property valuations and investment sales. He has also advised on projects in various parts of South East and North East Asia.

222 As with the other experts, Ling employed the DCF analysis for his valuation. The key assumptions he made were as follows:

(a) that the number of rooms is 364;

(b) that the stabilised ADR (from 2006 onwards) is THB4,628;

(c) that the ADR growth for the period from 2006 to 2015 varied, from 0.08% to 2.55%, depending on his detailed penetration analysis;

(d) that the occupancy rate is 80% for 2006, 79% for 2007 and 73% for 2008, before stabilising at 74% for 2009 onwards; and

(e) that the discount rate is 12%.

223 With the above key assumptions and using the DCF analysis, he arrived at the value of THB2.585bn for the value of the hotel. As with Chee, Ling made certain CAPEX deductions to arrive at this figure. To be more specific, Ling's CAPEX deductions were THB90m in the year 2014, THB110m in the year 2022 and THB134m in the year 2030. Under examination-in-chief, he was (like Chee) asked to elaborate on these CAPEX deductions:[note: 78]

Q: May I ask why you have taken into account CAPEX in your DCF computation?

A: Yes. We have taken into account CAPEX in our computation because it is part and parcel of hotel ownership. Because if you look at the hotel ownership over time, owners will have to update their hotel or upgrade their hotel periodically to keep up with the market.

For instance, your F&B concept, let us say, after six or 10 years, will need to be refreshed, your lobby needs to be refreshed, there could be technology change … Compliances with government regulations changes, such that – my experience in hotels in Hong Kong – before, you can even use seawater to – for air conditioning system, and suddenly over time the regulation change. So you need to upkeep the hotel to the current standard. That is all.

Q: May I also ask how you came about with the number of US$6,000 per room?

A: The number of US$6,000 is simply based on our experience, particularly a hotel of 4- and 5-star standard would require expenditure of, say, 5,000 to 25,000 US dollars a room to renovate [over] a period of time. And we have taken a more conservative view of, say, $6,000.

224 So rather than using the actual cost of renovation as a base (which Chee did), Ling preferred the option of calculating CAPEX based on US$6,000 per room, and at intervals of eight years rather than 10.

225 Another point of distinction in the evidence from Chee and Ling lies in Ling's quantification of demolition costs. While Ling agreed with Chee that demolition costs will have to be incurred at the end of the lease in 2042, he pegged the quantum at THB15.3m (instead of Chee's THB35.5m). Again, under examination-in-chief, Ling was given an opportunity to explain why he chose this figure:[note: 79]

Q: May I ask why you have done so, and what basis do you have for the figure of 15 million?

A: Well, when we are performing the calculations, we would look at – from the point of view of a prudent investor who will look at the subject property as an investment. When we have taken off demolition costs, it is simply – we were of the opinion that at the end of the lease period, the hotel building will have been 50 years old, and it is every reason to believe that most likely the building will have to be torn down to give way to either a new hotel, or it could be – at that point in time the market could have changed and therefore there could be a change of use to residential condominium or an office building.

226 To further support his view that a demolition of the building would be necessary at the end of the lease, he cited the experience of the ANA, the Marco Polo and the Equatorial hotels in Singapore

which were built in the 1960s and 1970s and which had recently been demolished to make way for new developments such as residential condominiums.

227 Ling was the only one out of the four experts on valuation who conducted a penetration or market segment analysis to derive the occupancy rate and ADR of the hotel. In his report, he went through a fair bit of detail to analyse the market penetration of the Westin Grande Sukhumvit by segment, *viz*, corporate, individual leisure, group leisure and MICE segments, and projected the penetration for the period from 2004 to 2008. Using this, he then projected the demand capture and occupancy for each of the segments for each of those years. This was then built into his DCF analysis. Although Mahaphon claimed to have done a penetration analysis, no evidence of the same was produced before the court. Further, Ling's firm specialised in hotel valuations.

228 In addition to the value of the hotel at THB2.585bn, Ling added the projected income that the hotel would potentially receive from its remaining lease to Robinson, the department store. He split the period into two parts. First, he analysed the period from 2007 to 2020, as 2020 is the year the current retail lease expires. Next, he analysed the potential income from the rental from 2021 to 2042. For both periods, he used a discount rate of 10% to calculate the net present value. According to Ling, the net present value of the rental for the two respective periods are THB14.03m and THB269.07m respectively, bringing the total potential realisable value for the rental of the retail portion of the property to THB283.1m.[note: 80] Next, he combined the value of both the hotel and the retail portions and, in doing so, arrived at the value of THB2.868bn before deducting demolition costs of THB15.33m, resulting in the final figure of THB2.85bn. A summary of Ling's DCF analysis can be found at Annex D of this judgment (over two pages due to constraints of space).

The plaintiff's critique of Chee's and Ling's evidence

229 Since the plaintiff's criticisms levelled against both Chee and Ling overlapped to a significant extent, I would deal with their submissions on both these experts together. The plaintiff roundly criticised the defendants' valuations for a number of reasons.

Room configuration and renovations

230 First, they submitted that the defendants' experts had wrongly assessed the number of rooms to be 364 instead of 388. Relying on the LOI and other contemporaneous documents such as the *proforma* provided by the defendants to the plaintiff[note: 81]and the "Final Project Approval Request" document submitted by the defendants,[note: 82]counsel argued that 388 was the number of rooms that the plaintiff had intended to operate on and, therefore, they submitted that the assessment of damages must be based on what the plaintiff had lost by reason of the breach. They submitted that the renovations and decisions taken by Pongphan, the Narulas and the defendants on the operations of the hotel were irrelevant and should not be considered. In short, if the plaintiff intended for the hotel to have 388 rooms, then the loss should be assessed based on 388 rooms.

231 Related to this issue of the number of rooms, counsel submitted that the defendants' experts erred in their assessment of the time taken to complete the renovations. It was common ground that the bulk of the renovations were completed at the end of 2004 while the renovations to the spa were completed sometime in May 2005. It was also not disputed that the hotel was not closed during the renovations; rather operations continued during the renovations with only a few floors being shut down for the purposes of the renovations.

232 The plaintiff argued that the defendants' experts had made the wrong assessment by including the actual time taken for renovations of the hotel, instead of assessing the time for renovations

based on the original scheduled date of completion of the renovations. In the defendants' closing submissions, counsel for the defendants pointed out that the delay was due to the defendants' hiring of an international designer by the name of Hirsch Bedner. This caused the renovations to start only in September 2002, about three to four months later than originally scheduled. Plaintiff's counsel argued that between the plaintiff and the first defendant, it was agreed that the renovations would have been completed by 1 April 2003 and that the plaintiff's "intention was to have the renovations completed as soon as possible, and hence there would be little reason for [the plaintiff] to delay the start of renovations by 3-4 months for the purposes of engaging Hirsch Bedner".[note: 83]

233 Further, the defendants had submitted that the renovations took longer than expected because the scope of the renovations were more extensive than initially planned, a point substantiated by Monahan when he came onto the witness box.[note: 84] Plaintiff's counsel, on the other hand, argued that an increase in the scope of renovations and delay in carrying out the retrofitting was certainly not in the plaintiff's experience. They then proceeded to cite Murray's testimony where he stated that he had completed the renovation of HHH in time previously. They also argued that if Murray had been in charge, he would have ensured that the renovation schedule would be adhered to and would not have let the renovation schedule slip.

Reliance on actual configuration instead of parties' intention in 2002

234 The second criticism levelled against the defendants' experts, which is related to the argument regarding the number of rooms, stems from the fact that they had allegedly relied on the actual performance of the hotel for 2003 to 2005 instead of what the parties had intended back in 2002. Counsel for the plaintiff submitted that the damages must be assessed at the time of the breach and, consequently, the basis of the valuation should have been on what the parties had intended (including the configuration of 388 rooms) rather than what the hotel eventually turned out to be. For this, the plaintiff relied on the *proforma* projections provided by the defendants on 15 January 2002. Counsel claimed that this was what was available to the parties as at the date of the breach.

235 In their defence, the defendants submitted that the *proforma* was merely a "desktop" projection of sorts and prepared before they had a chance "to fully understand how the re-positioned Hotel would perform". They also argued that the projections did not take into account subsequent events such as the SARS epidemic, the Iraq war, the avian influenza epidemic and the September 11 incident.

236 Counsel for the plaintiff submitted that these events would have had minimal impact on the configuration of the hotel that Murray and the plaintiff wanted. They cited passages from the testimony of the various experts (including the defendants' experts) where they had said that the impact of the events were minimal and short-term.

Incorrect view of competitive supply coming into market

237 The third criticism levelled against the defendants' experts is that they had over-emphasised the upcoming supply in the five-star hotel market. They submitted that both Chee and Ling had placed reliance on the upcoming supply but on further analysis and questioning during cross-examination, it transpired that the bulk of the alleged supply had in fact been pushed back, stalled, or cancelled. In order to forward their argument, counsel submitted that this error was not surprising given that, unlike Simister and Mahaphon, both Chee and Ling were Singaporeans based in Singapore and their qualifications paled in comparison to that of Simister, since he was the only one of two foreign valuers accredited by the Securities and Exchange Commission of Thailand.

238 Apart from this issue with the defendants' experts' qualifications, counsel further analysed the problems and difficulties with the upcoming hotel supply stated by Chee and Ling in their respective reports. Counsel pointed out that Chee contemplated 4,643 rooms coming on board between 2005 and 2007. However, under cross-examination, it transpired that most of the expected upcoming supply would not materialise. They noted that, after rigorous cross-examination by counsel, Chee had to concede that the increase in competitive supply was only about one-third of what she had suggested in her report. With Ling, they pointed out that he expected competitive supply of 1,930 rooms coming on-stream from five hotels in 2007 to 2008. However, counsel pointed out that in his earlier report, Ling had stated that this would be coming on-stream between 2005 and 2007. Counsel further highlighted that during cross-examination, Ling could not give a valid explanation for one of the discrepancies spotted by counsel between the original and the updated reports. Based on this, counsel submitted that Ling had been "disingenuous" in his opinion and that this would cast serious doubt on his impartiality. Further, for both experts, counsel submitted that they had looked at only the new supply but did not give due regard to the growth in demand for five-star hotel rooms during the same period.

Deducting CAPEX

239 Counsel for the plaintiff submitted that the deduction of capital expenditure or CAPEX by the defendants' experts constituted a "major error", a "fundamental error" and a "novel concept in the valuation of a property". They pointed out that CAPEX is not included as part of the International Valuation Standards ("IVS") but yet, Chee noted it would be prudent to make such a deduction. On the other hand, Ling's evidence was that IVS was not all-encompassing and that a prudent investor would want to take into account the relevant CAPEX deductions in a valuation.

240 The plaintiff submitted that Chee's inclusion of the CAPEX deduction resulted in a reduction of the valuation by THB160m while for Ling, the valuation was reduced by THB63.4m as a result of this deduction.

241 In this regard, the plaintiff relied on an e-mail from Dr Jan A deRoos[note: 85] to Murray. Dr deRoos is a HVS International Professor of Hotel Finance and Real Estate at Cornell University's School of Hotel Administration. The e-mail was a reply pursuant to a query sent by Murray to the Cornell University during the course of the assessment hearing, enquiring if the University's Hospitality Research Department was aware of, amongst other things, "[a]ny working paper or published articles that would refute the idea of deducting future renovation costs from the value of the hotel".

242 Counsel for the plaintiff sought to rely on this e-mail to argue that Dr deRoos had stated that "hotel cash flow typically has a deduction for a FF&E Reserve representing the estimated long term cost of renovations, and the value of the hotel being estimated has accordingly already been reduced by such deduction".[note: 86]

243 In order to appreciate the thrust and effect of the e-mail, I find it necessary to quote from the pertinent parts of the e-mail:

> Mr Murray,
>
> I am not aware of any publications that refute the deduction of future renovations from value. The definitive valuation text in the US is "Hotels and Motels – Market Studies and Valuation" by Rushmore and Baum. …
>
> In general, the dominant valuation paradigm is to produce estimate of annual *cash flows* (not

accounting earnings or net profit), based loosely on the Uniform System of Accounts and to then use DCF or a capitalization rate to transform the flows into a stock of value. The cash flow typically has a deduction of a 'normal' long-term Capital Expenditure or FF&E reserve (4% of gross revenues is standard), thus the value being estimated has been reduced by the estimated long term cost of renovations.

An alternative methodology (not mainstream) [is] to produce an estimate of value *before* a deduction of a 'normal' long-term Capital Expenditure or FF&E reserve, and then explicitly deduct these costs.

244 Further, counsel for the plaintiff also submitted that even if the defendants' experts' deduction of future CAPEX was correct, it did not take into consideration the fact that there were typical hotel investors like the plaintiff or Lehman Brothers who would only look at three- to five- year investment timelines and, as such, they would not consider the possibility of incurring future renovation costs.

245 Counsel for the plaintiff then submitted that for the DCF method, a valuer would only look at EBITDA and not debt financing. They pointed out that Chee had admitted that future CAPEX could be financed by future borrowings. However, debt service was never included when one considered EBITDA. Thus, they concluded, on a strict application of the DCF method, that CAPEX should not have been considered at all.

246 The plaintiff's allegations against the defendants' experts on CAPEX did not end there. Counsel went on to submit that the reason why the defendants' experts had adopted the approach of calculating the entire projected cash flow until 2042, rather than applying a terminal capitalisation rate after a certain number of years (as Simister and Mahaphon did) was simply because using the latter method would not have enabled them to incorporate a CAPEX deduction. They also added that the defendants' experts failed to consider that any improvement to the hotel after a major renovation would result in an uplift of the hotel's performance, since they did not take into account a corresponding uplift in terms of revenue after the CAPEX deductions were made.

Investment value as opposed to market value

247 Counsel for the plaintiff alleged that the defendants' experts erred because they had considered the valuation from an investor's point of view, instead of determining what the market value would be. They harped on Chee's testimony under cross-examination when she said that the value that she ascribed to the hotel was "the value which a prudent investor might pay at that point in time".[note: 87]

248 Counsel submitted that the investment value would naturally be lower. An analogy was drawn with a situation where there was a contract for the sale of property. There, a normal measure of damages for breach would be the market value of the property at the time of the completion less the contract price: see *Lie Kie Siang v Han Ngum Juan Marcus* [1992] 1 SLR 476. Counsel for the plaintiff maintained that the defendants' experts' approach in this regard, *viz*, that any seller of a hotel would agree that the buyer could deduct from the price the cost of renovations that the buyer would have to perform in the next 30 years, was "ridiculous" because no deal could ever be closed if such a stance was taken.

Inclusion of demolition costs

249 Apart from the issues of room configuration and the deduction of CAPEX, this formed the third main prong of the plaintiff's attack. The plaintiff submitted that both Chee and Ling deducted the

costs of demolition despite the fact that the lease agreement for the land did not make it mandatory that the hotel would have to be demolished at the end of the lease. They submitted that it would therefore be erroneous to factor in demolition costs.

250 Further, counsel for the plaintiff submitted that Ling's analogy with the older Singapore hotels was not useful because Singapore had a different economic and geographical climate to Bangkok. In any event, the plaintiff relied on the contention that in Bangkok, due to the salvage value of construction materials, a contractor would actually pay for the right to demolish (rather than the owner of the building having to pay to have the building demolished). They highlighted that this was a fact that the defendants' experts, being non-resident in Bangkok, were not aware of.

The defendants' experts did not rely on the defendants' own up-to-date projections

251 The final criticism levelled against the defendants' experts comes in the form of the experts' erring in not giving due regard to the projections made by the defendants. Counsel for the plaintiff emphasised the fact that while the defendants' experts had said that it was important for them to rely on the actual performance of the hotel in arriving at the projections, little consideration appeared to have been given to the fact that such actual data was in respect of the two years that the hotel was under renovation. They further attacked the defendants' experts by saying that they had placed no emphasis at all on the defendants' own projections for the years 2006 and 2007. In their closing submissions, the plaintiff brought the court's attention to the fact that each of the defendants' witnesses, namely Monahan, Pongphan, Kirin, Chee and Ling, had all used the word "aggressive" to describe the defendants' own projections.

252 In their submissions, counsel for the plaintiff also spent a fair amount of time on the argument that the defendants had clearly tried to hide the defendants' 2006 budget for the hotel. In essence, they reminded the court about the efforts made by counsel before me, back in November 2005 to early January 2006, to ask for discovery of the 2006 budget documents. Initially, at that stage of the proceedings, counsel for the defendants took the stance that they had been instructed that no documents existed "as regards documents relating to the projected performance, income and revenue of the [hotel] for the year 2006". It was only upon the court indicating that it would draw an adverse inference if the projections were not produced that the defendants produced their 2006 budget.

253 In their closing submissions, the defendants submitted to the court that the 2006 budget figures were not reliable for various reasons. Counsel for the plaintiff then rebutted by arguing that none of the reasons for not relying on the 2006 budget could stand up to scrutiny.

Other minor criticisms against Chee and Ling specifically

254 For Chee, counsel for the plaintiff also levelled two specific criticisms of her valuation. First, they pointed out that she had used a discount rate (12.5%) which was higher than the other experts' (12%). Counsel for the plaintiff submitted that if a discount rate of 12% had been used (instead of 12.5%), Chee's valuation would have been THB 2.813bn instead of THB2.695bn. Second, counsel argued that Chee had to concede under cross-examination that her projections for the hotel were more conservative than for the Crowne Plaza on Sukhumvit Road – a hotel which Chee had considered to be capable of performing in the same range as the hotel – because her projections for the hotel were about 15%–20% lower than Crowne Plaza's projections.

255 With regard to Ling's evidence, counsel for the plaintiff argued that his penetration analysis was flawed because his stabilised occupancy rate was 74%, two percentage points lower than the other three experts' stabilised occupancy rate at 76%. The rate of 76%, as pointed out by counsel for the

plaintiff, was also reflected in the defendants' own projections in January 2002 and in the Final Project Approval Request. Counsel also sought to diminish the value of Ling's penetration analysis by pointing out that Mahaphon had done a similar exercise in her report, even though she did not produce the working papers as Ling had. Counsel then pointed out two other flaws in Ling's report, namely, his erroneous view of "induced demand" and his failure to consider unaccommodated demand.

Evaluation of Chee's and Ling's evidence

256 I will evaluate the issues relating to the number of rooms, deduction of CAPEX and demolition costs more globally under the next heading. I will first deal with the other aspects of Chee's and Ling's evidence.

257 On the issue of the renovations to bring the hotel to a Westin standard, I did not find that the defendants' experts' reliance on the actual time taken for renovations had a material impact on the final valuation. Similarly, I did not find the arguments that the plaintiff would have wanted a configuration with 388 rooms (rather than 364) with a smaller scope for renovations to be meritorious. In assessing the plaintiff's loss, the authority I have cited below at [465] quite clearly states that the court should not turn a blind eye to the actual events that transpire after the breach. Sure, it would be easy for Murray and the plaintiff to now profess – with the benefit of hindsight – that they would not have been as indulgent as Pongphan and the Narulas would have been in terms of the length of the renovation and its scope. Such proclamations are easy to make, difficult to justify and easily refutable. Relying on Murray's experience with a different hotel as a basis is completely irrelevant – one does not know the factors which went into the renovations over at HHH. One simply cannot compare an apple with an orange. In any event, there is no reason to believe that the Narulas and Pongphan would have been more accommodating – to the extent of becoming foolish with their investment – than what Murray would have the court believe. Having examined the track record of the Narulas and having seen Kirin and Pongphan in the witness stand, I have no reason to doubt that both of them would have been less headstrong than Murray when it comes to making decisions for the renovations in order to maximise profits for their investments.

258 Next, I move on to the allegation that the defendants' experts had provided an erroneous forecast of the upcoming supply.

259 On the issue of not being able to estimate upcoming supply, I will make the following observations. I accept that supply does not equate demand. If new five-star hotels come on-stream in Bangkok, it would be naïve to expect all the new supply to be absorbed as the plaintiff sought to suggest, based on ever-increasing tourist numbers according to statistics from the Tourism Authority of Thailand. Such increases in tourist arrivals cannot continue *ad infinitum*. On the other hand, I do not accept the gloomy picture painted by the defendants that occupancy rates and the ADR of the Westin Grande Sukhumvit would suffer because of a glut in five-star hotel rooms in the near future. Just as water finds its own level, I am of the view that five-star hotels have their own niche in the tourist/travellers market in Bangkok. There will always be a demand for luxury accommodation in Bangkok, although the demand will be finite and not unlimited.

260 Apart from these general observations, I do not give any weight to the argument that the defendants' experts must necessarily have paled in comparison to the plaintiff's experts. The fact that Chee and Ling were non-resident, or the fact that they did not obtain the special foreigner's licence that Simister did, was, to my mind, irrelevant. Both Chee and Ling visited Bangkok several times in the course of carrying out their respective valuations. They could also tap into their network of associate offices in Bangkok as well as their expertise in valuing other properties and projects in and around South East Asia.

261 Another main thread of the plaintiff's criticism lies in its argument that the defendants' experts had based their valuation on investor value rather than market value. It submitted that such an approach would have necessarily resulted in a lower valuation.

262 I saw no merit in this argument from the plaintiff. In fact, I found this argument to be no more than an attempt to grab at straws. Even though the plaintiff has stronger arguments on other issues, it baffled me as to why the plaintiff would spend precious time (and ink) on this argument. One needs only to turn to two sources to see the fallacy of this argument. First, in Stephen Rushmore & Erich Baum, *Hotel & Motels – Valuations and Market Studies* (Appraisal Institute, 2001) a book touted as the "definitive valuation text" by Dr deRoos and relied upon by the plaintiff in its bundle of documents – the author stated, at p 310 of the book:[note: 88]

> The market value of a lodging facility may include the value of its various components … Market value is estimated by applying the valuation process, and the opinion of value is usually communicated in a written appraisal report.
>
> In arriving at the market value of real estate, the appraiser considers three approaches:
>
> 1. The cost approach
>
> 2. The sales comparison approach
>
> 3. The income capitalization approach[.]

263 The income approach was utilised by both the plaintiff's experts and the defendants' experts in arriving at their valuation. The approach so chosen, apart from deductions for CAPEX and demolition which I will come to later, are commonly used to evaluate *market* value.

264 Further, the plaintiff's expert, Simister, had used jargon in his report which may also be taken to mean that he was interested in investor value and not market value. When describing the income capitalisation method which he chose, he had this to say in his report:[note:89]

> This [income capitalisation approach] is an approach by which an appraiser derives a value indication for an income-producing property by converting anticipated benefits, i.e. cash flows and reversions, into property value. This conversion can be accomplished in one of two ways: firstly, one year's income expectancy, or an annual average of several years' income expectancies, may be capitalized at a market derived capitalization rate or *a capitalization rate that reflects a specified income pattern return on investment and change in the value of the investment.* [emphasis added]

265 Therefore, I saw very little merit in the plaintiff's characterisation of the defendants' experts' approach as one coming from investor value rather than market value. The difference is an exercise in the splitting of hairs. All the four experts had been given identical briefs to conduct a valuation of the hotel. Each of them was also informed about the purpose of the valuation, *viz*, for the court to assess damages arising out of this action. Therefore, it seemed to me to be disingenuous and utterly unnecessary for the plaintiff to paint or characterise the defendants' experts' approach in such a manner.

My findings on the five key factors

The court's approach to these five key factors and its impact on valuation

266 At the risk of stating the obvious, and as it has been repeatedly stated by the experts when they were on the stand, valuation is not an exact science, but an art. Faced with the different calculations and methods of the four experts, the court is tasked to separate the wheat from the chaff. Apart from the minor cavils I had addressed above for each of the four experts, I will now give my findings on five factors. I deem and find these five factors to be key or at least instrumental in terms of affecting each of the four experts' valuation.

267 The approach I propose to adopt is as follows. I will make certain findings for each of the five key issues. Subsequently, I will incorporate these findings into the calculations of each of the four experts, leaving their respective assumptions untouched apart from these five key factors. In short, what I attempt to achieve through such an exercise is to harmonise the valuations as best as the court can by applying certain common assumptions to each of the four valuations. Based on these calculations, the court will arrive at four different valuations, one for each of the experts. These valuations would be, for want of a better phrase, what the court would deem to be provided by each expert *if* they had applied the common assumptions on the five key factors. Subsequently, I will take the average of these four values to be determinative of the value of the hotel.

