Ng Giap Hon v Westcomb Securities Pte Ltd and Others
[2009] SGCA 19

Case Number : CA 88/2008

Decision Date : 29 April 2009

Tribunal/Court : Court of Appeal

Coram : Chao Hick Tin JA; Andrew Phang Boon Leong JA; V K Rajah JA

Counsel Name(s) : Kelvin Lee Ming Hui (Lee Shergill Partnership) for the appellant; David Chan, Koh Junxiang and Lum Baoling Georgina (Shook Lin & Bok LLP) for the respondents

Parties : Ng Giap Hon — Westcomb Securities Pte Ltd; Westcomb Financial Group Ltd; Westcomb Capital Pte Ltd; Choo Chee Kong; Tan Kah Koon

Contract – Commission contracts – Agent and principal – When term would be implied in favour of agent so as to entitle it to claim commission

Contract – Contractual terms – Entire agreement clause – Whether entire agreement clause precluded implication of terms into contract – Whether entire agreement clause precluded implication of terms into agency agreement

Contract – Contractual terms – Implied terms – Implied duty of good faith – Whether there was implied duty of good faith in Singapore – Whether there was implied duty of good faith between stockbroking firm and remisier – Whether duty of good faith could be implied in law into agency agreement

Contract – Contractual terms – Implied terms – Terms implied in law and in fact – Whether terms ought to be implied into contracts – Whether terms ought to be implied into agency agreement in favour of remisier

29 April 2009 Judgment reserved.

Andrew Phang Boon Leong JA (delivering the judgment of the court):

Introduction

1 Although the issues in the present appeal are deceptively simple, they belie important issues of principle centring around the inherently problematic doctrine of the implied term. On the one hand, we will need to consider the relationship between implied terms and what are commonly called "entire agreement clauses". On the other, we will need to consider whether or not a term based on the doctrine of good faith can be implied into a contract. In this last-mentioned regard, there has – as we shall see – been significant controversy in other jurisdictions (in particular, Australia). Indeed, in so far as the Singapore context is concerned, this issue appears to have been raised squarely for the first time in the present appeal.

2 More specifically, this is an appeal against the decision of the High Court judge ("the Judge") in Suit No 193 of 2007, in which he dismissed the claim by the appellant, Mr Ng Giap Hon, for commission due in respect of placement shares in initial public offerings ("IPOs") that were allocated to two customers of the first respondent, Westcomb Securities Pte Ltd (see *Ng Giap Hon v Westcomb Securities Pte Ltd* [2008] SGHC 101 ("the Judgment")). The appellant is licensed under the Securities and Futures Act (Cap 289, 2006 Rev Ed) to deal in securities. He was, at the material time, a remisier with the first respondent and is presently a remisier with UOB Kay Hian Private Limited. The first to the third respondents form what is known as "Westcomb Financial Group" in Singapore, while the

fourth respondent, Mr Choo Chee Kong, and the fifth respondent, Mr Tan Kah Koon, were, at all material times, the chief executive officer ("CEO") of the second respondent, Westcomb Financial Group Ltd, and the executive director of the third respondent, Westcomb Capital Pte Ltd, respectively. The fifth respondent has also been a director of the first respondent since 21 June 2004.

3 The appellant averred that he was entitled to "the remuneration that remisiers [were] customarily allowed in Singapore or, if there was no customary practi[c]e, reasonable remuneration taking into account all the aspects of the transaction [concerned]".[note: 1] He argued that "the customary rate of commission for remisiers, where [p]lacement [s]hares [were] dealt by or through the remisier, [was] 1% of the value of the [p]lacement [s]hares".[note: 2] He also argued, *inter alia*, that there was "an implied duty of good faith between [him] and [the first respondent] as between agent and principal"[note: 3] [underlining in original omitted] and that "it was an implied term of the agency agreement that the [first respondent] would not do anything to deprive [him] from earning his commission".[note: 4] The appellant further claimed that the second to the fifth respondents had wrongfully conspired with the first respondent to breach the agency agreement entered into between him (*ie*, the appellant) and the first respondent ("the Agency Agreement"), with the intention of causing loss to him by unlawful means.[note: 5]

4 Given that the trial was bifurcated, the only issue that arose for consideration before the Judge was the question of liability. As mentioned at [2] above, the Judge found in favour of the respondents.

