IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2020] SGHC 16

Suit No 585 of 2017

Between

Daisho Development Singapore Pte Ltd

… *Plaintiff*

And

Architects 61 Pte Ltd

… *Defendant*

JUDGMENT

[Tort] — [Misrepresentation] — [Negligent misrepresentation]

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Daisho Development Singapore Pte Ltd
v
Architects 61 Pte Ltd

[2020] SGHC 16

High Court — Suit No 585 of 2017
Tan Siong Thye J
4–8, 13–14 November 2019; 6 December 2019

21 January 2020 Judgment reserved.

Tan Siong Thye J:

Introduction

1 The plaintiff, Daisho Development Singapore Pte Ltd ("Daisho"), bought the Westin Hotel ("the Hotel") from Asia Square Tower 2 Pte Ltd ("AST2") under the sale and purchase agreement ("the SPA") dated 16 December 2013. The purchase price was approximately $469m. After the sale, Daisho alleged that AST2 made a false and fraudulent misrepresentation of fact by giving advice that members of the public could access certain of the Hotel's facilities even though the Urban Redevelopment Authority ("URA") had stipulated that these facilities were not accessible to the public. Daisho took the dispute to arbitration ("the Arbitration") and the tribunal ("Tribunal") handed down an award ruling against Daisho ("the Award").

2 After its unsuccessful attempts to set aside the Award in the High Court

and Court of Appeal, Daisho now seeks another bite of the cherry by suing the present defendant, Architects 61 Pte Ltd ("A61"), who was the project architect for the Hotel. Daisho relies on similar facts but this time alleges negligent misrepresentation regarding the restricted usage of the Hotel facilities. The misrepresentation was purportedly made by A61 to AST2 and then impliedly conveyed to Daisho.

3 In order to fully appreciate this case, I shall begin by tracing the background to the dispute and how the URA's prohibition of public access to certain facilities of the Hotel came to be implemented.

Background facts

4 Daisho is a company engaged in the acquisition and operation of assets such as hotels and restaurants.[1] A61 is an architectural firm.[2]

5 In April 2008, A61 was appointed, under a Memorandum of Agreement ("the MOA") with MGP Kimi Pte Ltd ("MGP"), as the architect for the project ("the Project") to develop Land Parcel B at Marina View (South Tower) Singapore into what would eventually be known as Asia Square Tower 2 ("the Development"). MGP was renamed AST2 in March 2009[3] but nothing turns on this. AST2 is a special purpose vehicle created only to hold property.[4] A61

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1 Kohda's affidavit at para 5.

2 Kohda's affidavit at para 6.

3 Defence at para 4.

4 4/11/19 NE 51.

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worked with Denton Corker Marshall Pty Ltd, which took the lead in design matters.[5]

6 The Project was granted planning permission by the URA in July 2009.[6] Under the Technical Conditions of Tender issued by the URA, the maximum permissible gross floor area ("Maximum GFA") of the Development was 113,580m^2. At least 60% of the Maximum GFA was to be for office use ("Office GFA") and at least 25% of the Maximum GFA was to be for hotel use ("Hotel GFA"). The remaining 15% could be developed for additional office, hotel or other permitted uses such has retail, residential, entertainment or recreational uses as approved by the URA ("Commercial GFA").

The Use Restrictions on the Hotel

7 The Hotel was built as part of the Project and it occupies part of levels 1 and 3, and the entirety of levels 32 to 46 of the Development.[7]

8 It is undisputed that certain facilities of the Hotel ("the Facilities") were classified under Hotel GFA and, hence, the Facilities could only be used by hotel guests and staff and not by members of the public ("the Use Restrictions"). The Use Restrictions were found in URA Circular No URA/PB/2002/18-DCD dated 2 September 2002 ("the URA Circular"). The affected Facilities comprised:

(a) meeting rooms on the third floor ("the L3 Meeting Rooms");

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5 DOS at para 3.

6 Defence at para 5.

7 6/11/19 NE 60.

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(b) food and beverage facilities on the 32nd and 33rd floors ("the F&B Facilities");

(c) meeting rooms on the 35th floor; and

(d) the health and fitness centre on the 35th floor.

9 AST2 wanted to optimise the proportions of Office GFA, Hotel GFA and Commercial GFA for profitability. In view of the Use Restrictions and to obtain the URA's consent for the Facilities to be computed as Hotel GFA, AST2 provided three letters of undertaking ("LOUs") to the URA:

(a) AST2's first letter of undertaking dated 14 October 2010 ("First LOU"), which stated in material part:

> We hereby agree and undertake that meeting rooms computed under Hotel quantum will be for hotel guests and staff use only (not open to public).

(b) AST2's second letter of undertaking dated 27 March 2013 ("Second LOU"), which stated in material part:

> We hereby agree and undertake that 32nd and 33rd Storey Guest Lounges, 35th Storey Health & Fitness Centre, Treatment Rooms, Business Centre Meeting Rooms and Executive Lounge computed under Hotel quantum will be for hotel guests and staff use only.

(c) AST2's third letter of undertaking dated 10 May 2013 ("Third LOU"), which stated in material part:

> 32nd and 33rd Storey Guest Lounges computed under Hotel quantum will be for hotel guests and staff use only.
>
> 35th Storey Health & Fitness Centre, Treatment Rooms, Business Centre Meeting Rooms and Executive Lounge computed under Hotel quantum will be for hotel guests use only. From 32nd Storey Hotel Lobby, hotel guests need to transfer to another set of Lifts (HPL 04 to 06) to

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> access the upper hotel floors (including 35th Storey). This set of Lifts is card controlled hence access is restricted for hotel guests only.

10 The URA issued its final grant of written permission on 10 October 2013 ("the FGWP"). The FGWP reiterated the Use Restrictions, in that it stated "The details of the Planning Permission are set out in Part III [titled "Details of the Planning Permission"] and the approved plans which are enclosed herewith. … All conditions stipulated in [the] approved plans … are still applicable".[8] The attached plans contained printed stipulations "for hotel staff and guest use only" (or similar stipulations) in respect of the Facilities.

Daisho's purchase of the Hotel

11 In July 2013, Daisho was interested in buying a five star hotel in Singapore.[9] Between October and November 2013, Daisho began conducting due diligence on the Hotel. Daisho was advised by WongPartnership LLP ("WongP"), Aylmer & Partners Ltd ("Aylmer") and EC Harris. A virtual data room was maintained for due diligence purposes.[10] Parties hotly dispute whether there was a physical data room in addition to the virtual data room and whether Daisho was provided with only the FGWP or also with the approved plans. I shall discuss these matters later. WongP eventually issued its legal due diligence report on 11 December 2013.[11]

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8 DBD 864.

9 Kohda's affidavit at paras 11–14.

10 ASOF at para 5.

11 ASOF at para 9.

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12 On 4 November 2013, Mr Bryan Law ("Mr Law") of AST2 circulated a draft budget ("the Draft Budget"), dated 30 September 2013 to Daisho. The Draft Budget was prepared by the operator of the Hotel ("Starwood").

13 On 15 December 2013, Daisho's representatives, PW2 Mr Mamoru Kohda ("Mr Kohda") and PW3 Mr Akira Kikuchi ("Mr Kikuchi"), and AST2's representatives, Mr Stuaret Greaves, Mr Mark Rada ("Mr Rada") and Mr Law, toured the Hotel ("the Tour"). Also present were personnel from White & Case (the lawyers for BlackRock, which owned AST2),[12] the Hotel, and Aylmer. A61's representatives did not participate in the Tour.[13] The Tour ended with drinks at one of the F&B Facilities on the 32rd floor.

14 The next day, 16 December 2013, AST2 sold the Hotel to Daisho under the SPA. Daisho had never communicated with A61 on and before this date.[14] Daisho had conducted due diligence for six weeks before the execution of the SPA.[15]

15 A lease agreement between Daisho and AST2 was registered in early 2014 ("the Lease").[16] The Certificate of Statutory Completion for the Development was obtained on 14 May 2014.[17]

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12 6 /11/19 NE 13.

13 ASOF at para 10.

14 ASOF at para 12.

15 ASOF at para 5.

16 SOC at para 5.

17 ASOF at para 13.

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16 It is undisputed that the Facilities are still open to members of the public and have been since 2013, notwithstanding the Use Restrictions.[18]

Daisho's arbitration against AST2

17 According to Daisho, it was only after entering into the SPA that it realised that the Facilities could not be patronised by members of the public. Daisho alleged that it had not been informed by AST2 about the Use Restrictions. In late November 2014 Daisho commenced the Arbitration against AST2 in accordance with the SPA.[19] In its statement of case filed on 3 June 2015 in the arbitral proceedings, Daisho alleged fraudulent misrepresentation, arising from the Tour and the Draft Budget, that the Facilities were open to the public. The Tribunal issued the Award on 1 June 2016 essentially dismissing Daisho's claims. A61 was not a party or a witness in the Arbitration proceedings.[20]

Daisho's court actions to set aside the arbitral award

18 Daisho expressed its disapprobation with the Award by applying to the High Court in Originating Summons No 871 of 2016 ("OS 871") to set aside the Award. At the same time, Daisho took out Suit No 1097 of 2016 ("Suit 1097") against AST2 relying on the same allegations raised in the Arbitration (*ie*, that AST2 deceived Daisho into entering into the SPA by fraudulently misrepresenting to Daisho that the public could patronise the Facilities). AST2 applied to strike out Suit 1097. The High Court dismissed OS 871 and struck out Suit 1097 in *BNX v BOE* [2017] SGHC 289.