Methodology to be used: Discounted cash flow

268 The methodology to be used can be quite easily dealt with. Apart from Mahaphon who had included other approaches to valuation in her report, all the other three experts had chosen the DCF approach. Even Mahaphon had, after going through all the other methods, concluded that the DCF approach was the most appropriate. It is also one of the recognised methods of valuation in Steven Rushmore's book ([262] *supra*). That being the case, I saw no reason to depart from the majority of the experts' views and will adopt the DCF approach.

269 However, the devil appears to be in the details of applying this approach. One of the main planks of the plaintiff's discontent with the defendants' experts was in the latter's preference for calculating the projected income from the base year (2007) to 2042 rather than adopting what Simister and Mahaphon did, *viz*, to project income for a certain number of years and then using a terminal capitalisation rate to calculate the projected income. Counsel for the plaintiff suggested that the defendants' choice of ignoring the terminal capitalisation rate approach was sinister: *viz*, to allow them to make CAPEX deductions which they would otherwise not be able to do with the terminal capitalisation rate approach.

270 Taking a holistic view of the evidence and the bases for Chee and Ling in coming to the conclusion that they did, I was unable to find such a sinister motive. Indeed, the plaintiff has not been able to adduce evidence or authorities to show that an application of the terminal capitalisation rate is a definite must when applying the DCF analysis. In fact, on the contrary, I see nothing wrong in projecting the income for each year right through to 2042. It may appear tedious at first blush, but the net result appears to be the same. Hence, there can be little or no fault attributed to the defendants' experts' choice of projecting the income for each year and not applying the terminal capitalisation rate. Consequently, I will not disturb Chee's and Ling's method of valuation in that regard.

Whether the number of rooms should have been 388 or 364

271 A key issue in the difference between the valuation of the plaintiff's experts and the defendants' experts lies in the number of rooms on which they had based their valuation. For the reasons alluded to in [230] above, counsel for the plaintiff submitted that a fair and reasonable basis for assessment of the damages would be on that of 388 rooms, or what the plaintiff would have

intended the hotel to be.

272 The plaintiff's argument overlooked a very important factor – Monahan had testified (and this was not challenged by the plaintiff) that the Westin standard required a minimum size for its guest rooms. The corner rooms ($31m^2$ in area) of GPH would not have fulfilled the Westin standard, hence a reduction in the existing number, and a corresponding increase in the size, of rooms as well as the creation of suites including a presidential suite, would have been necessary if the hotel was to be rebranded as a Westin. The reduced number of rooms would be offset by the higher rates charged for the suites. Consequently, I do not accept the plaintiff's argument that the hotel should be valued based on its configuration before renovations. My view is reinforced by the term sheet attached to the second LOI which, under the heading "Assumptions" contained the following term:

> The Hotel would be renovated in accordance to Westin design and operating standards and Starwood's Property Improvement Plan dated 2 December 2001.

273 On that basis, and for the reasons I have already stated at [257] above, I find that the hotel should be valued on the basis of it having 364 rooms and not 388 rooms.

274 Having found that a fairer and more reasonable assessment should be based on 364 rooms, the next question to be answered is how this would affect or have an impact on the projected revenues of the hotel and, consequently, on the valuation. I am mindful of the fact that during the cross-examination of Mahaphon, I had the following exchange with counsel when Mahaphon was being queried on whether a reduction in the number of rooms (from 388 to 364) would cause a change in revenue:[note: 90]

> MR RAMESH: [T]hat is why I am trying to establish from the witness [i.e. Mahaphon], If you change the configuration as represented at page 38, and you drop the number of standard rooms from 328 to 300, and you create more suites, your Honour, which is already at the top end of the bracket, and your Honour will appreciate, and certainly my instructions are that these properties operate at a much, much lower occupancy, and you create a presidential suite by combining standard rooms, which is, from the statistics here, a 131 square metre room, your Honour, it is about 1,500 square feet and really, that room is hardly ever occupied, and you actually drop the executive floor, which is a business floor, your Honour, from 50 to 40.
>
> So the business floor rooms have dropped from 50 to 40. Then, surely, if you drop the standard room from 328 to 300, you drop the executive floor from 50 to 40, which I would say are the key income generators for any property. Not the presidential suite, not the high end suits, if you like, then there must be an impact in terms of the revenue, room revenue of the property.
>
> ...
>
> Mr Simister's thesis is that it does not make a difference, and I am trying to establish that from the configuration changes, you cannot look at it in isolation; you must look at what really has changed, and the change is the standard room and the drop in the standard room and the drop in the business floor, and the number of suites has gone up.
>
> We will say that is because of brand standards; we will say that is a requirement of operational standards in the market and, therefore, there will be a change in the valuation, as a result. That is really what we are driving at, your Honour.
>
> MR YEO: Your Honour, again just –

COURT: A change in the valuation or change in the revenue?

MR RAMESH: Consequently, your Honour –

COURT: That is very strange that you would change the configuration of the hotel and end up with less revenue, it does not sound right to me. You may not have everybody staying in a presidential suite, but if you are going to have two stays in a year, you are made, if you are charging $1000 [Singapore dollars] per day, or more.

MR YEO: You are right, your Honour, I do not think they can have it both ways. …

The point is, your Honour, whatever the change has been driven by, the issue that my learned friend is trying to establish is not necessarily that there will be an impact, but that there will be a negative impact. *Mr David Simister says there is not necessarily a negative impact, and I think Ms Mahaphon is doing the same.*

COURT: *Yes.*

[emphasis added]

275 I reiterate my comments from the hearing. In short, while I may assess the number of rooms to be less, *ie*, at 364, it need not necessarily result in a reduction in the revenue. However, because of the need to harmonise the various experts' valuations and because I have found the number of rooms to be a key factor which requires harmonisation, I will take a broad-brush approach and align all the experts' calculations based on 364 rooms. I do recognise that this may be a rough and crude method to align the projections (and consequently, the valuation) because the change in the number of rooms may cause each of the plaintiff's two experts to revise their other assumptions. However, I do not see or think that the change in room numbers, though key, would necessarily result in an adverse effect on the valuation of the hotel, given what I will be addressing in terms of the other factors such as the ADR, which I will turn to immediately.

Fair average daily rate (ADR)

276 The ARR or ADR as well as the revenue per available room of the Westin Grande Sukhumvit were hotly disputed between the parties. The plaintiff contended through Mahaphon that the ADR should be THB4,841 (an estimate) while the defendants countered (relying on Ling's report) that it should be THB4,200 based on the hotel's actual performance. In 2003, 2004 and 2005, the Westin Grande Sukhumvit achieved ADRs of THB3,161, THB3,898 and THB 4,392 respectively.[note: 91]

277 On 1 November 2005, the general manager of the Westin Grande Sukhumvit had written to Pongphan forwarding the budget for 2006. In that budget, the ADR for 2006[note: 92] was stated as THB5,105. In November 2004, the defendants[note: 93] forecasted ADRs of THB4,854 and THB5,244 for 2006 and 2007 respectively, representing an increase of 2.7% in the projected ADR.

278 However, when Monahan was cross-examined, he claimed that the defendants' forecast for 2006 was "aggressive", a view that was echoed by Pongphan, Kirin and the defendants' valuers. Indeed, Ling went further and reduced the defendants' ADR of the hotel for 2005 from THB4,392 to THB4,383 and that for 2006 from THB5,105 to THB4,628.

279 For ease of reference, I set out the respective experts' stabilised ADR (for the year 2007) and the ADR for 2006, where they had stated a view on it, in the table below:

Expert	Projected 2006 ADR (THB)	Projected 2007 ADR (THB)
Simister	NA	4,680
Mahaphon	4,690	4,830
Chee	NA	4,640
Ling	4,628	4,746

280 I would state, for the avoidance of doubt, that no aspersions ought to be cast against the experts who did not have a projected ADR for 2006. Due to the method of calculation that they had employed (namely, to project revenue from 2007 onwards), it was not necessary for them to come up with an assessment on the projected ADR for 2006.

281 It would be relevant and material to contrast those projected figures against the defendants' actual and forecasted revenues:

Forecasted or actual (Correct as at)	2003	2004	2005	2006	2007
Forecasted (November 2004[note: 94])	NA	3,948	4,541	4,854	5,244
Forecasted (November 2005[note: 95])	NA	3,892	4,382	5,105	NA
Actual (2005)	3,161	3,898	4,392	NA	NA

282 Based on the above two tables, I would make this observation. The constant refrain from counsel for the plaintiff is that the defendants' witnesses (both experts and factual) had repeatedly stated that the defendants' projections were too "aggressive": see [251] above. Looking at these tables and putting the numbers side by side, it is clear that the plaintiff's allegations are unfounded because the plaintiff's own experts were almost as conservative as the defendants' experts when it came to the issue of the ADR. Simister's ADR was a mere THB40 more than Chee's and surprisingly, THB66 less than Ling's. Using a rough exchange rate of THB40 to US$1 (but only for the purposes of allowing a quick reference point and no more), the difference in ADR between the lowest of the four experts (*ie* Chee) and that of the highest (*ie* Mahaphon) was no more than THB190 or US$4.75. More importantly, it is worthy to note that all four experts' ADR, including the plaintiff's experts, are well below the defendants' own projection for 2007, *viz* THB5,244.

283 I do acknowledge that Simister had, in the course of cross-examination, stated that he had erroneously used the wrong exchange rate for the calculation of his ADR: see [199] above. If one "corrects" this error, then Simister's projected ADR for 2007 would be THB5,640 which is THB396 more than the defendants' own projections done in 2004. However, despite acknowledging this error in the exchange rate used, and for reasons best known to himself and the plaintiff, the calculations and worksheets were not corrected and he persisted on his ADR of THB4,680 for 2007.

284 Looking at all the evidence as a whole, including the evidence relating to the market penetration and the market outlook for the five-star hotel market in Bangkok, I find that a fair and reasonable ADR would be THB5,000 for the year 2007. My reasons are manifold. First, I agree with counsel for the plaintiff that the defendants, as managers of the hotel, would be in the best position to gauge what the performance of the hotel would be. Revenue projections are key documents in the management of a hotel, upon which the managers of the hotel are answerable to the owners. The managing fee is also calculated based on these revenue projections. As such, I find it reasonable to place greater weight on the projections provided by the defendants and to that extent, I do not accept, entirely, the evidence of the defendants' witnesses that they are necessarily too "aggressive".

285 Secondly, due weight must be given to the defendants' own projections because based on the track record of the projections made by them, one would observe that they had not been too far off from their projections for the past few years. For the year 2004, the earliest available forecast pegged the ADR at THB3,948 and the hotel actually achieved an ADR of THB3,898. Converting it to percentages, the defendants achieved 98% of the ADR they had forecasted. Similarly, for the year 2005, the earliest forecast attributed an ADR of THB4,541 for that year. In actual fact, an ADR of THB4,392 was achieved. For 2005, the actual figure was 96% of the forecasted ADR. Given the above, my finding of a fair ADR at THB5,000 for 2007 – which is about 95% of the projected ADR (projection done as at November 2004) is not entirely off the mark.

286 Thirdly, and more importantly, Monahan had confirmed, under cross-examination, that defendants managers would be paid a bonus when they achieved at least 90% of the budget for a particular year. The relevant part of the notes of evidence is extracted below:[note: 96]

> Q: Mr Monahan, you were telling us at the start of your evidence yesterday – this was in-chief – that Starwood as an organisation was very focused on targets; would that be correct?
>
> A: Yes, I said that our corporate head office establishes targets for each of the divisions. That is correct.
>
> Q: *That the managers get bonuses if they hit 90 per cent of budget?*
>
> A: *That is correct.*
>
> Q: Basically, in terms of their budget, they are looking to be not off plus/minus 10 per cent; right?
>
> A: Well, from a personal perspective, you would want to exceed your budget, certainly.
>
> Q: But you certainly want to be at least within 90 per cent of budget?
>
> A: I think. It is human nature."
>
> [emphasis added]

287 Hence, the mechanism of rewarding the managers if they hit 90% of their budget is an inherent check that the budget, and consequently, the ADR, is not overly aggressive.

288 Fourthly, I have to bear in mind that I have fixed the number of rooms to be 364 instead of 388. Consequently, it would be reasonable to expect that, at least for the plaintiff's experts' valuations, they would want to err on the side of caution and raise their respective ADRs as a consequence.

Taking a broad-brush approach, I am of the view that pegging the ADR at the rate of THB5,000 (which is higher than what the plaintiff's experts had based their valuations on) would take this adjustment into consideration.

289 Finally, at the present exchange rate of about THB34.8 to one US dollar (see [42] above), an ADR of THB5,000 would translate, roughly speaking, to about US$144. Given the present climate and the fact that the hotel markets itself as a five-star hotel, I think the rate of THB5,000 is fair and reasonable.

290 For the above reasons, I harmonise all four experts' ADR for 2007 to be THB5,000.

Stabilised occupancy rate

291 The stabilised occupancy rate of the hotel can be quite easily dealt with. With the exception of Ling who has pegged the stabilised occupancy rate at 74%, all the other three experts had assumed stabilised occupancy rate to be 76%.

292 Looking at the evidence as a whole, I am minded to agree with the majority of the experts and align the occupancy rate to 76%. Consequently, the necessary adjustments will have to be made to Ling's calculations.

Whether a CAPEX deduction ought to have been made

293 The question of whether a CAPEX deduction ought to have been made is trickier and, naturally, it formed a major plank of the plaintiff's attack. Counsel for the plaintiff submitted that the valuation was reduced by THB160m for Chee and THB63.4m for Ling as a result of including this CAPEX deduction: see [240] above. The issue that I had to consider, put in another way, was whether catering for an FF&E reserve (which the plaintiff's experts did) was sufficient or whether there ought to be a deduction for CAPEX at regular intervals in the future (which the defendants' experts did).

294 The FF&E reserve was stated in Mahaphon's report[note: 97] to include hotel room furnishings, kitchen equipment and supplies, service and maintenance vehicles and machinery. It surely cannot be a substitute for CAPEX. The defendants' management contract with Westin Grande Sukhumvit stipulated (under cl 2.4[note: 98]) that the Narulas must set aside 3% of the monthly gross operating profit of the hotel as provision for FF&E. While this FF&E provision would take care of wear and tear, renewal of operating equipment such as crockery, cooking utensils, beds/bedlinen, tables, chairs, machinery, *etc*, it would not, in my view, be sufficient to cover all the cost of renovating and refurbishing the hotel every seven to ten years, in order to keep up with its competitors and maintain its room rates which, to keep pace with inflation, would have to be increased periodically. Increase in room rates must surely be in tandem with maintaining, if not improving, the hotel's five-star standards.

295 I accept that surplus reserves for FF&E can be used to help defray the cost of renovations or refurbishment but renovations and/or refurbishment are not the same as replacement of FF&E. I am fortified in my view by the following passage extracted from the book written by the president of the HVS group, Stephen Rushmore ([262] *supra*, at p 285):[note: 99]

> Furniture, fixtures, and equipment are essential to operating a lodging facility, and their quality often influences a property's class. Included in the reserve for replacement expense category are all non-real estate items that are normally capitalized, not expensed.

Hotel furniture, fixtures, and equipment are exposed to heavy use and must be replaced regularly. The useful lives of these items is determined by their quality, their durability, and the amount of guest traffic and use.

Periodic replacement of furniture, fixtures, and equipment is essential to maintaining a lodging facility's quality, image, and income. Capitalized expenditures are not included in the operating statement, but they do affect an owner's cash flow. Therefore, an appraisal should reflect these expenses in an appropriate reserve for replacement.

Based on industry experience, a reserve for replacement ranging from 3% to 5% of total revenue is generally sufficient to provide for the timely replacement of furniture, fixtures, and equipment.

[emphasis added].

296 The defendants had referred to the vast sums spent on renovations by other comparable hotels as proof, *eg*, JW Marriott, Dusit Thani and Swissôtel Nai Lert Park spent THB300m, THB650m and THB650m respectively whilst Four Seasons Hotel spent THB245m on "soft" refurbishments (according to Chee). Consequently, a CAPEX provision would adversely affect the hotel's cash flow periodically to some, although not to the large, extent set out in the valuations of Chee and Ling. In that light, I do not accept the plaintiff's argument that hotels would typically borrow to fund renovations and refurbishment. Even if that was true, the servicing of the interest on the loan would be an expense that would reduce the cash flow and the net operating income of the hotel. Similarly, I do not accept the plaintiff's submission that an investor, who is only interested in three-to five-year investment cycles would not be interested to know what the long-term renovation costs for the hotel are.

297 In any event, counsel for the plaintiff has been able to do no more than produce an e-mail from Dr deRoos which, to my mind, was neither here nor there, because he had stated quite simply that he was not aware of any books or authorities which would refute the deduction of CAPEX.

298 I am fortified in my view by an e-mail from Stephen Rushmore ("Rushmore") to Ling, an e-mail which was sent to the court by way of a letter from defendants' counsel after the hearing was concluded. As I had placed some weight on this e-mail (the authenticity of which was not challenged by the plaintiff in subsequent correspondence), I will quote the e-mail exchange in a fair bit of detail. In order to set out Rushmore's e-mail in the relevant context, it would be necessary to first quote from the e-mail that Ling had sent to him (Ling referred to him as Steve in the e-mail):

Dear Steve,

May I seek your opinion on CAPEX for a hotel valuation please – we have adopted the DCF approach in the valuation of a hotel.

In a valuation exercise, we would reflect in reality what a prudent buyer would consider, one of which is CAPEX.

When valuing a hotel, we have taken into account CAPEX in addition to contractual FF&E reserve deduction. If the contractual FF&E reserve is only 3% of revenues [sic] (which is not sufficient for ALL Capex for the life of the asset), would an additional deduction for CAPEX (e.g. in the 8th, 16th and 24th year) be appropriate in arriving at the valuation of the property?

Further to the above, if the proposed Capex is to be funded by external borrowings (as opposed to being funded by Owners [*sic]* funds), should it still be taken into account in determining the valuation[?] The other party is trying to argue that if you borrow money for Capex (instead of funding with Owners funds), the Capex does not impact our cash flows and therefore does not affect our valuation. We believe this premise is flawed! The funding method of an expense (i.e. external borrowings vs Owners funds) should not determine whether or not that expense is taken into account in our DCF analysis. Do you agree?

299 Rushmore's reply was as follows:

David

I agree with both of your points made in your e-mail below.

Today, hotels require between 5% to 6% reserve for replacement of FF&E. *If the reserve is only 3%, then an additional deduction is required which could be done each year or as you suggested periodically over the life of the lease. Either method will produce similar results.*

It does not matter how Capex is funded either external borrowings or by Owners funds, for valuation purposes, *it must still be deducted as an expenses [*sic*] when* performing *the DCF.*

If you have any further questions, please give me a call.

[emphasis added]

300 The next issue is then which of the two experts', *viz*, Chee's or Ling's, assessment of the CAPEX the court should accept. I first make reference to the table at [215] above. For the purposes of Chee's valuation, she had made reference to the cost of renovations incurred by other similar hotels such as the Swissôtel Nai Lert Park, JW Marriott and the Four Seasons Hotel. Each of those hotels incurred between US$17,000 and US$48,000 per room for the renovations. Based on Chee's method of calculating the CAPEX which was based on the actual renovation costs to bring the hotel to a Westin hotel, *viz*, 50% for 2014, 100% for 2024 and 50% again for 2034, all grown at inflation rate, she arrived at a CAPEX of about US$15,000 to US$33,000 per room. In contrast, Ling based his calculations for the CAPEX at the rate of US$6,000 per room.

301 Faced with these two approaches, I am minded to adopt Chee's calculation for the CAPEX. Not only did she link the CAPEX to the actual cost of renovation to bring the hotel to a Westin hotel, her rates on a per room basis were much closer to those of similar hotels. Conversely, I was unable to accept Ling's estimation of the CAPEX because I found his estimation, at US$6,000, to be too low and way off the mark when compared to other similar hotels.

302 Consequently, in an effort to align the four experts' valuations, I will include a CAPEX deduction and use the method (*ie*, three deductions, one each at 2014, 2024 and 2034) and quantum (*ie*, THB222m, THB388m and THB400m respectively) proposed by Chee.

303 I do realise that because Simister and Mahaphon had used a terminal capitalisation rate in their DCF analysis, it may not be easy or appropriate to incorporate the CAPEX. Nevertheless, and once again taking a holistic view to the valuation, I will make the necessary deductions from the projected income that Simister and Mahaphon had arrived at using the terminal capitalisation rate method.

Whether there ought to have been a deduction for demolition costs

304 The final of the five key factors relates to the issue of demolition costs. On this issue, I am persuaded by the plaintiff's argument that the issue of demolition is a contingent one. Under the terms of the lease, it is not compulsory for the lessee to return the land after demolition of the building. The landlord's permission may be sought to return the land with the building, or the lease could be further extended with the building intact, in which case, there would not be a need for the building to be demolished. Hence, I have disregarded the issue of demolition costs. As Mahaphon pointed out,[note: 100] demolition is only one of the options open to the hotel operator upon termination of the lease. It may well be that the lessor would prefer to have the hotel transferred to him if it was well maintained and the building was still in good condition. However, the plaintiff went one step further. It relied on a letter from Nawarat (see [220] above). The plaintiff's argument was that, in essence, instead of having to pay someone to demolish the building, the contractor would be happy to pay the building owner for the right to demolish the building and to salvage materials after the demolition. The maker of this letter was not called as a witness and neither was it shown to the court that it was made in the ordinary course of business. Hence, the letter could not be admitted as evidence and I could not place any weight this letter. Similarly, Ling's estimate of THB15m as demolition costs was based on hearsay, as the information was provided to him by the Bangkok office of quantity surveyors, M/s Davis, Langdon and Seah. Hence, on balance, I find that a deduction for demolition costs was not necessary.

305 Consequently, I will remove the respective deductions for demolition costs from both Chee's and Ling's calculations, in order to harmonise all four experts' valuations.

Aligning the four experts' valuations

306 In summary, I will make the following adjustments to the calculations of the four experts using the DCF analysis:

(a) align the number of rooms to 364;

(b) align ADR to THB5,000 for 2007;

(c) align stabilised occupancy rate to 76%;

(d) incorporate Chee's CAPEX deduction into Simister's and Mahaphon's calculations;

(e) remove Ling's CAPEX deduction and incorporate Chee's CAPEX deduction into Ling's calculations; and

(f) remove the deductions for demolition costs for both Chee and Ling.

307 Adjusting the number of rooms and ADR to THB5,000 for 2007 and incorporating CAPEX for Simister's and Mahaphon's valuations will result in the following (for the tables to follow, Mahaphon's figure is derived from her valuation using the DCF method and not the average of the DCF and direct capitalisation approaches, *viz* THB3.4bn):

	Valuation as stated in report/ affidavit (THB)	Adjust room number to 364 (THB)	Then adjust ADR to THB 5,000 for 2007 (THB)	Then incorporate Chee's CAPEX (THB)
Simister	3,548,800,000	3,340,800,000	3,559,800,000	3,158,800,000

Mahaphon	3,297,869,109	3,210,583,792	3,312,891,068	3,144,882,337

308 As for the defendants' experts, a similar exercise to adjust the number of rooms and ADR to THB5,000 for 2007, remove demolition costs and incorporate Chee's CAPEX (for Ling's valuation) would produce the following figures:

	Valuation as stated in report/affidavit (THB)	Remove demolition costs deduction(THB)	Then adjust room number to 364 and ADR to THB 5,000 with expert's own CAPEX (THB)	Then incorporate Chee's CAPEX (THB)
Chee	2,695,000,000	2,730,600,000	2,940,600,000	2,940,600,000
Ling	2,853,283,771	2,810,436,687	3,047,290,942	2,954,898,050

309 The following table shows the four experts' figures compared side-by-side pre- and post-alignment.

Expert	Valuation as stated in report/affidvait (THB)	Valuation after alignment (THB)	Valuation after alignment (rounded off to nearest THB0.1bn)
Simister	3,548,800,000	3,158,800,000	3,200,000,000
Mahaphon	3,297,869,109	3,144,882,337	3,100,000,000
Chee	2,695,000,000	2,940,600,000	2,900,000,000
Ling	2,853,283,771	2,954,898,050	3,000,000,000
Average	3,098,738,220	3,049,795,097	3,000,000,000

310 Before the alignment, the valuations ranged from THB2.695bn (Ling's) to THB3.549bn (Simister's). After the alignment exercise, the valuations now range from THB2.9bn (Chee's) to THB3.2bn (Simister's) (rounded off to the nearest THB0.1bn). The average of the four valuations changed from THB3.098bn to THB3.049bn.