The facts

5 The first respondent is a well-known stockbroking company and holds a capital market services licence which permits it to deal in securities and provide custodial services for securities. The second respondent, an investment holding company listed on the Singapore Exchange Ltd ("SGX"), is the parent company of both the first and the third respondents. The third respondent deals in securities as well as provides corporate finance advisory services. As mentioned earlier (at [2] above), the first to the third respondents form what is known as "Westcomb Financial Group" in Singapore; this group has been involved in the launch of numerous IPOs in Singapore as manager, underwriter and placement agent.

6 The appellant has been working as a remisier in Singapore since 2000. As Prof Walter Woon observed in his article, "The Legal Position of a Remisier" (1992) 4 SAcLJ 346, the position of remisiers in Singapore and Malaysia is unique (at 346):

> A remisier is basically a self-employed person whose job is to buy and sell shares on behalf of clients. Remisiers function at the retail end of the market. They do not get [Central Provident Fund] contributions from any employer, even though they are affiliated to stockbroking companies. They are not in any sense employed by the stockbroking companies. Rather, they are allowed to use the facilities of the stockbroking companies … in return for payment of a fee. A remisier is remunerated through commission on transactions, a proportion of which is taken by the stockbroking firm for [giving the remisier] the privilege of using [its] facilities. As far as the remisier is concerned, the people who trade through him are his clients, not the firm's.

7 However, the learned author also clarified, as follows (*ibid*):

> In the light of the above practice, one might conclude that remisiers are in business for themselves and insofar as they act as agents, they are agents of the clients rather than of the

stockbroking firms. This conclusion is in fact misleading.

If one looks at a remisier's agreement with a stockbroking firm, one is immediately struck by the fact that it is titled an "Agency Agreement". Paragraph 1 [of the sample agreement set out in Appendix IV of the Bye-Laws of the Stock Exchange of Singapore Ltd] provides that "the Company [ie, the stockbroking firm] hereby appoints the remisier … as agent of the Company to trade and deal in … securities … in the name of the Company …"[.] Paragraph 12 again repeats that the remisier is an agent. The Stock Exchange's Bye-Laws also provide that remisiers are agents of the broking firms: see Bye-Law V, clauses 2 and 3. *The legal result of all these provisions is that remisiers are agents of the stockbroking firms with which they are affiliated, rather than of the client (as one might expect if one examine[s] the way [in which] remisiers conduct their affairs).*

[emphasis added]

8 On 3 May 2005, the appellant and the first respondent entered into the Agency Agreement, which was precisely the type of agreement described by Prof Woon above. In particular, the first respondent appointed the appellant as its agent to trade and deal in stocks, shares and other marketable securities (hereinafter collectively referred to as "securities"). The Agency Agreement, a six-page document, set out, *inter alia*, the duties of the remisier (*ie*, the appellant), the rights and duties of the stockbroking firm (*ie*, the first respondent) as well as the remisier's liability in respect of transactions dealt by or through the remisier in the name of the stockbroking firm. The salient clauses in the Agency Agreement (particularly relevant for our purposes) include the following:[note: 6]

…

6. Commission

The Company [*ie*, the first respondent] shall pay the Remisier [*ie*, the appellant] a commission equivalent to 40% of the commission charged by the Company to clients on transactions that are dealt by or through the Remisier in the name of [the] Company during the period twelve months from the date of commencement of this Agreement. Thereafter, the commission rate will be adjusted to 50% of the commission charged by the Company to clients on transactions that are dealt by or through the Remisier in the name of [the] Company.

…

12. Relationship with Remisier

12.1 The Remisier shall at all times be an agent of the Company in dealing in securities. Nothing in this Agreement shall be construed as creating an employer-employee relationship between the Company and the Remisier and accordingly the Remisier shall not be entitled to or [shall not] claim any employment benefits whatsoever.

…

18. Entire Understanding

This Agreement embodies the entire understanding of the parties and there are no provisions, terms, conditions or obligations, oral or written, expressed or implied, other than those contained herein. All obligations of the parties to each other under previous agreements ([if] any) are

hereby released, but without prejudice to any rights which have already accrued to either party.

