Rockline Ltd and another *v* Silverlink Holdings Ltd and another (Schroder Venture Managers Inc and another, third parties) and another suit
[2010] SGHC 127

Case Number : Suit No 834 of 2005 and Suit No 375 of 2007

Decision Date : 26 April 2010

Tribunal/Court : High Court

Coram : Choo Han Teck J

Counsel Name(s) : Indranee Rajah SC, Rakesh Kirpalani, Tan Shou Min and Arvindran Manoosegaran (Drew & Napier LLP) for the plaintiffs; Kannan Ramesh, Eddee Ng, Cheryl Koh and Emmeline Lim (Tan Kok Quan Partnership) for the defendants in Suit No 834 of 2005 and the 1st to 4th and 7th to 9th defendants in Suit No 375 of 2007; S Suressh and Sharmini Selvaratnam (Harry Elias Partnership) for the third parties; Vinodh Coomaraswamy SC and David Chan (ShookLin & Bok LLP) for Schroders plc (watching brief); Francis Xavier SC and Tang Hui Jing (Rajah & Tann LLP) for Overseas Hotels Limited (watching brief).

Parties : Rockline Ltd and another — Silverlink Holdings Ltd and another (Schroder Venture Managers Inc and another, third parties)

Contract

26 April 2010 Judgment reserved.

Choo Han Teck J:

I. INTRODUCTION

1 This action concerned the defendants' refusal to issue certain corporate notes to the plaintiffs. The plaintiffs in this action were Rockline Limited ("Rockline") and Superon International Limited ("Superon"), both of which were owned by Schroder Asian Properties Fund ("SAP"). The defendants were Silverlink Holdings Limited ("Silverlink") and Argent Holdings Limited ("Argent"). The 1st third party, Schroder Ventures Managers Inc ("SVMI"), was an entity vested with the exclusive right, power and discretion to manage Schroder Ventures Asia Pacific Fund ("SVAPF"). The 2nd third party Anchor Victory Ltd ("AVL") was a special purpose company wholly-owned by SVAPF.

2 The plaintiffs' claim was for breach of contract. They alleged that the defendants failed to issue certain Secured Convertible Redeemable Notes ("SCRNs") to them (or their nominee) pursuant to the Rockline Repurchase Agreement ("RRA") and as consideration for the agreed complete repurchase of Superon's indirect interest in Silverlink ("the Superon Repurchase"). The defendants, on the other hand, contended that except for economic benefits, the SAP Notes (defined at [4] below) were subject to the control of the holder of the SVAPF Note ("SVAPF Control"), and that before the SAP Notes may be issued, this control provision must be documented and executed. They contended that their failure to issue the SAP Notes was not in breach of any agreement because SVAPF Control had not been documented and executed.

3 SVAPF comprised of, *inter alia*, two limited partnerships, Schroder Ventures Asia Pacific Fund LP1 and Schroder Ventures Asia Pacific Fund LP2. At the material time, SVMI was the General Partner of the two limited partnerships. SVMI was also vested with full management and control over SVAPF. Pursuant to a Fund Management Agreement with Schroder Venture Managers Limited ("SVML") dated

1 July 1999, SVMI appointed SVML as fund manager of SVAPF. According to SVMI, the functions of SVMI were, in effect, delegated to SVML. Pursuant to a Fund Advisory Agreement and Investment Advisory Agreement executed that same day, Schroder Ventures (Asia) Limited ("SVAL") was appointed the Fund Advisor to SVML while Schroder Capital Partners Limited ("SCPL") was appointed the Investment Advisor to advise and guide SVAL. The recommendations of the Investment Advisor were to be reviewed by an investment committee ("the SVAPF IC") which would in turn make its recommendation formally to SVMI/SVML. As at November 2002, the SVAPF IC comprised of Nicholas Ferguson ("NF"), Anil Thadani ("AT") and Andrew Williams. At the material time, AT was also a director of Silverlink and Argent. Argent was then the majority shareholder of Silverlink.

4 In November 2002, SVAPF gave a loan of US$79.5m to Silverlink through AVL. In return, a SCRN (the "SVAPF Note") was issued to SVAPF. Silverlink needed the money to acquire a piece of land in Lodhi Road, New Delhi, India. The important questions in the present dispute were whether the SVAPF Note was able to control the rights under two other SRCNs that were to be issued by Silverlink to the plaintiffs, Rockline and Superon (respectively the "Rockline Note" and "Superon Note" and collectively the "SAP Notes"), and whether the documentation and execution of such control was a condition precedent to the issuance of the SAP Notes. Since SAP was the ultimate shareholder of both Rockline and Superon, this meant that both SVAPF and SAP were linked to Schroders plc (the parent company of SVMI and SAPML) and shared common directors.

5 The SAP Notes were meant to be consideration in respect for the partial repurchase of Rockline's shareholding in Silverlink and the Superon Repurchase. The issuance of the SAP Notes therefore did not require any fresh funds to be injected into Silverlink (unlike the SVAPF Note). The Rockline repurchase was duly completed, although the Rockline Note was not issued. According to the plaintiffs, Superon tendered its shares in Silverlink for repurchase, but in breach of its obligations, the defendants did not complete the Superon Repurchase. The relevant agreed term pertaining to the Rockline Note was as follows:

> a secured convertible note to be issued by the Purchaser in substantially the form and substance of the US$79.5M Note [SVAPF Note] with necessary amendments but otherwise ranking pari passu with the US$79.5M Note.