311 I am minded to take the average of the four valuations after the alignment exercise to be the value of the hotel. It would not be possible for the court to accept any valuation report in isolation and *in toto*. Each of the valuations had its strengths and weaknesses. Despite acknowledging that their duty was to the court (under O 40A r 2(1) of the Rules of Court (Cap 322, R 5, 2005 Rev Ed)), I found that there was a tendency for the experts to provide evidence favourable to the party from whom they had received their instructions. Taking the average of the post-alignment valuations would ensure that, at the very least, the five key factors have been properly accounted for, instead of a rough-and-ready averaging exercise.

312 Indeed, it is my view that THB3.049bn after rebranding would be a conservative but fair figure.

313 Lest parties come to the conclusion that an averaging exercise is arbitrary and unsupported by case law, in *Lee Cheng Kang v Lee Tian Kai* [1996] 2 SLR 252, the Court of Appeal endorsed my approach in *Lee Cheng Kang v Lee Tian Kai alias Lee Tian Khai* [1995] SGHC 36 upon appeal, where I similarly took the average of three valuations from the experts.

314 For the reasons I have enunciated at [39] to [42] above, I will value the hotel in Thai baht. Hence, the final value as at 31 December 2006 which I ascribe to the hotel, after perusing and analysing the evidence from the experts in totality, is **THB3,049,795,057**.

Pirie's evidence: Weighted average cost of capital and shared control

315 Having disposed of the value of the hotel, the next step in the assessment exercise is to quantify the actual loss. To do that, I turn to consider the evidence of another expert who testified for the defendants, *viz* Jeffrey Pirie ("Pirie"), a director of Deloitte & Touche Financial Advisory Services Pte Ltd, whose impressive credentials include 14 years of experience in advising clients on mergers, acquisitions, divestitures and raising finance across South East Asia.

316 Pirie[note: 101] was tasked with addressing two issues:

(a) What was an appropriate range of capital costs for PSD as at May 2002?

(b) What was the likely range of discounts to be applied for shared control of a 54.25% interest in PSD as at May 2002?

317 Pirie's report was highly technical and not easily comprehensible to the layperson. His evidence was important as the defendants' last expert, Robert van Rensselaer Hecker ("Hecker"), had used Pirie's discount rate of 13.37% in his report, which rate Pirie calculated based on the weighted average cost of capital ("WACC") for PSD. The computation by which Pirie arrived at a discount rate of 13.37% will be elaborated upon below.

318 In order to value the plaintiff's lost chance as at the time of the defendants' breach, Pirie had to discount future cash flows back to their present values in May 2002. To carry out that exercise, Pirie had to calculate the cost of capital to PSD.

319 The concept of WACC requires some elaboration. During his examination-in-chief, Pirie gave a Microsoft Powerpoint presentation in court. He made the following introductory comments which I found to be useful and which I will quote in full here:[note: 102]

> What we have seen here, your Honour, is that there is a central tenet of investment theory that *there is a value to time in respect of money.* So, in simple terms, what it means is that I would prefer to have a dollar today, rather than a dollar tomorrow, because I can reinvest that dollar to gain more money, if you like.
>
> Now in this situation, what we have is a series of future cash flows from this lost chance. What we have to do, in order to put a value to that lost chance, is *to bring those future cash flows back to a common, present date.*
>
> [emphasis added]

320 Wikipedia, the online encyclopedia, explains WACC as follows (see <http://www.en.wikipedia.org/wiki/Weighted_average_cost_of_capital> (accessed 29 March 2007)):

> The **weighted average cost of capital (WACC)** is used in finance to measure a firm's cost of capital. It has been used by many firms in the past as a discount rate for financed projects, since the cost of the financing seems like a logical price tag to put on it.
>
> Corporations raise money from two main sources: equity and debt. Thus the capital structure of a firm comprises three main components: preferred equity, common equity and debt (typically bonds and notes). The WACC takes into account the relative weights of each component of the capital structure and presents the expected cost of new capital for a firm.

321 Another online resource, Investopedia, provides the following explanation on WACC (see <http://www.investopedia.com/terms/w/wacc.asp> (accessed 29 March 2007)):

> Broadly speaking, a company's assets are financed by either debt or equity. WACC is the average of the costs of these sources of financing, each of which is weighted by its respective use in the given situation. By taking a weighted average, we can see how much interest the company has to pay for every dollar it finances.
>
> A firm's WACC is the overall required return on the firm as a whole and, as such, it is often used internally by company directors to determine the economic feasibility of expansionary opportunities and mergers. It is the appropriate discount rate to use for cash flows with risk that is similar to that of the overall firm.

322 In the present assessment, rather than using it to calculate the expected cost of new capital in the future, the WACC was used by the defendants as a means to "pre-date" the loss at 2006 values to the time of the breach. For the purposes of this assessment, I accept the majority decision of the Court of Appeal that the date of breach by the defendants should be used as the basis for computing the plaintiff's loss of profits; that date should either be February 2002 or May 2002. Consequently, it made little difference whether Pirie or Hecker used 1 June 2002 (which they did) as the cut-off date for their calculations or some other date between February and May 2002. (In this regard, counsel for the defendants had rightly pointed out in its closing submissions[note: 103]that counsel for the plaintiff had accepted the date of the breach to be "February 2002 or thereabouts".)

323 The defendants had submitted that the WACC should be applied to the 2006 values, in order to assess the loss as at the date of the breach and for the court to award interest at 6% from February 2002 to the date of payment. The plaintiff submitted that not only should Pirie's calculation of the WACC at 13.37% be disregarded but there should not be any discounting factor at all as, had the defendants not breached the NCA, the plaintiff would have purchased the hotel, and the Lai Sun stake would have been disposed of at the end of 2006. Consequently, what the plaintiff had lost was the value of the Lai Sun stake in 2006, not 2002. The plaintiff accepted that if damages were to be assessed at the time of the breach, what would be relevant would be the value of the Lai Sun stake as at 15 February 2002. A discount based on the time value of money worked on the premise that if the plaintiff had invested the discounted sum on 15 February 2002, the plaintiff would have an investment value at the end of 2006 which was equivalent to the value of the Lai Sun stake in 2006. However, the fact of the matter was that in 2006, the plaintiff had not been able to invest that amount from 2002.

324 Counsel for the plaintiff urged the court not to apply the WACC for two main reasons. First, and more importantly, the plaintiff submitted that the quantum should be evaluated as at end 2006 values

simpliciter. For this submission, the plaintiff relied on the case of *Johnson v Agnew* [1980] AC 367 (at 400–401) where it was stated that while the general principle for an assessment of damages is compensatory and damages is normally assessed as at the date of breach, "this is not an absolute rule: if to follow it would give rise to injustice, the court has power to fix such other date as may be appropriate in the circumstances". With respect, the one-line reference from *Johnson v Agnew* can hardly be an authority that the plaintiff can rely on. Not discounting the plaintiff's damages to 2002 values would, in my view, unjustly enrich the plaintiff and give it an unjustified windfall.

325 Further, the plaintiff compared Pirie's rate of 13.4% with Mahaphon's (12%) and pointed out that the defendants were wrong in their submission that Mahaphon did not consider WACC in her valuation because she did. Mahaphon had also used a more reasonable debt to equity ratio of 65:35 (which was corroborated by Vipoota) instead of Pirie's 40:60.

326 The defendants, on the other hand, argued that Pirie's use of WACC was appropriate, citing *Re Colt Telecom Group plc* (No 2) [2003] BPIR 324 and *P M Sulcs & Associates Pty Ltd v Daihatsu Australia Pty Ltd* [2001] NSWSC 636. The defendants contended that the purpose of the percentage discount was part of the process to bring the value of the plaintiff's loss back to 2002, after determining the full 100% value.

327 I am not persuaded by the plaintiff's submission that this is an appropriate case to depart from the general rule that damages ought to be assessed as at the date of the breach. The plaintiff's argument appears to be attractive on the surface – if the figures are available now, why award a lesser amount which could allegedly lead to injustice to the plaintiff? However, to be persuaded by such a simplistic argument would be to ignore the fact that the Narulas and Murray had very different approaches to running the hotel.

328 Apart from the fact that both wanted the hotel to be converted to a Westin, there was little similarity between their strategies. First, the Narulas could be said to have been more prudent in their financial planning, to the extent that they attempted to, and eventually did, bring in DBS Thai Danu as their financier, which bank provided them with relatively attractive terms and interest rates. Second, while Murray intended only a US$5m renovation loan at the outset, the Narulas proved that they were able to fork out US$8.8m for the renovation efforts, partly from their own sources. Third, the Narulas were more patient in their renovation efforts, allowing the renovation to stretch over a longer period of time. These are but three key factors that distinguished their approaches.

329 For the above reasons and despite the criticisms made by Murray of the Narulas' financial position around February 2002, Murray's chance success with HHH pales in comparison to the more established and experienced lineage in hotel management that the Narulas had proved themselves to be. Before Tan J, Kirin had testified[note: 104]that the Narulas were one of the oldest Thai Indian families with hotels being only part of their businesses, which encompassed the fast food industry in Thailand (*eg*, licence for Dunkin Donuts and franchise for Au Bon Pain, a French bakery chain which began in the US in Boston, Massachusetts) as well as compact discs, retail stores and properties in both India and Thailand. With such different approaches, backgrounds and experiences, it would not be just or fair to compensate the plaintiff with exactly what the Narulas had achieved through their industry, labour and hard work.

330 To my mind, the application of WACC coupled with an award of the statutory interest from February 2002 to the date of payment, would more than adequately and fairly compensate the plaintiff for its loss of the hotel; WACC offered an objective means to evaluate the risk of the plaintiff's capital if it had been used to purchase the shares in PSD.

331 A second objection (raised in the plaintiff's closing submissions[note: 105]) against the use of WACC by the defendants lay in the argument that the value of the hotel in 2006 had already been discounted through the DCF method (of valuing the hotel) and therefore, the plaintiff should not be prejudiced twice over.

332 I am again not persuaded by the plaintiff's argument. While it may appear, at first glance, that both the DCF method and the WACC introduced some form of "discount" due to the passing of time since February 2002, they were applied for two separate and distinct reasons. The former (DCF method) took into account the value of the hotel. Certain factors peculiar to property valuation were incorporated into that method of calculation. In contrast, WACC calculated the opportunity cost of the capital which the plaintiff could have had a chance to invest. Each method takes into account a "discount" for vastly different reasons: one pertains to property valuation over time, the other applies to the cost of capital over time. While both connote a sense of a "discount", it does not necessarily lead to an unjust finding that the plaintiff would be prejudiced twice over, due to the discount.

333 More importantly, apart from a bare submission[note: 106] that the discount component had already been incorporated into the DCF method, counsel for the plaintiff did not adduce any authorities – be it in law, economics, finance or otherwise – to support its submission. In any event, I note from the notes of evidence that Pirie was not cross-examined on whether the DCF method had an undue negative impact on the WACC.

334 Consequently, I am not persuaded by the plaintiff's objections to the application of WACC. I proceed to consider the application of the WACC concept and Pirie's calculations in arriving at the quantum of discount.

335 As I understand it, computation of PSD's WACC comprised of three components *viz*, (a) the cost of debt to the company, (b) the cost of equity to the company, and (c) a blend of (a) and (b) to get the debt to equity ratio.

336 Mathematically, the WACC, at the risk of oversimplification, is a "weighted" function of the market cost of debt against the market cost of equity, taking into account the relative risk for this particular sector in the market as well as the risk-free cost of capital (*eg* bonds) for the relevant period. This can be broken down in the following components:[note: 107]

(a) the market cost of debt (expressed as a percentage);

(b) the risk-free cost of capital (expressed as a percentage);

(c) the expected market return (expressed as a percentage);

(d) the debt to equity structure (expressed as a ratio); and

(e) the "beta" relevant to PSD (expressed as a ratio).

337 These five components interact in the following equations as presented by Pirie during his Microsoft Powerpoint presentation to the court (terms which are underlined denote further elaboration of the term's formula below):

WACC = Debt component + equity component

= Debt cost [or cost of debt] × (1 − tax rate) ×

[debt ÷ (debt + equity)] + <u>cost of equity</u> × [equity ÷ (debt + equity)]

Cost of equity = Risk-free cost of capital (or "risk-free cost") + (*beta* × <u>market risk premium</u>)

Market risk premium = [(<u>Expected market rate of return</u>×premium for private company) − growth of economy during the same period] − risk-free cost

Expected market rate of return = <u>Capital appreciation</u> + <u>Dividends</u>

Capital appreciation = Expected capital returns of companies listed on SET

Dividends = Historic dividend yield of companies listed on SET

338 Before I evaluate each of the components in detail, I should preface the evaluation with these preliminary comments. First, as stated in his brief (see [316] above), Pirie's report focused on the position as of May 2002. It appeared that for the purposes of Pirie's report, the defendants were happy to adopt the date of May 2002, even though, as I had stated earlier at [327] above, the proper date of breach should be pegged at February 2002. Be that as it may, I have already indicated at [322] above that a discrepancy of three months would not be critical for the purposes of Pirie's report. I further note that counsel for the plaintiff did not voice strong objections to the adoption of May 2002 as the date for Pirie's report – the main objection was whether WACC should be applied at all and, if applied, whether 13.4% (rounded to the nearest 0.1%), as derived by Pirie on the evidence before him, was too high a percentage.

339 Second, I noted that Pirie had included in his report under "our approach to the scope of work" section, a detailed explanation of the approach he took. First, he stated that:[note: 108]

> [I]n deriving a range of suitable costs of capital, we will employ the fair value basis (as opposed to the investment value basis).
>
> Fair value is the amount at which the entire issued share capital and third party debt of PSD would change hands between a willing buyer and seller, dealing on an arm's length basis with neither being compelled to transact and both having reasonable knowledge of the relevant facts. The essence of this basis is the desire to be equitable to both parties. This basis explicitly recognises that the transaction is not in the open market. As such in these circumstances, fair value must take into account as a minimum requirement what each of the parties give up and acquire in value in an arm's length transaction.
>
> *Fair value generally differs from prices at which transaction are closed in the market. This is because transacted prices are typically arrived at after extensive negotiations between the parties to the transaction, the focus of which is to take into account a variety of factors specific to those parties ...*
>
> [emphasis added]

340 Further, Pirie stated that:[note: 109]

> In deriving a range of suitable costs of capital, we will apply the economic method.
>
> *Economic methods are appropriate in illiquid markets, where there are heterogeneous assets and where there is little information on completed transactions. The discounted cash flow*

method is the predominant technique used to implement this approach. Its advantage is that it makes explicit the detailed assumptions regarding the future performance of the business concerned. It can also be useful for sensitivity analysis. The costs of capital used are derived using the Capital Asset Pricing Model ("CAPM") which has similar advantages in respect of the cost of capital that the discounted cash flow method has to the underlying performance of the business. Such a method appears best suited to the circumstances of the dispute between the parties.

[emphasis added]

341 Pirie subsequently went on to explain, for reasons not materially important, that he had considered but chosen not to adopt the other methods such as market-based methods and cost-based methods. To my mind, there was nothing wrong with the general approach adopted by Pirie in coming up with his report to assist the court. The premises and bases were rational and sensible, not wrong or unreasonable. Further, it appeared from his description of the capital asset pricing model ("CAPM") that the plaintiff's complaint that the DCF method was unduly prejudicial was unfounded – in fact, there appeared to be express mention that the economic method took into account the DCF. I am therefore of the view that the plaintiff's objections against the application of WACC as a general concept were unfounded.

342 I will now address each of the components in greater detail.

Cost of debt

343 Pirie had looked at the prospectus of GAD (see [20] above) to ascertain PSD's estimated cost of debt as of May 2002. Pirie calculated it was 7.9%, based on the average prime lending rate of three commercial banks in Thailand as at May 2002.

344 However, that was not the end of the inquiry for cost of debt. From a shareholder's perspective, a debt provides the company with the capacity to deduct or to offset the interest cost against its earnings. This is a benefit which is accrued to the company. Therefore, even though the market cost of debt may have been 7.9%, the *effective* cost of debt, taking into account the tax benefit, may be lower.

345 In PSD's case, the statutory tax rate was 30% at the material time. However, in the light of its low level of profitability as of May 2002 and the existence of tax losses from the previous years which it had carried forward, Pirie opined that the effective benefit of the deduction of interest for tax was 14%. This meant that the *effective cost of debt* to PSD was 6.79% (derived from (100% – 14%) × 7.9%).

Risk-free cost of capital

346 The next component that Pirie had to derive was the risk-free cost of capital. This was required to determine what the cost of capital would have been assuming there was absolutely no risk taken. In this instance, Pirie selected the yield to maturity as at May 2002 of a Thai government bond which was due in 2017 (*viz,* a 15-year bond) as a yardstick for risk-free cost of capital.

347 Pirie explained (in both his report and in his examination-in-chief) that the longest term bond of 15 years was selected in order to reflect "the fact that the underlying asset of PSD is a long life asset, which must impact the appropriate range of costs of capital".[note: 110] He also tested the yield to maturity rate of the 15-year bond over 12 months preceding May 2002 and found the rate to

be fairly stable at 5.93%.

Expected market return

348 To calculate the WACC, Pirie also took into account the expected return if the money had been invested in the market. This was an eminently sensible component to take into consideration because it is highly unlikely that an investor would invest all its capital in a risk-free option. In calculating this component, Pirie said in his report, that "we would habitually look to the compound average growth in value of a representative index for an appropriate equity capital market (in this case, the Stock Exchange of Thailand or 'SET')".[note: 111]

349 In so doing, Pirie noted that the returns implied were actually negative for the relevant period from September 1987 to March 2002. According to Pirie, this was due to two main reasons. First, the data set available to him in the course of research was too short and, in the period covered, there was "extreme volatility" in the SET index, reflecting the impact of the Asian currency crisis. Therefore, he came to the conclusion that it would not be sensible to adopt this as a method of calculating the expected market return of capital.

350 Instead, Pirie made reference to research available from leading equity capital market analysts at or around May 2002 as to their expectations of expected market returns in Thailand at the same time. For this, he referred to the following three market analysts:

(a) Credit Suisse First Boston (source: Bangkok Bank Report, 1 November 2002) which reported a rate of 12.9%;

(b) Salomon Smith Barney (source: Siam Cement Report, 21 August 2002) which reported a rate of 13.3%; and

(c) Société-Generalé (source: Siam Cement Report, 23 September 2002) which reported a range of rates between 14% and 16%.

351 Taking the average of rates given by these three leading market analysts, Pirie established the range of expected market returns to be between 13.4% and 14.1%. For the purposes of moving forward with his calculations, he informed the court that he took the lower end of this range and used 13.4%.

352 Quite significantly, Pirie was acutely aware of the fact that PSD was, as of May 2002, a private company and that the rate 13.4% represented an expected return for *public* equity, *viz* the rates that could be derived by equity in public listed companies. He noted in his report:[note: 112]

> To adjust this to an expected return for a private company, we have adjusted the expected return to reflect a premium on the cost of equity of 30%. This is at the lower end of the 30% to 50% premia we habitually see being applied on the cost of equity for private companies in Southeast Asia.

(This was a significant component in my assessment of Pirie's expert evidence, which is a point that I will return to below.)

353 That was not the end of calculating the expected market return. According to Pirie, the expected market return to equity comprises both capital appreciation and a dividend yield. The above calculation only related to the capital element of the total expected return. For dividend yield, Pirie

calculated the expected dividend yield for equity in Thailand as of 2002 based on data derived from the SET. Using historical equity yields from March 1996 to March 2002, Pirie derived an average yield of 2.2%. In coming to this yield rate, he took into account the fact that between 1997 and 1998, there were sharp falls in share prices as a consequence of the Asian currency crisis and, therefore, those years with extreme figures were excluded from the data computation.

"Beta" relevant to PSD

354 The next element which was critical to the establishment of the WACC in Pirie's calculations, was the concept of "*beta*". The above calculations took into account the cost of capital in the common market, the dividend yield and the premium for the fact that PSD was a private company in May 2002. What it did not take into account thus far was to correlate the cost of capital in the open market against this specific type of industry, *viz*, the hospitality business. At the risk of pointing out what is obvious, each industry has its own associated risks and returns. The "*beta*" coefficient is an effort to correlate the general, open market cost of capital against this particular type of industry.

355 Under examination-in-chief,[note: 113] Pirie explained the concept of "*beta*" as follows:

> Now, that is specific to – that return that we have estimated is in essence for all companies in Thailand, all types of different companies. Different companies have different risk, investors expect different returns from those different types of companies.
>
> So, for example, a technology company, for example, generally would seem to be more risky, because the returns are more volatile than, say, for example, a financial institution, a bank.
>
> So we have to adjust for that difference, the nature of the business. This is a very technical area, it is called a BETA. What the BETA does is it looks at the relative volatility of returns from a particular type of company versus the wider market.
>
> What we did was we looked at the hospitality companies that are listed in Thailand, and we compared them against the relative volatility of their returns against the wider market.
>
> So we have to then adapt that total return that I talked to you about to something that is specific to hospitality companies.

356 Pirie set out, in a fair amount of detail, in his report, a table[note: 114] listing out a possible basket of companies selected for deriving an appropriate "*beta*" for PSD. The list of companies included single asset owning hotels (such as Oriental Hotel Thailand PCL) and other hotels with various portfolios (such as the Amarin Plaza PCL). He then worked out what was termed the "unlevered *beta*" for each hotel in the computation table.

357 At the risk of understating the complex calculations used in the derivation, the unlevered *beta* for each comparable company in the table, quite simply put, is a derivative of the debt-equity ratio over a five-year period from 2000 to 2004. The reason, as stated in Pirie's report was:[note: 115]

> In the years immediately following the Asian Financial Crisis of 1997, equity prices on the Stock Exchange of Thailand were at depressed levels resulting in higher debt to equity ratios than under more normal circumstances. Consequently, we believe that use of the average debt to equity ratios for 2000 and 2001 is not representative of long term norms.

358 Next, Pirie derived a weighted average unlevered *beta* for these comparable companies by

assigning "higher weights to the single-asset owning comparable companies"[note: 116] because those were more similar to PSD. He then applied the proposed debt-equity ratio for PSD, at 40% debt to 60% equity, to the weighted average of unlevered *beta* (0.55) to arrive at the *weighted average of levered beta*, which was a value of 0.86. In explaining this concept of leveraging and deleveraging, Pirie had this to say under examination-in-chief:[note: 117]

> There is one other area that we have to adjust; not only does the market make a difference depending on what types of businesses you invest in, *they also adjust for the differences in capital structure.*
>
> Essentially, if a business has a lot more debt, there is a financial risk for the shareholders, there is additional financial risk, and that should get reflected in returns.
>
> This is the jargon, your Honour, which is this question of you go through a process essentially to strip out the existing capital structure of the company, and then impose upon it the capital structure that we are applying here. This is the process of leveraging and deleveraging, as they call it. So it is a mathematical process.
>
> [emphasis added]

Debt to equity structure

359 The final component in the calculation is the derivation of the debt-equity ratio. In his report, Pirie had this to say about the debt-equity ratio which he employed for the calculations for PSD:[note: 118]

> We have estimated the target debt to equity ratio for PSD to be 0.67 (that is, 40% of the long term capital employed being debt and 60% of the long term capital employed being equity). *This was derived based on the observed debt to equity ratio of PSD (as shown in the prospectus of GAD pcl) and supported by the average debt to equity ratios of comparable hotel companies that were listed on SET as at May 2002.*

360 Pirie was cross-examined, at length, as to why he had chosen to rely on the observed debt to equity ratio in the prospectus of GAD, and not the actual debt to equity ratios of the five years from 2001 to 2004, which was what he did in deriving the weighted average of levered *beta*. (I will address below the criticisms levelled against Pirie in this regard, together with the other objections raised by counsel for the plaintiff.)