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18 5/11/19 NE 49.

19 DOS at para 15.

20 ASOF at para 14.

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19 Daisho was again dissatisfied with the decisions and lodged notices of appeal against the High Court decisions (Civil Appeal Nos 61 of 2017 and 62 of 2017, the "Substantive Appeals"). In the meantime, in November 2017 Daisho applied to adduce fresh evidence for its appeal (Summons No 132 of 2017 and Summons No 133 of 2017, the "Fresh Evidence Applications"). The Fresh Evidence Applications were dismissed by the Court of Appeal in *BNX v BOE and another appeal* [2018] 2 SLR 215. The Substantive Appeals were dismissed on 17 January 2019 without written grounds of decision.

20 In the midst of exhausting its legal recourse against AST2, around June 2017 Daisho started this Suit against AST2's architect, A61. This is what this case is all about.

The parties' cases

Daisho's case

21 Daisho's case in essence is that A61 was negligent in providing advice to AST2 regarding the Use Restrictions. Mr Kohda alleged that AST2 conveyed that advice impliedly to Daisho *by the way it operated the Hotel and via the Draft Budget* and that Daisho acted upon that implied advice, causing it to incur loss.[21]

22 Daisho alleges that A61 had, in the course of acting as the architect for the Hotel's development, advised AST2 on all planning issues and dealt with the URA on AST2's behalf.[22] A61 had orally advised AST2's representatives

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21 POS at paras 6, 7, 10, 11.

22 SOC at para 4.

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(sometime during the development phase of the Hotel[23]) that members of the public could use the Facilities, by way of providing the following advice singly or cumulatively ("the Advice") as stated in Daisho's opening statement and paragraphs 7(a) to 7(g) of its statement of claim:[24]

> (a) The Use Restrictions were aimed at preventing the Facilities from being run as separate businesses.
>
> (b) So long as the Facilities stayed within and as part of the Hotel, this would comply with the primary focus of the Use Restrictions.
>
> (c) From the URA's point of view, the distinction between hotel use and commercial use was not focused on who could access the Facilities but whether the Facilities were kept within the Hotel.
>
> (d) So long as the Facilities remained under the Hotel's control and were not leased to third parties to run commercial businesses out of the Hotel's premises, that would be in line with the Use Restrictions.
>
> (e) It would not be an issue if the Facilities allocated as Hotel GFA were accessed by the public, that in practice all types of people (*ie*, hotel guests, visitors or the general public) would access the Facilities or that the URA would not consider public access to the Facilities as contrary to the planning rules.

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23 F&BP (Plaintiff) at para 2b(i).

24 SOC at para 7.

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(f) In the practical sense, so long as the Hotel's management did not intentionally or purposely market the Facilities to the general public, it would not violate the Use Restrictions.

(g) The operation of the Facilities by the Hotel's operators and not by outside businesses was consistent with the URA's policy, such that no problems would arise by allowing business from persons not resident in the Hotel contrary to the Use Restrictions.

23 When the alleged Advice was rendered, the parties present were Mr Rada or PW1 Mr Jeremy Choy ("Mr Choy") of AST2 and DW1 Cheang Eng Cheng Joseph ("Mr Cheang") from A61.[25]

24 Relying on the Advice, AST2 planned and operated the business of the Hotel accordingly. The Facilities have remained opened to resident hotel guests, hotel staff, visitors and the general public to date and income was derived from these people.[26]

25 Daisho's case is that A61 owed a duty of care to a buyer of the Hotel, in this case Daisho, to ensure the Advice was given with reasonable care and skill.[27] A61 knew or should have known that the Advice would be made available to a buyer of the Hotel (Daisho) and that the buyer would rely on the Advice in contracting with AST2 to purchase the Hotel. In particular, A61 knew or should have known that AST2 was beneficially owned by a fund (Blackrock) and that any such fund would dispose of the assets soon after completing a

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25 F&BP (Plaintiff) at paras 3–11.

26 SOC at para 9.

27 SOC at para 11.

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project. AST2 sold the Hotel to Daisho soon after completing it. AST2 would make available the Advice from A61 to Daisho. Therefore, A61 as the architect must be taken to have assumed a responsibility to Daisho as the eventual buyer for the accuracy of its statements in the Advice to AST2.[28]

26 Daisho alleges that A61 breached its duty of care because the Advice it gave was inaccurate. A61 knew at all material times of the Use Restrictions on the Facilities from the URA Circular, the FGWP, and the LOUs.[29] A61 should have known that the Advice was contrary to the Use Restrictions.[30]

27 Daisho claims that it was at all material times unaware of the Use Restrictions[31] and that the Advice was made available to it in these ways:

(a) By the manner in which the operations of the Hotel were conducted. During the Tour, Daisho understood from the operations of the Hotel that the Facilities were open to, amongst others, the general public and income was derived from this.[32] At that time, the Facilities were being used contrary to the Use Restrictions. There were no visible signs at the bar that it was not accessible to non-resident hotel guests.

(b) Through the Draft Budget, which contained information regarding the income to be derived from the Hotel's operations.[33]

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28 SOC at para 10.

29 SOC at para 6.

30 SOC a paras 11, 16.

31 SOC at para 13.

32 SOC at para 12.

33 SOC at para 14.

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28 Relying on the Advice, Daisho entered into the SPA and suffered loss, namely, the payment of a higher purchase price than it would otherwise have if access to the Facilities was restricted to only the hotel guests and staff; and the loss of income that would have been derived from the general public's access to the Facilities for the Lease duration.[34] At the trial, Daisho abandoned its claim for loss of income from the public. It now pursues only the claim that the Hotel has diminished in value because of the Use Restrictions on the Facilities.

29 Daisho called these witnesses:

(a) Mr Choy, the director of the Project until about 2011 (after which he handed the Project over to Mr Rada, who was his "number two" before that[35]);

(b) Mr Kohda, a director of Daisho;

(c) Mr Kikuchi, another director of Daisho; and

(d) PW4, Ms Chee Hock Yean ("Ms Chee"), its expert on quantum.

A61's case

30 A61 accepts that it knew of the Use Restrictions on the Facilities.[36] However, it denies that it had given the Advice to AST2. To the contrary, all documentary evidence shows that A61 advised AST2 to comply with the Use Restrictions. A61 also alleges that AST2 had communicated directly with the

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34 SOC at paras 17–18.

35 4/11/19 NE 48.

36 Defence at para 8.

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URA on certain occasions, including appeals on GFA computation for hotel use and the execution of the LOUs addressed to the URA.[37]

31 A61 disagrees that Daisho was unaware of the Use Restrictions at all material times. These restrictions would have been apparent upon due diligence being done as the Use Restrictions were printed on the building plans depicting the relevant Facilities. Further, if Daisho was unaware of them it could not have known and relied on the Advice as the Advice and the Use Restrictions were intertwined.[38]

32 A61 raises five defences. Firstly, it contends that it did not give any of the alleged Advice, which Daisho claims was negligently given to AST2. In fact, it said the exact opposite. A61 understood from July 2009, as conveyed through MGP's design brief for the Project,[39] that MGP intended to minimise Hotel GFA subject to the URA's stipulated minimum 25% of Maximum GFA. This was because MGP considered Hotel GFA to be the least profitable out of Hotel GFA, Office GFA and Commercial GFA.[40] A61 had advised AST2 that the Facilities could only be operated in accordance with the Use Restrictions in order to be characterised as Hotel GFA.[41] A61 referred to communications between A61, AST2 and the URA regarding the Use Restrictions. These are as follows:

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37 Defence at para 6.

38 Defence at para 22.

39 F&BP (Defence) at para 4.

40 Defence at para 9.

41 Defence at para 9.

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(a) Between 2009 and 2010, A61 appealed to URA against the latter's interpretations of GFA, which A61 thought were inconsistent between the Technical Conditions of Tender and various URA circulars.[42] This culminated in the URA approving the computation of the L3 Meeting Rooms as Hotel GFA on condition that AST2 provided the First LOU.[43]

(b) Between February and May 2013 the correspondence with the URA culminated in the URA approving the computation of the remaining Facilities as Hotel GFA on condition that AST2 provided the Second LOU. The Second LOU was later amended and re-executed on 10 May 2013 as the Third LOU to comply with the URA's request to include proposed measures to restrict public access to the 35th storey.[44]

A61 had, at all times, informed AST2 that they were to comply with the LOUs.[45]

33 Secondly, A61 disagrees that it owes a duty of care to Daisho, who was not its client, for the following reasons:[46]

(a) It is not the case that A61 knew or should have known that the Advice would be made available to a buyer of the Hotel.[47] A61 would not expect any advice it gave to be made available to third parties,

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42 7/11/19 NE 80–81.

43 Defence at para 12.

44 Defence at paras 13–14.

45 Defence at para 15.

46 Defence at para 20.

47 Defence at paras 18–19.

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because the MOA with AST2 stipulated that any information on the Project, including any advice given by A61, was confidential.

(b) The relationship between A61 and Daisho was not sufficiently proximate. They had no contractual relationship. A61 had not assumed responsibility for the accuracy of the Advice or to prevent loss to Daisho. A61 did not and could not have known that Daisho relied on it to take care to avoid or prevent loss to Daisho.