…

9 The events that arose in 2006 (and which are relevant in the context of the present appeal) were of considerable dispute. The appellant contended in his second amended statement of claim filed on 16 November 2007 ("the Statement of Claim") that, on or around 8 February 2006, he met one Julian Lionel Sandt ("Sandt"), the CEO of Orchid Capital Limited ("Orchid Capital"), an Australian listed company, during a networking event.[note: 7] The appellant submitted that, at the networking event, Sandt got along with him very well and revealed that he was looking for investment opportunities with a "particular interest in taking up … [p]lacement [s]hares".[note: 8] After the appellant indicated that he was a representative of the first respondent, Sandt agreed to be the appellant's client in his *personal* capacity and further confirmed that Orchid Capital and/or its subsidiaries would eventually be clients of the appellant. The appellant further alleged that Sandt informed him during this networking event that he (Sandt) was the representative of an Austrian fund investment company known as Aktieninvestor.com AG ("Aktieninvestor"), but did not specify whether he was a formal representative of that company or only had informal connections with it. The appellant claimed that Sandt represented on or around March 2006 that Aktieninvestor would be the appellant's client as well. The respondents, on the other hand, denied that Sandt and the appellant had as close a relationship as the appellant averred. The respondents contended, firstly, that Sandt's relationship with the fourth and the fifth respondents in fact *predated* any relationship between Sandt and the appellant;[note: 9] and, secondly, that before Sandt opened a trading account with the first respondent through the appellant, he was already in talks with the third respondent on his possible involvement in pre-IPO investments.[note: 10]

10 What is clear from the evidence is that, on or around 6 March 2006, Sandt opened an *individual* trading account with the first respondent through the appellant.[note: 11] The appellant contended that the opening of this account was the result of a meeting where he introduced Sandt to the fourth respondent. After the meeting, the appellant submitted, Sandt expressed an interest in taking up placement shares for IPOs managed, underwritten or placed out by the first respondent and its related companies.[note: 12] On 7 March 2006, the appellant sent a follow-up e-mail to the fourth respondent informing him of Sandt's interest:[note: 13]

Hi Boss

The meeting yesterday centred on discussions about doing primary or secondary listings in [G]ermany. Julian [*ie*, Sandt] has since clarified that in addition to this, he is also interested in participating in Westcomb's pre-[IPO]s and placement[s] on a personal and company (Orchid Capital) basis. So he would appreciate if we can keep him in the loop on these matters.

Of the secondary listings which he has done so far, ie Asiawater and Chinasun, [they were] done through Orchid Capital's majority shareholder['s] personal account and [are] currently handled by Merrill Lynch. Essentially, this would involve the transfer of the said shares from Singapore to the [G]erman market maker.

If we are able to establish a similar link with our [G]erman partner and offer this majority shareholder the share transfer facility at a lower overall cost with better service, I can request Julian's help in channelling the execution of future placements through us. In that respect, I would need your help in sounding out Westcomb's [G]erman partner to assist us in the share transfer.

Thank you[.]

This was followed by the opening of a *corporate* trading account for Orchid Emarb Limited ("Orchid Emarb"), a subsidiary of Orchid Capital, with the appellant on 15 March 2006.[note: 14] As mentioned earlier (at [9] above), the respondents submitted that, prior to opening a trading account with the first respondent through the appellant, Sandt was already engaged in discussions with the third respondent on his possible involvement in pre-IPO investments.

11 On 27 April 2006, Sandt subscribed for 1.5 million placement shares in the IPO of Natural Cool Holdings Ltd ("Natural Cool") at $0.20 per share, paying an aggregate amount of $300,000.[note: 15] The first respondent, which was the placement agent, did not charge Sandt any commission on this transaction. On the same day, Aktieninvestor and the second respondent entered into a share subscription agreement ("the Share Subscription Agreement") under which Aktieninvestor agreed to subscribe for 7.8 million shares in the second respondent.[note: 16] A Mr Raymond Low of Trondheim Consulting was responsible for brokering this deal and was paid commission of $85,000 for his role in this particular transaction.

12 The appellant alleged that he subsequently arranged for a meeting on or around 17 May 2006 between Sandt and other key figures, namely: Mr Thomas Roggla ("Thomas"), the chairman of the supervisory board of Aktieninvestor and a director of Extra Rum Investments Ltd ("Extra Rum"); Mr Lim Teck Heng Winston ("Winston Lim"), the managing director of the first respondent; as well as Mr Tan Meng Shern, the head of the third respondent's corporate finance department. The purpose of this meeting was to discuss the possibility of Aktieninvestor taking up placement shares in IPOs. The appellant alleged that, after the meeting ended, Winston Lim approached him to inquire how he came to acquire clients such as Sandt, Thomas and Aktieninvestor. The appellant gave Winston Lim details of how he had met these clients and revealed that he had mailed out the account opening forms to Aktieninvestor.