Calculation

361 All in all, the components used for the derivation of WACC may be summarised below (see [335] above):

Effective cost of debt = 6.79%

Cost of equity = Risk-free cost of capital + (*beta* × market risk premium)

= 5.93% + 0.86 × (expected market rate of return × premium for private company − growth of economy during the same period − risk-free cost)

= 5.93% + 0.86 × [(capital appreciation + dividends)

$\times$ 130% − 0.6% − 5.93%]

= 5.93% + 0.86 $\times$ [(13.4% + 2.2%) $\times$ 130% − 0.6% − 5.93%]

= 5.93% + 0.86 $\times$ 13.75%

= 5.93% + 11.825%

= 17.76% (rounded off to 2 decimal places)

WACC, as a weighted average of the two components at 40% debt to 60% equity may thus be calculated as follows:

WACC = (40% $\times$ 6.79%) + (60% $\times$ 17.76%)

= 2.716% + 10.656%

= 13.37% (rounded off to 2 decimal places)

362 Before I move on to assess the value of Pirie's theoretical model and his calculations, I should point out that Pirie had, in fact, suggested a range of WACCs in his affidavit, *viz*, between 13.4% and 13.8%. This took into account the potential ranges in the cost of equity. For the purposes of his testimony, he had chosen to adopt the lower end of the range at 13.37% (correct to two decimal places). For the sake of convenience, this figure will be used in my analysis subject to my assessment of his testimony.

Assessment of Pirie's theoretical model and calculations

363 At theoutset, I should point out that the plaintiff chose not to call its own experts to present another version of WACC (a fact noted in the defendants' closing submissions). This would appear to be understandable in the light of the approach taken by counsel for the plaintiff, which was to submit that the WACC should not be applied and, instead, that the plaintiff should be awarded the damages based on 2006 values *simpliciter* (*viz*, without applying discounts and without awarding interest).

364 In doing so, the plaintiff took the risk that if the court disagreed with its submission that WACC should not be applied in favour of awarding based on 2006 values, then the court's evaluation of the expert evidence provided by Pirie would stand or fall, based on counsel's objections alone, without the plaintiff providing a viable alternative for the court's consideration.

365 The principles behind assessment of expert evidence in court have been succinctly stated in *Halsbury's Laws of Singapore* vol 10 (Butterworths Asia, 2000) at para 120.257:

> As to reception of the evidence, *the court may, if there is no definite expert evidence to the contrary, agree with the expert [Official Administrator Federated Malay States v State of Selangor* [1939] MLJ 226] but it must not blindly accept the evidence merely because there is no definite opinion to the contrary [*Re Choo Eng Choon, decd* (1908) 12 SSLR 120]. Apart, however, from that duty, the duty of the court is largely negative. Ex hypothesi, the evidence is outside the learning of the court. Therefore, the role of the court is restricted to electing or choosing between conflicting expert evidence or accepting or rejecting the proffered expert evidence, though none else is offered [*Muhammad Jeffry bin Safii v PP* [1997] 1 SLR 197]. The court should

not, when confronted with expert evidence which is unopposed and appears not to be obviously lacking in defensibility, reject it nevertheless and prefer to draw its own inferences. *While the court is not obliged to accept expert evidence by reason only that it is unchallenged [Sek Kim Wah v PP* [1987] SLR 107], *if the court finds that the evidence is based on sound grounds and supported by the basic facts, it can do little else than to accept the evidence.* [emphasis added]

366 The challenge against Pirie's evidence came only in the form of the plaintiff's closing submissions and not by way of another expert. While I accept that the plaintiff was not obliged to call another expert to refute Pirie's expert opinion, it should also be borne in mind that by choosing *not* to call another expert, the court was left with choosing between (a) counsel's objections through submissions and (b) in the event that the court disagreed with all of counsel's objections, Pirie's evidence in its entirety. The court was not presented with another choice. With that framework in mind, I shall now proceed to evaluate the grounds of objections raised by the plaintiff.

367 First, counsel for the plaintiff submitted[note: 119] that it was "inappropriate for Jeff [Pirie] to have relied on the D/E [debt to equity] ratio of listed companies, since listed companies generally have greater means of raising equity capital and it is easier for them to do so compared to a private company, a fact that Jeff conceded", citing the notes of evidence of 3 February 2006.[note: 120]

368 However, I believe Pirie's alleged "concessions" under cross-examination have been quoted out of context. In the two cited passages, Pirie was merely agreeing with a general proposition put forth by counsel for the plaintiff. It certainly did not have the effect of his "conceding" that he had been wrong in relying on the debt to equity ratio of listed companies.

369 I find this criticism against Pirie's method to be wholly unmeritorious for the reason that Pirie had already factored in PSD's status as a private company in his calculations. He had provided for a premium of 30%, taking into account the fact that his comparables were public companies whilst PSD was a private entity.

370 Second, counsel submitted that while Pirie "looked at the D/E ratio of listed companies during a 5 year period, he failed to do so for PSD, and only looked at PSD's position as reflected in the IPO prospectus".[note: 121] In the course of cross-examination, counsel for the plaintiff brought Pirie extensively through the actual debt to equity ratios and sought to establish that:

(a) Pirie should have included all debt and not just long-term debt in deriving the debt to equity ratio; and

(b) Pirie should have relied on all five years' worth of actual debt to equity ratios (based on total debt) and not merely the IPO prospectus information.

371 However, despite counsel's valiant attempts to discredit him, Pirie's testimony stood up to scrutiny. The following passages from his cross-examination[note: 122] bear setting out in full, in support of my finding:

MR YEO: The point is, Mr Pirie, they are looking at the debts and liabilities of the companies, not just bank debts; would you accept that?

A: They are looking – I understand what you are saying. I do not think, though, that they would –

Q: Do you agree with my question first, my suggestion first, then can you go on to explain.

A: Unfortunately no, I think is the answer. No, do I [sic] not agree with the statement. For example, there will be certain elements in liabilities that will have matching assets; a financial institution would pay no attention to those.

For example, in this situation, you could get situation where I have a leased asset which they would disregard, because they have an asset on the one side and a liability on the other, okay. So it depends on the situation.

372 Then Pirie added:[note: 123]

Q: Certainly, in the prospectus, which presumably was prepared with the help of financial advisers versed in Thai accounting standards, the debt equity ratio takes into account all the liabilities of the company, not just the long-term loan?

A: In their calculations they have chosen to do that, yes.

Q: In their calculations they have chosen to do that. You would assume, would you not, Mr Pirie, that they would be doing it in accordance with Thai accounting standards?

A: That is not something – Thai accounting standards will not stipulate how you calculate a debt equity ratio. That is a matter of practice –

373 On the issue of whether he ought to have relied on the five years' data of debt to equity ratios rather than the information in the IPO prospectus, Pirie gave what was to my mind a convincing answer – that he was merely exercising a judgment call in choosing the latter and not the former:[note: 124]

Q: ... I suggest, Mr Pirie, that you should have taken into account all these different values in arriving at what you yourself have described as a target debt to equity ratio.

A: I think we can agree that the weighted average cost of capital is indeed sensitive to the proportion of debt and equity. I think that is correct.

Clearly it is an area, your Honour, where there is judgment that has to be applied. We have chosen to, or I have chosen rather, excuse me, I have chosen to look to place primary reliance on the facts of the situation as at that point in time.

I have then looked, for the purpose of benchmarking, over a longer period of time with the peer group. I can accept that if one does apply a similar process to PSD one would get a different answer. I chose not to do so, and it is my judgment that is the right way of doing it.

374 I do not think that the exclusion of short-term liabilities can be said to be inherently wrong, erroneous, unsupportable or indefensible. When one looks at the WACC, one enters the realm of evaluating what the cost of that capital would be, if it had been invested for a significant period of time. Given this context, it is inherently plausible for the calculation of debt to equity ratio to exclude short-term loans and liabilities. Indeed, apart from this appeal to common sense and logic, counsel for the plaintiff was not able to offer any authorities to support his contention that Pirie's reliance on only the long-term liabilities was indefensible.

375 Next, on the issue of whether Pirie should have included five years' worth of PSD's actual debt-equity figures in its calculations, I again believe that Pirie's expert opinion was not indefensible. If one

were to follow counsel's arguments, that reliance should have been placed on the five years' debt-equity figures instead of the figures given in the IPO prospectus, one would arrive at the following debt to equity ratios for the period 2001 to 2004:

(a) 2001: 100% debt to 1 % equity;

(b) 2002: 40% debt to 60% equity;

(c) 2003: 55% debt to 45% equity; and

(d) 2004: 67% debt to 21% equity.

376 It must be borne in mind that there were significant shifts in the debt-equity structure of PSD during this period, and for good reasons. First, the company was financially strapped. Hence, the need for its debt restructuring exercise in 2001 and for Lai Sun to sell its stake. Next, by 2003 and 2004, PSD was already into the debt financing arrangement provided by DBS Thai Danu, which provided for certain debt to equity ratios to be adhered to (*viz* 2:1).

377 To my mind, to take into account what happened post-2002 as well as the figures for 2001 would be unrealistic and it would unnecessarily skew the ratio in the plaintiff's favour. More importantly, any skewing of the ratio would be through purely fortuitous events unrelated to what Murray would have intended for PSD – indeed, it was his evidence that he would have gone for the Lehman Brothers loan and not that of DBS Thai Danu Bank. In such a situation, to impose the debt to equity ratio of the years when the company was saddled with a DBS Thai Danu loan would not only be illogical, it would also be unrealistic.

378 The defendants pointed out that it was fallacious of the plaintiff to contend that Pirie should not have looked at debt to equity ratios of listed hotel companies because those entities had greater means of raising equity capital and a lower debt capital. On the contrary, such companies had greater access to debt capital by virtue of being listed. Since Pirie was calculating the cost of capital using the debt to equity ratio, liabilities other than long-term borrowings would have no bearing on capital. In any case, Pirie had opined (which the plaintiff did not challenge) that certain liabilities would have matching assets. The defendants pointed out that the 2:1 debt equity ratio imposed on PSD by Thai Danu Bank was a *limit* on the extent the company could borrow, not PSD's debt to equity ratio as such.

379 Pirie employed the fair value basis to derive a range of suitable costs of capital. He defined "fair value" as the amount at which 100% of the issued share capital (and third-party debt) of PSD would change hands between a willing buyer and willing seller, dealing on an arm's length basis; neither party would be compelled to transact and both parties would have reasonable knowledge of the relevant facts. To derive a range of suitable costs of capital, Pirie applied the economic method which he opined was suitable where, as in this case, there was little information on completed transactions, there were heterogeneous assets and it was an illiquid market. He added that the DCF method was the predominant technique used to implement this approach.

380 The costs of capital used were derived by Pirie using the CAPM which had similar advantages to the DCF method; this method was commonly used in both private and public companies.

381 All in all, I am convinced that Pirie's model of calculating the WACC based on the CAPM was sound and defensible. I believe it was a just and equitable model for calculating the damages to compensate the plaintiff for its loss. I note that the WACC is a theoretical model which has achieved

a wide level of significance in the investment and financial circles. Indeed, it was not refuted by counsel for the plaintiff as a method of calculation. However, as it is a theoretical model, one has to accept that certain assumptions and judgment calls have to be made, in order to proceed to the next step.

382 As I have attempted to set out above, the calculation for WACC was not an easy process and at each step of the way, a certain level of skill and expertise in financial management was required to make the necessary judgment calls. For an expert of Pirie's standing and based on the evidence he had presented, it could not be said that his expert opinion was unsound in logic or commercially indefensible. On the contrary, I found the plaintiff's complaints of his calculations and bases to be attempts at nitpicking at best.

383 Since I rejected plaintiff's counsel's objections and since the plaintiff chose not to call another expert on the issue of WACC, I accept Pirie's expert evidence without reservations.

Discount for shared control

384 In relation to his second task (see [316] above), Pirie acknowledged he had little market-derived data on a reasonable range of discounts to apply to situations of shared control in South East Asia. He opined that a discount of between 20% and 50% from the *pro rata* value was normal for a minority interest in a private company in South East Asia. Based, *inter alia*, on the fact that both majority and minority interests in PSD held veto rights for board resolutions and there were restrictions on the sale or transfer of shares, Pirie concluded that a likely range of discounts for shared control to be applied to the *pro rata* value of the 54.25% interest in PSD as at May 2002 was between 15% and 20%.

385 Cross-examined, Pirie explained that this form of shared control could result in an impasse between board members in the majority and minority camps. Hence, there had to be a reasonably substantial discounting factor for the possibility of such a deadlock.

386 The plaintiff contended that there was no basis to apply a discount of 15% to 20% as Pirie had done. On the contrary, the plaintiff argued, a majority stake would ordinarily carry a premium. Here, although the Lai Sun stake did not carry a premium, neither should it have a minority discount. The plaintiff pointed to the fact that under cross-examination, Pirie had agreed he had no authority to support his discounting factor. Indeed an extract from the book *Valuation of Unquoted Securities* by Christopher G Glover (Gee & Co (Publishers) Ltd, 1986) contradicted him. The extract reads (at p 220):[note: 125]

> A company with two shareholders each owning 50% presents a problem in valuing for control. If there is no casting vote, it would be illogical to value one shareholding on a control basis and not the other, and equally absurd to value them both as minority interests. In practice, the least objectionable course is to value both holdings on a full control basis, that is, at 50% of the value of the entire equity.

387 The defendants on the other hand argued that Pirie's view that there should be a discount factor was supported by an extract from another book by Glover called *Valuation of Unquoted Companies,* (GEE Publishing Ltd, 4th Ed, 2004) which states (at para 10.5.1, pp 232–233):

> Where 100% of the equity is being acquired, the DCF appraisal may be carried out as if the buyer had legal ownership of the business and, hence, complete freedom to dispose of its cash. But, where a controlling interest of less than 100% is acquired, the buyer does not have unfettered

discretion as to the use of the company's cash, and adjustment must be made to reflect this fact.

The court's analysis

388 As stated earlier at [366] above, the plaintiff did not object to Pirie's use of the WACC method to compute PSD's cost of capital but only to the discount percentage of 13.37%. Consequently, on the basis that WACC was the proper method for the reasons given in [377] above, I need only address the issue of whether a discount of 13.37% applied by Pirie was justified, if indeed there should be any discount at all.

389 As I had stated earlier in [363] and [364] above, the plaintiff's failure to call another expert to rebut Pirie's analysis for WACC left the court with two choices: (a) rejecting Pirie's analysis premised on WACC and relying on counsel's submissions alone; or (b) accepting Pirie's analysis based on WACC.

390 For the reasons given above, I found no ground for doubting Pirie's analysis for WACC. The plaintiff's criticisms of Pirie's analysis are, at best, minor cavils on what I deem to be a sound and credible framework. Therefore, I accept the defendants' submission of 13.37% as the WACC or discount rate.

391 However, that was not the end of Pirie's evidence. Pirie was asked to give his opinion on whether there should be a discount given that Murray would have had to share control with Pongphan in PSD. In this regard, I agree with the plaintiff that the defendants quoted the extract from the textbook *Valuation of Unquoted Companies* out of its context. That passage in [387] above was in relation to using the DCF method of valuation in the acquisition of a company. As I had indicated in court to counsel, I saw no justification for either loading on a premium to, or making a discount for, the Lai Sun stake just because the owner would have to share control with Pongphan; I reaffirm that view. Shared control was at best a neutral factor.

392 It is trite law that the court is entitled to accept one part of an expert's evidence, while rejecting another. Here, Pirie's evidence on WACC and his views on shared control were two separate and distinct limbs. While I disagree with him on his views on shared control in the light of the other authorities which were tendered to the court, that did not mean that his analysis on WACC could be faulted in any way.

Hecker's evidence

393 I turn next to Hecker's evidence. Hecker was tasked by the defendants to quantify the plaintiff's loss of profits. This may appear to be a seemingly easy exercise at first blush but as his affidavits of evidence-in-chief (he had filed two affidavits for the purposes of the assessment: one in August 2003 and the other in May 2005) as well as his examination-in-chief and cross-examination in court demonstrated, this was a complex exercise that required a very detailed analysis.

394 Under examination-in-chief, Hecker (like Pirie) brought the court through a series of Microsoft Powerpoint slides to aid the presentation of his opinion. In his first slide, he succinctly summarised his objective to be as follows:

(a) To analyse the cash flows over an investment period of five years; and

(b) To compute and quantify the hypothetical net return on investment as at 1 June 2002 (assumed investment date).

395 The reason for doing so can be found in his second affidavit filed on 3 May 2005 where he had annexed his report. In a nutshell, as with the other defendants' experts, it was Hecker's expert evidence that the DCF method was the preferred one for assessing the plaintiff's loss. In his report, he had gone through the other two approaches, namely what he termed the "direct income capitalization methodology" and the "direct comparison methodology" and explained, in a fair bit of detail[note: 126] why he deemed them not to be appropriate for the purposes of evaluating the loss in this instance. For the sake of brevity, I shall not quote his reasons for rejecting those two methodologies, except to quote his reasoning for supporting the DCF method[note: 127]:

> As mentioned previously, given the leasehold position of the property the most appropriate valuation method is the discounted cash flow analysis method which calculates the present value of future income streams using a discount factor based on a weighted average cost of capital which reflects average funding costs and equity return requirements, inclusive of any risk premiums associated with the hotel sector, country risks, etc. Given prevailing lending rates and equity return requirements for hotel property, an appropriate discount rate should be in the range of 12-13%[.]

396 For the same reasons that I had given above in accepting the DCF methodology, I accept Hecker's reliance on DCF as the appropriate methodology for calculating the loss of profits.

397 I pause here to note two preliminary issues. First, it was not in Hecker's brief to provide his expert opinion on what the WACC discount should be. Indeed, that task fell on Pirie's shoulders. Therefore, I do not need to place any reliance on his views that the range of WACC should be in the range of 12–13%, save to say that this is not entirely off from Pirie's view that it should be 13.37%, which view I have accepted in my above analysis. Second, at the outset of Hecker's cross-examination, the plaintiff questioned the value of his opinion as Hecker was not a licensed appraiser. The relevant parts of the notes of evidence may shed light on where counsel for the plaintiff was going with this and what Hecker's position was:[note: 128]

> Q: … Looking at your CV, Mr Hecker, it does not seem to us that you had formal training in hotel valuations; is that right?
>
> A: No, incorrect.
>
> Q: Incorrect?
>
> A: Right.
>
> Q: You had formal training in hotel valuations?
>
> A: Yes. Right.
>
> Q: Where did you get that training from, Mr Hecker?
>
> A: From Cornell University. I specialised in real estate finance.
>
> Q: That was part of your master's degree in hotel administration?
>
> A: That is right.

398 Much was made by counsel about Hecker's qualification or lack thereof but as the above

exchange showed, while Hecker was not a licensed appraiser, he had received formal training in hotel valuations when he specialised in real estate finance in Cornell University as part of his master's degree in hotel administration. I was satisfied, based on his credentials and his testimony in court, that he was amply qualified to give the evidence that he did.

399 This is the approach that I intend to adopt with regard to Hecker's evidence in this judgment: At the risk of making this judgment longer than it already is, I feel strongly that it would be necessary to state what his evidence is at the outset. As Hecker revised his figures a few times, it is necessary to go through – again in detail – what those changes were. This is necessary because the various changes made by Hecker in his calculations formed one of the main planks of the plaintiff's complaints against Hecker's evidence. Next, I will go through the various complaints levelled by the plaintiff against Hecker's evidence and calculations. Finally, I will state what a fair and reasonable view of the calculations should be in order to arrive at the plaintiff's loss of profits.

400 With that framework in mind, I now move on to explain the nature and effect of Hecker's evidence. A convenient starting point to explain the nature of Hecker's evidence is to start with the Powerpoint slides which he had brought the court through under his examination-in-chief.

Methodology

401 On the issue of the methodology that Hecker adopted in his calculations, Hecker had this to say under examination-in-chief:[note: 129]

> First of all, we are analysing cash flows for an investment period of five years, which is really a typical investment horizon for investors in the region.
>
> … It is actually computed to 1st June 2002 … That is really the starting point of our five-year period, the exit being and the residual value calculation being in 2006, at the end of 2006.
>
> There is a lot of assumptions that go into this appendix which come from [various] source documents. Those source documents I would like to point you to are the draft Lehman Brothers term sheet, the draft Starwood letter of intent, the actual financial performance of the property, and the actual renovation costs of the property. These will all be indicated in the actual calculations.
>
> The methodology, really, is that – like I mentioned before, there is this typical five-year holding period with an exit at the end. I believe that was also introduced earlier on in the trial, so we are trying to be consistent with that.
>
> We are tracking the inflows and the outflows of the cash in between this five-year period, from the initial equity investment through the annual cash flows, the free cash flow and then the residual value, which is usually an assumed sale of the property at the end of the five years.
>
> Those free cash flows to the June 1st, 2002 date. It is using a weighted average cost of capital, which I believe Jeffrey Pirie has presented in court. We have taken that weighted average cost of capital number into these calculations. All this takes into account the time value of money, which I believe Jeffrey [Pirie] went into.

402 In essence, Hecker's methodology involved calculations for the expected cash flows for the five-year period from 2002 to 2006, taking into account various (for want of a better phrase) "pluses and minuses" because of issues such as the servicing of loans and meeting the terms as stipulated in

the Lehman Brothers term sheets, the projected sale value of the property at the end of the five-year period, then, finally, discounting the values according to the WACC.

403 For the sake of completeness, and before I examine each of these "pluses and minuses" in turn, one should make reference to the two key assumptions made by Hecker in his calculations. First, he assumed that the shareholders of the property were able to fund all cash shortfalls that arise over the term of the investment and second, that his calculations did not include tax issues, *viz*, that his calculations were all based on pre-tax positions. Apart from the issue of a deduction for principal repayment to meet a debt service coverage ratio shortfall, which I will explain later, nothing really turned on either of these assumptions.

Cash outflows

404 The first item which Hecker took into account was cash outflows. This comprised five main items:

(a) the plaintiff's cost of acquiring the Lai Sun stake;

(b) renovation costs to bring the hotel up to a Westin standard;

(c) the loan which the defendants would have provided to Murray ("the Starwood mezzanine loan");

(d) working capital; and

(e) Lehman Brothers financing costs.

405 I will explain each of these five items in turn.

406 First, for the plaintiff's cost of acquiring the Lai Sun stake, Hecker valued it at THB100m, which was the amount of minimum equity mandated by Lehman Brothers in the term sheets to Murray. Second, for the renovation costs to bring the hotel up to a Westin standard, Hecker fixed this at THB370m. I will deal with the plaintiff's objections against Hecker's use of this figure below. Third, the Starwood mezzanine loan was a loan that the defendants would have provided to Murray if the management deal had gone through. This included both the principal and interest payments. Fourth, for working capital, Hecker included a figure of THB22.6m based on the actual working capital of the hotel as at 31 December 2005. During his examination-in-chief, Hecker gave the following explanation for fixing the working capital at THB22.6m:[note: 130]

> We have actually decided to use the number of what was the working capital at the end of last year [relative to 2006], because it was a little too speculative to figure out what would have been the working capital back then. So we are using a real figure here from the end of 2005, which I think is actually a conservative number.

407 The last of the cash outflows, namely the Lehman Brothers financing costs, bears some exposition. As Hecker rightly noted during his examination-in-chief, the term sheets that was offered to Murray was "quite a complicated term sheet". If Murray had gone through with those term sheets, there were several payments and terms which had to be met by the plaintiff. First, there was the 2% origination fee which would work out to THB26m (*ie*, 2% of THB1.3bn). Second, Lehman Brothers required a debt service reserve account. The most efficient way to describe how this debt service reserve account works would be to quote verbatim from the term sheets:[note: 131]

Debt Service Reserve: Borrower will be required to maintain a debt service reserve equivalent to three months interest, to be funded at Closing from Loan Proceeds and adjusted monthly, Borrower shall be required to maintain a debt service reserve account funded with an amount equal to the greater of the total of the interest amount owed in the prior three month period or three times the interest amount owed in the prior month.

408 According to Hecker's calculations, the plaintiff was required to inject a sum of THB22.75m into this account at the outset. After the commencement of the term loan, there would be ongoing transfers into and out of this debt service reserve account. As explained very helpfully by Hecker during his examination-in-chief:[note: 132]

[A]s you go through the five years, there will be transfers in and out of that debt service reserve because it is just supposed to be maintained as a three-month level of interest … So sometimes when that reserve requirement is reduced, you can bring back some of that reserve into the cash flows as a positive number, and at some points you might actually have to top it up. So it is in and out of that reserve.