6 The plaintiffs contended that the SAP Notes ranked *pari passu* with the SVAPF Note and the former were not intended to be issued subject to SVAPF Control. The plaintiffs further asserted that the defendants were in breach of contract for not issuing the SAP Notes. As mentioned above at [2], the defendants disputed the plaintiffs' claim and argued that save for economic benefits, the SAP Notes are subject to the control of the holder of the SVAPF Note and that before the SAP Notes may be issued, the control given by SAP to SVAPF had to be documented and executed. According to the defendants, SVAPF Control arose out of:

(1) an express or implied term;

(2) a collateral contract;

(3) the mutual common assumption of the parties; or

(4) estoppel.

The purpose of the purported agreement was to give SVAPF overall control of Silverlink. The defendants' defence was that they were not obliged to issue the SAP Notes because the SVAPF Control had not been documented or executed.

7 The third parties agreed with the plaintiffs that no agreement on SVAPF Control had been reached. However, they denied that they were parties to any agreement or sub-agreements therein (characterised as the capital raising agreement ("CRA") by the plaintiffs and defendants). The third parties, however, disagreed with the plaintiffs that the preliminary document known as the Outline of the Principal Terms of Agreement ("Outline") was binding on them.

II. SVAPF CONTROL

a. The definition of SVAPF Control

8 What SVAPF Control meant was an important issue in the trial. In this regard, according to the plaintiffs:

> [T]he [d]efendants definition and use of the phrase "SVAPF Control" keeps changing and it is different at different times. The [d]efendants have at trial deviated from their pleaded case, and there are three different versions of what the [d]efendants say is "SVAPF Control"

These three versions related to: (a) the defendants' pleaded case; (b) the deleted clause in the 27 November 2002 draft of the Outline; and (c) cl 6 of the 4 November 2003 version of the unsigned Downside Protection Agreement ("DPA"). The defendants did not dispute the above assertion. In fact, in their reply submission, they stated that:

> … the [p]laintiffs submit that the [d]efendants do not have a clear idea of what SVAPF Control means and that there is an "ever changing definition" of SVAPF Control even within the many DPA drafts. They claim that as a result, SVAPF Control cannot be implied. However, this is a misreading of the requirement that an implied term must be capable of clear expression. The only question which the Honourable Court needs to ask itself is whether there was any lack of clarity in Clause 6, which is the elaborated form of SVAPF Control. The answer must be no. Notably neither the [p]laintiffs nor the [t]hird [p]arties have ever raised any ambiguity as to how Clause 6 might apply. Clause 6 is clear and that in turn means that SVAPF Control was capable of clear expression in the form of Clause 6.

In response, the plaintiffs reiterated that "the [d]efendants cannot even articulate with precision exactly what the terms of SVAPF Control are. The court cannot imply terms which are vague or uncertain."

9 The salient terms of cl 6 of the unsigned draft DPA provided that before AVL, as nominee, exercised the "*conversion rights*" or "*any other rights arising solely on the occurrence of an event of default*", AVL was to seek instructions from both SAP and SVAPF. If the instructions were in conflict, AVL had to take instructions from whoever had the greater residual cost then outstanding. Further, before AVL exercised "rights" under the respective notes, it need only take instructions from or give notice to the party with the greater residual cost then outstanding (*viz* cl 6.2). Given that cl 6.1 provided for pro rata conversion of the SAP Notes and SVAPF Note, control over the rights provided in cl 6 under the SAP Notes would effectively lie with SVAPF as the latter would have a greater residual cost outstanding at all times.

10 In stark contrast, the relevant part of the Outline (with the deleted portion) simply provided as follows:

> The security for the Loan amount held by SAP will be a further Note, the Debenture and the Pledge Agreement. The Note will be held by SVAPF as Nominee of SAP. ~~SVAPF will have the right to exercise all the rights and provisions under the Note, the Debenture and the Pledge Agreement as it in good faith after consultation with SAP decides and cannot be replaced~~."

The deleted sentence in the Outline was plainly different from the provisions set out under cl 6 of the draft DPA. This was pointed out by Ms Indranee Rajah, counsel for the plaintiffs. The defendants' response to this was that cl 6 "*is the elaborated form of SVAPF Control*". This cover of "elaboration" did not, however, explain the irreconcilable differences between the Outline and the draft DPA. Adding to the differences, the defendants' pleaded case articulated yet another version of SVAPF Control, wherein it averred that SVAPF Control related to conversion rights and other rights pertaining to events of default or acceleration of payment (*i.e.* corresponding roughly to the first part of cl 6.2 of the DPA), without any suggestion to SVAPF Control being extended to "other rights" (*i.e.* the second part of cl 6.2 of the DPA). The failure to identify the terms and scope of SVAPF Control consistently indicated strongly against the defence that an agreement (or common assumption) on SVAPF Control existed.

b. Whether there was an express agreement as to SVAPF Control

11 The defendants' main contention was that there was an agreement between SVAPF and SAP for SVAPF Control, and that they were therefore not obliged to issue the SAP Notes until the said control had been documented and executed. This claim was made notwithstanding SVAPF's and SAP's assertions that SVAPF Control was not agreed upon and did not exist. In this regard, counsel relied on *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR(R) 1029, to persuade this court to adopt a contextual approach to contractual interpretation.

i. SVAPF's and SAP's positions

12 Significantly, SVMI, which had full control over the affairs of SVAPF, took the position that SVAPF Control did not exist:

> Both SVAPF and SAP have denied any such binding agreement between them. The parties asserting SVAPF Control are Silverlink and Argent – parties who have no role in respect of SVAPF Control.