13 When the appellant did not receive Aktieninvestor's account opening forms after several months, he began to suspect that something was amiss. On 27 October 2006, to expedite the processing of the account opening forms, the appellant sent an e-mail to Thomas asking for help:[note: 17]

> Hi Thomas
>
> Your personal account has been [set up].
>
> Separately, I have yet to receive the corporate account form[s] for [Aktieninvestor]. Can I trouble you to give your men in Austria a call to expedite the process?
>
> Thanks and regards
>
> James Ng [*viz*, the appellant]

Thomas responded via e-mail later on the same day stating that Mr Markus Mair ("Markus"), the CEO of Aktieninvestor, was on vacation, but would be in touch with the appellant shortly:[note: 18]

> Dear James,
>
> Thanks for your efforts. Markus Mair … left today on vacation. He will be back on 6.11. [*sic*] and will contact you then to finalize everything.

Kindest Regards

Thomas

14 Following a courtesy e-mail from the appellant to Markus on 7 November 2006,[note: 19] Markus wrote to the appellant via e-mail on 9 November 2006 and revealed that he had already sent Aktieninvestor's account opening forms to the fifth respondent, a director of the first respondent:[note: 20]

Dear James,

I did send to Alex Tan [*ie*, the fifth respondent] on 26th May 2006 by DHL a set of corporate [account] opening forms for our company [Aktieninvestor]. Included in this DHL letter [were]:

- Account opening Form for Securities Trading Account (corporate)

- Authorised to Trade Personnel Form (Appendix A)

- Authorised to Give Settlement Instruction Form (Appendix B)

- Particulars of Directors

- Declaration Form for Goods and Services Tax

- Form 25A.1 Authorisation for Linkage of trading account to securities account

- Form 2.2 Application for opening of securities account (for corporation) [including] Certificate of Resolution

- Application to open a depository agent sub-account

So I thought you have already received all the required documents. Maybe you double-check it with Alex, please.

Or did you mean something different when you were asking for our corporate account forms in your last email? We have not received anything else and we have not mailed to you any further forms.

Please clarify and let us know.

Kind Regards

Markus

15 A series of correspondence thereafter ensued between the appellant and Markus, through which the appellant found out that the fifth respondent had allegedly intercepted Aktieninvestor's account opening forms by contacting Markus and asking Markus to send the account opening forms to him (the fifth respondent) instead. The appellant wrote to Markus by e-mail on 9 November 2006 to get to the root of the mystery:[note: 21]

Hi Markus

> The form[s] [were] sent out by me. How did [they] end up being returned to Alex Tan [*ie*, the fifth respondent]?
>
> [R]egards
>
> James Ng

Markus Nair responded on the same day via a short e-mail explaining why the account opening forms had been sent to the fifth respondent instead:[note: 22]

> Hi James,
>
> I did send the forms to Alex [*ie*, the fifth respondent] because he told me to do so. First it was written [*sic*] your name and [for] your attention on the envelope which you sent to me. But Alex told me to mail the forms to his attention. So did I. I don't remember why Alex told me to do so. Maybe you were out of office that week.
>
> It was [sent] to
>
> 5 Shenton Way
>
> # 09-08 UIC Building
>
> Singapore
>
> Attn. Mr. Alex Tan
>
> +65-98584296
>
> So did you find our forms within Westcomb finally?
>
> Kind Regards
>
> Markus

16 The appellant continued to correspond with Markus, who could not recall how the fifth respondent managed to contact him. This led to much unhappiness, and formed the basis of the appellant's allegations that the first respondent had bypassed him and had dealt directly with Sandt and Aktieninvestor without his knowledge and that the fifth respondent had intercepted the account opening forms sent to Aktieninvestor. The fourth respondent testified at the trial in the court below that that had been done because Sandt was too important a customer for the appellant and matters such as secondary listings of shares in overseas markets were "too big"[note: 23] for the appellant to handle.

17 Whether or not the account opening forms were redirected surreptitiously, on 29 May 2006, Aktieninvestor opened an account with the first respondent without going through the appellant and was assigned a dealer in the first respondent.[note: 24] The respondents contended that this account was opened through the facilitation of the fifth respondent pursuant to Aktieninvestor's private subscription for shares in the second respondent under the Share Subscription Agreement (see [11] above). The appellant denied this and argued that Aktieninvestor would have opened its account with the first respondent through him *but for* the interception of the account opening forms

by the respondents (via the fifth respondent). On 30 October 2006, Aktieninvestor subscribed for 1.5 million placement shares in Swiber Holdings Ltd ("Swiber") through BBY Pty Ltd, an Australian stockbroking company.[note: 25] Aktieninvestor was not charged any commission for this transaction. On the same day, Sandt subscribed for 750,000 placement shares in Swiber at $0.355 per share, paying an aggregate amount of $266,250;[note: 26] he was not charged any commission on this transaction. It was undisputed that Orchid Emarb did not subscribe for any placement shares, although it did carry out certain trades through the first respondent. The appellant received commission for those transactions by Orchid Emarb.