409 The fourth item listed by Hecker under "Lehman [Brothers] financing costs" involves "Ongoing Debt Service – Principal and Interest Payments". This is required under the term sheets "to pay back the principal, and the interest that occurs on a monthly basis".

410 Fifthly, there is this element of a "cash flow sweep". The term in the Lehman Brothers term sheets states:[note: 133]

Cash Flow Priority: All monthly cash flow the Property [*sic*] shall be directly deposited by the Property Manager into a separate account in the name of the Bond Trustee (the "Lockbox Account"). The Lockbox Account shall be subject to a Cash Management Agreement among the Trustee and Borrower and Property Manager shall be bound to direct all revenues to the Lockbox Account. Funds in the Lockbox Account at the end of a month shall be disbursed on the 15th of the following month in accordance with the following waterfall: First, to fund the Tax and Insurance Reserve; Second, to an operating account in accordance with the Monthly Memorandum provided it is in compliance with a Lender pre-approved operating expense budge; Third, to pay accrued and current mandatory interest; Fourth, to pay scheduled principal amortization amounts; Fifth, to replenish the working capital and debt service reserve accounts and all other Lender accounts described below; Seventh, to pay the subordinate Starwood loan; Eighth, to further amortize loan principal with 50% of any remaining cashflow (subject to increase to 100% by the operation of the Debt Service Coverage Test); and Ninth, to pay any remaining balance to the issuer's account. The cash flows from the Property shall be available to support the payment and reserve obligations of the Borrower. Except as stated otherwise, all reserves will be fully funded on Closing.

411 Hecker, again, helpfully explained this convoluted term into simple English for the benefit of the court during his examination-in-chief:[134]

Then, there is this cash flow sweep which basically Lehman was saying that "Whenever you do have the opportunity to pay some additional downpayment on the principal, we would want 50 per cent of that free cash flow that is available", and they have this waterfall that goes from … 1 to 9, different levels of what gets paid, the priority of payment. I think it is about number 8 or so that the – that Lehman then gets 50 per cent of the remaining cash flow at that point in time. And in our calculations, that really does not happen until around 2005.

412 Finally, there is the element of debt service coverage shortfall principal repayment. Again, it would be helpful to first quote from the term sheets before stating Hecker's explanation for this item. The term sheets state:[note: 135]

> Debt Service Coverage Test: Beginning 12 months after funding; in the event the DSCR [debt service coverage ratio] as determined by the lender in any month falls below 1.2 times, all cash available following the current interest payment item on the waterfall shall sweep to pay down principal and the Borrower or Sponsor must pay down the financing within 60 days of demand thereof by the Lender such that, after giving effect to such prepayment, the DSCR shall not be less than 1.2 in the first 18 months, 1.3 in the months 19–24 and after the 24th month, 1.4. Failure to make such payment within 60 days notice shall be considered an event of default. No penalty shall apply on such payment. Until such DSCR is restored, all net cash flow available after payment of regularly scheduled debt service shall be used to pay down the financing as described above. "DSCR" means the ratio of (x) Net Operating Income to (y) annual debt service. "Net Operating Income" means, as of any date of determination, the difference between the aggregate amount of all gross revenues derived from the Property for twelve (12) month period prior to each respective date of determination and the aggregate amount of all operating expenses during such period.

413 Under examination-in-chief, Hecker stated the following to explain this term:[note: 136]

> Then we have this issue of a debt service coverage shortfall, because there was a debt service coverage test, and this test was set at 1.2, which means the NOI divided by the debt service should be at least 1.2; hopefully above, but at least 1.2. If it falls below 1.2, there would effectively be not quite a default, because this is allowing for a remedy, it is allowing the borrower to then pay down some principal to then get that coverage ratio back up to 1.2.
>
> The way this particular one was defined is that the debt service cash flow, the coverage ratio, would be the annualised amount, so it is 12 months of cash flow over 12 months of debt service. Whenever that 12-month period of cash flow over debt service falls below 1.2, it would affect this requirement to pay down principal to get that ratio back up to 1.2. It is just a means for the borrower to stay protected.

414 Based on Hecker's evaluations, this debt service coverage ratio ("DSCR") was not met during the five-year period and a partial repayment of close to THB500m was required in Year 2 (ending 31 December 2003). He further assumed that the borrower would have had the necessary funds to meet this payment. This was the subject of challenge by the plaintiff under cross-examination, which I will come to later.

Cash inflows

415 Apart from the outflows mentioned above, Hecker also considered the various cash inflows that the plaintiff would have received in this five-year period. There were four main components of cash inflows, according to Hecker. First, there was the excess cash from the Lehman Brothers financing (after taking into account the uses of those funds). Second, any excess amount of cash from the first component would then be taken into account to arrive at the cash in excess of working capital requirements as at 31 May 2002. For the purposes of Hecker's calculations, he had deemed the five-year period to commence from 1 June 2002, a fact which was not seriously challenged by the plaintiff. Third, he took into account the mezzanine loan proceeds (*ie*, the amount of cash which could have been injected by the Starwood mezzanine loan). Fourth, he took into account the value of the sale proceeds of the hotel at the end of 2006. I will go through his evidence on each of these four

elements in turn.

Excess cash from the Lehman Brothers financing

416 The first of the cash inflow elements is excess cash from the Lehman Brothers financing. One would appreciate that if the Lehman Brothers loan had gone through, the plaintiff would have to inject certain funds, a portion of which would be used to acquire the Lai Sun stake as well as to make repayments under the various loans that Lai Sun had.

417 Hecker first considered what he termed the "sources" of funds. If the loan had gone through, the plaintiff would receive THB1.3bn from Lehman Brothers. However, the term sheets also required "sponsor cash equity" of no less than THB100m. The term sheets stated that the sponsor, in this case Murray, would have to contribute that sum "in cash equity into the transaction prior to the funding by the Lender [Lehman Brothers] which investment shall be maintained throughout the term of the Loan". So, in short, the plaintiff would receive a total sum of THB1.4bn.

418 Next, he considered what the "uses" of those funds might be. In this context, he identified five uses which he set out in his Powerpoint slide:

	Baht
Acquisition of the Lai Sun Equity	106,250,000
Acquisition of the Lai Sun Loan and Unpaid Fees	212,500,000
Repayment of Bangkok Bank	777,062,244
Repayment of Hypo Bank	269,996,402
Senior Debt Origination fee	26,000,000

419 The figures obtained for repayment to Bangkok Bank and Hypo Bank were based on "what the Narulas actually negotiated because we do not really know what the amount would have been". In other words, Hecker relied on the figures that the Narulas managed to negotiate with these other banks when they refinanced the prior existing Lai Sun loans with those banks. This, to my mind, amounted to giving the benefit of the doubt to the plaintiff, *ie*, it was assumed that Murray would have been equally successful in his negotiations with those banks and have obtained the same terms, which I thought was reasonable. In any event, this was not challenged by the plaintiff.

420 In summary, the sources and uses of funds at the initial stage of the five-year period may be summarised in the following table:

Sources	**THB**	**Uses**	**THB**
Lehman Brothers loan	1,300,000,000	Acquisition of the Lai Sun stake	106,250,000

Sponsor cash equity	100,000,000	Acquisition of the Lai Sun loan and payment of unpaid fees	212,500,000
		Repayment of Bangkok Bank loan	777,062,244
		Repayment of Hypo Bank loan	269,996,402
		Payment of Senior debt origination fee	26,000,000
Total sources	1,400,000,000	Total uses	1,391,808,646
Excess refinancing proceeds =		1,400,000 – 1,391,808,646 = HB8,191,354	

The property's opening cash position

421 Next, Hecker considered what the property's opening cash position was. First, he took into account what the figure left on the balance sheet as at 31 May 2002 was, the day before the five-year period commenced on 1 June 2002. This figure stood at THB38,790,207. Next, he added the excess refinancing proceeds found in the table in the paragraph immediately above. Third, he deducted the working capital requirement. This concept of working capital requires some explanation. According to Richard A Brealey, Stewart C Myers & Franklin Allen, *Corporate Finance* (McGraw Hill, 8th Ed, 2006) at p 115, "working capital" is defined as follows:

> **Net working capital** (often referred to simply as *working capital*) is the difference between a company's short-term assets and liabilities. The principal short-term assets are accounts receivable (customers' unpaid bills) and inventories of raw materials and finished goods. The principal short-term liabilities are accounts payable (bills that *you* have not paid). ***Most projects entail an additional investment in working capital.*** [emphasis added in bold italics]

422 The Lehman Brothers term sheets were no different. Under the term sheets, there was a term mandating the maintenance of a working capital account:[note: 137]

> Borrower shall fund at closing and maintain in each subsequent month … a minimum balance (the "Working Capital Requirement") in the Working Capital Account. The Working Capital Requirement in any year shall equal the sum of the positive differences (ignoring negative differences) for each of the months of such year between 1.2 times projected loan debt service and projected net cash flow (which may be a negative number in the event of a projected monthly operating deficit), each as reflected in the Approved Budget. The Working Capital Requirement shall be revised annually upon determination of an Approved Budget for each subsequent year.

423 For the reasons found in [406] above, Hecker had fixed this amount at THB22.6m and he took this as a deduction from the cash on the balance sheet and the excess refinancing proceeds. In short, the calculations for the property's opening cash position may be summarised in the following table:

Property's opening cash position	**THB**

Cash on balance sheet as at 31 May 2002	38,790,207
Excess refinancing proceeds	8,191,354
Less: Working capital requirement	(22,600,000)
Cash in excess of working capital requirements	24,381,561

The Starwood mezzanine loan

424 Third, for cash inflows, Hecker took into account the Starwood mezzanine loan proceeds. For this, Hecker relied on the defendants' LOI to the plaintiff dated 22 January 2002. Under the LOI, the principal loan amount was US$6m. However, to better appreciate the effect of the Starwood mezzanine loan on the cash flows, it would be important to appreciate that there would be outflows as well, when the plaintiff are required to service this debt.

425 At this juncture, it may be useful to quote the entire term relating to the Starwood mezzanine loan in the defendants' LOI in order to appreciate the repayment schedule for this mezzanine loan:[note: 138]

> Terms of Operator [Starwood mezzanine] Loan: Starwood would provide US$6 million through a non-revolving, 5-year mezzanine loan to renovate the Hotel to a Westin standard. The loan would bear a fixed interest rate of 10% and would be repaid over 5 years. The mezzanine loan would be secured by a mortgage on the hotel ranking 2nd in priority after the 1st mortgage loans.
>
> The principal and interest payments would be as follows:
>
> 2003 $1.1 million
>
> 2004 $1.1 million
>
> 2005 $1.6 million
>
> 2006 $1.6 million
>
> 2007 $3.0 million

426 In short, while the funds would have been provided by defendants as and when they were needed for renovations, the plaintiff was given (under the LOI) an opportunity make repayment of the principal plus interest over five years starting in 2003 in the amounts quoted above.

427 At this point, it may be useful to say a few words about the figures that Hecker used for renovation costs. For his calculations, Hecker chose to rely on the figure which the Narulas eventually spent to get the hotel up to a Westin standard. That figure was THB370,488,192. One would appreciate that that is about THB145m more (based on Hecker's calculation and conversion rate of THB42.5 to US$1.00) than the amount anticipated in the defendants' LOI (*viz* THB225m). The plaintiff spent much time, both during cross-examination and in its closing submissions, trying to discredit Hecker's calculations by questioning this approach. I will deal with that later, save to say that for present purposes, my intent here is to present Hecker's calculations as they stand first, so that the reader gets a complete picture of his evidence.

Sale proceeds in 2006

428 I now turn to the fourth, and perhaps most thorny, element which is the value of the sale proceeds. On this item, Hecker had this to say under examination-in-chief:[note: 139]

> The other cash inflows, besides the annual property net operating income – that is reflected from that point, June 2002 to the end of 2006 – we also have the sale proceeds at the end of 2006, which is basically the hypothetical sale or the valuation of the property, which would be – effectively be the residual value or the sale at that point in time, which we have a number – we are using a number of 2.77 billion which is basically just as a simple average of the Jones Lang LaSalle value and the HVS values which have been presented.
>
> We have a transaction cost of 3 per cent deducted from that. This is a hypothetical sale; that is how the exit is assumed, and that relates to brokers fees, it relates to due diligence cost, the lawyers' costs.
>
> There is a lot of – you know, stamp duties or whatever that accumulate into that 3 per cent. Then you have to pay off at that point in time, because the Lehman debt – well, actually it is not Lehman debt, it has been refinanced by then, but it is the debt that is outstanding at the time of the senior loan, which is 613 million [baht].
>
> Then we have the origination – sorry, the – it was an additional interest fee of 10 per cent of the original loan amount. This is in the term sheet, and that would have to be paid at the end. And we have assumed that or we put that in at 10 per cent according to the term sheet.
>
> Then we have the remaining mezzanine debt, because that was actually a five-year term, so at 2006 we still have another year to go, I believe. So that is the outstanding debt for the mezzanine loan that needs to be paid off with the proceeds of this hypothetical sale.

429 One would recall that the values of the two valuations provided by the defendants' experts, namely Chee from Jones Lang LaSalle and Ling from HVS International were THB2.695bn and THB2.8bn respectively. Taking the simple numerical average of these two figures, Hecker arrived at about THB2.77bn. Next, he valued the transaction costs at 3% of the total sale proceeds and arrived at a figure of about THB83m. Again, this is straightforward.

430 Then, Hecker deducted the sums required to pay off the senior debt and the Starwood mezzanine loan. This requires some explanation. Under the Lehman Brothers term sheets, the loan would only be for 36 months and the principal has to be repaid over monthly instalments determined on the basis of a 25-year amortisation schedule. The three relevant terms for appreciating the payment term, interest rate and monthly payments are set out as follows:[note: 140]

> Interest Rate: Sum of the greater of 6% and one-month MLR (average of Bangkok Bank, Siam Commercial Bank, and Thai Farmers Bank) adjusted monthly, and:
>
> Year 1: 100 bps
>
> Year 2: 250 bps
>
> Year 3: 400 bps.
>
> Interest shall be payable on the 15th day of each month commencing on the 15th day of the first

calendar month following the month of closing. Interest shall be calculated on the basis of a [30/360] day count convention. Interest in each payment period will accrue from and including the closing date or preceding interest payment date, as applicable, through but not including the following interest payment date.

Term: 36 Months. Outstanding Principal Amount to be paid on the first interest payment following the third anniversary of the Closing Date (the "Maturity Date").

Minimum amortization: Principal shall be repaid in minimum monthly installments determined on the basis of a 25-year amortization schedule. The first year's minimum amortization payments shall be computed assuming the interest rate in effect at the time of closing and a remaining term of 300 Months. The second year's minimum amortization payments shall be computed assuming the interest rate in effect on the first anniversary of closing and a remaining term of 288 months. The third year's minimum amortization payments shall be computed assuming the interest rate in effect on the second anniversary of closing and a remaining term of 276 months.

431 At the expiry of three years from the commencement of the loan, the plaintiff would have to seek refinancing (whether from Lehman Brothers or otherwise) in order to maintain its investment up to the end of the five-year period. For the purposes of the calculation, Hecker had assumed that refinancing would be obtained at the end of the third year, at an interest rate of 7% and the same amortisation as the Lehman Brothers loan.[note: 141] With this assumption in mind, Hecker then calculated the amount payable in each year to Lehman Brothers, up to Year 3, and from then onwards, the amounts payable each year assuming refinancing at 7% interest rate and the same amortisation as the Lehman Brothers loan. Whatever was left would be the outstanding senior debt principal payable at the end of the five-year period, which he calculated to be around THB613m.

432 Next, there was the element of a 10% interest fee. The relevant term from the Lehman Brothers term sheets is as follows:[note: 142]

Loan Fee and Additional Fees: Origination Fee plus *deferred additional interest payable at maturity equal to 10.0% of the Principal Amount drawn down.*

The Loan Fee is based on original Principal Amount and is earned upon the execution of definitive documentation or a commitment letter as applicable, and payable at the earlier to occur of the Closing Date or a date upon which any commitment to fund expires other than due to a material default by Lender. The additional interest will be payable on the Maturity Date or upon any acceleration.

[emphasis added]

433 This meant that when the Lehman Brothers loan matures at the end of Year 3, the plaintiff would have to pay a 10% interest fee. Bearing in mind that the original loan amount was THB1.3bn, Hecker fixed the value of this 10% interest fee at THB130m. For the calculation and his tables, Hecker appears to have affixed this payment to be made at the end of the five-year period, *ie*, only at the end of 2006.

434 Finally, there was the outstanding Starwood mezzanine loan principal to be made. As the mezzanine loan would only be repaid at the end of 2007, the plaintiff's exit at the end of 2006 would necessarily mean that it would have to pay off the remainder of the debt – both principal amount and interest – to the defendants. According to Hecker's calculations, the amount of principal and interest outstanding as at 31 December 2006 would be THB26,604.662.

435 In summary, the calculations for this series of inflows starting from the sale proceeds to the outstanding Starwood mezzanine loan, are as follows:

(I) Net Sale Proceeds at Year End ("YE") 2006	**THB**
Total sale proceeds [A]	2,772,500,000
Less: Transaction costs at 3% (ie, 3% x [A]) [B]	(83,175,000)
Net sale proceeds at YE 2006 [C] = [A] – [B]	**2,689,325,000**
(II) Total Outstanding Debt at YE 2006	**THB**
Outstanding senior debt principal [D]	613,326,371
10% interest fee (based on 10% of THB1.3bn) [E]	130,000,000
Outstanding mezzanine loan principal [F]	26,604,662
Total outstanding debt at YE 2006 [G] = [D]+[E]+[F]	**769,931,033**
Sale proceeds to shareholders at YE 2006 [H] = [C] – [G]	**1,919,393,967**

Hecker's Appendix 3 (Version 3)

436 With these calculations in mind, it would be timely to introduce Hecker's Appendix 3, which is a very complex table comprising the above calculations entered into a table showing the net operating investment for each year, as against the various "pluses and minuses". (For reasons to be stated below, Hecker made a few revisions to his Appendix 3. I will, for starters, deal with Version 3.) For the clarity of presentation, I have split up Version 3 of his Appendix 3 into two parts and reproduced them in Annexes E and F to this judgment.

437 Annex E merely contains the 100% cash flow figures for the five-year period between 2002 and 2006. From these figures, Hecker took two steps to derive the loss of profits sustained by the plaintiff. First, he took into account the fact that the plaintiff's stake in PSD was merely 54.2%, as the remainder belonged to Pongphan. Hence, the plaintiff's share of these cash flows would only be 54.2% of the 100% values. I have appended these calculations at Annex F to this judgment.

438 Next, as he had adopted the DCF analysis, he had to obtain the net present value ("NPV") of those cash figures as at 2002. However, in his Appendix 3 (all versions), he merely stated what the NPV was and did not provide any workings as to how he had arrived at that figure. Under examination-in-chief, he had this to say for the figure arrived at for Version 3 of Appendix 3:[note: 143]

> So the summary line is, it comes out to approximately 250 million Baht as of June 2002, which is the prevent value of all those future cash flows, and using the 42.5 Baht exchange rate, which was the exchange rate at that point in time, June 1st, 2002, we get to 5.89 US million [dollars].

439 This explanation, however, fell short of explaining how the plaintiff's cash flow line became that figure of around THB250m. As I have attempted to show in Annex F, the sum total of the plaintiff's cash flows from Year 0 to Year 5 stands at THB1,419,622,526 which is a far cry from the THB250m figure that Hecker had provided.

440 I have checked the bundles of documents as well as the notes of evidence and note that neither Hecker, counsel for the defendants nor counsel for the plaintiff brought the court's attention to how this figure was arrived at. At first blush, it may appear that this calculation has nothing to do with the plaintiff and, therefore, it does not have to explain this calculation to the court. However, on closer scrutiny, it appeared that counsel for the plaintiff did rely on this NPV concept in arriving at his client's version of figures as well. In the course of re-examination, counsel for the plaintiff referred to various working tables produced by Murray in an attempt to demonstrate that the calculations arrived at by Hecker could not be relied on.[144] Leaving aside its attempt to provide calculations based on discount at inflation rather than discount through WACC, the plaintiff's versions in these worksheets were one step better than the table drawn up by Hecker in his various versions because, at the very least, the plaintiff had attempted to include two extra lines, namely "Discount at 13.37%" and "NPV Cashflow" for each of the years.[note: 145]

441 However, to my mind, that was still insufficient. No explanation was given by counsel for the plaintiff as to how the "discount" figures of 1.00, 1.00, 0.882, 0.778, 0.686 and 0.605 (figures which are rounded up to three decimal places) for each of the respective years were arrived at.

442 Fortunately, in this instance, the court is able to take judicial notice of well-established textbooks and online resources on corporate finance to find out what the formula for NPV is. Brealey, Myers & Allen's *Corporate Finance* ([421] *supra*) had this to say about the NPV (at p 88):

> [I]t is worth keeping in mind the following key features of the net present value rule. First, the NPV rule recognizes that a ***dollar today is worth more than a dollar tomorrow****,* because the dollar today can be invested to start earning interest immediately. *Any investment rule which does not recognize the* ***time value of money*** *cannot be sensible.* Second, net prevent value depends solely on the ***forecasted cash flows*** from the project and the ***opportunity cost of capital***. … Third, ***because present values are all measured in today's values, you can add them up*****.** [emphasis added, emphasis in original in bolt italics]

443 Wikipedia defines the formula for NPV (see <http://en.wikipedia.org/wiki/Net_present_value> (accessed 29 March 2007)) as follows:

> Each cash inflow/outflow is discounted back to its PV [present value]. Then they are summed. Therefore
>
> **[LawNet Admin Note: Click on the link to the PDF above to see the formula for NPV]**
>
> Where
>
> *t* - the time of the cash flow
>
> *n* - the total time of the project
>
> *r* - the discount rate
>
> C_t - the net cash flow (the amount of cash) at time *t*.

C_0 - the capital outlay at the beginning of the investment time (t = 0)

444 Such a complex formula may seem daunting at first blush. Fortunately, in Brealey, Myers and Allen's *Corporate Finance* ([421] *supra*), this is illustrated with an example at p 36:

> For example, suppose you are now offered an investment that produces a cash flow of $100 in year 1 and a further cash flow of $200 in year 2. The one-year interest rate is 7 percent and the two-year rate is 7.7 per cent. … [T]he value today of the first year's flow is $C_1/(1 + r_1)$ = 100/1.07 = $93.46 and … the value of the second year's flow is $C_2/(1 + r_2)^2$ = 200/1.077^2 = $172.42. Our rule for adding present values tells us that the *total* present value of the investment is
>
> $$PV = \frac{C1}{1 + r_1} + \frac{C2}{(1 + r_2)^2} = \frac{100}{1.07} + \frac{200}{1.077^2} = \$265.88$$
>
> We can continue to apply the additivity rule to find the present value of an extended stream of cash flows:
>
> $$PV = \frac{C1}{1 + r_1} + \frac{C2}{(1 + r_2)^2} + \frac{C3}{(1 + r_2)^3} + \ldots$$
>
> This is called the **discounted cash flow** (or **DCF**) formula. A shorthand way to write it is
>
> $$PV = \Sigma \frac{C_t}{(1 + r_t)^t}$$
>
> Where Σ refers to the sum of the series. To find the net present value (NPV) we add the (usually negative) initial cash flow …:
>
> $$NPV = C_0 + PV = C_0 + \Sigma \frac{C_t}{(1 + r_t)^t}$$
>
> [emphasis in original]

445 Interestingly, the Microsoft Excel program facilitates the calculations of NPVs within a spreadsheet. This was helpfully illustrated by Stephen A Ross, Randolph W Westerfield & Bradford D Jordan, *Corporate Finance Essentials* (McGraw-Hill, 5th Ed, 2007) at p 229 in the following spreadsheet example:

Spreadsheets and financial calculators are commonly used to calculate NPVs. The procedure used by various financial calculators are too different for us to illustrate here, so we will focus on using a spreadsheet (financial calculators are covered in Appendix D). Examining the use of the spreadsheets in this context also allows us to issue an important warning. Let’s rework Example 8.1:

	A	B	C	D	E	F	G	H
1								
2	**Using a spreadsheet to calculate net present values**							
3								
4	From Example 8.1, the project’s cost is $10,000. The cash flows are $2,000 per year							
5	for thefirst two years, $4,000 per year for the next two, and $5,000 in the							
6	last year. The discount rate is 10 percent; what’s the NPV?							
7								
8		Year	Cash flow					
9		0	-$10,000	Discount rate =	10%			
10		1	2,000					
11		2	2,000		**NPV =**	**$2,102.72**	(*wrong* answer)	
12		3	4,000		**NPV =**	**$2,312.99**	(*right* answer)	
13		4	4,000					
14		5	5,000					
15								
16	The formula entered in cell F11 is = NPV(F9,C9:C14). This gives the wrong answer							

17	because the NPV function actually calculates present values, not net present values.							
18								
19	The formula entered in cell F12 is = NPV(F9,C10:C14) + C9. This gives the right answer							
20	because the NPV function is used to calculate the present value of the cash flows and then							
21	the initial cost is subtracted to calculate the answer. Notice that we added cell C9 because it is already negative.							