(c) Even if any of its advice was communicated to third party investors or buyers, A61 did not know or expect its advice to be acted upon by these third parties without independent inquiry or due diligence. Any subsequent purchaser of the Development or the Hotel would in the ordinary course of conduct do its independent due diligence.

34 Thirdly, causation is not established for the following reasons:

(a) There is a *novus actus interveniens*: Any damage resulted from Daisho's own negligence in failing to conduct due diligence thoroughly, contrary to the advice of their own experts.[48] If all the documents regarding the Use Restrictions were in the data-room and Daisho saw them and ignored them, it would be Daisho's fault. If Daisho did not see the documents, that would be Daisho's adviser's fault. If the documents were not in the data-room, it could be AST2's fault. In no situation would A61 be at fault.[49]

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48 Defence at para 27.

49 4/11/19 NE 16.

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(b) A61 submits that it did not take part in the Tour,[50] which in any case happened after all Daisho's due diligence had been completed. There was, similarly, no causal nexus between the Advice and the Draft Budget,[51] as A61 had not given input on or seen the Draft Budget.

35 Fourthly, A61 relies on the doctrine of abuse of process. Daisho cannot allege that the Advice was made available by AST2 to it by the manner in which the operations of the Hotel were conducted[52] because the Arbitration tribunal had found, *inter alia*, that there was no such representation and that Daisho could not have understood any representation to have been made during the Tour. The allegations regarding the Draft Budget are likewise precluded by the extended doctrine of *res judicata* or abuse of process as these were thoroughly argued in the Arbitration proceedings. The tribunal had found that while there was an implicit representation in the Draft Budget that it would be lawful to admit non-residents, Daisho did not give conscious thought to the question of whether non-residents of the Hotel had lawful access to the Facilities. Nor had Daisho relied on any of the representations in the Draft Budget to enter into the SPA.

36 Fifthly, Daisho has to date not suffered any damage. All the Facilities are still open to the public notwithstanding the Use Restrictions. Its loss of profit claim cannot stand because the purpose of damages in tortious misrepresentation is to put the victim in the position he would have been in if the representation had not been made.

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50 Defence at para 21.

51 Defence at para 23.

52 Defence at para 21A.

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37 A61 called these witnesses:

(a) Mr Cheang, the Chief Operating Officer of A61;

(b) DW2, Ms Ooi Wen Chuen ("Ms Ooi"), an architect at A61;

(c) DW3, Mr Micheal Ngu ("Mr Ngu"), the Chief Executive Officer of A61; and

(d) DW4, Mr Robert van Rensselaer Hecker ("Mr Hecker"), A61's expert on quantum.

My Decision

Issues to be determined

38 The following issues arise for my determination:

(a) Did any of the Advice allegedly given by A61 reach Daisho?

(b) Did A61 render the Advice to AST2 on the Use Restrictions?

(c) Did A61, the architect engaged by AST2 for the Development that included the Hotel, owe Daisho, the eventual buyer of the Hotel, a duty of care to provide accurate advice regarding the Use Restrictions and thus prevent Daisho from incurring pure economic loss?

(d) If the answer to sub-paragraph (c) is in the affirmative, did A61 breach that duty by providing the Advice, contrary to the Use Restrictions, to the effect that members of the public could use the Facilities?

(e) If A61 was negligent, did Daisho suffer any loss?

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Did the Advice allegedly given by A61 reach Daisho?

39 Daisho vehemently denies it was aware of the Use Restrictions before entering into the SPA. A61 argues that if Daisho never knew of the Use Restrictions before entering into the SPA, it could not possibly be aware of any purported Advice given by A61 on how to circumvent these same restrictions.[53] Mr Kohda accepted A61's logic during cross-examination.[54] This concession by Mr Kohda sounds the death knell for Daisho's case.

40 It is important to grasp what exactly Daisho's case is. Mr Kohda's affidavit evidence suggested that the Advice itself (at paragraphs 7(a) to 7(g) of Daisho's statement of claim) was conveyed to Daisho. At paragraph 58 of his affidavit, he stated that "AST2 had relied on ***the Advice*** provided by the Defendant [A61] and in turn, ***such Advice*** *was conveyed to and relied upon by the Plaintiff* in coming to a decision to purchase the Westin Singapore" [emphasis added].

41 However, Mr Kohda explained in court that it was not the Advice *per se* that was conveyed to Daisho, but a general impression that the Facilities were open to the public. Further, it was not A61 but AST2 that conveyed that impression. This was done in a non-verbal manner through the Draft Budget and the Tour as follows:

(a) Mr Kohda clarified, in response to my questions at the trial, that the Advice at paragraphs 7(a) to 7(g) of Daisho's statement of claim (see [22] above) was *not* in fact conveyed to Daisho. Rather, the Advice was

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53 DOS at para 14.

54 5/11/19 NE 72–73.

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only conveyed to *AST2*. It was undisputed that Daisho had no dealings or communication with A61 before it signed the SPA.[55]

(b) Mr Kohda further explained that AST2 also did not render any verbal advice or any actual direct advice to Daisho regarding the Use Restrictions.[56] Daisho assumed and formed the impression, from the *fact* that the Hotel was being operated in a "normal way", that the Facilities were open to the public. This impression was then supported by the Draft Budget.[57]

(c) Daisho reiterated in its closing submission that it is "not [Daisho's] case that the *full advice* from A61 to AST2 [*ie*, the whole of the advice in paragraphs 7(a) to 7(g) of the statement of claim] was communicated to [Daisho]. [Daisho]'s case is only that *part of the advice that the hotel's Relevant Facilities could be open to the public* was communicated by AST2 to the Plaintiff" [emphasis added].[58]

42 Therefore, even on the assumption that A61 had given the Advice to AST2, Daisho had to show that A61's Advice had affected the formulation of the Draft Budget or the way the Tour was conducted. There is no evidence to support this proposition and, thus, Daisho has failed to discharge its burden of proof. Mr Kohda accepted that he had no evidence to suggest A61 saw the Draft Budget or had any direct or indirect input regarding the Draft Budget.[59] It is not

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55 PCS at para 2(o).

56 6/11/19 NE 112.

57 6/11/19 NE 105–106.

58 PCS at para 10.

59 5/11/19 NE 74.

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even apparent if *AST2* had any input in the Draft Budget, which was prepared by Starwood (the operator of the Hotel). Although Mr Kikuchi claimed in his affidavit that the Draft Budget had been "subsequently approved by AST2",[60] he conceded in cross-examination that he *assumed* that AST2, as owner, must have approved it. This was because "usually" in management contracts between the owners and operators of international hotels the former would have to approve or disapprove of the hotel budget.[61] Similarly, there is a complete lack of nexus between A61 or the Advice and the Tour. Furthermore, it is undisputed that A61's representatives did not participate in the Tour.[62] Daisho has not suggested that A61 had advised AST2 regarding how the Tour should be conducted.

43 In other words, it follows from Mr Kohda's evidence that A61's purported Advice, even assuming that the Advice had been given to AST2, did not reach Daisho through the Draft Budget or the Tour. Thus, Daisho was unaware of the Advice and could not possibly have relied on the Advice purportedly given by A61 when it signed the SPA. Daisho's evidence, on a balance of probabilities, fails to establish that A61 had directly or indirectly made any representation regarding the Advice to Daisho before it signed the SPA. Therefore, Daisho's case against A61 is completely devoid of basic legal foundation.

44 Even if Daisho did not know of the Use Restrictions before entering into the SPA (as it alleged), this lack of knowledge cannot be attributed to A61. A61

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60 2BAEIC689 at para 12.

61 6/1/19 NE 119–120.

62 ASOF at para 10.

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had advised AST2 to comply with the Use Restrictions imposed by the URA. This will become evident from my analysis below. It was not A61's responsibility to bring the Use Restrictions to Daisho's attention but that of Daisho's advisers, who had been engaged to conduct a thorough due diligence check on the Hotel before Daisho signed the SPA. The purchase of the Hotel was conducted on the basis of *caveat emptor*. Daisho was fully aware of the implications and responsibilities of contract entered into on the basis of *caveat emptor* as it had engaged its own advisors.

45 At this juncture, I shall briefly refer to a tangential issue in the Arbitration. In those proceedings Daisho alleged that representations were made by AST2 via the Tour and the Draft Budget that the public could access the Facilities. A61 relied on the extended doctrine of *res judicata* or abuse of process to argue that Daisho could not raise this point in this Suit. A61 also referred to clause 23.2 of the SPA which provided:

> Each party confirms that it has not entered into this Agreement … on the basis of any representation, warranty, undertaking or other statement whatsoever by another party or any of its Related Persons which is not expressly incorporated into this Agreement …

It is unnecessary for me to resolve this issue because it would not have made a difference to my analysis, given my reasoning above.

46 On the basis of Mr Kohda's evidence I dismiss Daisho's case against A61. However, for completeness I shall discuss the other issues listed at [38] above.

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Did A61 render the Advice to AST2 regarding the Use Restrictions?