SAP was also unequivocal in stating that SVAPF Control would have been unacceptable to them and they would not have agreed to it. Given that *both* the purported parties to SVAPF Control (which does not involve the defendants) had denied its existence, it was obvious that a non-party had no basis to assert that there had been an agreement on SVAPF Control.

ii. SVAPF IC / SCPL – Authority

13 Citing the testimony of several SVAPF IC members, the defendants argued, *inter alia*, that SCPL would not have compromised on SVAPF Control. In particular, NF said, in cross examination:

> Q: Can I just ask, then, a very simple question. Would you accept that SVAPF would also want to control an exercise of right by SAP under clause 6(B) of the note?

A: Let me be very clear. At the investment committee, the understanding was and the desire was that SVAPF controlled the notes. It obviously wouldn't control it if somebody else controlled it. So it was very clear, as far as I was concerned, that SVAPF would control the notes and would appoint the majority of the board.

The defendants then pointed out that both Peter Everson ("PE") and Gary Carr agreed that if NF had agreed to SVAPF Control, it was unlikely that SVMI as General Partner would have disagreed with NF. Several points should be noted from the above. First, NF's response to the question posed to him was in the context of what SVAPF IC had wanted and not what had been agreed upon between SAP and SVAPF. Secondly, taking the defendants' submissions at its highest, it was still possible for SVMI to disagree with NF and/or the SVAPF IC (although in their view it would be unlikely). At the same time, it should also be pointed out that SCPL, as Investment Advisor, had no power to enter into any transactions or to make investment decisions on behalf of SVAPF. The same applied to SVAPF IC whose function was to consider and provide an objective review of the recommendations of SCPL to SVMI/SVML. Nonetheless, the defendants continued to assert that SCPL had been clothed with the necessary authority to secure an agreement on SVAPF Control. A post-conflict letter dated 14 September 2006 by Lester Gray of Schroders plc to investors of SVAPF stating that "*Schroders has deferred to Anil Thadani, as advisor to SVAPF and a director of Silverlink, to represent the interests of SVAPF*", was cited in support. However, the third parties pointed to the fact that AT and Sunil Chandiramani ("SC") (both officers of SCPL) admitted that SCPL had no authority to enter into agreements on behalf of SVAPF, and their counsel Mr S Suressh thus submitted that the defendants had failed to demonstrate that SCPL had any such authority.

14 It was evident from the record that no express actual authority existed. If there were any authority, it would have to be either implied actual authority or ostensible authority: see *Skandinaviska Enskilda Banken v Asia Pacific Breweries (Singapore) Pte Ltd* [2009] SLR(R) 788. Reverting to the facts, I am of the view that SCPL could not have possessed any implied actual authority because the evidence showed that as advisor, it had no authority to bind the fund. Entry into binding agreements without prior approval would not be reasonably necessary, and would also not fall within the usual scope of an advisor. In this regard, SC's own evidence contradicted the defendants' case. While he may be correct to say that it was not unusual for advisers to handle the negotiations and documentations, he also conceded that "the ultimate signing [was] done by the GP". Quite evidently, this suggested that fund advisors typically do not possess the authority to sign off on transactions or enter into binding agreements. If the defendants meant to suggest that SCPL was ostensibly authorised to bind SVAPF, that argument could not succeed since they could not show any representation by SVAPF to SAP that SCPL (or its officers) had the requisite authority to bind SVAPF on the issue of SVAPF Control. In the circumstances, I had little hesitation in finding that SCPL and AT had no authority (whether actual, implied or ostensible) to agree to SVAPF Control.

iii. Leverage

15 The evidence showed that SAP had substantial leverage during the material period. Under the Silverlink Shareholders Agreement, the SVAPF Investment would have to garner approval from holders of 75% of Silverlink's shares. It was not seriously disputed that the SVAPF Note might potentially have resulted in a significant dilution of the existing shares. What was disputed, however, was whether the 75% votes had been locked in. The defendants contended that Asia Pacific Trust ("APT") and Byam Limited would vote in favour of the investment alongside Argent thereby crossing the 75% threshold. The plaintiffs, on the other hand, maintained that they could have blocked SVAPF's entry and consequently, the Lodhi deal. For the following reasons, I was inclined to the plaintiffs' version of events on this issue. First, the threat of substantial dilution meant that APT would be unlikely to vote in favour of SVAPF's entry (by way of the SVAPF Note) if its exit was not

assured. Second, a speedy exit on APT's part was required because it was perceived (by, amongst others, AT), at the material time, that the Lodhi deal would fail if the SVAPF Investment was not swiftly concluded. Contrary to AT's testimony, this urgency was clearly documented in numerous contemporaneous documents. It was the more probable version.