446 Therefore, one would be able to use the cell formula "=NPV([discount rate], [yearly cash flows])+[initial cash flow]" to calculate what the NPV is.

447 To further illustrate this, one turns to Microsoft Excel Help on the NPV formula for an example of how the formula is to be applied:

Example 1

A	**B**
Data	**Description**
10%	Annual discount rate
-10,000	Initial cost of investment one year from today
3,000	Return from first year
4,200	Return from second year
6,800	Return from third year
Formula	**Description (Result)**
=NPV(A2, A3, A4, A5, A6)	Net present value of this investment (1,188.44)

In the preceding example, you include the initial $10,000 cost as one of the values, because the payment occurs at the end of the first period.

Example 2

A	**B**

Data	Description
8%	Annual discount rate. This might represent the rate of inflation or the intest rate of a competing investment.
-40,000	Initial cost of investment
8,000	Return from first year
9,200	Return from second year
10,000	Return from third year
12,000	Return from fourth year
14,500	Return from fifth year
Formula	**Description (Result)**
=NPV(A2, A4:A8)+A3	Net present value of this investment (1,922.06)
=NPV(A2, A4:A8, -9000)+A3	Net present value of this investment, with a loss in the sixth year of 9000 (-3,749.47)

In the preceding example, you don't include the initial $40,000 cost as one of the values, because the payment occurs at the beginning of the first period.

448 However, even if one incorporates Version 3 of Hecker's Appendix 3 into an Excel worksheet using the above formula, one does not arrive at the NPV value that Hecker had obtained. This can be seen through three tables appended in Annex G to this judgment. (The following paragraphs should be read in conjunction with the tables found in Annex G.)

449 Hecker's NPV as given in Version 3 of his Appendix 3 stands at THB250,404,959. However, a direct application of the NPV formula would return a value of THB232,805,688 (see cell B11 in Annex G). This produces a difference of THB17,599,271 from Hecker's figures. The same result would have been obtained, even if one were to calculate the present value for each of the years and then sum them up for the NPV: see calculations in rows 13 to 15.

450 However, one realises that applying this formula directly may not be appropriate in this case because the end of Year 1 was a mere seven months away (or 213 days out of 365 days) from the commencement of the five-year period on 1 June 2002. Therefore, I had attempted to reconcile the figures using figures where t = 7/12 (see rows 17 to 19) and where t = 213/365 (see rows 21 to 23) and extrapolating the same formula for the respective years. These two calculations returned a difference of THB217,322 and THB207,302 respectively, which is more manageable and reasonable than the difference if one had applied the NPV directly. I am prepared, for the purposes of this assessment, to adopt the formula using t = 213/365 since I am of the view that that is the more accurate way of denoting the values even though I appreciate that at the end of the day, the difference between that and using t = 7/12 is a mere THB10,000 (or around US$235). Further, I am also prepared to resolve any doubts in favour of the plaintiff. In this instance, picking the formula

which uses 213/365 would produce a greater value for the plaintiff.

451 Having explained Version 3 of Hecker's Appendix 3, it is now appropriate to discuss the changes which he had made to the earlier versions (*ie*, how he had arrived at Version 3 from his original Version 1) and also how he had, in court, corrected his own Version 3 to arrive at what I term Version 4.

Hecker's explanations for the changes up to Version 3

452 During examination-in-chief, Hecker admitted that he had revised his Appendix 3 twice since his first affidavit. He gave his explanation as follows:[note: 146]

> [W]e are constantly trying to make sure that we are being as proper as possible in calculating this number that is due.
>
> As we keep reviewing it and making sure we are being as fair as possible, you know, we made changes to make sure that we are doing it properly, re-reading the term sheet, making sure we have the understanding of each of the clauses, and all of that.

453 Hecker gave a sundry list of the changes that he had made since his affidavit of evidence-in-chief was filed in May 2005. To summarise, one may refer to the Powerpoint slide which he presented in court and where appropriate, quote from the notes of evidence where he attempted to give the following explanations:

(a) The plaintiff's investment amount was changed from US$2.5m or THB106.25m to THB100m to reflect the Lehman Brothers term sheet requirement for sponsor cash equity of "no less than THB100m".

(b) The origination fee of 2% of the THB1.3bn principal amount according to the Lehman Brothers' Terms Sheet was now assumed to be paid out of refinancing proceeds.

(c) The initial working capital requirement was revised to reflect the actual working capital of hotel as of 31 December 2005.

(d) The exchange rate for the mezzanine loan was revised to the rate of THB42.5 to US$1.00 based on the time of the loan, which was 1 June 2002.

(e) The net operating income ("NOI") of the hotel for each of the years and 2004 was updated with latest data. The 2005 actual NOI and 2006 budget were used.

(f) The NOI was adjusted to reflect a reserve of 3% in 2002 and 3.583% in 2003 (a weighted average of 3% for five months and 4% for seven months). This is consistent with the 22 January 2002 LOI.

(g) The NOI was adjusted to reflect a 2.5% gross operating revenue base fee and an 8% gross operating profit incentive fee which were consistent with the 22 January 2002 LOI.

(h) The retail income in 2002 was changed to THB700 from THB1,200 due to the fact that 2002 was not a full year.

(i) The NOI adjustments resulted in changes in senior debt service and principal repayments to meet the DSCR shortfall, transfer to and from debt service reserve, and senior cash flow sweep.

(j) The total sales proceeds were increased to reflect updated values provided by Jones Lang LaSalle and HVS International.

Hecker's Appendix 3 (Version 4)

454 In addition to the changes that he had already made and explained above from the earlier versions to Version 3, Hecker sought to amend his figures again during examination-in-chief. The exchange between the defendants' counsel and Hecker[note: 147]bears citation:

> MR RAMESH: Mr Hecker, you have submitted the version 3 of appendix 3. Are there any corrections you want to make? A final opportunity do so before you are put in the hands of my learned friend for cross-examination.
>
> A: Right. Okay. Well, again, always going over it and over it to make sure that it is correct. Going through it one last time, I found a couple of slight errors that need to be corrected, but they are very minimal.
>
> But just to review them quickly, the mezzanine loan debt service, there is – as the schedule goes across monthly, it is supposed to – the change of the amount to be paid for two of the years was done incorrectly; it should have been – it was changed in May when it should have been changed in June. In May 2004 and in May 2006 there should have been – it should be a lower amount in those two items, because it was taken one month too early in those two situations.
>
> Then the other one is on the cash flow statement that was used. Again, it was a pro-rated error, in that the ground rent in 2002 was shown as a full year amount, and it should have been a partial year amount, so that would be a reduction of that number in 2002.
>
> Then in 2003, the cash flow statement actually says 2.5 per cent base fee as ratio, but the actual amount that is calculated is 2 per cent. So if you were to correct that, that would actually be an increase in the expense, and so the cash flow would be lower. In fact, that error, which carries through 2003 to 2006, compensates for the ground rent. It is actually much to the benefit of the plaintiff in terms of showing a lower net operating income – I mean a higher one, because the base fee is lower than it should be. But it is minimal. It is really a very small correction.

455 Hecker's Version 4 was eventually submitted to court via a letter from counsel for the defendants dated 10 February 2006. A summary of the figures provided in Version 4 can be found appended in Annex H to this judgment. By the same token and analysis for Version 3, I have appended in Annexes I and J the respective tables based on Version 4 figures in order to arrive at the NPV. In short, Hecker's NPV in Version 4 stands at THB243,381,930. According to my analysis above, using t = 213/365 but utilising all the other figures in Hecker's Version 4, I would arrive at a figure of THB243,585,677 which is THB203,747 more than Hecker's NPV in Version 4.

The plaintiff's critique of Hecker's evidence

456 When the cross-examination of Hecker commenced, the first line of attack adopted by counsel for the plaintiff pertained to Hecker's qualification. In particular, questions were asked regarding Hecker's qualification as an expert in hotel valuation. In essence, the plaintiff sought to assert (as it did its closing submissions[note: 148]) that Hecker – as a person who was not qualified in hotel

valuation – went so far as to state his opinion on the value of the hotel in his affidavit of evidence-in-chief. Further, it was argued that, at para 5 of the same affidavit, "Hecker had stated that he was of the opinion that the computations done by Starwood were 'reasonable'".[note: 149] The line of argument appeared to be simple: Hecker was not a licensed appraiser, yet, it appeared obvious from his affidavit that he was stating his view on – and went so far as to agree with – the defendants' earlier valuations.

457 For the reasons I have already given in [397] and [398] above, I found no merit in this argument to discredit Hecker. He had made it clear under cross-examination that he had received training in real estate finance. Therefore, even though Hecker may not have been a licensed appraiser, it cannot be said that real estate finance and the valuation of hotels are subjects alien to him, particularly since he had received a master's degree in hotel administration. More importantly, it was clear in my mind that Hecker's chief, and perhaps only, role was to calculate the lost profits by doing the various "pluses and minuses" to the cash flows and the valuations. He was, for want of a better phrase, the man who was tasked to put the final nails into the coffin; the person who had the task of putting on the finishing touches to a piece of work. Therefore, I found no merit whatsoever in the quibbles over his qualification.

458 Next, counsel for the plaintiff sought to discredit Hecker by highlighting the fact that he had changed his figures no less than five times (*viz*, four versions of Appendix 3 which differed from the figures he had given in his affidavit of evidence-in-chief for the trial at first instance, back in August 2003). This fact was raised no less than three times in the plaintiff's closing submissions. In what I deem to be arguments which are more verbose than necessary, counsel for the plaintiff submitted from its closing submissions[note: 150] various (what I would term) "nitpicking" reasons why the court should discredit Hecker as an expert witness. Looking at the explanations given by Hecker and evaluating, for myself, the differences between Versions 1, 2, 3 and 4, I am of the view that Hecker's changes between these versions were reasonable and justified. As my attempts to explain the calculations in the earlier paragraphs have shown, each of the entries in the Appendices is complex and is contingent on various factors. To compound the matter, some of the entries have the potential to "cascade" into other entries. In the light of the highly interconnected calculations, the need for revisions – particularly with the discovery of new information or mistakes in earlier assumptions – is perfectly understandable. What is more important is to note that Hecker's task is based on building a model of cash flow figures based on various assumptions. His role is not an enviable one – when one makes assumptions, it is always easy to challenge those assumptions. However, as with Pirie, the plaintiff chose (for reasons best known to itself) not to call another expert in this regard to refute Hecker's evidence. Instead, what it did was to rely on Murray's various worksheets to postulate a possible alternative. At the risk of stating the obvious, Murray is not an expert by any stretch of the imagination. To reject Hecker's evidence and to rely on Murray's tables, simply because the latter appeared to be "plausible", does not seem to me to be a logical, fair or sensible solution. Therefore, overall, I was not persuaded by the plaintiff's general attempts to discredit Hecker as a witness.

459 I now turn to the more substantive arguments levelled by the plaintiff against Hecker. First, in its closing submissions,[note: 151] counsel for the plaintiff highlighted that in his latest Version 4, Hecker revised the "Property NOI" line item downwards. This, it was argued, was incorrect and the change should not be allowed because it was not one arising from cross-examination, not one for which Hecker was asked by the court to revise and, lastly, not a change resulting from the other changes that Hecker was asked to make. Further, the plaintiff argued that if Hecker was relying on the actual figures for the hotel's NOI between 2002 and 2005 (as stated in footnote 10 to his Appendix 3), then there should not be any revision downwards, if at all, between Versions 2 and 3, and again, between Versions 3 and 4.

460 On further scrutiny of the notes of evidence, I found that Hecker did explain – under examination-in-chief, which I had quoted at [454] above – that there were some errors in the cash flow statements that were used in Version 3. Although he did not go so far as to explain *specifically* why this had an impact on the "Property NOI" line item, I am prepared to give him the benefit of the doubt and find that his changes to the "Property NOI" line item were, more probably than not, a result of the changes to the cash flow statements that he had relied on. As I had attempted to show throughout this part of the judgment, the various line items are closely interlinked. Therefore, I dismiss the argument that the changes to Version 4 as a result of the change in the NOI, should be disregarded because it was a change not prompted by cross-examination or led during examination-in-chief. In any event, I found no basis for the complaint that Hecker had revised his figures for the NOI between Versions 2 and 3 even though he had purportedly used actual figures (according to his footnote 10). I note, from the notes of evidence, that although counsel for the plaintiff attempted to clarify with Hecker that he had used the actual performance figures of the Westin Grande Sukhumvit for 2005 and that he had used budget figures for 2006,[note: 152]counsel did not go so far as to cross-examine Hecker on why the NOI had changed despite his footnote 10. Hence, according to the rule in *Browne v Dunn* (1893) 6 R 67, I find that it would be unfair for the plaintiff to now argue that no explanation was given – the case was simply not put to the witness during cross-examination when the opportunity was available. (One would note that the changes between Versions 2 and 3 were done before the trial and, therefore, could be the subject of cross-examination by the plaintiff.)

461 I next turn to the argument found in the plaintiff's closing submissions, *viz* that:[note: 153]

> The reduction in the Property NOI also has the effect of causing Hecker's calculation of a principal repayment to meet an alleged DSCR shortfall to become higher by Baht 10 million. This new change after close of trial again has repercussions that have been untested under cross examination.

462 While, at first blush, this argument appeared attractive, I found no merit in the argument after due consideration. One has to bear in mind that Hecker's examination-in-chief and cross-examination were over in half a day on 8 February 2006. His Version 4 came some two days later, by way of a letter dated 10 February 2006. If the plaintiff thought it prudent or necessary to cross-examine Hecker again, after looking through his Version 4, it was incumbent on the plaintiff to make an application to have Hecker recalled as a witness for further cross-examination. That would have been a perfectly reasonable and legitimate request: If clarifications were necessary in the light of a new set of figures being tendered, I would have readily recalled Hecker and heard his clarifications. However, the plaintiff made no such request. Having chosen to remain silent, it would be unfair and unjust to disregard Version 4 just because Hecker was not cross-examined on the document.

463 Having sought to discredit Version 4 in its closing submissions, the plaintiff also requested the court to disregard Version 3.[note: 154] The "serious errors" which allegedly "plagued" Hecker's conclusions included the following:

> (a) relying on an average of Chee's and Ling's conservative valuations (themselves not based on the defendants' projections);
>
> (b) deducting renovation costs of THB380,488,192 (US$8.8m) when the plaintiff's plan was to spend, and the renovation costs under discussion were, US$5m only;
>
> (c) treating the renovation loan as US$6m, when what was required was US$5m only;
>
> (d) applying the actual earnings achieved by the hotel when that was not "the product under

discussion", and the earnings were achieved through delayed renovations;

(e) introducing a principal repayment to meet the DSCR shortfall;

(f) discounting the value of the hotel and its cash flows at a factor of 13.37%;

(g) penalising the cash flows by applying a management fee of 2.5% and incentive fee of 3.9% during the period before the hotel was rebranded as a Westin, even though the LOI terms clearly did not indicate this; and

(h) alleging that the stake that the plaintiff was purchasing was only 54.2% when it was undisputed that the stake was 54.25%.

464 I find no merit in the argument summarised in (a) above. Hecker was merely relying on the valuations provided by the defendants' two experts. Hecker needed a starting point and reliance on those cannot be faulted. Nevertheless, because I have evaluated a fair and reasonable value of the hotel as at 31 December 2006 to be THB3,049,795,097 (see [314] above), I will make the necessary adjustments to Hecker's figures later.

465 On the issue of renovation costs, I find it illogical for the plaintiff to insist that it would have spent less money renovating the hotel than the Narulas. Hecker's explanation for this, which I accept, was simple, *viz*, "I believe it is better to take an actual renovation that occurred, because then you have actual cost that it took to make this a Westin".[note: 155]That is a perfectly sensible approach, based on the fundamental principle that the court need not postulate if real figures are available. This is also an approach supported by authorities, for example, *The Bwllfa and Merthyr Dare Steam Collieries (1891), Limited v The Pontypridd Waterworks Company* [1903] AC 426 where Lord Macnaghten, in the House of Lords, opined at 431:

> If the question goes to arbitration, the arbitrator's duty is to determine the amount of compensation payable. In order to enable him to come to a just and true conclusion it is his duty, I think, to avail himself of all information at hand at the time of making his award which maybe laid before him. *Why should he listen to conjecture on a matter which has become an accomplished fact? Why should he guess when he can calculate? With the light before him, why should he shut his eyes and grope in the dark?* [emphasis added]

466 To my mind, whether the plaintiff would have spent the US$5m which it intended for the renovations is moot. While it can now insist that it would have restricted the renovations to US$5m and would not have allowed any delays in the renovations, that is being said with the benefit of hindsight. The fact of the matter is that it took that long, and it took that much, for the hotel to be upgraded to a Westin. To ask the court to turn a blind eye to actual figures incurred for renovations is illogical and unacceptable.

467 Further, the fact that the plaintiff had merely requested US$5m, but was granted a loan of US$6m by the defendants, is also irrelevant. I pause here to note that it does not lie in the mouth of the plaintiff to quibble about this increase in the loan amount. One would have to recall the history of the negotiations between the defendants and Murray to appreciate this increase: it was due to Murray's insistence on key money that the defendants, on consideration, decided to increase the quantum of loan. Given that context, I think it unwise for the plaintiff to now argue that it would not have required the entire US$6m loan. To do so would unjustly enrich the plaintiff, and, more importantly, turn a blind eye to the status of the negotiations between Murray and the defendants at the material time.

468 Next, I come to the issue of the DSCR. Attempts were made by the plaintiff to demonstrate that the deduction for repayment to meet the DSCR was not necessary. However, without going into the details, I found that Hecker stood his ground during cross-examination on this point.[note: 156] The fact of the matter remains that the DSCR was a provision in the Lehman Brothers term loan. Granted, there was always a *possibility* that the plaintiff might have been able to negotiate and remove this requirement; however, it would be entering the realm of wild speculation to determine if this *might* have been *possible*. It is far more prudent and logical for the court to rely on the express terms and the hard figures. Based on Hecker's analysis, which I find overall to be sound, there was a need to make the repayment and I have (after checking the notes of evidence again on Hecker's cross-examination) no reason to doubt him on this point.

469 As for the issue of using the discount rate of 13.37%, I have already dealt with this point at length in my treatment of Pirie's evidence, so I do not propose to repeat the findings here. Moving on to the issue of the 2.5% management fee, on my perusal of the notes of evidence again, I found that counsel for the plaintiff did not cross-examine Hecker on this point. Therefore, again invoking the rule in *Browne v Dunn* ([460] *supra*) it would not be procedurally correct for me to accept the plaintiff's complaint as it had not been put to Hecker.

470 Last, but not least, I come to the allegation that the plaintiff's share was inaccurately stated by Hecker as 54.2% (even though it was undisputed that the plaintiff's share was 54.25%). During cross-examination, I chided counsel for the plaintiff on pursuing this minor detail:[note: 157]

> MR TAY: Staying with your third version, Mr Hecker, look at your assumptions. The first point I want to raise is this.
>
> In terms of the percentage that you say AHIL will be acquiring in this property, you have said 54.2 per cent. Would you not agree with me, Mr Hecker, that the more – a more accurate number would be 54.25 per cent?
>
> A: I am not sure – I believe this is just close to one decimal point, so I am not sure that it is actually 54.2.
>
> COURT: Is it going to be an earth shaking difference? Are you nitpicking or is it going to make a material difference? Tell me before you proceed with this line of cross-examination.
>
> MR TAY: The amount is 1 million Baht.
>
> COURT: How much is 1 million Baht in US dollars, Mr Tay? Do not nitpick. Look at the big picture.
>
> MR TAY: US$25,000.
>
> MR YEO: I assure you, your Honour, in the submissions we will be looking at the big picture.

471 In spite of Mr Yeo's reassurance, this point was again raised in the submissions. This was typical of the plaintiff's repeated attempts to discredit Hecker's evidence. As I have mentioned time and again in this judgment, the calculations are not easy. Assumptions are made, the figures are contingent upon one another. To my mind, set against the backdrop of Hecker's unenviable task, all that the plaintiff has done, both in cross-examination and in written submissions, amounted to no more than nitpicking at Hecker's evidence. Be that as it may, for the sake of completeness, I will make the necessary adjustments to the tables to reflect the shareholding at 54.25% (rather than

54.2%).

The court's analysis of lost profits

472 Overall, I accept Hecker's Version 4 figures, save with three caveats. First, his calculation of NPV (for reasons I have already mentioned) does not tally with the formulae prescribed in the authorities, which I have referred to earlier in [446] above from both online resources and textbooks on corporate finance. Therefore, I have chosen to adopt what I deem to be a reasonable method of calculating the NPV, *viz* to use *t* = 213/365 as the starting point, since the time period between Year 0 and Year 1 is a mere seven months.

473 Second, for the reasons I have given on the valuation, I am unable to accept Hecker's reliance on the average of Chee's and Ling's valuations alone. As I had mentioned at [314] above, I find that a fair and reasonable value to be ascribed to the hotel is THB3,049,795,097. Therefore, I am obliged to substitute this figure for Hecker's Version 4 figures, in order to calculate the plaintiff's loss. Third, I make the adjustment to reflect the shareholding at 54.25% (rather than 54.2% as assumed by Hecker).

474 I will now illustrate my calculations in the following annexes. First, in Annex K, I insert the valuation of the hotel (THB3,049,795,097) into the first row under "Sale Proceeds". This, in turn, would affect the second row of that table, namely the 3% transaction cost item. Consequently, the net sale proceeds according to my evaluation would be THB2,119,686,389 (or about US$52.99m at the exchange rate of THB40 to US$1).

475 Next, I inserted this net sale proceeds figure into Hecker's Version 4 workings, in Annex L. This would result in one significant change, for the property cash flow (at 100%) for Year 5 (ending 31 December 2006). Finally, in Annex M, I calculate what is the court's evaluation of the plaintiff's NPV as at 1 June 2002, bearing in mind that the plaintiff's share is a 54.25% and value of *t* = 213/365 as the starting point for Year 1. This would provide me with a final NPV figure of **THB325,997,077** (or about US$8.15m).

The plaintiff's damages

476 Evaluating the plaintiff's lost profits in the above paragraph is only half of the equation in assessing the plaintiff's damages. One has to attribute the loss of chance to the figure of THB325,997,077 to take into account the fact that the plaintiff's loss, at the end of the day, is merely a loss of chance and not the actual loss of profits. For the reasons I have given above and to summarise here for easy reference, I have evaluated the plaintiff's chance as follows:

(a) Likelihood of securing financing element: 4% (being 10% of 40% weightage for this element);

(b) Likelihood of securing shareholder element: 18% (being 60% of 30% weightage for this element); and

(c) Likelihood of securing management element: 12% (being 40% of 30% weightage for this element).

477 Adopting the framework in [34] above and applying it to the weightage I had prescribed (of 40:30:30), the plaintiff's lost chance stands at 4% + 18% + 12% = 34%.

Conclusion

478 In assessing the plaintiff's damages, the court not only had to provide an analysis of the facts, the law and the credibility of witnesses, it also had to understand, analyse and explain the evidence of the experts in the realm of finance, economics and hotel valuation. To reiterate what had been mentioned much earlier in this judgment, assessment of damages is an art, not an exact science. This task has been made all the more complex by the fact that (a) it involved a loss of chance; and (b) it required the court to put a numerical value to an investment in a hotel *and* "pre-date" it to 2002 values. In arriving at the final compensation, I have relied on a framework which I hope will prove useful to litigants and courts in future.