47 Daisho alleges that A61 is bound by the findings of the Tribunal that A61 had given the Advice.[63] The Award states at paragraph 78[vii] that "the tenor of the advice from A61 was that operation of the hotel's facilities by the operators of the hotel and not by outside businesses was consistent with the policy of the URA such that no problems would arise by receiving business from persons not resident in the hotel. This gave [AST2's] representatives comfort that the restrictions would not pose a significant problem for the operation of the hotel.". But this court is not bound to accept the findings the Tribunal made regarding A61, which was not even a party or a witness in the Arbitration. Since A61 was not given an opportunity to advance its case at the arbitral proceedings before the Tribunal made its findings, this court must be cautious of any of the Tribunal's findings relating to A61. I shall now analyse the issue of whether A61 gave the purported Advice to AST2 based on documentary evidence, Mr Choy's evidence, and A61's witnesses' evidence.

Documentary evidence

48 Daisho admits that there was no documentary evidence to support the view that A61 had given the Advice. Thus, Daisho's allegations are based entirely on oral evidence, primarily on Mr Choy's oral evidence. A61 denies giving the Advice.

49 On the other hand, A61's position is supported by the documentary evidence. All the documentary evidence shows that A61 informed AST2 to comply with the Use Restrictions and that A61 emphasised the importance of

63 PRS at para 46.

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AST2 honouring its undertakings in the various LOUs. Moreover, the documentary evidence supports the view that AST2 did not advocate going, or intend to go behind the URA's back by circumventing the Use Restrictions. When AST2 wished to designate certain ballrooms and meeting rooms as Hotel GFA yet allow the public to access these, there are records of A61 advising AST2 to appeal to the URA. As A61's counsel pointed out, there is no sign that A61 suggested a "workaround" or circumvention of the URA rules[64] of a similar nature to the alleged Advice.

50 The absence of documentary evidence of the Advice buttresses A61's case. Mr Cheang testified that his practice (and the practice he instructed his staff to adopt) was to confirm in writing if advice was given orally.[65] The practice of A61's staff members that discussions would be followed up with written minutes of discussions that had occurred was borne out by the documentary evidence. For instance, on 22 April 2010 (Thursday) Mr Cheang emailed Mr Jim Davis ("Mr Davis") (who was the head of development at MGP) and Mr Rada about "pop[ping] over to chat" on GFA the next day, or next Tuesday morning. Mr Davis and Mr Rada emailed back to say they were fine with 2.30pm on Friday.[66] The meeting evidently occurred, as recorded in a letter sent by Mr Cheang dated 26 April 2010 which stated:[67]

> ***Second (2nd) Appeal on Gross Floor Area Computation For Hotel Uses***
>
> 1. Please refer to the following:

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64 DCS at para 81.

65 7/11/19 NE 56.

66 2BAEIC 1112.

67 2BAEIC1117.

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> (a) URA's refusal of 1st Appeal letter … dated 15 April 2010 issued to AST2.
>
> (b) [MGP]'s email (16 April 2010 6.14pm) to Architects 61
>
> (c) *Meeting at* [*MGP*] *on Friday, 23 April 2010*
>
> 2. *As discussed*, we have endeavoured to draft a second appeal based on [MGP]'s outline …
>
> [emphasis added]

Mr Cheang confirmed that the Friday 23 April 2010 meeting was the same meeting as that referred to in the emails.[68]

Mr Choy's evidence

51 Daisho relied heavily on the evidence of Mr Choy and Mr Rada. Both of them testified in the Arbitration on behalf of AST2, the defendant in those proceedings.

52 I shall not refer to Mr Rada's evidence because Mr Rada was not a witness in this Suit and so his evidence is hearsay. Even on the basis of Mr Rada's evidence, I would have given his evidence little or no weight. The tenor of Mr Rada's evidence that Daisho relies on is that he was "advised by A61 … on maintaining a clear line between commercial use … and hotel use", that he had "talked … with A61", and that there was "advice [he] was getting from A61".[69] But one key issue in these proceedings (which did not arise in the Arbitration) is *who* in A61 had purportedly given the Advice, which was oral advice, to Mr Rada. That cannot be safely gleaned from Mr Rada's evidence without giving A61 the benefit of cross-examination.

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68 7/11/19 NE 106–107.

69 PCS at para 38.

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53 Turning to Mr Choy's evidence, the key portions of his evidence in this case and in the Arbitration are as follows:

(a) Mr Choy's supplemental witness statement:[70]

> … my understanding *from A61 and the development team* was that it would not be an issue if facilities allocated as hotel GFA were accessed by the public. … [emphasis added]

(b) Mr Choy's oral evidence in the Arbitration:[71]

> … I think we had enough comfort that something like this is not going to be actively enforced. We were working on the belief that, *based on advice from our architects*, like at the end of the day, what the URA is really concerned about is not really whether … non-hotel guest walks into the hotel and uses the facilities. …
>
> …
>
> The reason is I think *collectively as a team* at that point in time we kept -- *together with our -- based on advice from other people, namely the architects*, I think we *collectively came to a conclusion* that it would not have been an issue. …
>
> [emphasis added]

54 I do not accept Daisho's submissions that unless the court finds that Mr Choy has lied, it has "no alternative but to accept" Mr Choy's evidence that A61 had given the Advice to AST2.[72] It is the duty of this court to critically scrutinise and evaluate Mr Choy's evidence carefully to ascertain which aspects of his evidence can be accepted and to discard those that are unsafe to rely on.

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70 PBD4228.

71 PBD5640, 5724.

72 PCS at para 18.

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55 Firstly, Mr Choy testified in this court that he could not recall whether anyone from A61 ever gave him each item of the Advice,[73] or even whether he had directly discussed with A61 regarding the restricted uses of the Facilities.[74]

56 Secondly, Mr Choy admitted that his understanding of the Advice was based on his assumptions and not first-hand knowledge of the facts.[75] He clarified and emphasised that he was taking advice from *both* A61 and his development team in the sense that he assumed his team spoke to A61 and then kept him informed as their "boss":[76]

> A: … I do not take advice from one party and make a decision. So if in the event that there's contradicting advice, then obviously I have a issue on my hand, but my point is that A61 may give advice on all issues, they will be understood and processed by my development team. Then if someone asks me for an opinion, I will be then taking advice from these two parties collectively.
>
> …
>
> Q: … Then you say:
>
> "… my understanding from A61 and the development team …"
>
> So you don't actually sort of identify who gave you this understanding. Would it be correct to say that this was something that was told to you by your team, but you understood it to be a collective advice from A61 and your own team?
>
> A: Yes.
>
> Q: But the advice came or the understanding was given to you directly by one of your team members?
>
> A: Yes.

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73 4/11/19 NE 147–151.

74 5/11/19 NE 32.

75 4/11/19 NE 133.

76 4/11/19 NE 66–67, 154–155.

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> Q: It may have been a fair assumption, but you made an assumption that your team speaks to A61, and, therefore, they collectively come to a view and then your team members will, as the boss, keep you informed of what the view is.
>
> A: Yes.

As A61 pointed out, Mr Choy could not distinguish between advice allegedly given by A61 to members of Mr Choy's team and advice that came only from Mr Choy's team without A61's input.[77] It is apparent that this aspect of Mr Choy's evidence is based on his general assumption rather than any facts. Daisho did not call Mr Rada, who would have first-hand information on the alleged Advice given by A61, or any member of Mr Rada's team. Mr Choy testified that most of the team members were still in Singapore albeit working for other employers.[78] I note also that Mr Cheang, the only person from A61 named by Daisho in its further and better particulars to the statement of claim as having actually given the Advice, denied giving the Advice to Mr Rada and Mr Choy of AST2 in his dealings with them.[79]

57 Thirdly, Daisho had taken inconsistent positions regarding Mr Choy's evidence, which casts serious doubt on the weight the court should attribute to that evidence. In OS 871, Daisho had unsuccessfully attempted to set aside the Award. In the Fresh Evidence Applications, Daisho sought to introduce fresh evidence (discovered in the preparation of the present suit) that would allegedly have shown that AST2 had obtained the Award by perjury. In other words, Daisho's argument had essentially been that AST2's witnesses (including Mr Choy) had *lied in the Arbitration* and that the new evidence would prove

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77 DRS at para 16.

78 5/11/19 NE 28.

79 7/11/19 NE 92.

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this. But now, Daisho makes an about-turn and relies on the *correctness and veracity* of precisely the same evidence from Mr Choy before me. Mr Kohda rightly accepted that this was inconsistent.[80]

A61's witnesses' evidence

58 A61's witnesses (Mr Cheang, Ms Ooi and Mr Ngu) consistently maintained in cross-examination that they had not given the Advice. Mr Cheang elaborated that when the appeals to the URA were ongoing, in the lead-up to the LOUs and which were ultimately unsuccessful, he did not discuss with AST2 how to circumvent the Use Restrictions if the appeals failed. A61's approach had been to make proposals to MGP in parallel to the URA's processing of the appeal, going through different iterations of GFA combinations so as to meet the URA's requirements.[81] All three of them from A61 clarified that if they had been asked by AST2 about the matters mentioned in the Advice, they would have advised AST2 that A61 and AST2 should consult the URA[82] given that this was a grey area. I accept these explanations, which were not discredited during cross-examination.

59 I did not find that any of the three sets of correspondence emphasised by Daisho's counsel during cross-examination of A61's witnesses supported Daisho's case that the Advice was given. I shall now deal with these correspondence.

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80 5/11/19 NE 98.

81 7/11/19 NE 71, 75.

82 7/11/19 NE 14, 109; 8/11/19 NE 53–54, 105–106.