18 The appellant further argued that Sandt was responsible for referring other customers to him (*ie*, the appellant), including Thomas and Extra Rum.

The decision below

19 The Judge was of the view that it was "probably" (see [3] of the Judgment) the case that the appellant was "the person … [who] formally asked [Aktieninvestor] to open a client account with him in the first [respondent]" (*ibid*), but he held that this was "not a fact of significance for [several] reasons" (*ibid*). It is useful to set out the evidence and the Judge's findings, as follows (*ibid*):

> The [appellant] claimed that he was the person to have formally asked [Aktieninvestor] to open a client account with him in the first [respondent]. I find that that was probably so, but it was not a fact of significance for the reasons [which] I will elaborate on shortly. I also accept that the account was eventually opened through the second [respondent] instead. The account was opened at the first [respondent] with the second [respondent] as the remisier and there was no evidence before me that [Aktieninvestor] would not have agreed to this. The fact that the second [respondent] became the agent in such circumstances alone does not give the [appellant] a cause of action in the tort of conspiracy in respect of the IPO shares. It may have entitled the [appellant] to commission in respect of securities that [Aktieninvestor] traded through the second [respondent] which, if not for the intervention of the second [respondent], would have been done through the [appellant]. The [appellant's] claim for commission was [however] in respect of the IPOs which were not deals done through the [appellant] or [deals which] would have been done through [him]. I accept the [respondents'] evidence that the IPO shares were not transacted through the [appellant] (the first [respondent] was the placement agent), and more importantly, no commission was charged by the first [respondent] on those shares. It was the first [respondent's] prerogative not to charge commission, and if [the first respondent] did not do so, the [appellant] would be unable to invoke clause 6 [of the Agency Agreement] because under clause 6, the [appellant's] entitlement would be 40% (or 50% as the case [might] be) of the commission charged by the first [respondent]. I accept the [respondents'] evidence that the allocation of IPO shares [is] a matter of goodwill and that the trading company often allocates them to favoured clients [while] waiving any commission.

20 The Judge rejected the appellant's submission that the court should imply a term of good faith into the Agency Agreement. He explained that this was because of the entire agreement clause in that agreement (*ie*, cl 18 (reproduced at [8] above)). According to the Judge, cl 18 "expressly provided that the [Agency] [A]greement embodied the entire agreement between the parties" (see the Judgment at [4]). He further held that there was "a lack of particularization in respect of what the duties entailed, and how they were breached" (*ibid*).

21 The Judge concluded that, *even if* (as the appellant so vigorously sought to establish during the trial) Sandt and Aktieninvestor were clients of the appellant for the purposes of trading in securities, "there [was] no evidence to persuade [him] that the trading company [*ie*, the first

respondent] was obliged to charge commission in respect of IPO shares" (*ibid*). In the absence of such an obligation, the Judge held, no duty could be implied. He added that the appellant's case that there was a "customary practice" (*ibid*) of paying remisiers a commission of 1% of the value of the placement shares taken up by their clients was dubious, and that there was "no reliable evidence" (*ibid*) to support this assertion.

22 Instead, the Judge reasoned that the evidence at the trial showed that the second to the fifth respondents had no substantial connection with the appellant's claim; nor had there been any concerted plan of action by the respondents to, *inter alia*, deprive the appellant of commission which was due to him. While he noted that the appellant had referred to some "surreptitious actions on the part of the first [respondent] as a company" (see the Judgment at [5]), the Judge was of the view that the appellant had not proved that the respondents had "acted in furtherance of a coherent plan" (*ibid*). Therefore, in his view, the appellant's cause of action based on conspiracy could not be substantiated.

23 The appellant further sought to claim commission on a *quantum meruit* basis, but the Judge held that, in view of his finding that there had been no breach of contract, the claim based on *quantum meruit* must also fail (see the Judgment at [6]). Further, he was of the view that this particular claim was "poorly made out in pleading, evidence and counsel's closing submission" (*ibid*).