16 Next, APT's exit was in itself not ensured unless Silverlink shareholders waived their rights to pre-emption. This was because both Golden Land's (the original purchaser) and later George Robinson & Liakat Dhanji's (the replaced purchaser) offers were conditional upon the waiver of pre-emption rights by the shareholders of Silverlink. While the defendants submitted that APT's exit was ensured as either Golden Land or Rockline would acquire the APT shares, it was a weak argument because Golden Land (or George Robinson & Liakat Dhanji) could have declined to proceed with the offers had the waiver not been put in place (at the point the Transfer Notice was served). This would effectively put an end to the Lodhi deal since Rockline was not bound to acquire the APT shares at the end of the 45-day period. In the circumstances, Rockline, being a shareholder of Silverlink, would therefore be in a position to jeopardise the Lodhi deal because it could have refused to waive its pre-emption right, and thus imperil both APT's exit and the urgently required infusion of funds by SVAPF. That in turn meant that SAP possessed substantial leverage in November 2002. It was thus less likely to have agreed to the onerous terms imposed by way of SVAPF Control.

iv. SAP's commercial considerations

17 Any agreement on SVAPF Control would have impinged upon SAP's ability to exercise its rights independently under the SAP Notes, and especially the right to exit the investment. As pointed out by Ms Indranee Rajah, SVAPF Control would adversely affect the plaintiffs' ability to sell the SAP Notes to a third party. Further, given the remaining 5 year shelf life of the fund, it would not have been commercially sensible for SAP to agree SVAPF Control since that would conflict directly with SAP's limited fund life. That was then a live issue which appeared in several correspondences during a relevant period (see below at [19] where the text of NR's e-mail is reproduced). Some of the other provisions in SVAPF Control were also in counsel's words, "draconian and wholly inequitable" and there was no reason why Macquarie (advisor to SAP) or SAP would have accepted them. This "inequity" formed the basis for SAP's assertion that SVAPF Control would have been unacceptable to them and they would not have agreed to it.

v. Whether SVAPF Control was agreed by way of the Outline and the 29 November e-mail

18 The defendants submitted that the negotiations and correspondence leading up to and post-conclusion of the 3-page Outline were evidence that an agreement for SVAPF Control had been concluded. Reference was made to a conversation between AT and David Schaefer ("DS") (as evidenced in an e-mail dated 30 October 2002 from DS to Nick Ridgewell ("NR") and Craig Wallace), an executive summary sent on 7 November 2002 by AT to DS, as well as the evidence of SC. Reference was also made to the Outline wherein DS deleted a sentence pertaining to control on the basis that "that is part of documentation". Both AT and DS signed the Outline on 27 November 2002, wherein AT in his covering letter also sought confirmation on the nominee issue. This was followed shortly by an e-mail from SC to PE on 29 November 2002. The defendants contended that an express agreement on SVAPF Agreement was reached as a result of the latter two correspondences. The relevant portion of AT's cover letter to DS on 27 November 2002 when he returned the signed copy of the Outline reads as follows:

> I am returning your version of the terms signed by me on the condition that the final documentation will reflect our agreement that SVAPF will, at all times, act as Nominee for SAP and cannot be replaced as Nominee.

SC's e-mail to PE on 29 November 2002 reads as follows:

> … you mention that Anchor [Victory] would act as Nominee for SAP for the Superon related Note. Actually, AV would act as Nominee for all Convertible Notes issued to SAP (e.g. they could get more Notes if Golden Land does not come in later on). Also, as you may have noted from Anil's cover note SAP cannot replace AV as Nominee. The reason for this arrangement is that we have build in a lot of protections into the Note which effectively give us control of the Company. Given that we are injecting $79.5mm [sic] this makes sense. However, all these rights do not make sense for a smaller Noteholder. Therefore by AV acting as Nominee SAP [e]ffectively shares in those rights pari-passu though it cannot independently exercise any of them.

In construing SC's e-mail, it was important to emphasise again that reference to any form of SVAPF Control had been removed from the Outline by DS. Further, SC's e-mail referred to "control of the Company", and any references to "rights" that follow would, presumably have related to rights regarding "control of the Company" (*i.e.* control of the Board). Contrary to the defendants' attempt to conflate control over Silverlink with control over the SAP Notes, and AT's testimony that to his "frame of mind" control over Silverlink "automatically translated to control of the notes", the two were legally and factually distinct. This distinction was consistent with DS's evidence where he stated that to his mind, control of the company meant majority board representation. Further, DS had agreed with the obvious point that control of Silverlink was different from control over the SAP Notes. In other words, in DS's frame of mind, control over Silverlink was limited only to the issue of board representation. As for the "nominee" point raised by the defendants, it was difficult to see how DS would have agreed to any form of SVAPF Control, especially when he deleted the subsequent sentence in the Outline. It seemed to indicate that "nominee" in the Outline referred only to a nominee simpliciter. It should also be noted that SVAPF, the only beneficiary of SVAPF Control, had taken the position that it did not possess SVAPF Control. In the premises, I find that the Outline as well as the 27 November 2002 and 29 November 2002 correspondences did not support the argument for SVAPF Control.