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60 The first was a letter from Starwood to the URA that was annexed to AST2's appeal letter to the URA in 2009–2010 (before the First LOU). That appeal had arisen because Mr Rada disagreed with Mr Ngu's advice that the L3 Meeting Rooms should be restricted to use by hotel guests and staff to be computed under Hotel GFA,[83] and so AST2 appealed to the URA. The draft letter from Starwood had been circulated to Mr Rada and Mr Choy of AST2 on 5 March 2010, with Mr Cheang and Mr Ngu in the loop.[84] The final letter was dated 9 March 2010.[85] Both the draft and the final letter listed the storeys of the Development that the Hotel comprised, then respectively stated:

(a) "All these areas (27526.46sqm) will be controlled and managed by Westin Hotel for the exclusive use of hotel guests and patrons"; and

(b) "All these areas would be managed by Starwood, pursuant to the terms of a management agreement, for the exclusive use of Hotel guests and patrons".

I shall refer to the text in sub-paragraphs 60(a) and (b) as the "Disputed Words". Daisho's counsel latched onto the inclusion of the Disputed Words to support the Advice having been made. Presumably, this was because paragraphs 7(a) and 7(d) of the statement of claim alleged that A61 had advised AST2 that "so long as the … Facilities stayed within and as part of the Westin Hotel, this would be complying with the primary focus of the Use Restrictions" and "so long as the … Facilities remained under the Westin Hotel's control … that would be in line with the Use Restrictions". I disagree with Daisho's counsel. Even if A61

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83 4BAEIC1829 (Mr Ngu's affidavit) at para 85.

84 2PBD7136, 7144.

85 2BAEIC1106.

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had made no comment on the inclusion of the Disputed Words, counsel was incorrect to focus on the words "managed by Westin Hotel …" and completely ignore the words "for the exclusive use of" hotel guests and patrons.

61 The second set of correspondence in 2013 eventually led to the Third LOU. There, the URA had written to Ms Ooi to say that the Second LOU should be amended to restrict the uses of the 35th floor to hotel guests.[86] Ms Ooi then updated Ms Michelle Yik ("Ms Yik") of AST2 of the same, who said that they were fine with extending the Second LOU to ensure that only guests of the Hotel used the Facilities on L35.[87] Ms Ooi then proposed the wording, which was eventually incorporated into the Third LOU, on restricting access to L35 by way of card-controlled lifts.

62 Daisho's counsel pointed to a cryptic statement subsequently sent by Mr Ngu, copied to Ms Yik and Mr Rada, that "URA has no preference if it is restricted to 'Guest Only' only the commercial quantum allocation is accessible".[88] MGP then emailed Ms Ooi to ask what this meant, and she replied to say "[i]t means URA don't control access by public to the hotel spaces, they only control the quantum, commercial quantum if accessible by public". Mr Ngu explained in cross-examination that there was a minimum quantum for Hotel GFA that had to be met. If a space was accessible to the public, that area would not count towards the hotel quantum. The URA did not control what facilities should or should not be accessible to the public, just that in the former case the facilities would count towards commercial quantum and not hotel

86 5BAEIC2719.

87 5BAEIC2718.

88 5BAEIC2717; PCS at para 23.

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quantum.[89] Ms Ooi's explanation in cross-examination had similar meaning.[90] In view of this explanation, this set of correspondence did not support Daisho's case. It was wrong for Daisho to argue that Mr Ngu had opined that the Facilities could be used by members of the public.[91] What Mr Ngu said was that if the Facilities were accessible to the public they could not be counted under the hotel quantum.

63 The third set of correspondence was in late September 2013. On 27 September 2013, Mr Lee Beng Kian ("Mr Lee") of the Hotel had written to Ms Ooi and Ms Yik regarding the difficulties faced by the Hotel in obtaining food licences from the National Environment Agency ("NEA"):

> 3. Lobby Lounge: Terminology. According to NEA, Lounge is a place where only drinks are served. If we want to serve food, it has to be a cafe/restaurant/snack bar. If this is the case, according to NEA, the terminology in the BP plan needs to be amended.
>
> 4· Cook & Brew: Same as above. Currently on the BP this is termed as Guest Lounge.
>
> 5· Executive Lounge: Same as above.

The difficulty arose because the NEA's position was that in order to serve food, the relevant premises had to be called a "café", "restaurant" or "bar" as opposed to a lounge. Ms Ooi replied on the same day and attached an explanation letter she had drafted to the NEA. She stated that "I spoken [*sic*] to Mr Wee Ming from NEA, he mentioned that he is not concerned about minor discrepancies on the kitchen layout. What he require for L32 is a single layout showing Seasonal

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89 8/11/19 NE 74.

90 8/11/19 NE 49.

91 PCS at para 28.

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Tastes seating areas and kitchen areas".[92] Daisho's counsel attempted to get some mileage out of this response by asking Ms Ooi during cross-examination whether she had explained to Mr Lee that the relevant premises could not be termed or operated as a "restaurant" as that entailed letting the public access the same. He then asked whether it would be reasonable to assume, with Ms Ooi's knowledge of the matter, that the Hotel intended to open that facility to members of the public. Ms Ooi stated that this had not crossed her mind.[93] I find Daisho's reliance on this set of correspondence to be misplaced. The correspondence dealt with the separate question of NEA licences, not the Use Restrictions. In any case, Ms Ooi did mention, in her attached explanation letter of the same date, that:[94]

> We refer to attached URA Written Permission dated 23 May 2013 … where URA approved Guest Lounges on 32nd and 33rd Storey as "*catering for hotel guests and staff* where drinks, snacks and food will be served" (refer to page 6 and 7, text highlighted In YELLOW). [emphasis added]

64 Therefore, I find that A61 did *not* provide any of the Advice to AST2 and certainly not to Daisho. The overwhelming documentary evidence, which is contemporaneous, reveals that A61 was working with AST2 towards the Use Restrictions so that those relevant Facilities would come within the Hotel GFA. This is another ground to dismiss Daisho's case.

Did A61 owe Daisho a duty of care?

65 I shall start from my finding that the evidence did not disclose that A61 gave the Advice to AST2 or Daisho. Daisho alleges that it was unaware of the

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92 BAEIC 685-3.

93 8/11/19 NE 38.

94 BAEIC685-2.

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Use Restrictions. Following from this, the proper question to ask would have been whether A61 owed a duty of care to *inform* Daisho of the Use Restrictions, though this was not how Daisho advanced its case. I have explained above at [44] why A61 did not owe Daisho this duty of care.

66 Even if A61 did give the negligent Advice to AST2, did A61 owe a duty of care to Daisho? It is unnecessary to determine this issue. As I have explained, Daisho's case fails in any event because its position was that it was not aware of the Advice and hence it could not have acted on the Advice. It was also unmeritorious and disingenuous for Daisho to allege that the Advice was manifested via the Tour and Draft Budget because A61 was not involved in these. Be that as it may and on the assumption that A61 did render the Advice to AST2, I shall address the issue of whether A61 owes a duty of care to Daisho.

Applicable legal principles

67 The basic principles are not in dispute. According to *Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency* [2007] 4 SLR(R) 100 ("*Spandeck*"), to establish a duty of care the plaintiff must show that the harm is factually foreseeable, the relationship between the parties is sufficiently proximate, and that there are no policy considerations that negate the finding of a duty of care (*Spandeck* at [77], [81] and [83]).

68 Factual foreseeability or reasonable foreseeability is "a threshold question which the court must be satisfied is fulfilled, failing which the claim does not even take off": *Spandeck* at [76]. Further, citing Phang Boon Leong Andrew J in *Sunny Metal & Engineering Pte Ltd v Ng Khim Ming Eric* [2007] 1 SLR(R) 853 at [55], "… [T]he requirement of reasonable foreseeability from a factual perspective will almost always be satisfied, simply because of its very

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nature and the very wide nature of the 'net' it necessarily casts" [original emphasis omitted]: *Spandeck* at [75]. The focus is on the foreseeability of harm, in general, as well as the class of persons who may be affected by the negligent act or omission (as opposed to a specific identified person): Gary Chan Kok Yew and Lee Pey Woan, *The Law of Torts in Singapore* (Academy Publishing, 2011) at para 03.042.

69 Proximity is "a composite idea, importing the whole concept of the necessary relationship between the claimant and the defendant": *Spandeck* at [79]. It refers to the existence of "sufficient legal proximity between the claimant and defendant for a duty of care to arise. The focus here is necessarily on the closeness of the relationship between the parties themselves" [original emphasis omitted]: *Spandeck* at [77]. This embraces physical, circumstantial and causal proximity as well as notions of assumption of responsibility and reliance (*Spandeck* at [77]–[79], citing *Sutherland Shire Council v Heyman* (1985) 60 ALR 1 at 55–56):

> The requirement of proximity is directed to the relationship between the parties in so far as it is relevant to the allegedly negligent act or omission of the defendant and the loss or injury sustained by the plaintiff. It involves the notion of nearness or closeness and embraces *physical proximity* (in the sense of space and time) between the person or property of the plaintiff and the person or property of the defendant, *circumstantial proximity* such as an overriding relationship of employer and employee or of a professional man and his client and what may (perhaps loosely) be referred to as *causal proximity* in the sense of the closeness or directness of the causal connection or relationship between the particular act or course of conduct and the loss or injury sustained. It may reflect *an assumption by one party of a responsibility to take care to avoid or prevent injury, loss or damage to the person or property of another* or *reliance by one party upon such care being taken by the other in circumstances where the other party knew or ought to have known of that reliance.* Both the identity and the relative importance of the factors which are determinative of an issue of proximity are likely to vary in different categories of case. … [emphasis in original omitted, emphasis added]

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70 If there is factual foreseeability and proximity, "a *prima facie* duty of care arises. Policy considerations should then be applied to the factual matrix to determine whether or not to negate this duty. Among the relevant policy considerations would be, for example, the presence of a contractual matrix which has clearly defined the rights and liabilities of the parties and the relative bargaining positions of the parties": *Spandeck* at [83].