479 Applying that framework, I award the sum of **THB110,839,006** to the plaintiff with interest from 15 August 2002 (being the date of the writ), the workings of which can be summarised as follows:

Value of the hotel = THB3,049,795,097

Value of chance = Financing element + shareholder element + management element

= 4% + 18% + 12%

= 34%

Value of investment = THB325,997,077 (or about US$8.15m).

Compensation award to the plaintiff = Value of chance x value of investment

= 34% x THB325,997,077

= THB110,839,006

(or about US$2.77m at the exchange rate of THB40 to US$1)

480 The costs of the assessment shall be agreed, if not, taxed.

[note: 1]At para 151 of his affidavit of evidence-in-chief for the assessment.

[note:2]At para 6.

[note: 3]At para 205.

[note: 4]At AB1983.

[note: 5]At Notes of Evidence, 5 August 2005, p 82.

[note: 6]PW3.

[note: 7]DB455.

[note: 8]At Notes of Evidence, 29 July 2006, p 57.

[note: 9]PW7.

[note: 10]Notes of Evidence, 13 January 2006, pp 102 & 104.

[note:11]At AB1969.

[note:12]At Notes of Evidence, 5 August 2005, p 67.

[note:13]At AB1800.

[note:14]At PB152-154.

[note:15]At PB1018.

[note:16]At Notes of Evidence, 13 January 2006, pp 81 & 102.

[note:17]At Notes of Evidence, 3 August 2005, p 82:6-10, p 83:18-19.

[note:18]At para 3.

[note:19]At para 85 of the plaintiff's closing submissions.

[note: 20]At para 92.

[note: 21]At Notes of Evidence. 13 January 2006, p 54.

[note: 22]At para 96.

[note: 23]At para 41.

[note: 24]At para 22 of Monahan's affidavit of evidence in-chief.

[note: 25]DW2.

[note: 26]At para 51.

[note: 27]At, for example, Notes of Evidence, 25 January 2006, p 157.

[note: 28]At Notes of Evidence, 25 January 2006, p 54.

[note: 29]At AB2101.

[note: 30]At para 36 of Monahan's affidavit of evidence-in-chief.

[note: 31]At Notes of Evidence, 28 July 2006, p 53.

[note: 32]At Notes of Evidence, 2 August 2006, p 25.

[note: 33]At AB2558a.

[note: 34]At Trial Notes of Evidence, pp 7-8.

[note: 35]At AB1514.

[note: 36]At AB1987.

[note: 37]At Trial Notes of Evidence, p 18.

[note: 38]At Notes of Evidence, 23 January 2006, p 59.

[note: 39]At Notes of Evidence, 3 September 2003, pp 47-48.

[note: 40]At Notes of Evidence, 23 January 2006, p 66.

[note: 41]At AB1989.

[note: 42]At Notes of Evidence, 23 January 2006, pp 65-66.

[note: 43]At Notes of Evidence, 2 August 2005, pp 150-151.

[note: 44]At AB1800.

[note: 45]At Notes of Evidence, 24 January 2006, p 147.

[note: 46]At para 34.

[note: 47]PW8.

[note: 48]PW7.

[note: 49]DW4.

[note: 50]DW6.

[note: 51]DW1.

[note: 52]At DB526.

[note: 53]At Notes of Evidence, 1 February 2006, p 50.

[note: 54]At p 167.

[note: 55]At p 170 of her affidavit.

[note: 56]At p 171 of her affidavit.

[note: 57]At p 172 of her affidavit.

[note: 58]At p 184 of her affidavit.

[note: 59]At p 186 of her affidavit.

[note: 60]At p 187 of her affidavit.

[note: 61]At p 191 of her affidavit.

[note: 62]At p 192 of her affidavit.

[note: 63]At p 199 of her affidavit.

[note: 64]At p 200 of her affidavit.

[note: 65]At page 201 of her affidavit.

[note: 66]At page 202 of her affidavit.

[note: 67]At p 202 of her affidavit.

[note: 68]At Notes of Evidence, 20 January 2006, p 3.

[note: 69]At p 41 of his affidavit.

[note: 70]At Notes of Evidence, 16 January 2006, p 58 line18 onwards.

[note: 71]At Notes of Evidence, 27 January 2006, pp 147-150.

[note: 72]At pp 41 to 43 of Chee's affidavit and at Notes of Evidence, 2 February 2006, p 22 onwards.

[note: 73]At Notes of Evidence, 27 January 2006, pp 151-152.

[note: 74]At PB1393.

[note: 75]At Notes of Evidence, 2 February 2006, p 64 line 9.

[note: 76]At PB1526 & PB1527.

[note: 77]At Notes of Evidence, 2 February 2006, p 70 line 23.

[note: 78]At Notes of Evidence, 6 February 2006, pp 3–4.

[note: 79]At Notes of Evidence, 6 February 2006, p 4 line 11.

[note: 80]At p 84 of Ling's affidavit.

[note: 81]At AB1797.

[note: 82]At AB2365 & AB2370.

[note: 83]At para 120 of the plaintiff's closing submissions.

[note: 84]At Notes of Evidence, 23 January 2006, p 187 lines 9 to 18.

[note: 85]At PB2071.

[note: 86]At para 142 of the plaintiff's closing submissions.

[note: 87]At Notes of Evidence, 1 February 2006, p 30.

[note: 88]At PB1856.

[note: 89]At p 41 of Simister's affidavit.

[note: 90]At Notes of Evidence, 20 January 2006, p 141 line 8 onwards.

[note: 91]At DB540.

[note: 92]At AB7576.

[note: 93]At AB5671.

[note: 94]At AB5671.

[note: 95]At AB7576.

[note:96]At Notes of Evidence, 24 January 2006, pp 43–44.

[note: 97]At p 56.

[note: 98]At AB2400.

[note: 99]At PB1832.

[note: 100]N/E 126 on 20 January 2006.

[note: 101]PW5.

[note: 102]At Notes of Evidence, 3 February 2006, p 9.

[note: 103]At para 267.

[note: 104]At Trial Notes of Evidence, p 123.

[note: 105]At para 230.

[note: 106]At para 230 of the plaintiff's closing submissions.

[note: 107]At p 4 of Pirie's affidavit.

[note: 108]At p 2 of his report.

[note: 109]At p 2 of his report.

[note: 110]At p 5 of his report.

[note: 111]At p 5 of his report.

[note: 112]At p 7.

[note: 113]At Notes of Evidence, 3 February 2006, pp 16–17.

[note: 114]At Table 3, p 7 of his report.

[note: 115]At footnote 1 to Table 3.

[note: 116]At Footnote 2 to Table 3.

[note: 117]At Notes of Evidence, 3 February 2006, pp 17-18.

[note: 118]At p 8.

[note: 119]At para 224.

[note: 120]At pp 40–42.

[note: 121]At para 225 of the plaintiff's closing submissions.

[note: 122]At Notes of Evidence, 3 February 2006, p 54–55.

[note: 123]At Notes of Evidence, 3 February 2006, pp 62–63.

[note: 124]At Notes of Evidence, 3 February 2006, pp 70–71.

[note: 125]At PB2068.

[note: 126]At pp 12 and 13 of his affidavit.

[note: 127]At p 9 of his report.

[note: 128]At Notes of Evidence, 8 February 2006, pp 21–22.

[note: 129]At Notes of Evidence, 8 February 2006, pp 2–4.

[note: 130]At Notes of Evidence, 8 February 2006, p 5.

[note: 131]At p 836 of Olafson's affidavit filed on 13 July 2005.

[note: 132]At Notes of Evidence, 8 February 2006, p 6.

[note: 133]At p 88 of Olafson's affidavit.

[note: 134]At Notes of Evidence, 8 February 2006, p 6 line 19 to p 7 line 4.

[note: 135]At pp 89–90 of Olafson's affidavit.

[note: 136]At Notes of Evidence, 8 February 2006, p 7 lines 5 to 21.

[note: 137]At p 89 of Olafson's affidavit.

[note: 138]At p 34 of Monahan’s affidavit filed on 3 May 2005.

[note: 139]At Notes of Evidence, 8 February 2006, p 9 at line 11 to p 10 line 18.

[note: 140]At pp 85–86 of Olafson’s affidavit.

[note: 141]At footnote 11 to version 3 of Appendix 3 of his report.

[note: 142]At p 1023 of Olafson’s affidavit.

[note: 143]At Notes of Evidence, 8 February 2006, p 13 line 23 onwards.

[note: 144]At PB2115 to PB2150.

[note: 145]At, for example, PB2143 & PB2144.

[note: 146]At Notes of Evidence, 8 February 2006, p 14.

[note: 147]At Notes of Evidence, 8 February 2006, p 19 line 11 onwards.

[note: 148]At para 207.

[note: 149]At para 207 of the plaintiff’s closing submissions.

[note: 150]At paras 207–213

[note: 151]At para 217(a).

[note: 152]At Notes of Evidence, 8 February 2006, p 55.

[note: 153]At para 217(b).

[note: 154]At paras 218(a) to (h) of the plaintiff’s closing submissions.

[note: 155]At Notes of Evidence, 8 February 2006, p 59.

[note: 156]At, for example, Notes of Evidence, 8 February 2006, pp 66 to 68.

[note: 157]At Notes of Evidence, 8 February 2006, p 57.

Image – [2007] SGHC 50

Paragraph 443

$$\mathrm{NPV} = \sum_{t=1}^{n} \frac{C_t}{(1+r)^t} - C_0$$

ANNEX A

Summary of Mahaphon's DCF Analysis under the Income Approach[158]

Year	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013
Before-tax Cash Flow	110.5	209.5	244.1	290.5	294.9	305	312.7	322.6	332.5	343.3	353.4
PV of Future Income @ 2006				$3,075.48							
Retail Subleasehold Value				255.7							
Total (after 1% transaction fee)				3,297.87							
Rounded				3,300.00							
Year	2014	2015	2016	2017	2018	2019	2020	2021	2022	2023	2024
Before-tax Cash Flow	364.1	375.1	387.7	398.1	410.1	422.5	436.6	217.3	461.8	475.6	491.5
Year	2025	2026	2027	2028	2029	2030	2031	2032	2033	2034	2035
Before-tax Cash Flow	504.8	520.1	535.7	553.6	568.6	585.8	603.5	623.5	640.4	659.7	679.6
Year	2036	2037	2038	2039	2040	2041	2042				
Before-tax Cash Flow	702.3	721.2	742.9	765.4	790.9	812.3	176.9				

[158] At page 199 of Mahaphon's affidavit.

ANNEX B(1)

Summary of Simister's DCF Analysis (1)

			Cumulative	2007	2008	2009	2010	2011	2012	2013	2014	2015	Reversion
Total Guest Room				388	388	388	388	388	388	388	388	388	388
Rooms available per year				141,620	141,620	141,620	141,620	141,620	141,620	141,620	141,620	141,620	141,620
Rooms occupied				107,631	107,631	107,631	107,631	107,631	107,631	107,631	107,631	107,631	107,631
Average Room Rate				4,680	4,797	4,917	5,040	5,166	5,295	5,427	5,563	5,702	5,702
Occupancy Rate				76%	76%	76%	76%	76%	76%	76%	76%	76%	76%
REVENUE													
Room	59%	of total revenue		503,724,000	516,321,000	529,230,000	542,451,000	556,023,000	569,907,000	584,142,000	598,767,000	613,743,000	613,743,000
Food & Beverage	29.30%	of total revenue		250,341,000	256,581,000	263,016,000	269,607,000	276,315,000	283,257,000	290,316,000	297,570,000	305,019,000	305,019,000
Telecommunication	4.80%	of total revenue		40,872,000	41,886,000	42,939,000	44,031,000	45,123,000	46,254,000	47,385,000	48,594,000	49,803,000	49,803,000
Spa	3.90%	of total revenue		33,189,000	34,008,000	34,866,000	35,724,000	36,621,000	37,557,000	38,493,000	39,468,000	40,443,000	40,443,000
Other Operated Department	2.50%	of total revenue		20,943,000	21,450,000	21,996,000	22,542,000	23,127,000	23,712,000	24,297,000	24,882,000	25,506,000	25,506,000
Rental & Other Income	0.50%	of total revenue		4,875,000	4,992,000	5,109,000	5,265,000	5,382,000	5,499,000	5,655,000	5,811,000	5,928,000	5,928,000
Total Revenue	100%		8,500,557,000	853,944,000	875,238,000	897,156,000	919,620,000	942,591,000	966,186,000	990,288,000	1,015,092,000	1,040,442,000	1,040,442,000
OPERATING COSTS & EXPENSES													
Room	11.60%	of room revenue		58,422,000	59,904,000	61,386,000	62,946,000	64,506,000	66,105,000	67,743,000	69,459,000	71,214,000	71,214,000
Food & Beverage	61.90%	of F&B revenue		154,908,000	158,808,000	162,825,000	166,881,000	171,015,000	175,344,000	179,712,000	184,197,000	188,799,000	188,799,000
Telecommunication	40%	of telecome revenue		16,341,000	16,731,000	17,160,000	17,628,000	18,057,000	18,525,000	18,954,000	19,461,000	19,929,000	19,929,000
Spa	40%	of spa revenue		13,260,000	13,611,000	13,962,000	14,274,000	14,625,000	15,015,000	15,405,000	15,795,000	19,185,000	16,185,000
Other Operated Department	30%	of other operated department		6,279,000	6,435,000	6,591,000	6,747,000	6,942,000	7,137,000	7,293,000	7,449,000	7,644,000	7,644,000
Rental & Other Income	0%	of other revenue		-	-	-	-	-	-	-	-	-	-
Total Operating Costs & Expenses			2,484,609,000	249,210,000	255,489,000	261,924,000	268,476,000	275,145,000	282,126,000	289,107,000	296,361,000	306,771,000	303,771,000
DEPARTMENT PROFIT													
Room	88.40%	of room revenue		455,302,000	456,417,000	467,844,000	479,505,000	491,517,000	503,802,000	516,399,000	529,308,000	542,529,000	542,529,000
Food & Beverage	38.10%	of F&B revenue		95,433,000	97,773,000	100,191,000	102,726,000	105,300,000	107,913,000	110,604,000	113,373,000	116,220,000	116,220,000
Telecommunication	60.00%	of telecome revenue		24,531,000	25,155,000	25,779,000	26,403,000	27,066,000	27,729,000	28,431,000	29,133,000	29,874,000	29,874,000
Spa	60.00%	of spa revenue		19,929,000	20,397,000	20,904,000	21,450,000	21,996,000	22,542,000	23,088,000	23,673,000	21,258,000	24,258,000
Other Operated Department	70.00%	of other operated department		14,664,000	15,015,000	15,405,000	15,795,000	16,185,000	16,575,000	17,004,000	17,433,000	17,862,000	17,862,000
Rental & Other Income	100.00%	of other revenue		4,875,000	4,992,000	5,109,000	5,265,000	5,382,000	5,499,000	5,655,000	5,811,000	5,928,000	5,928,000
Total Department Profit			6,025,948,000	614,734,000	619,749,000	635,232,000	651,144,000	667,446,000	684,060,000	701,181,000	718,731,000	733,671,000	736,671,000

ANNEX B(2)

Summary of Simister’s DCF Analysis (2)

			Cumulative	2007	2008	2009	2010	2011	2012	2013	2014	2015	Reversion
UNDISTRIBUTED OPERATING EXPENSES													
Administrative & General	3.60%	of total revenue		30,693,000	31,512,000	32,292,000	33,111,000	33,930,000	34,788,000	35,646,000	36,543,000	37,440,000	37,440,000
Heat, Light and Power	5.00%	of total revenue		43,797,000	44,655,000	45,747,000	46,917,000	48,087,000	49,257,000	50,505,000	51,753,000	53,079,000	53,079,000
Credit Card Commissions	1.90%	of total revenue		16,224,000	16,614,000	17,043,000	17,472,000	17,901,000	18,369,000	18,798,000	19,305,000	19,773,000	19,773,000
Chain Marketing Fee	1.90%	of total revenue		16,224,000	16,614,000	17,043,000	17,472,000	17,901,000	18,369,000	18,798,000	19,305,000	19,773,000	19,773,000
Property Operation and Maintenar	2.30%	of total revenue		19,461,000	20,124,000	20,631,000	21,138,000	21,684,000	22,230,000	22,776,000	23,361,000	23,946,000	23,946,000
Marketing	4.10%	of total revenue		35,100,000	35,880,000	36,777,000	37,713,000	38,649,000	39,624,000	40,599,000	41,613,000	42,666,000	42,666,000
TOTAL UNDISTRIBUTED OPERATING EXPENSI			1,606,722,000	161,499,000	165,399,000	169,533,000	173,823,000	178,152,000	182,637,000	187,122,000	191,880,000	196,677,000	196,677,000
GROSS OPERATING PROFIT (GOP)			-1,606,722,000	443,295,000	454,350,000	465,699,000	477,321,000	489,294,000	501,423,000	514,059,000	526,851,000	539,994,000	539,994,000
MANAGEMENT FEE													
Base Fee	2.00%	of total revenue		17,082,000	17,511,000	17,940,000	18,408,000	18,837,000	19,305,000	19,812,000	20,319,000	20,826,000	20,826,000
Incentive Fee	7.50%	of GOP		33,228,000	34,086,000	34,944,000	35,802,000	36,699,000	37,596,000	38,571,000	39,507,000	40,521,000	40,521,000
TOTAL MANAGEMENT FEE			500,994,000	50,310,000	51,597,000	52,884,000	54,210,000	55,536,000	56,901,000	58,383,000	59,826,000	61,347,000	61,347,000
OTHER DEDUCTIONS													
Reserve for FF&E	4%	of total revenue		34,164,000	35,022,000	35,880,000	36,777,000	37,713,000	38,649,000	39,624,000	40,599,000	41,613,000	41,613,000
Insurance Building	0.40%	of total revenue		3,159,000	3,510,000	3,588,000	3,666,000	3,783,000	3,861,000	3,978,000	4,056,000	4,173,000	4,173,000
Property Tax	1.00%	of total revenue		8,580,000	8,736,000	8,970,000	9,204,000	9,438,000	9,672,000	9,906,000	10,140,000	10,413,000	10,413,000
TOTAL OTHER DEDUCTIONS			459,200,000	45,903,000	47,268,000	48,438,000	49,647,000	50,934,000	52,508,000	53,508,000	54,795,000	56,199,000	56,199,000
NET OPERATING INCOME			3,452,358,000	347,022,000	355,485,000	364,377,000	373,464,000	382,824,000	392,340,000	402,168,000	412,230,000	422,448,000	422,448,000
NOI (1 US = 39 BAHT)				$8,898,000	$9,115,000	$9,343,000	$9,576,000	$9,816,000	$10,060,000	$10,312,000	$10,570,000	$10,832,000	
				Terminal Value: Cap income over remaining term at reversion @ 10%						Factor:	9.19	3,880,419,102	
				NPV of Reversional Value to as at date of valuation, discounted @ 12%						Factor:	0.36	1,399,318,029	
Period				1	2	3	4	5	6	7	8	9	
PVIF @ 12%				0.89	0.80	0.71	0.64	0.57	0.51	0.45	0.40	0.36	
NPV @ 12%			2,006,679,431	309,841,071	283,390,466	259,356,351	237,343,124	217,224,619	198,771,654	181,920,379	166,492,783	152,338,984	
NPV of Terminal Value at 10.00%			1,399,318,029										
Total Capital Value of Hotel	(Baht)		3,405,997,460										
	(Baht)		3,406,000,000										
	(US$)		$87,333,333										

ANNEX B(3)

<u>Summary of Simister's DCF Analysis (3)</u>

Summary of Value

		1 US = 39 Baht
Capital Value of Hotel	3,406,000,000	$87,333,333.33
Capital Value of Department Store	317,000,000	$8,128,205.13
Total	3,723,000,000	$95,461,538.46
Less		
PV of Existing Land Lease	29,400,000	$753,846.15
PV of Deposit of Land Lease another 20 years (as at date valuation)	133,800,000	$3,430,769.23
PV of Rent for Land Lease another 20 years (as an existing contract)	11,000,000	$282,051.28
Total Capital Value (LH 35.31 years)	3,548,800,000	$90,994,871.79
	3,500,000,000	$90,000,000.00

ANNEX C(1)

Summary of Chee's DCF Analysis (1)

Period	Projected NOI	Additional CAPEX	Adjusted NOI	Discount Rate at 12.5%	PV of NOI
2007	271,028		271,028	0.88889	240,914
2008	279,995		279,995	0.79012	221,231
2009	287,306		287,306	0.70233	201,784
2010	296,137		296,137	0.62430	184,877
2011	304,835		304,835	0.55493	169,162
2012	314,787		314,787	0.49327	155,275
2013	323,320		323,320	0.43846	141,764
2014	332,922	221,699	111,223	0.38974	43,349
2015	342,904		342,904	0.34644	118,795
2016	354,053		354,053	0.30795	109,029
2017	363,678		363,678	0.27373	99,550
2018	374,589		374,589	0.24332	91,143
2019	385,826		385,826	0.21628	83,447
2020	398,490		398,490	0.19225	76,609
2021	409,323		409,323	0.17089	69,948
2022	421,603		421,603	0.15190	64,042
2023	434,251		434,251	0.13502	58,634
2024	448,504	487,546	-39,042	0.12002	-4,686
2025	460,697		460,697	0.10668	49,149
2026	474,518		474,518	0.09483	44,999
2027	488,753		488,753	0.08429	41,199
2028	504,795		504,795	0.07493	37,823
2029	518,519		518,519	0.06660	34,535
2030	534,074		534,074	0.05920	31,618
2031	550,096		550,096	0.05262	28,948
2032	568,152		568,152	0.04678	26,577
2033	583,597		583,597	0.04158	24,266
2034	601,105	400,413	200,692	0.03696	7,418
2035	619,138		619,138	0.03285	20,341
2036	639,460		639,460	0.02920	18,674
2037	656,844		656,844	0.02596	17,050
2038	676,549		676,549	0.02307	15,611
2039	696,846		696,846	0.02051	14,292
2040	719,717		719,717	0.01823	13,121
2041	739,283		739,283	0.01621	11,980
2042	225,309		225,309	0.01440	3,246
	16,601,003	1,109,658	15,491,345		
		6.68%		**Total Baht (simple summation)**	**2,565,713,604**
		1,109,658		**Rounded value**	**2,566,000,000**

See page 56 of Chee's affidavit:	**Chee's Figures ('000)**	**2,565,714**
	Rounded Value	**2,566,000,000**

ANNEX C(2)

<u>Summary of Chee's DCF Analysis (2)</u>

Indicative Value as at Jan 1 2007	THB
Hotel (rounded)	2,566,000,000
Retail (rounded)	293,700,000
Sub-Total (rounded)	2,860,000,000
Less:	
Total Monthly Ground Lease Payments	43,100,000
Ground Lease Renewal Fees	86,000,000
Demolition Fees	35,500,000
Total	2,695,000,000

ANNEX D(1)

Summary of Ling's DCF Analysis(1)