vi. Subsequent conduct

19 The defendants also relied on the parties' subsequent conduct. While it was common ground that post-contractual conduct was irrelevant when construing a written contract, the defendants argued that they could help determine whether the parties had agreed to a "relevant term under an incompletely expressed contract". The defendants referred first to DS's e-mail dated 17 December 2002. The relevant words there were "*… the Notes which are generally under the control of SVAPF*". The defendants' counsel submitted that this was consistent with DS having agreed to SVAPF Control on 27 November 2002. While I do not disagree with the authorities cited by the defendants, the point remained that any purported understanding on SVAPF Control between AT/SCPL and DS did not bind the principal parties, namely SVAPF and SAP. AT and DS were just the fund advisors and any understanding between them are non-binding until approved by SVMI/SVML and SAPML. Perhaps both fund advisors thought that it might be appropriate to have some form of SVAPF Control (which remained to be finalised), but such thoughts did not, in themselves, create a binding agreement or prove the probability of such an agreement. It should be noted that DS had caused the deletion of all references of SVAPF Control from the Outline, and he also took a consistent position that he had never agreed on behalf of SAP to SVAPF Control. The defendants also relied on correspondence emanating from NR. An e-mail sent by NR to PE in December 2002 was significant:

> I noticed that the revised terms for *what is being put forward* on the Notes mean that these may be outstanding for up to 7 years before being redeemed or converted to equity, which I thought was beyond the life of the Fund. I also understood that control of the Fund's notes would not be in the hands of the Fund or its advisers, so that the Fund would not be able to engineer an exit

itself. [emphasis added]

The defendants claimed that the above e-mail was "again consistent with an agreement having been reached on SVAPF Control on 27 November 2002 between SC and DS". A plain reading of the above e-mail however showed otherwise. First, the words "what is being put forward on the Notes" made it clear that an agreement had not yet been reached given that a particular position had only been "put forward". Secondly, it was also apparent that NR was of the view that SVAPF Control made little commercial sense to SAP as redemption or conversion of the SAP Notes might stretch beyond the life of the fund, and control over the SAP Notes would have slipped out of SAP or from its advisors. NR was clearly not in favour of the position put forward. In my view, the said e-mail further supported the plaintiffs' and third parties' contention that no binding agreement on SVAPF Control had been reached, and that SVAPF would only be acting as nominee simpliciter for SAP. Here, I should also add that the instances cited by the defendants in support of the proposition that SVMI/SVML had approved of SVAPF Control did not directly address the issue.

vii. The draft DPA

20 The defendants also took issue with the parties' conduct *vis-à-vis* the draft DPA. In particular, they pointed out that NR had not objected to cl 6 of the DPA when earlier drafts were exchanged. As for PE's explanation that cl 6 was one of the reasons why the DPA was not signed, the defendants claimed that this was inconsistent with PE's response when he received SC's e-mail on 29 November 2002 (in relation to the Outline), and for this reason (and others), PE's use of cl 6 as a justification for the non-conclusion of the DPA was an afterthought. A closer examination of SC's 29 November 2002 e-mail and AT's 27 November 2002 cover letter however showed that they did not specifically refer to any agreement to give control of any rights under the SAP Notes to SVAPF. Consistent with the Outline (which deleted references to any form of SVAPF Control), the cover letter referred only to SVAPF acting as nominee for SAP, and SVAPF having control of Silverlink (which is different from control over the SAP Notes). PE could not therefore have agreed to SVAPF Control (which entailed restrictions on conversion and redemption) given that there were no references to the same in the two cited correspondences. Finally, I also accept PE's explanation that the DPA was not signed partly because of cl 6. In the premises, I am of the view that the draft DPA did not assist the defendants' case.

c. Conclusion on express/collateral agreement for SVAPF Control

21 For the above reasons (as well as my finding below that the Outline was not a binding contract), I find that there was no express or collateral agreement between any of the parties for SVAPF Control. I should also state that at this point, I do not propose to venture into the cross-allegations of conflict as I am of the view that they are irrelevant for the purposes of determining whether there was an agreement on SVAPF Control.

III. IMPLIED SVAPF CONTROL

a. Whether SVAPF Control within parties' contemplation

22 The law on implied terms was discussed in the Court of Appeal judgment in *Ng Giap Hon v Westcomb Securities Pte Ltd* [2009] 3 SLR(R) 518 ("*Westcomb*"), at [34]–[40]. The question before this court was whether SVAPF Control should be a "term implied in fact", as opposed to a "term implied in law". See *Westcomb* at [31]:

First, an implied term, by its *very nature* (as an *implied* term), would *not*, *ex hypothesi*, have

been in the contemplation of the contracting parties to begin with when they entered into the contract. Secondly, if a term were implied on, so to speak, a "broader" basis "in law" (as opposed to on a "narrower" basis "in fact"), it would follow, *a fortiori*, that such a term would not have been in the contemplation of the parties for, as we shall see below (at [38]), a term which is implied "in law" (*unlike* a term which is implied "in fact") is *not* premised on the presumed intention of the contracting parties as such. Thirdly, it is clearly established law that a term *cannot* be implied if it is *inconsistent with* an *express* term of the contract concerned. [emphasis in original]

The defendant's alternative case was that if SVAPF Control had not been agreed between by SVAPF and SAP, "*there was every likelihood that a chaotic state of affairs for Silverlink would result*", and Silverlink could receive conflicting instructions from the three different noteholders. Those noteholders could veto decisions made by Silverlink's board, thereby compromising SVAPF's control over Silverlink. This, of course, begged the question why did Silverlink, as note issuer, give away co-extensive rights to three different parties in the first place? The references to the earlier form of SVAPF Control in the Outline were inserted by AT but were deleted by SAP's advisor, DS. That being the case, SVAPF Control must have been within the parties' contemplation (although no express agreement had been reached). Following *Westcomb*, a term should therefore not be implied given that "an implied term, by its *very nature* (as an *implied* term), would *not*, *ex hypothesi*, have been in the contemplation of the contracting parties to begin with when they entered into the contract" (see *Westcomb* at [31]). Further, at least one party, SAP, made a deliberate decision not to agree to SVAPF Control. Any reference to SVAPF Control had been deleted from the Outline, which was concluded on 27 November 2002 well before the execution of the RRA on 17 February 2003, which I note also contained an entire agreement clause (*viz* cl 7). Significantly, both parties to the alleged SVAPF Control had since taken the stand that there was no express agreement on SVAPF Control, and confirmed that it should not be implied. In the circumstances, it was evident that SVAPF Control could not be implied as the issue was obviously within the parties' contemplation on or around the time the RRA was concluded.