71 Applying the *Spandeck* framework, I find that A61 also does *not* owe Daisho a duty of care to provide accurate advice regarding the Use Restrictions.

Factual foreseeability

72 Daisho has not satisfied the factual foreseeability threshold; it is not foreseeable to an architect in A61's position that a buyer of the Hotel would take the Advice into consideration and suffer economic loss.

73 A61 did not know that AST2 was planning to sell the Hotel (whether to Daisho or to any other buyer) so soon after it was completed. The unchallenged affidavit evidence of Mr Cheang, Ms Ooi and Mr Ngu was that they did not know the Hotel was for sale or that Daisho had bought the Hotel until the sale was made public around December 2013.[95] It is not enough for Daisho to allege that A61 knew that AST2 was managed by a fund (BlackRock) and so any and all assets owned by AST2 would be disposed of shortly or by way of sale.[96] Various factors, not least the prevailing economic conditions, would factor into an entity's decision on what to do with its assets.

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95 2BAEIC 913; 4BAEIC 1838; 5BAEIC 2776.

96 POS at para 7.

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74 It is also not foreseeable that a buyer would even take into consideration advice given earlier on by a project's architects, given the distinct possibility that the buyer would conduct its own due diligence when purchasing a premium five-star hotel (such as the Hotel) as a matter of good corporate governance. I note that due diligence was in fact done in this case, and as explained further below, Daisho's advisers could easily have noticed the Use Restrictions. An architect could reasonably expect a buyer to approach the deal carefully because of the potential repercussions in this extremely high value transaction. Mr Kohda stated in his affidavit that he had seen the Draft Budget, which indicated revenue from both residents and non-residents.[97] This should have piqued his curiosity, since on his own evidence he had not come across any five-star hotel that was not open to the public (which would necessitate a distinction between residents and non-residents). But he failed to probe further or direct his advisers to study this limitation of the Hotel despite its potential significance. Daisho would have had to analyse the implications of the Advice and Use Restrictions on the profitability and revenue income of the Hotel during its operation. Daisho would also have had to ascertain the extent to which the Advice and Use Restrictions would affect the potential value of the Hotel. This also would have allowed Daisho to negotiate with AST2 for a lower selling price for the Hotel because of the Use Restrictions, or decide to back out of the SPA.

75 Daisho argues that because there was no expectation on AST2's part to carry out any due diligence after receiving the Advice, there could be no obligation for Daisho to carry out due diligence when that advice reached Daisho.[98] This argument is naïve and fundamentally flawed as *caveat emptor*

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97 Kohda's affidavit at para 33.

98 PRS at para 19.

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and corporate governance require Daisho, as purchaser of the Hotel, to conduct proper and comprehensive due diligence before the endorsement of the SPA.

Proximity

76 Daisho has also not satisfied the proximity criteria.

77 Firstly, there is no circumstantial proximity. A61 was not in any antecedent relationship with Daisho. It had been engaged to act as architect by AST2 for the Development, part of which formed the Hotel. Several years later, in a separate transaction, AST2 contracted to sell the Hotel to Daisho. There was no direct or indirect contact between A61 and Daisho at any relevant juncture, be it during the negotiation of the SPA, the Tour or review of the Draft Budget. Thus, it is inconceivable that Daisho, the buyer of the Hotel, would believe A61 owe any duty or responsibility towards Daisho, particularly because the SPA was conducted on an arm's length and *caveat emptor* basis.

78 Secondly, there was no voluntary assumption of responsibility by A61. As mentioned above, A61 could not have known that its advice would be made available to persons in Daisho's position because it did not even know the Hotel was going to be sold.[99] Even if A61 had known that the Hotel would eventually be sold, A61 cannot be said to have assumed responsibility for advice that is passed on to the prospective buyer without further consultation or discussion with it. In this regard, Mr Cheang testified that his understanding was that "[i]n the normal course of our practice, fulfilling our work scope responsibilities of our client, we give our advice *to our client for the clients*" [emphasis added].[100]

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99 2BAEIC913; 4BAEIC1838; 5BAEIC2776.

100 7/11/19 NE 41.

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An architect gives advice within the confines of its relationship with its client, tailored to the facts and at a specific point in time. While that advice can be said to "belong to" the client in the sense of being commissioned by the client (who is free to do as it pleases, including passing it to a third party), that does not mean the architect assumes responsibility to parties to whom that advice is conveyed *by the client*, without the architect being consulted or giving further input. Circumstances change and advice that might have been appropriate when it was given to the client can become obsolete by the time the client passes it on. The architect cannot, by any stretch, be taken to have assumed responsibility for the advice to the third party at a later date. Seen in that light, a claim for economic loss arising from negligent misstatement differs materially from a claim for physical damage arising from negligent construction, or even economic loss arising from negligent construction (in the sense of expenses incurred to rectify damage, see *RSP Architects Planners & Engineers (formerly known as Raglan Squire & Partners FE) v MCST Plan No 1075 and anor* [1999] 2 SLR(R) 134 at [12]).

79 For this reason, the case of *Hunt and others v Optima (Cambridge) Ltd and others* [2014] EWCA Civ 714 ("*Hunt*") cited by Daisho is distinguishable. In *Hunt*, the claimant purchasers of flats sued the builders and the architects because of defective building works. The builders had engaged the architects to inspect the buildings and issue certificates for the flats for the benefit of the purchasers and their lenders. The claimants alleged that the certificates amounted to negligent misstatements that founded a cause of action in tort. The English Court of Appeal held, reversing the findings of the trial judge, that the claim in negligent misstatement had to fail because there was no reliance on the certificates (the certificates had post-dated exchange and completion by the claimants). For our purposes, *Hunt* does not assist Daisho in establishing

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proximity because there the architects had issued certificates specifically for the benefit of the purchasers and their lenders and the court had found the architects knew the purchasers were likely to receive a draft of the certificate. In this case I have found that A61 did not and could not be expected to know that any advice it rendered would be passed on to Daisho, the buyer of the Hotel.

80 Daisho relies on the evidence of Mr Choy, Mr Rada, Mr Kohda and Mr Kikuchi to argue that A61 knew or should have known its advice would be made available to Daisho.[101] This would not advance Daisho's case unless their evidence suggests that they, *ie*, AST2 or Daisho, *had conveyed to A61* that Daisho was a prospective buyer who would receive the advice. But Mr Kohda admitted that Daisho was unaware of the Advice. I also do not accept Daisho's argument that "[A61] knew that [Daisho] would be relying on the advice given by [A61]".[102] Quite the opposite.

81 Thirdly, there is no evidence that A61 knew that Daisho would rely on the Advice if given. To the contrary, A61 cannot be faulted if it were to expect purchasers in such high-value and arm's length land transactions to conduct their own due diligence. Crucially, Mr Kikuchi for Daisho accepted during cross-examination that A61 would expect the buyer of the Hotel to have conducted due diligence.[103] This takes the force out of Daisho's counsel's submission that there is no market practice when it comes to matters of due diligence.[104]

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101 POS at para 15.

102 PCS at para 46.

103 6/11/19 NE 121.

104 PCS at para 68.

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82 Before leaving this point on proximity, I would like to comment on two clauses that A61 relies on. The first is cl 11 of the MOA, a confidentiality clause. A61 argues that because of cl 11, A61 would not expect any advice they gave to AST2 to be made available to third parties. I do not agree with this submission as cl 11 does not impose *reciprocal* duties of confidentiality on both A61 and AST2. This clause imposes a *unilateral* obligation on A61 not to disclose information on the Project. In other words, nothing in the clause prevents AST2 from doing what it pleases with the advice it commissioned. Clause 11 of the MOA states:

> 11. **CONFIDENTIALITY RELATING TO THE WORKS**
>
> 11.01 All information on the Project is confidential and *shall not be disclosed by the Architect* [A61] to any other person, firm or Company with exception to the Employer's consultants and contractors engaged to perform works for this Project. [emphasis added]

83 The second is cl 23.2 of the SPA, an entire agreement clause that A61 claims precludes Daisho from relying on any representations by A61 or AST2. That clause states:

> **23. Entire agreement**
>
> 23.1 This Agreement, together with the Transaction Documents and any other documents referred to in this Agreement or any Transaction Document, constitutes the whole agreement between the parties and supersedes any previous arrangements or agreements between them relating to the Sale.
>
> 23.2 Each party confirms that it has not entered into this Agreement or any other Transaction Document on the basis Of any representation, warranty, undertaking or other statement whatsoever by another party or any of its Related Persons which is not expressly incorporated into this Agreement or the relevant Transaction Document, and that, to the extent permitted by law, a party will have no right or remedy in relation to action taken in connection with this Agreement or any other Transaction Document other than pursuant to this Agreement or the relevant Transaction Document.