The issues on appeal

24 The appellant did not pursue his *quantum meruit* claim before this court. Before proceeding to analyse the appellant's claim based on implied terms, we should state that we agree with the Judge's reasoning as well as findings of fact with regard to, first, the appellant's claim in conspiracy (see [22] above) and, second, the appellant's contention that there was a "customary practice" (see the Judgment at [4]) of paying remisiers a commission of 1% of the value of placement shares taken up by their clients (see [21] above). There are, in essence, therefore two main issues for our decision, namely:

(a) whether the entire agreement clause in cl 18 of the Agency Agreement precludes the implication of terms into that agreement ("the First Main Issue") (if this issue is answered in the affirmative, this appeal must fail at the threshold, so to speak); and

(b) if the First Main Issue is answered in the negative, whether terms ought to be implied into the Agency Agreement in favour of the appellant ("the Second Main Issue").

25 We turn now to consider each of these issues *seriatim*.

The First Main Issue: Entire agreement clauses and the implication of terms

The applicable principles

26 The applicable principles relating to entire agreement clauses were set out comprehensively by this court in *Lee Chee Wei v Tan Hor Peow Victor* [2007] 3 SLR 537 ("*Lee Chee Wei*"). In particular, the following statements of principle by V K Rajah JA, delivering the judgment of the court, bear setting out in full (at [25]–[28]):

> 25 Entire agreement clauses appear as a smorgasbord of variously worded provisions. *The effect of each clause is essentially a matter of contractual interpretation and will necessarily depend upon its precise wording and context.* Generally, such clauses are conducive to certainty

as they define and confine the parties' rights and obligations within the four corners of the written document thereby precluding any attempt to qualify or supplement the document by reference to pre-contractual representations.

26 The purpose and [the] effect of an entire agreement clause were succinctly summarised by Gavin Lightman J with his customary clarity in *Inntrepreneur Pub Co v East Crown Ltd* [2000] 2 Lloyd's Rep 611 (at 614) as follows:

> The purpose of an entire agreement clause is to preclude a party to a written agreement from threshing through the undergrowth, and finding, in the course of negotiations, some (chance) remark or statement (often long-forgotten or difficult to recall or explain) upon which to found a claim, such as the present, to the existence of a collateral warranty. The entire agreement clause obviates the occasion for any such search and the peril to the contracting parties posed by the need which may arise in its absence to conduct such a search. *For such a clause constitutes a binding agreement between the parties that the full contractual terms are to be found in the document containing the clause and not elsewhere, and that, accordingly, any promises or assurances made in the course of the negotiations (which in the absence of such a clause, might have effect as a collateral warranty) shall have no contractual force, save in so far as they are reflected and given effect in that document*.
>
> … [T]he formula used is abbreviated to an acknowledgment by the parties that the agreement constitutes the entire agreement between them. That formula is, in my judgment, amply sufficient to constitute an agreement that the full contractual terms to which the parties agreed to bind themselves are to be found in the agreement and nowhere else. That can be the only purpose of the provision.
>
> [emphasis added]

27 From the freedom of contract perspective, Lightman J's *dictum* makes eminent sense, *a fortiori* in the context of parties who are commercial entities or knowledgeable businessmen who have negotiated the terms of their agreement with the benefit of legal advice. In *Sere Holdings Limited v Volkswagen Group United Kingdom Limited* [2004] EWHC 1551 (Ch), Mr Christopher Nugee QC, sitting as a deputy judge of the [English] High Court, considered Lightman J's observations on the purpose and [the] effect of an entire agreement clause, and perceptively concluded (at [22]):

> I can see no flaw in the reasoning. It is elementary that whether an agreement has legal effect is a matter of the intentions of the parties … . I can see no reason why parties who have in fact reached an agreement in precontractual negotiations that would otherwise constitute a collateral contract should not subsequently agree in their formal contract that any such collateral agreement should have no legal effect, or in other words should be treated as if the parties had not intended to create legal relations; and for the reasons given by Lightman J this is precisely what an entire agreement clause on its face does.

28 In *IBM Singapore Pte Ltd v UNIG Pte Ltd* [2003] SGHC 71, Tay Yong Kwang J held that such clauses effectively erased any legal consequences that might have ensued from prior discussions or negotiations and that "[t]he contractual relationship between the parties was now circumscribed by the signed agreements and those alone". This decision was subsequently upheld on appeal. Much earlier in *Chuan Hup Marine Ltd v Sembawang Engineering Pte Ltd* [1995] 2 SLR 629, Selvam J determined that a similarly worded clause excluded any implied term,

collateral warranty and misrepresentation. That said, whether or not an entire agreement clause can purport to exclude a claim in misrepresentation remains a matter of some controversy (*cf Thomas Witter Ltd v TBP Industries Ltd* [1996] 2 All ER 573 …); and see *Inntrepreneur Pub Co v East Crown Ltd* at 614 – "An entire agreement provision does not preclude a claim in misrepresentation, for the denial of contractual force cannot affect the status of a statement as a misrepresentation". As such an issue has not arisen in the instant appeal, a discussion of this controversy, intriguing as it may be, is not warranted.