b. Officious bystander and/or business efficacy tests

23 The fact that the term sought to be implied is within the parties' contemplation would in itself be sufficient to dispose of the point. However, even if the officious bystander test or business efficacy test were to be applied and taking the defendants' case at its highest, I am of the opinion that SVAPF Control could not be implied because of the expansive articulation of SVAPF Control. The portion of the Outline that was struck out, SVAPF Control included "*all the rights and provisions under the Note*", while cl 6 of the unsigned DPA depicted SVAPF Control as "*conversion rights*" or "*any other rights arising solely on the occurrence of an event of default"* and "*other rights*". If the concern was truly over control of SVAPF, why would it be necessary for SVAPF Control to include, *inter alia*, conversion rights, rights upon default and other rights held by the SAP Notes? I shall deal with these rights in turn.

i. Redemption

24 In respect of the 30-day redemption point under cl 6(B) of the SVAPF Note, the fact that funds injected by SVAPF could be used to repay SAP was irrelevant since SVAPF had maintained that there was no SVAPF Control. If SAP desired to redeem, the onus would be on Silverlink to raise sufficient funds to meet the redemption. As for the event of default point, it would be commercially unacceptable to imply a term into an agreement to prevent a noteholder from exercising an independent right to repayment in order to allow the issuer to avoid repayment or default (the direct beneficiary of which is again Silverlink).

ii. Conversion

25 In respect of devolving SAP's right of conversion to SVAPF, AT's evidence was that SAP could take "control" of Silverlink with an investment of $17 million by converting its SCRNs. This was to mistake ownership for control. If an agreement on board representation had been placed, SAP would still not be able to control Silverlink because shareholders of a company generally cannot interfere with the management of a company as the power to manage the company was usually vested with the board. In respect of the dilution point, the defendants contended, by way of several illustrations, that "this could result in a situation where an earlier conversion by one of the Noteholders will be diluted by a subsequent conversion by another Noteholder", which would be highly inequitable, especially to SVAPF. It also emphasised that a "Mexican stand-off" would ensue if SAP and SVAPF could not reach an agreement on conversion. The defendants submitted that this would be avoided if SVAPF Control was implied into the agreement. However, that a dilution could take place unimpeded by a later issuance of shares at a lower notional price, as suggested by counsel, was not consistent with the fact that SVAPF did manage to obtain protections from future dilution by way of lower-priced shares: see cl 9(B)(iii) of the Conditions, which provided:

> Continuing undertakings:-
>
> The Company undertakes with the Noteholder that:-
>
> (a) it shall not issue any Shares within one (1) year of any conversion of principal outstanding under the Note into Shares at a price per Share lower than the price per Share at which such conversion notionally took place; and
>
> (b) in the event that, Condition 9(B)(iii)(a) is not complied with, it shall recalculate the number of Shares convertible on such conversion at the first-mentioned price Share under Condition 9(B)(iii)(a) and issue the Noteholder the difference between the number of Shares issued to the Noteholder on such conversion and the number of Shares found by such recalculation at no cost to the Noteholder.

The parties were free to negotiate the scope of anti-dilution provisions, and so it was unnecessary to imply a term that would allow SVAPF to control SAP's conversion rights. Such control would have been unnecessary in the face of a suitably drafted anti-dilution clause, which SVAPF could have insisted on prior to its investment.

iii. Co-extensive rights

26 I turn now to the co-extensive rights. Some of the more significant rights, *inter alia*, are:

1 the right to procure the appointment of a majority of the directors of Silverlink;

2 the right to procure the appointment or removal of the signatories of the bank accounts of Silverlink and its subsidiaries;

3 the right to veto the acquisition of any freehold or leasehold interest in or licence over land;

4 the right to veto the establishment of any credit facility or making any borrowing;

5 the right to veto the approval of Silverlink's annual budget; and

6 the right to veto any increase in remuneration or benefits of an employee the total cost of which is likely to exceed US$100,000.

According to the defendants, it was incongruous for SAP to insist on having exactly the same rights as SVAPF as "such rights would compromise and even deprive SVAPF of its control over Silverlink if they could be independently exercised". It was also contended that very real difficulties could arise if there were two Noteholders exercising the same rights. Under the RRA, the Note to be issued to Rockline is defined as "a secured convertible note to be issued by the Purchaser in substantially the form and substance of the US$79.5M Note with necessary amendments but otherwise ranking pari passu with the US$79.5M Note". The defendants' position was that notwithstanding the word "substantially", the SVAPF Note and the Rockline Note were in fact "identical" save for the necessary amendments, which I understood to be the identity of the parties and quantum *etc*. For instance, in submitting that SVAPF Control should be implied as a term of the CRA, the defendants said:

> 256.1 Given that all the Notes are to be issued with identical provisions (save for necessary amendments), the SAP Notes will have rights of control over Silverlink which are co-extensive with those of the holder of the USD79.5m Note. As pointed out in paragraph 99 above, such rights include the right to appoint the majority of the directors on Silverlink Board, the signatories to the bank accounts of Silverlink and its subsidiaries, the right to veto the acquisition of any freehold or leasehold interest in or licence over land, the right to veto the establishment of any credit facility or borrowing, the right to veto the approval of Silverlink's annual budget and the right to veto any increase in the renumeration or benefits of an employee the total cost of which is likely to exceed USD100,000.