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Leaving aside Daisho's point that this clause was not pleaded,[105] it is unclear whether the entire agreement clause precludes reliance by Daisho on alleged misrepresentations in tort in proceedings taken out against a third party (*ie*, A61) to the SPA. Be that as it may, these two different provisions are not directly relevant and will not affect the outcome of this case.

Policy considerations

84 In any case, policy considerations would have negated any *prima facie* duty of care on A61. In negligence cases, there is always a concern of opening the floodgates of liability if the scope of the duty of care is drawn too widely. Therefore, the court must guard against the spectre of imposing liability "in an indeterminate amount for an indeterminate time to an indeterminate class": *RSP Architects Planners & Engineers v Ocean Front Pte Ltd and another appeal* [1995] 3 SLR(R) 653 at [75]. Precisely that danger would arise in this case if a duty of care to Daisho were imposed on A61, because that would mean A61 potentially owes a duty to any buyer of the Hotel down the road, no matter how far removed in time or space, as long as the purported Advice is transmitted to that buyer.

85 The second policy consideration against imposing a duty of care on A61 is that doing so would undermine the rule of *caveat emptor*. The rule of *caveat emptor* is "[t]he general rule in contracts for the sale of land" save for a vendor's duty to disclose latent defects of title: *Indian Overseas Bank v Cheng Lai Geok* [1991] 2 SLR(R) 574 at [46]. A61 points out that in the Arbitration Daisho accepted that *caveat emptor* applied to Daisho.[106] I accept A61's submission that

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105 PRS at para 21.

106 DOS at para 26; DBD1456 at para [c].

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the exceptions to the *caveat emptor* rule are not engaged here, these being misrepresentation amounting to fraud or where a vendor has failed to disclose latent defects of title. In *Huang Ching Hwee v Heng Kay Pah and another* [1992] 3 SLR(R) 452, the Court of Appeal held that breaches of planning regulations would not make the title defective unless enforcement action has been taken by regulatory bodies. In this case, the Advice would not constitute latent defective title to the Hotel as the URA has not taken any action despite being aware of the breaches of the Use Restrictions.

86 Therefore, I would have found that A61 does not owe Daisho a duty of care to provide accurate advice regarding the Use Restrictions.

Has Daisho proven causation?

87 Even if A61 owed Daisho a duty of care to provide accurate advice regarding the Use Restrictions and breached this duty by providing the Advice to AST2 in the first instance (as Daisho contends), Daisho would have failed to establish causation.

88 A61 argues that Daisho's lack of knowledge of the Use Restrictions is a *novus actus interveniens* that breaks the chain of causation because Daisho could have discovered the Use Restrictions if it had not itself been remiss at the due diligence exercise. I find that this was indeed the case.

***The issue on* novus actus interveniens**

89 I do not accept Daisho's submission that A61's reliance on *novus actus interveniens* was legally incorrect.

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90 Daisho first argues that an omission on Daisho's part to conduct proper due diligence, after A61 has set in motion a "train of events" by its negligent act of giving the Advice, cannot be an intervening act. To find otherwise would allow a defendant to say that "I have done wrong. If you do not catch me, then the failure on your part to catch me is an intervening act".[107] The central question is simply whether the plaintiff's failure to conduct proper due diligence is so unreasonable as to be regarded as the sole effective cause of its injury: *Law of Torts in Singapore* at para 06.076.

91 Daisho's second argument is that there is no "factual basis" for alleging a requirement for Daisho to conduct due diligence.[108] However, as stated earlier, Mr Kikuchi conceded that purchasers in such high-value and arms' length land transactions are expected to conduct their own due diligence.[109]

92 Finally, Daisho argues that allowing A61 to rely on Daisho's failure to conduct due diligence properly would mean A61 is never liable. If Daisho had done proper due diligence it would not have relied on A61's purported negligent advice; conversely if Daisho had not done proper diligence then Daisho itself would be at fault.[110] In this case, it is ironic that Daisho had failed to exercise adequate due diligence and has not come to terms with this lapse and yet Daisho now tries to pin the blame on others like A61. I shall next explain why I found Daisho's actions to be so unreasonable as to break the chain of causation.

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107 PCS at paras 50–53.

108 PCS at paras 53–57.

109 6/11/19 NE 121.

110 PCS at paras 59–62.

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The LOUs, FGWP and plans attached to the SPA

93 Regardless of whether Daisho was actually told by AST2 of the Use Restrictions, it could have acquired the knowledge about the Use Restrictions in at least two instances: (a) through reviewing the LOUs as part of its due diligence; or (b) through reviewing the FGWP as part of its due diligence.

94 I begin with the LOUs. Daisho claims that there was no physical data room and the LOUs were not found in the virtual data room. A61's position is that there was a physical data room in which the First LOU and the Second LOU could be found.

95 I find that there was indeed a physical data room containing the First LOU and the Second LOU. The Court of Appeal judgment in the Fresh Evidence Applications specifically affirms this. The Tribunal had also found that "There was a room at [AST2's] office which contained all documents referable to the project. Its label as a '*physical data room*' is not material to the issues in the arbitration".[111] Despite these findings from the Court of Appeal and the Tribunal, Mr Kohda maintained that there was *no* physical data room at all.[112] It is unclear, however, if Mr Kohda was simply quibbling on labels because he also said there was a "meeting room with cabinet" that EC Harris could use and where AST2 would bring him any documents he required upon request.[113] This means that AST2 would provide any documents to Daisho regardless of whether or not there was a "physical data room" that was labelled as such. Daisho's argument may be semantic but what is important is substance

111 DCB768; 6/11/9 NE 39.

112 5/11/19 NE 134–135.

113 5/11/19 NE 140.

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over form. Essentially, Mr Kohda admitted that AST2 would furnish any documents upon request. Thus, AST2 did not refuse any request for documents from Daisho.

96 But even assuming there was no physical data room and that the LOUs were not in the virtual data room, Daisho has not made out its case. Mr Kohda accepted[114] that it was *AST2's responsibility* to ensure that Daisho and its advisers had access to all relevant documents for due diligence purposes. Given that documents relating to the Use Restrictions would be very relevant to Daisho at that time, if AST2 did not disclose documents relating to the Use Restrictions to Daisho it would be AST2's fault. If the documents on the Use Restrictions (in particular, the First LOU and the Second LOU) were shown to Daisho's advisers (WongP, EC Harris or Aylmer) Daisho would have expected its advisers to bring these documents to its attention. Daisho accepted that if the documents were in the data room but its advisers missed them or failed to appreciate their significance *the fault would lie with these advisers*. Therefore, in these circumstances A61 was not at fault.

97 Turning then to the FGWP, Mr Kohda stated that he first saw this document around the last Friday of November 2013 (before the SPA was signed). He alleged that he only had the FGWP and not the attached plans.[115] The Tribunal had found that the FGWP was uploaded to the virtual data room without the plans.[116] But Mr Kohda conceded that it would be usual to attach the approved plans, and any adviser looking at this document would know there

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114 5/11/19 NE 136–138, 148, 151.

115 5/11/19 NE 153.

116 DCB768.

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were plans attached. Looking at the FGWP, it would be *Daisho's advisers' duty to check the approved plans*. If there were plans that may be relevant but not in the data room, the advisers would have a duty to ask for them.[117] Likewise it would not be A61's fault.

98 I note that there were plans indicating "for hotel staff and guest use only" attached to the SPA. These were originally A1 size drawings that were scanned and shrunk to A3 size, for inclusion in the SPA. Upon looking at these plans I find, contrary to Mr Kohda's view,[118] that the words indicating the Use Restrictions are legible, even though the plans had been coloured over (the plans were intended to demarcate which areas belonged to the Westin Hotel). This dovetails with the Tribunal's finding that the annotations that indicated the Use Restrictions are "mostly readily legible on the drawings".[119] However, I did not place much weight on this factor considering that the Tribunal had also found that this set of plans could not have affixed Daisho with knowledge of the restrictions, because the relevant parties were not thinking of those restrictions at the time they looked at the drawings (which had been included for a different purpose).[120] In other words, the Tribunal opined that the Use Restrictions were not in Daisho's contemplation when it signed the SPA.

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117 6/11/19 NE 2–3.

118 6/11/19 NE 58–59.

119 DCB709 at para 103.

120 DCB709–710.

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Advice from EC Harris and WongP

99 The above begs the question why Daisho failed to find out about the Use Restrictions despite having multiple opportunities to do so and being advised by its advisers (EC Harris, WongP and Aylmer).

100 It is possible that Daisho had fallen into its own false sense of security because BlackRock was a "reputable company",[121] hence did not instruct its advisers to dig further into the correspondence and records, which would have revealed the Use Restrictions (it is a separate question – that does not arise in these proceedings – whether its advisers ought to have investigated of their own accord, without any express instructions from Daisho). The following portion of Mr Kohda's cross-examination is revealing of how Daisho had simply *assumed* that all was well:[122]

> Q: … I'm saying you saw this letter, you saw a reference to annotations, would you have expected WongPartnership or your experts -- sorry, your advisers to go and check the actual approved drawings -- actual approved plans by the URA? "Yes" or "no".
>
> A: Personally, no, because this letter was issued 2019 and … -- I'm sorry, 2009 and 2010, three years -- three or four years ago, from the -- our due diligence. *So our reasonable assumption was all -- everything about GFA issue was solved before TOP was given.*
>
> [emphasis added]

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121 5/11/19 NE 157.

122 6/11/19 NE 54.