[emphasis in original]

27 Rajah JA also considered the issue of whether or not an entire agreement clause could be ignored (and the relevant extrinsic evidence admitted) if it could be demonstrated that one or more of the exceptions to s 94 of the Evidence Act (Cap 97, 1997 Rev Ed) – the statutory embodiment of the parol evidence rule at common law – applied. He held that this ought *not* to be the case (see generally *Lee Chee Wei* ([26] *supra*) at [29]–[34]), disagreeing (in the process) with the view expressed in the Singapore High Court decision of *Exklusiv Auto Services Pte Ltd v Chan Yong Chua Eric* [1996] 1 SLR 433 at 439, [21]. He emphasised, however, that much would of course depend, in the final analysis, on the *precise construction of the precise language of the entire agreement clause itself* (see *Lee Chee Wei* at [25] and [35]). He also noted that entire agreement clauses might nevertheless be subject (where applicable) to the reasonableness requirements under s 11 of the Unfair Contract Terms Act (Cap 396, 1994 Rev Ed) ("UCTA") (see generally *Lee Chee Wei* at [36]–[38]). Further, "[e]ntire agreement clauses [would] usually not prevent a court from justifiably adopting a contextual approach in contract interpretation" (*id* at [41]; see also the English Court of Appeal decision of *Proforce Recruit Limited v The Rugby Group Limited* [2006] EWCA Civ 69 (especially at [41]) and, *vis-à-vis* the contextual approach to contractual interpretation generally, the decision of this court in *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR 1029). Rajah JA added, however, that "unless the contract [was] embraced by the UCTA, it would be theoretically possible for an entire agreement clause to expressly preclude any reference to the factual matrix as an interpretative tool" (see *Lee Chee Wei* at [41]).

28 It will be noted that, whilst the *general principles* set out in *Lee Chee Wei* ([26] *supra*) are very helpful, the facts of that case dealt with the more common situation where it was sought to introduce *extrinsic evidence* (in that case, oral contracts or pre-contractual representations alleged to have been made in the course of negotiations) in order to "infer" a contingent condition that was *clearly inconsistent with* the *express terms* of the contract (*id* at [21]). This was clearly not permissible in law and, indeed, that particular issue could have been decided on that basis alone, although this court then proceeded, "for completeness" (*ibid*), to discuss the effect of the entire agreement clause in the contract in question. Hence, *Lee Chee Wei* did not, strictly speaking, deal with the *specific* issue which we are faced with in the present appeal, *viz*, whether an entire agreement clause operates to exclude the implication of terms into a contract. Much will, as we have seen (at [26]–[27] above), depend on the precise language of the entire agreement clause concerned as well as the nature of the implied terms that are relied on. However, we will endeavour to set out some guidelines on this particular issue below.

Our decision on the First Main Issue

29 As already mentioned, the relevant entire agreement clause in the present case is contained in cl 18 of the Agency Agreement, which reads as follows (also reproduced above at [8]):

Entire Understanding

> This Agreement embodies the entire understanding of the parties and there are no provisions, terms, conditions or obligations, oral or written, expressed *or implied*, other than those contained herein. All obligations of the parties to each other under previous agreements ([if] any) are hereby released, but without prejudice to any rights which have already accrued to either party. [emphasis added]

30 We find the appellant's argument to the effect that *cl 18 itself contemplates the existence of implied terms* persuasive. Indeed, that clause refers *expressly* to *implied* terms, as the italicised words in the clause (as reproduced in the preceding paragraph) clearly demonstrate. This is, in fact, sufficient to dispose of the First Main Issue in the present appeal.