The grant of veto rights to two different parties would not necessarily create any conflict. However, to give two parties the right to each other to appoint the majority of the directors would be unworkable (unless one party did not insist on having a majority, as in SVAPF which initially requested for only two board seats). It was also apparent that the defendants knew that they would be giving co-extensive (and conflicting) rights to both SAP and SVAPF since (in their own words) the rights given to the latter by the defendants were "identical". In these circumstances, it would not be necessary for the court to imply any term. Instead, had both parties insisted (hypothetically) on appointing the majority of the board, that would have been a breach (on the defendants' part) attracting the attendant consequences.

iv. SAP's commercial considerations

27 SVAPF Control would also have been directly in conflict with the limited remaining shelf life of SAP. Along with the reasons set out at [17] above, this was a strong factor militating against the implication of SVAPF Control *vis-à-vis* the officious bystander test. For the foregoing reasons, I am of the view that SVAPF Control should not be implied as part of the CRA (assuming in the first place it exists) or in any of the agreements between the plaintiffs and the third parties.

IV. MUTUAL COMMON ASSUMPTION/ESTOPPEL BY CONVENTION

28 The defendants contended that even if no agreement on SVAPF Control existed, SVAPF Control was mutually and commonly assumed by the parties and this gave rise to an estoppel by convention which would have precluded the plaintiffs from denying the existence of SVAPF Control. Counsel for the defendants, Mr Ramesh Kannan, submitted that the evidence clearly established that SCPL on behalf of SVAPF operated under the assumption that there would be SVAPF Control and that assumption was encouraged by the conduct of SAP and its advisor Macquarie Asia Property Advisers Ltd. He argued that, alternatively, the defendants were misled by the plaintiffs and the third parties into believing that there would be SVAPF Control. Consequently, the defendants proceeded on the assumption that SVAPF Control would be documented and/or executed prior to the issuance of the SAP Notes. I reiterate my finding that there was no agreement, at any point in time, between SVAPF

and SAP on SVAPF Control. There was also no evidence that the parties had acted in a manner suggesting that SVAPF Control was a condition precedent to the issuance of the SAP Notes. The fact that any reference to SVAPF Control was deleted from the Outline as well as the fact that the DPA was not signed in part because of SVAPF Control are incontrovertible evidence that there had been no common assumption between SVAPF and SAP (as well as the defendants) on SVAPF Control. Further, while there might have been an understanding between all parties that SVAPF would have some form of control over Silverlink, control over the latter and control over the SCRNs are distinct. In any event, from a commercial and a reasonable point of view, I think that it would be astonishing for any note issuer to assume that a given series of notes would be controlled by the dominant noteholder in the absence of any clear instructions from the involved parties. Further, if there had been any doubt, the defendants, as issuer, ought to have verified and sought confirmation from the relevant noteholders. In any event, as discussed in the preceding paragraphs, there was scant evidence and no clear conduct (or something close to it) on the part of SVAPF and SAP that could give rise to any assumption or estoppel on the defendants' part. In my view, therefore, such assumptions by the defendants would have been made by them unilaterally and without any basis, and thus no estoppel could be raised in their favour.

V. ISSUES PERTAINING TO THE THIRD PARTIES

a. Whether the Outline is binding on SAP and SVAPF

29 As for the Outline itself (which contained other terms apart from the deleted form of SVAPF Control), a further question was whether it amounted to a binding agreement between SVAPF and SAP. The plaintiffs' case (while making it clear that SVAPF Control was not agreed upon) on the issue was as follows:

> The [Outline] was put before the ICs of SVML and SAPML for formal approval. The ICs approved the same, upon which it became a binding and concluded contract.

The third parties, on the other hand, argued that the Outline was not a binding agreement. Since the DPA was ultimately not signed, a binding Outline would have meant that the plaintiffs should have the downside protection as articulated in the Outline.

30 Having considered the parties' submissions on this point, I am of the view that the plaintiffs had failed to discharge the burden of proving that the Outline was a binding agreement. First, the "Outline of the Principle Terms of an Agreement" was described as a "term sheet" by both SAP and SVAPF. Secondly, the signatories to it did not have the authority to enter into binding agreements on behalf of their respective funds. In this regard, it should be pointed out that AT signed off "*on behalf of Schroder Capital Partners (Asia) Limited*" while DS signed off "*on behalf of the Senior Adviser to Schroder Asian Properties LP*". Both SCPL and the Senior Advisor to SAP have no authority to enter into binding agreements for their respective funds (see also [13] above). Further, the SVML minutes only stated that it had considered the Outline and there was no indication of any agreement or ratification of the same. As the third parties had rightly put it, at the 28 November 2002 meeting, "*[t]here [was] no suggestion that SVML had agreed to anything else [apart from the US$79.5m injection], in particular they did not agree to being bound by the Outline*". Further, an agreement to agree was not a binding contract. Indeed, it would be commercially untenable to say that an agreement existed simply based on the fact that a company's board contemplated, in a handful of paragraphs in its board minutes, the possible entry into a series of agreements. On the facts I found, one would have expected that a binding agreement of this nature, complexity and quantum would be entered into only after extended negotiations between all parties with input from counsel (like in the later case of the DPA), and not be based on "in-principle" views to enter into

arrangements/agreements outlined on those three pages of paper.