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Mr Kohda had also explained in re-examination that he was comfortable buying property from BlackRock because BlackRock was regulated by US banking law:[123]

> A: … end of November 2013, but, actually, 3 December 2013. That time, the hotel under BlackRock -- the Westin Hotel under BlackRock's ownership has been opened already. Then we understand that BlackRock is -- AST2/BlackRock is restrict -- strictly regulated by United States banking law, so they cannot violate any type of local law, that I understand. So this background even I don't imagine they are complying -- not complying anything.
>
> Q: Not complying anything?
>
> A: Any -- any -- I was comfortable if we buy something from BlackRock, they are -- you know, they are biggest company -- one of the biggest banking firm, and they -- they don't do something strange.
>
> Q: Strange? What do you mean by strange?
>
> A: Strange, something wrong.

101 It was also significant that due diligence lasted for about only six to eight weeks, because Daisho wanted to complete the due diligence process before the end of 2013 to avail itself of tax savings of between $30m and $40m in Japan. While Mr Kohda and his expert, Ms Chee, opined that this was the right length of time,[124] this was contradicted by WongP's own observation and A61's expert, Mr Hecker. WongP in an email dated 22 November 2013, opined that this was a "tight timeline".[125]

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123 6/11/19 NE 94–95.

124 5/11/19 NE 134–135.

125 BAEIC911 at para 85 (Mr Cheang's affidavit and supporting exhibit).

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102 I also notice that there appears to have been some confusion amongst the advisers over who exactly was in charge of what:

(a) On 13 November 2013, WongP emailed Mr Kohda stating:[126]

> (d) Legal requisition reply from the URA
>
> …
>
> … we would mention that under the terms of the State Lease … in respect of the Property, the development of the Property shall:
>
> …
>
> (iv) be in accordance with the plans approved or to be approved by the Competent Authority under the Planning Act.
>
> With regard to item (iv), *we would mention that there were several documents which were provided by the Vendor* [*ie*, AST2] *in the data room, relating to permits and permissions from the URA and the Building Control Authority (including hotel architectural drawings, hotel M&E drawings and hotel structural drawings) as well as hotel assets (i.e. FFE and OS&E)* ***for which you should have your consultants review****. …*
>
> [emphasis added in italics and bold italics]

However, Daisho did not instruct either Aylmer or EC Harris to look at the approved plans.[127] Mr Kohda agreed that if Daisho had followed WongP's advice, its advisers would have seen the approved plans and become aware of the Use Restrictions.[128]

(b) On 29 November 2013, WongP emailed EC Harris (copying Mr Kohda) asking EC Harris to review the documents and confirm to

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126 DCB219–220.

127 6/11/19 NE 36.

128 6/11/19 NE 36–37.

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Daisho that the GFA and minimum component prescribed by the URA had been regularised:[129]

> Dear Alisdair [of EC Harris]
>
> We note that [AST2] has recently uploaded new documents to the data room. As many of these are of a technical nature, Simon [from Aylmer] has requested that *we check that EC Harris will be reviewing these documents.*
>
> These new documents are specifically found in the following sub-folders of the data room:
>
> …
>
> We have requested Kohda-San to have BlackRock grant access to you for these folders, but we understand that access can only be granted on Monday …
>
> In particular, we draw your attention to two letters issued by the URA dealing with Gross Floor Area ("GFA") (please see attached). … One of these letters from URA to [A61] dated 22 October 2009 states that (i) the GFA as verified by the Competent Authority has exceeded the maximum GFA of 113,580 sqm for the site, and (ii) the minimum Hotel quantum (at least 25% of 113,580 sqm for Hotel uses) is also not met. The other letter dated 20 July 2010 makes reference to the submission of a full set of GFA plans. These letters are all dated prior to the issuance of the Temporary Occupation Permit ("TOP") and we are aware from replies dated 22 October 2013 to our legal requisitions from URA (please see attached) that a recent proposal for the regularisation of GFA and erection of 46-storey building was approved by URA on 10 October 2013.
>
> We had, in view of the above requested [AST2] to let us have copies of (a) the follow-up correspondences between URA and the architects and (b) the said proposal and approval from URA. [AST2] has replied to our requests for these documents that these issues have been resolved by the issuance of the TOP and that the Grants of Written Permission have already been uploaded to the data room. In this regard, we attach

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129 DCB203–204.

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> copies of the TOP and Grants of Written Permission for your review.
>
> *With this information and with the various documents which you may have come across in your due diligence exercise, would you be able to confirm to Daisho that the GFA and minimum component prescribed by the authorities have been fulfilled/regularised?*
>
> [emphasis added]

Interestingly, Mr Kohda's view, as stated in cross-examination, was that the responsibility to review correspondence with the authorities lay with WongP and not EC Harris, since he appointed EC Harris as mechanical consultants.[130] He maintained this in the face of EC Harris's report that listed, under "Documents Reviewed", "Grant of Written Permission" amongst other things.[131] However, he had taken a different position in the Arbitration where he explained that he expected *both* WongP and EC Harris to review the terms of planning permission for the Development.[132]

(c) EC Harris replied to WongP on 2 December 2013 at 2.28pm, stating that while it believed the correct statutory approval had been obtained, given the issues in 2009 regarding Hotel GFA, a *legal* opinion on whether the building had any pending issues had to be formulated by Daisho's legal counsel:[133]

> For the TOP to be granted a number of different documents need to be submitted by the developer. These include, amongst other things, Copies of Written Permission issued by the URA and As-built plans where

130 5/11/19 NE 143–144.

131 PBD500.

132 DCB703 (Award at para 97[ii]).

133 DCB203.

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> any deviations from the approved building plans are highlighted. Although some of the as-built drawings were available at the time of our inspection, not all were, so we cannot confirm what information was passed provided as part of the TOP process. However, we would note that the granting of TOP is one step away from granting the Certificate of Statutory Completion which is the final certificate in the development process and which to date has not been issued. The Legal Requisition reply would infer by the planning proposal on 10 October 2013 was approved with no adverse remarks. Given the presence of the Legal Requisition document from the URA and the TOP certificate, *we believe that the correct statutory approval steps have been taken but given the issues noted in 2009, we believe that a legal opinion on whether the building has any pending issues needs to be formulated by Daisho's legal counsel.* [emphasis added]

(d) In the same email chain, EC Harris again wrote to WongP on 2 December 2013 at 10.41pm, stating it might be a good idea to check the "close out" of the issue by A61 with AST2:[134]

> The approval process in Singapore tends to have an iterative approach therefore with the TOP in place, we would not consider there to be any pending matters in relation to planning approvals *however as you rightly point out, it may be a good idea to check the close out of this particular issue by A61 with the vendor to satisfy yourself that the matter is no longer an issue.* [emphasis added]

103 Accordingly, I find that Daisho has not proven causation. A61's purported provision of the Advice did not cause AST2 to conduct the Tour in the way it did or forward the Draft Budget. Nor did A61's purported provision of the Advice cause Daisho's alleged lack of knowledge regarding the Use Restrictions.

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134 DCB192.

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104 For completeness, I also deal with an information package that Mr Kohda was sent (to solicit interest in the purchase of the Hotel) by Mr Dennis Turner of Aylmer. Mr Kohda alleges in his affidavit that "[t]he second information package entitled 'Asia Square Tower 2 Information Pack' further described the property as a '5 Star Westin Hotel'. *To me, a '5 Star Westin Hotel' entails that the Relevant Facilities were to be open for use by members of the public as well as hotel residents*" [emphasis in original omitted; emphasis added].[135] Quite apart from who this package was created by and intended for (apparently this was a "solicitor's report from Blake Dawson addressed to Mr Jeremy Choy"[136]), there was no support for Mr Kohda's view that the definition of a five-star hotel meant its facilities had to be open for public use. He acknowledged that this was only his personal opinion.[137]

105 Given my findings above, it is unnecessary to deal with whether Daisho was contributorily negligent (A61 had pleaded this in the alternative).[138] It is also unnecessary to deal with the issue of whether Daisho suffered any actionable damage.

Conclusion

106 In summary, I have found that A61 did not owe Daisho a duty of care; that A61 did not give any of the alleged Advice; and that even if A61 had given any of the Advice Daisho was unaware of it; assuming Daisho was aware of the alleged Advice this did not cause Daisho to act as it did.

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135 1BAEIC4 at para 13.

136 1BAEIC4 at para 12.

137 5/11/19 NE 115–116.

138 Defence at para 27.

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107 This was an unfortunate case where Daisho at every opportunity overlooked the Use Restrictions, but this is not by any stretch A61's fault. How could it possibly be A61's fault when it did not give the alleged Advice to AST2? This explains Mr Kohda's position that Daisho was unaware of the alleged Advice.

108 The evidence is overwhelmingly stacked against Daisho. Clearly, Daisho has no case against A61 and its claim must be dismissed. Unfortunately, this suit is merely the latest salvo in Daisho's long-running witch hunt to pin the blame on someone else for its purchase of the Hotel. I award the costs of these proceedings, to be agreed or taxed, to A61.

Tan Siong Thye
Judge

Gabriel Peter, Loh Jia Le and Loshini d/o Shanker (Gabriel Law Corporation) for the plaintiff;
Thio Shen Yi, SC, Kishan Pillay s/o Rajagopal Pillay, Thara Rubini Gopalan and Tan Yan Ting, Tanya (TSMP Law Corporation) for the defendant.

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