(THB '000)	2006		2007		2008		2009		2010		2011		2012		2013		2014		2015	
No of Rooms	364		364		364		364		364		364		364		364		364		364	
Occupied Rooms	106,288		104,959		96,988		98,316		98,316		98,316		98,316		98,316		98,316		98,316	
Occupancy	80%		79%		73%		74%		74%		74%		74%		74%		74%		74%	
Average Rate	4,628		4,746	2.55%	4,750	0.08%	4,879	2.72%	5,001	2.50%	5,126	2.50%	5,255	2.52%	5,386	2.49%	5,521	2.51%	5,659	2.50%
REVENUE																				
Rooms	491,901	71.2%	498,137	71.3%	460,692	70.0%	479,686	70.2%	491,680	70.2%	503,970	70.2%	516,653	70.2%	529,532	70.2%	542,805	70.2%	556,373	70.2%
Food & Beverage	155,446	22.5%	157,196	22.5%	154,661	23.5%	159,212	23.3%	163,193	23.3%	167,272	23.3%	171,482	23.3%	175,756	23.3%	180,162	23.3%	184,665	23.3%
Telephone	8,981	1.3%	9,082	1.3%	9,214	1.4%	9,566	1.4%	9,806	1.4%	10,051	1.4%	10,304	1.4%	10,560	1.4%	10,825	1.4%	11,096	1.4%
Rental and Other Income	17,963	2.6%	18,165	2.6%	18,428	2.8%	19,133	2.8%	19,611	2.8%	20,101	2.8%	20,607	2.8%	21,121	2.8%	21,650	2.8%	22,191	2.8%
Other Operated Departments	15,890	2.3%	16,069	2.3%	15,137	2.3%	15,716	2.3%	16,109	2.3%	16,512	2.3%	16,927	2.3%	17,349	2.3%	17,784	2.3%	18,229	2.3%
Total Revenue	690,181	100.0%	698,650	100.0%	658,132	100.0%	683,313	100.0%	700,399	100.0%	717,906	100.0%	735,972	100.0%	754,319	100.0%	773,226	100.0%	792,553	100.0%
DEPARTMENTAL EXPENSES																				
Rooms	58,044	11.8%	59,278	11.9%	59,429	12.9%	60,920	12.7%	62,443	12.7%	64,004	12.7%	65,615	12.7%	67,251	12.7%	68,936	12.7%	70,659	12.7%
Food & Beverage	100,574	64.7%	102,964	65.5%	103,468	66.9%	106,035	66.6%	108,687	66.6%	111,403	66.6%	114,207	66.6%	117,054	66.6%	119,988	66.6%	122,987	66.6%
Telephone	3,799	42.3%	3,851	42.4%	3,962	43.0%	4,104	42.9%	4,207	42.9%	4,312	42.9%	4,420	42.9%	4,530	42.9%	4,644	42.9%	4,760	42.9%
Rental and Other Income	3,413	19.0%	3,506	19.3%	3,575	19.4%	3,712	19.4%	3,805	19.4%	3,900	19.4%	3,998	19.4%	4,097	19.4%	4,200	19.4%	4,305	19.4%
Other Operated Departments	4,116	25.9%	4,178	26.0%	4,102	27.1%	4,228	26.9%	4,333	26.9%	4,442	26.9%	4,553	26.9%	4,667	26.9%	4,784	26.9%	4,904	26.9%
Total Departmental Expenses	169,785	24.6%	173,964	24.9%	174,405	26.5%	179,028	26.2%	183,505	26.2%	188,091	26.2%	192,825	26.2%	197,632	26.2%	202,585	26.2%	207,649	26.2%
DEPARTMENTAL INCOME	520,396	75.4%	524,686	75.1%	483,727	73.5%	504,285	73.8%	516,894	73.8%	529,815	73.8%	543,147	73.8%	556,687	73.8%	570,641	73.8%	584,904	73.8%
OPERATING EXPENSES																				
Administrative & General	48,313	7.0%	46,810	6.7%	46,727	7.1%	48,515	7.1%	49,728	7.1%	50,971	7.1%	52,254	7.1%	53,557	7.1%	54,899	7.1%	56,271	7.1%
Marketing	53,144	7.7%	51,700	7.4%	51,992	7.9%	53,298	7.8%	54,631	7.8%	55,997	7.8%	57,406	7.8%	58,837	7.8%	60,312	7.8%	61,819	7.8%
Prop. Operations & Maint.	17,255	2.5%	17,466	2.5%	17,770	2.7%	17,766	2.6%	18,210	2.6%	18,666	2.6%	19,135	2.6%	19,612	2.6%	20,104	2.6%	20,606	2.6%
Energy	31,748	4.6%	32,138	4.6%	31,590	4.8%	32,116	4.7%	32,919	4.7%	33,742	4.7%	34,591	4.7%	35,453	4.7%	36,342	4.7%	37,250	4.7%
Total Operating Expenses	150,460	21.8%	148,114	21.2%	148,079	22.5%	151,695	22.2%	155,488	22.2%	159,376	22.2%	163,386	22.2%	167,459	22.2%	171,657	22.2%	175,946	22.2%
HOUSE PROFIT	369,936	53.6%	376,572	53.9%	335,648	51.0%	352,590	51.6%	361,406	51.6%	370,439	51.6%	379,761	51.6%	389,228	51.6%	398,984	51.6%	408,958	51.6%
Management Fee	13,804	2.0%	13,973	2.0%	13,163	2.0%	13,666	2.0%	14,008	2.0%	14,358	2.0%	14,719	2.0%	15,086	2.0%	15,465	2.0%	15,851	2.0%
INCOME BEFORE FIXED CHARGES	356,132	51.6%	362,599	51.9%	322,485	49.0%	338,924	49.6%	347,398	49.6%	356,081	49.6%	365,042	49.6%	374,142	49.6%	383,519	49.6%	393,107	49.6%
FIXED EXPENSES																				
Property Taxes	6,902	1.0%	7,685	1.1%	7,239	1.1%	7,516	1.1%	7,704	1.1%	7,897	1.1%	8,096	1.1%	8,298	1.1%	8,505	1.1%	8,718	1.1%
Insurance	2,071	0.3%	2,096	0.3%	2,633	0.4%	2,733	0.4%	2,802	0.4%	2,872	0.4%	2,944	0.4%	3,017	0.4%	3,093	0.4%	3,170	0.4%
Incentive Management Fee	27,607	4.0%	27,946	4.0%	25,009	3.8%	26,649	3.9%	27,316	3.9%	27,998	3.9%	28,703	3.9%	29,418	3.9%	30,156	3.9%	30,910	3.9%
Land Lease	3,451	0.5%	3,493	0.5%	3,291	0.5%	3,417	0.5%	3,502	0.5%	3,590	0.5%	3,680	0.5%	3,772	0.5%	3,866	0.5%	3,963	0.5%
Office Lease	690	0.1%	699	0.1%	658	0.1%	683	0.1%	700	0.1%	718	0.1%	736	0.1%	754	0.1%	773	0.1%	793	0.1%
Reserve for Replacement	20,705	3.0%	20,959	3.0%	19,744	3.0%	20,499	3.0%	21,012	3.0%	21,537	3.0%	22,079	3.0%	22,630	3.0%	23,197	3.0%	23,777	3.0%
Total Fixed Expenses	61,426	8.9%	62,878	9.0%	58,574	8.9%	61,498	9.0%	63,036	9.0%	64,612	9.0%	66,238	9.0%	67,889	9.0%	69,590	9.0%	71,330	9.0%
NET INCOME (A)	294,918		299,819		263,511		276,849		283,882		291,006		298,210		305,733		313,399		321,286	

ANNEX D(2)

Summary of Ling's DCF Analysis(2)

	Year	Net Income Before Land Lease	Land Lease	CAPEX Deduction	Net Income After Lease & CAPEX	Cost of Lease Renewal	Net Cashflow	Discount @ 12%	Discounted Net Cashflow
2007	1	303,256	3,437		*299,819*		299,819	0.892857	267,696
2008	2	266,996	3,485		*263,511*		263,511	0.797194	210,069
2009	3	280,334	3,485		*276,849*		276,849	0.711780	197,056
2010	4	287,367	3,485		*283,882*		283,882	0.635518	180,412
2011	5	294,491	3,485		*291,006*		291,006	0.567427	165,125
2012	6	301,818	3,608		*298,210*		298,210	0.506631	151,082
2013	7	309,392	3,659		*305,733*		305,733	0.452349	138,298
2014	8	317,058	3,659	90,528	*313,399*		313,399	0.403883	126,577
2015	9	324,945	3,659		*321,286*		321,286	0.360610	115,859
2016	10	333,069	3,659		*329,410*		329,410	0.321973	106,061
2017	11	341,395	3,788		337,607		337,607	0.287476	97,054
2018	12	349,930	3,841		*346,089*		346,089	0.256675	88,832
2019	13	358,678	3,841		*354,837*		354,837	0.229174	81,319
2020	14	367,645	3,841		*363,804*		363,804	0.204620	74,442
2021	15	376,836	3,841		*372,995*		372,995	0.182696	68,145
2022	16	275,958	4,113	110,300	*271,845*	201,317	70,528	0.163122	11,505
2023	17	395,914	4,224		*391,690*		391,690	0.145644	57,047
2024	18	405,811	4,224		*401,587*		401,587	0.130040	52,222
2025	19	415,957	4,224		*411,733*		411,733	0.116107	47,805
2026	20	426,356	4,224		422,132		422,132	0.103667	43,761
2027	21	437,014	4,373		432,641		432,641	0.092560	40,045
2028	22	447,939	4,434		443,505		443,505	0.082643	36,652
2029	23	459,138	4,434		454,704		454,704	0.073788	33,552
2030	24	336,227	4,434	134,389	331,793		331,793	0.065882	21,859
2031	25	482,382	4,434		477,948		477,948	0.058823	28,114
2032	26	494,441	4,591		489,850		489,850	0.052521	25,727
2033	27	506,802	4,655		502,147		502,147	0.046894	23,547
2034	28	519,472	4,655		514,817		514,817	0.041869	21,555
2035	29	532,459	4,655		527,804		527,804	0.037383	19,731
2036	30	518,770	4,655		514,115		514,115	0.033378	17,160
2037	31	559,415	4,820		554,595		554,595	0.029802	16,528
2038	32	573,401	4,888		568,513		568,513	0.026609	15,127
2039	33	587,736	4,888		582,848		582,848	0.023758	13,847
2040	34	602,429	4,888		597,541		597,541	0.021212	12,675
2041	35	617,490	4,888		612,602		612,602	0.018940	11,602
2042	36	183,809	1,419		182,390		182,390	0.016910	3,084
							PV of cashflow (THB '000)		2,585,513

	THB
PV from Year 17 to 30 of Retail Lease	14,028,993
Projected Value of Additional 22-year Lease	269,071,319
Potential Realisation Price in 2007	283,100,312

	THB
Hotel	2,585,513,459
Retail	283,100,312
Hotel + Retail Component	2,868,613,771
Less	
Estimated Demoition costs (THB/m2)	210
Gross Floor Area of Hotel (m2)	73,000
Demolition Costs (THB)	15,330,000
Potential Realisation Price	2,853,283,771
Say (rounded to nearest THB 0.01bn)	2,850,000,000

ANNEX E

<u>Hecker's Discounted Cash Flow Analysis based on 100% of Cash Flow - Appendix 3 (Version 3)</u>

S/N	**Property Cash Flow**	**Year 0**	**Year 1**	**Year 2**	**Year 3**	**Year 4**	**Year 5**
	(based on 100%)	**1/06/2002**	**31/12/2002**	**31/12/2003**	**31/12/2004**	**31/12/2005**	**31/12/2006**
1	Senior Debt Origination Fee						
2	Cash in excess of working capital requirements	24,381,561					
3	Property NOI (including retail)		79,964,250	91,773,696	184,250,478	245,173,393	295,976,734
4	Renovation Cost		(106,815,795)	(167,604,781)	(96,067,616)		
5	Mezzanine Loan Proceeds		106,815,795	148,184,205	-		
6	Senior Debt Service		(64,316,907)	(90,546,280)	(81,925,563)	(72,506,683)	(62,993,828)
7	Principal Repayment to meet DSCR shortfall			(498,322,291)			
8	Transfer from / (to) Debt Service Reserve	(22,750,000)	142,123	6,084,816	(2,669,275)	6,751,795	12,440,541
9	Mezzanin Loan Debt Service		(27,270,833)	(46,750,000)	(60,916,667)	(68,000,000)	(107,666,667)
10	Senior Loan Cashflow Sweep/Principal Repayment		-	-	-	(55,709,252)	(68,878,390)
11	Sales Proceeds at YE 2006						1,919,393,967
12	Total Property Cash Flow	1,631,561	(11,481,367)	(557,180,635)	(57,328,643)	55,709,253	1,988,272,357

ANNEX F

<u>Hecker's Discounted Cash Flow Analysis based on 54.2% and taking into account WACC - Appendix 3 (Version 3)</u>

AHIL Cash Flow (54.2%)	Year 0	Year 1	Year 2	Year 3	Year 4	Year 5
	01/06/2002	31/12/2002	31/12/2003	31/12/2004	31/12/2005	31/12/2006
AHIL Acquisition Cost	(100,000,000)					
Total Property Cash Flow (at 100%) (cross-reference with Annex A)	1,631,561	(11,481,367)	(557,180,635)	(57,328,643)	55,709,253	1,988,272,357
54.2% of Total Property Cash Flows (i.e. 54.2% of above line)	884,306	(6,222,901)	(301,991,904)	(31,072,125)	30,194,415	1,077,643,617
Total AHIL Cash Flow (54.2% cash flow - AHIL acquisition cost)	(99,115,694)	(6,222,901)	(301,991,904)	(31,072,125)	30,194,415	1,077,643,617

Total of all AHIL cash flow from Year 0 to Year 5 = THB 1,419,622,526

ANNEX G

Comparison of Hecker's NPV (Version 3) against the NPV Formula

	A	B	C	D	E	F	G
1		**Year 0**	**Year 1**	**Year 2**	**Year 3**	**Year 4**	**Year 5**
2		1/06/2002	31/12/2002	31/12/2003	31/12/2004	31/12/2005	31/12/2006
3	AHIL Acquisition Cost	(100,000,000)					
4	Total Property Cash Flow (at 100%) (cross-reference with Annex A)	1,631,561	(11,481,367)	(557,180,635)	(57,328,643)	55,709,253	1,988,272,357
5	54.2% of Total Property Cash Flows (i.e. 54.2% of Row 4 above)	884,306	(6,222,901)	(301,991,904)	(31,072,125)	30,194,415	1,077,643,617
6	Total AHIL Cash Flow (54.2% cash flow - AHIL acquisition cost)	(99,115,694)	(6,222,901)	(301,991,904)	(31,072,125)	30,194,415	1,077,643,617
7							
8	Discount Rate (13.37%)	0.1337					
9				**Difference from Hecker's figure**			
10	Hecker's NPV Value	**250,404,959**					
11	Calculations using Excel's NPV Formula:	**232,805,688**		**(17,599,271)**			
12							
13	Present Value (where *t*=1, 2, 3, etc.)	(99,115,694)	(5,489,019)	(234,962,745)	(21,324,385)	18,278,226	575,419,305
14	(formula for the figures seen in Row 8)	=B6	=C6/(1+0.1337)^1	=D6/(1+0.1337)^2	=E6/(1+0.1337)^3	=F6/(1+0.1337)^4	=G6/(1+0.1337)^5
15	**Net Present Value (where *t*= 1, 2, 3 etc)**	**232,805,688**		**(17,599,271)**			
16							
17	Present Value (where *t*= 7/12, 1+(7/12), 2+(7/12), etc.)	(99,115,694)	(5,783,654)	(247,574,875)	(22,469,017)	19,259,349	606,306,172
18	(formula for the figures seen in Row 17)	=B6	=C6/(1+0.1337)^(7/12)				
19	**Net Present Value (where t=7/12, 1+(7/12), 2+(7/12), etc.)**	**250,622,281**		**217,322**			
20							
21	Present Value (where *t*= 213/365, 1+(213/365), 2+(213/365), etc.)	(99,115,694)	(5,783,488)	(247,567,782)	(22,468,373)	19,258,797	606,288,801
22	(formula for the figures seen in Row 17)	=B6	=C6/(1+0.1337)^(213/365)				
23	**Net Present Value (where t=213/365, 1+(213/365), 2+(213/365), etc.)**	**250,612,261**		**207,302**			
24	Note = "^" in formula denotes "to the power of"						

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ANNEX H

Hecker's Discounted Cash Flow Analysis based on 100% of Cash Flow - Appendix 3 (Version 4)

S/N	Property Cash Flow	Year 0	Year 1	Year 2	Year 3	Year 4	Year 5
	(based on 100%)	01/06/2002	31/12/2002	31/12/2003	31/12/2004	31/12/2005	31/12/2006
1	Senior Debt Origination Fee						
2	Cash in excess of working capital requirements	1,631,561					
3	Property NOI (including retail)		72,616,626	90,099,618	181,860,640	242,340,736	292,558,827
4	Renovation Cost		(106,815,795)	(167,604,781)	(96,067,616)		
5	Mezzanine Loan Proceeds		106,815,795	148,184,205	-		
6	Senior Debt Service		(64,316,907)	(89,735,675)	(80,436,753)	(71,184,953)	(61,842,053)
7	Principal Repayment to meet DSCR shortfall			(508,079,712)			
8	Transfer from / to Debt Service Reserve		195,655	6,331,552	(2,620,768)	6,631,997	12,211,563
9	Mezzanine Loan Debt Service		-	(46,750,000)	(46,750,000)	(68,000,000)	(68,000,000)
10	Senior Loan Cashflow Sweep/Principal Repayment		(4,247,687)	-	-	(54,893,890)	(87,464,168)
11	Sales Proceeds at YE 2006 (cross-ref other table)						1,850,710,145
12	Total Property Cash Flow	1,631,561	4,247,687	(567,554,793)	(44,014,497)	54,893,890	1,938,174,314

Note: For "Total Property Cash Flow" for Year 5 (31/12/2006), Hecker's Version 4 reflects as 1,938,174,31**3**. A summation of the various figures for that year should be 1,938,174,31**4**.

ANNEX I

<u>Hecker's Discounted Cash Flow Analysis based on 54.2% and taking into account WACC - Appendix 3 (Version 4)</u>

AHIL Cash Flow (54.2%)	**Year 0**	**Year 1**	**Year 2**	**Year 3**	**Year 4**	**Year 5**
	01/06/2002	**31/12/2002**	**31/12/2003**	**31/12/2004**	**31/12/2005**	**31/12/2006**
AHIL Acquisition Cost	(100,000,000)					
Total Property Cash Flow (at 100%) (cross-reference with Annex A)	1,631,561	4,247,687	(567,554,793)	(44,014,497)	54,893,890	1,938,174,314
54.2% of Total Property Cash Flows (54.2% of above line)	884,306	2,302,246	(307,614,698)	(23,855,857)	29,752,488	1,050,490,478
Total AHIL Cash Flow (54.2% cash flow - AHIL acquisition cost)	(99,115,694)	2,302,246	(307,614,698)	(23,855,857)	29,752,488	1,050,490,478

ANNEX J

Comparison of Hecker's NPV (Version 4) against the NPV Formula

	A	B	C	D	E	F	G
1		**Year 0**	**Year 1**	**Year 2**	**Year 3**	**Year 4**	**Year 5**
2		1/06/2002	31/12/2002	31/12/2003	31/12/2004	31/12/2005	31/12/2006
3	AHIL Acquisition Cost	(100,000,000)					
4	Total Property Cash Flow (at 100%) (cross-reference with Annex A)	1,631,561	4,247,687	(567,554,793)	(44,014,497)	54,893,890	1,938,174,314
5	54.2% of Total Property Cash Flows (i.e. 54.2% of Row 4 above)	884,306	2,302,246	(307,614,698)	(23,855,857)	29,752,488	1,050,490,478
6	Total AHIL Cash Flow (54.2% cash flow - AHIL acquisition cost)	(99,115,694)	2,302,246	(307,614,698)	(23,855,857)	29,752,488	1,050,490,478
7							
8	Discount Rate (13.37%)	0.1337					
9				**Difference from Hecker's figure**			
10	Hecker's NPV Value	**243,381,930**					
11	Calculations using Excel's NPV Formula:	**226,136,866**		**(17,245,064)**			
12							
13	Present Value (where *t*=1, 2, 3, etc.)	(99,115,694)	2,030,737	(239,337,521)	(16,371,957)	18,010,705	560,920,596
14	(formula for the figures seen in Row 8)	=B6	=C6/(1+0.1337)^1	=D6/(1+0.1337)^2	=E6/(1+0.1337)^3	=F6/(1+0.1337)^4	=G6/(1+0.1337)^5
15	**Net Present Value (where *t*= 1, 2, 3 etc)**	**226,136,866**		**(17,245,064)**			
16							
17	Present Value (where *t*= 7/12, 1+(7/12), 2+(7/12), etc.)	(99,115,694)	2,139,741	(252,184,477)	(17,250,757)	18,977,468	591,029,214
18	(formula for the figures seen in Row 17)	=B6	=C6/(1+0.1337)^(7/12)				
19	**Net Present Value (where t=7/12, 1+(7/12), 2+(7/12), etc.)**	**243,595,496**		**213,566**			
20							
21	Present Value (where *t*= 213/365, 1+(213/365), 2+(213/365), etc.)	(99,115,694)	2,139,680	(252,177,252)	(17,250,263)	18,976,924	591,012,281
22	(formula for the figures seen in Row 17)	=B6	=C6/(1+0.1337)^(213/365)				
23	**Net Present Value (where t=213/365, 1+(213/365), 2+(213/365), etc.)**	**243,585,677**		**203,747**			
24	Note = "^" in formula denotes "to the power of"						

ANNEX K

Court's Evaluation of Net Sale Proceeds

S/N	Description	THB	US$	
1	Sale Proceeds	3,049,795,097	76,244,877	(at exchange rate of US$1 = THB 40)
2	*Less* : 3% transaction cost (3% x [1])	(91,493,853)	(2,287,346)	
3	Outstanding debts:			
4	(a) Outstanding Senior debt Principal	581,719,928	14,542,998	
5	(b) Outstanding Senior debt 10% interest fee	130,000,000	3,250,000	
6	(c) Outstanding Mezzanine Loan Principal	126,894,927	3,172,373	
7	Total Outstanding Debts [4]+[5]+[6]	838,614,855	20,965,371	
8	Net Sale Proceeds [1]+[2]-[7]	2,119,686,389	52,992,160	

ANNEX L

Court's Evaluation of Property Cash Flow (at 100%)

S/N	Property Cash Flow (based on 100%)	Year 0 01/06/2002	Year 1 31/12/2002	Year 2 31/12/2003	Year 3 31/12/2004	Year 4 31/12/2005	Year 5 31/12/2006
1	Senior Debt Origination Fee						
2	Cash in excess of working capital requirements	1,631,561					
3	Property NOI (including retail)		72,616,626	90,099,618	181,860,640	242,340,736	292,558,827
4	Renovation Cost		(106,815,795)	(167,604,781)	(96,067,616)		
5	Mezzanine Loan Proceeds		106,815,795	148,184,205	-		
6	Senior Debt Service		(64,316,907)	(89,735,675)	(80,436,753)	(71,184,953)	(61,842,053)
7	Principal Repayment to meet DSCR shortfall			(508,079,712)			
8	Transfer from / (to) Debt Service Reserve		195,655	6,331,552	(2,620,768)	6,631,997	12,211,563
9	Mezzanin Loan Debt Service		-	(46,750,000)	(46,750,000)	(68,000,000)	(68,000,000)
10	Senior Loan Cashflow Sweep/Principal Repayment		(4,247,687)	-	-	(54,893,890)	(87,464,168)
11	Sales Proceeds at YE 2006 (cross-reference Annex G)						2,119,686,389
12	Total Property Cash Flow	1,631,561	4,247,687	(567,554,793)	(44,014,497)	54,893,890	2,207,150,558

ANNEX M

Court's Evaluation of the Plaintiff's Net Present Value

	A	B	C	D	E	F	G
1		**Year 0**	**Year 1**	**Year 2**	**Year 3**	**Year 4**	**Year 5**
2		01/06/2002	31/12/2002	31/12/2003	31/12/2004	31/12/2005	31/12/2006
3	AHIL Acquisition Cost	(100,000,000)					
4	Total Property Cash Flow (at 100%) (cross-reference with Annex H)	1,631,561	4,247,687	(567,554,793)	(44,014,497)	54,893,890	2,207,150,558
5	54.25% of Total Property Cash Flows (i.e. 54.25% of Row 4 above)	885,122	2,304,370	(307,898,475)	(23,877,865)	29,779,935	1,197,379,178
6	Total AHIL Cash Flow (54.2% cash flow - AHIL acquisition cost)	(99,114,878)	2,304,370	(307,898,475)	(23,877,865)	29,779,935	1,197,379,178
7							
8	Discount Rate (13.37%)	0.1337					
9							
21	Present Value (where *t*= 213/365, 1+(213/365), 2+(213/365), etc.)	(99,115,694)	2,141,654	(252,409,888)	(17,266,176)	18,994,431	673,652,750
22	(formula for the figures seen in Row 17)	=B6	see text box below				
23	**Net Present Value (where t=213/365, 1+(213/365), 2+(213/365), etc.)**	**325,997,077**					
24	Note = "^" in formula denotes "to the power of"						

Formula for C21 = C6/(1+0.1337)^(213/365)
Formula for D21 = D6/(1+0.1337)^(1+(213/365))
Formula for E21 = E6/(1+0.1337)^(2+(213/365))
Formula for F21 = D6/(1+0.1337)^(3+(213/365))
Formula for G21 = D6/(1+0.1337)^(4+(213/365))

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