b. The Capital Raising Agreement

31 The third parties also denied that they were party to any umbrella agreement (characterised as the CRA by the plaintiffs and the defendants). The plaintiffs and defendants submitted otherwise. In particular, the plaintiffs asserted that the SVML minutes (referred to above) made it clear that the third parties were aware of and were party to the CRA. As I had found, the SVML minutes merely set out, in a brief manner, the various transactions envisaged under the Outline (which I had found to be non-binding). While it might be true that the SVML IC did envisage that certain transactions would take place concurrently, they certainly did not agree to be part of any umbrella agreement, or had agreed to partake in those agreements/transactions. As Mr S Suressh, counsel for the third parties put it, the minutes merely documented an internal consensus to further agreements, and there was no resolution as to whether or not to enter into those agreements. In reality, the only transaction that SVAPF had resolved to enter into at that meeting was the US$79.5m loan to Silverlink as reflected by the recorded resolution. Looking at the SVML minutes itself, one might also wonder why it was not resolved that the Outline (defined as the "term sheet" in the minutes) be approved, or that it be resolved that SVAPF agree to downside protection or the other contemplated co-terminus transactions. The obvious answer to this seemed to be that no binding agreement had been entered into by SVAPF in that regard (*i.e.* the "Outline" and the "CRA").

VI. BRIEF ACCOUNT OF THE PRINCIPAL WITNESSES

32 PE and AT were a contrast in style and clarity. Although the documentary evidence in this case in itself virtually determined the verdict of this court, the oral testimonies of the principal witnesses including PE and AT were important. PE seemed to me more knowledgeable about the details and his response was calm and measured in the face of a strong and long cross-examination by Mr Ramesh Kannan. AT, on the other hand, was more porous and sweeping in his comments and his oral testimony often could not be supported by the documentary evidence. One example was his assertion that he was confident that the pre-emption rights would be waived, and even if they were not, the first defendant "would just serve the pre-emption notice." As explained above, it was not that simple because Silverlink could still find itself blocked. I found, in particular, the evidence of NF, DS and Andrew Sykes to be more corroborative of PE's evidence than SC's was to AT's evidence. As I mentioned, this case was largely determined by the documentary evidence and, therefore, the performance (and demeanour) of the witnesses, though important, was not critical to the case. Although discrepancies occurred in the testimonies of witnesses on both sides, that was due mainly to the complexity of the case, the difficulty of a witness to recall all details of a long and complicated story; and partly also, to counsel's forensic skills. I should, however, say that in judging the oral evidence in the context of explaining the historical accounts, the evidence of AT, impressive in its rhetoric, was, in my view, surpassed by the plaintiffs' witnesses in substance and coherence, by which I mean that they held up the plaintiffs' case more plausibly than AT and SC did for the defendants.

VII. CONCLUSION

33 In conclusion, I hold that:

a. Silverlink was in breach of contract for failing to issue the Rockline Note;

b. The defendants were in breach of their obligations in relation to the Superon Repurchase;

c. The Outline was not binding on the plaintiffs and third parties; and

d. The third parties were not parties to the CRA.

VIII. REMEDIES & RELIEF

34 The third parties denied that AVL had agreed to act as nominee for SAP. The plaintiffs contended otherwise. Based on the documentation before the court, I am of the opinion that AVL had agreed to act as nominee. In this respect, both the amended SVML minutes and the SAPML minutes (both dated 28 November 2002) stated that "*[SVAPF], in the form of Anchor Victory Limited, would act as nominee for [SAP]*". This was supported by the resolutions passed by AVL. As for the contention that AVL was a separate legal entity from SVMI/SVML and ought not be bound by decisions made by the latter, it ran against the resolution passed by SVML, as follows:

> RESOLVED:
>
> That Schroder Ventures Asia Pacific Fund LP1 and LP2 makes a $79.5 million Secured Convertible Loan [Note] to Silverlink Holdings Limited via an investment holding company called Anchor Victory Limited and that authorized signatories of Anchor Victory Limited be instructed to sign said Note in accordance with its signatory policy.

It was apparent from the above resolution that AVL took instructions and acted in accordance with the directions of SVAPF. As such, AVL was the alter ego of SVAPF. In the circumstances, I find that SVAPF/AVL did in fact agree that AVL would act as nominee for SAP (there was however no evidence to suggest that documentation of AVL's agreement to act as nominee was a condition precedent to the issuance of the SAP Notes). However, as the plaintiffs were no longer keen on having AVL act as their nominee, I would be inclined to direct that the SAP Notes be issued directly to the relevant SAP entities. That said, as cl 6(A) of the SVAPF Note specified the repayment date as 30 June 2008 (which suggested that the SAP Notes had expired since the issuance terms are identical to the SVAPF Note), I will hear parties (including Overseas Hotels Limited) as to the appropriate remedies and relief before making any order herein.