31 However, we would also pause to observe that, even if there is no reference to implied terms in an entire agreement clause, it is arguable that the presence of such a clause in a contract would not, as a matter of general principle, exclude the implication of terms into that contract for several reasons. 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. This principle is, of course, both logical as well as commonsensical. Finally, as pointed out by Nigel Teare QC (sitting as a deputy judge of the English High Court) in *Exxonmobil Sales and Supply Corp v Texaco Ltd* [2004] 1 All ER (Comm) 435 at [27]:

> It [is] … arguable that where it is necessary to imply a term in order to make the express terms work such an implied term may not be excluded by [an] entire agreement clause *because* it could be said that such a term is to be found *in* the document or documents forming part of the contract. [emphasis added]

32 That having been said, we are *not* prepared to state that an entire agreement clause can *never* exclude the implication of terms into a contract. However, for an entire agreement clause to have this effect, it would need to *express* such effect in *clear and unambiguous language*. Further, if the effect of the language used renders the entire agreement clause, in *substance*, an exception clause, the clause would be subject to both the relevant common law constraints on exclusion clauses as well as the UCTA (reference may also be made to Elisabeth Peden & J W Carter, "Entire Agreement – and Similar – Clauses" (2006) 22 JCL 1 at 8–9; *cf* (not surprisingly, perhaps) a similar approach towards the utilisation of the factual matrix of a contract as an interpretative tool where the contract contains an entire agreement clause (see [27] above)). However, this was clearly not the situation in the present appeal.

33 We turn now to the Second Main Issue, which centres on the question of whether or not this court ought to imply terms in favour of the appellant into the Agency Agreement. In this regard, it would be appropriate to begin by setting out the applicable principles relating to the implication of terms into contracts.

The Second Main Issue: Implied terms

The applicable principles

Introduction

34 The law relating to implied terms is now well established in local case law. There are in fact two main categories of implied terms at common law, *viz*, "terms implied in fact" and "terms implied in law", respectively. Such terms are "gap-fillers" by which (as we shall elaborate upon below) the courts fill in gaps in contracts on the basis that, in the case of a "term implied in *fact*", the contracting parties would have intended the particular gap in question to be filled, and, in the case of a "term implied in *law*", the gap concerned ought to be filled on (broader) policy grounds.

"Terms implied in fact"

35 The nature of "terms implied in fact" has been described in the Singapore High Court decision of *Forefront Medical Technology (Pte) Ltd v Modern-Pak Pte Ltd* [2006] 1 SLR 927 ("*Forefront*"), as follows (at [41]):

> ["Terms implied in fact"] relate to the possible implication of a *particular* term or terms into *particular* contracts. In other words, the court concerned would examine the *particular factual matrix* concerned in order to ascertain whether or not a term ought to be implied. This is the established general approach, regardless of the view one takes of the "business efficacy" and [the] "officious bystander" tests [as to which, see [36] below]. There are practical consequences to such an approach, the most important of which is that the implication of a term or terms in a particular contract *creates no precedent for future cases*. In other words, the court is only concerned about arriving at a just and fair result via implication of the term or terms in question in that case – *and that case alone*. The court is only concerned about the presumed intention of the particular contracting parties – *and those particular parties alone*. [emphasis in original]

This is an important point, especially since it is the focal point of contrast with "terms implied in law", which we shall deal with briefly below (at [38]–[40]).

36 The actual tests which are utilised by the courts in relation to this particular category of implied terms (*ie*, "terms implied in fact") are also well established. They comprise the "business efficacy" and the "officious bystander" tests, respectively. Both these tests have been described in *Forefront* ([35] *supra*), as follows (at [29]–[32]):

> 29 It has always been acknowledged that particular terms might be implied into particular contracts. However, in order not to undermine the concept of freedom of contract itself, terms would be implied only rarely – in exceptional cases where, as one famous case put it, it was *necessary* to give "*business efficacy*" to the contract (see *per* Bowen LJ (as [he] then was) in the English Court of Appeal decision [of] *The Moorcock* (1889) 14 PD 64). In the words of Bowen LJ himself (at 68):
>
> > Now, an implied warranty, or, as it is called, a covenant in law, as distinguished from an express contract or express warranty, really is in all cases founded on the presumed intention of the parties, and upon reason. The implication which the law draws from what must obviously have been the intention of the parties, the law draws with the object of giving efficacy to the transaction and preventing such a failure of consideration as cannot have been within the contemplation of either side; and I believe if one were to take all the cases, and there are many, of implied warranties or covenants in law, it will be found that in all of them the law is raising an implication from the presumed intention of the parties with the object of giving to the transaction such efficacy as both parties must have intended that at all events it should have. In business transactions such as this, what the law desires to effect by the implication is to give such business efficacy to the transaction as must have

been intended at all events by both parties who are [businessmen]; not to impose on one side all the perils of the transaction, or to emancipate one side from all the chances of failure, but to make each party promise in law as much, at all events, as it must have been in the contemplation of both parties that he should be responsible for in respect of those perils or chances.

30 Indeed, Lord Esher MR adopted a similar approach, although it is Bowen LJ's judgment that is most often cited. This is probably due to the fact that a close perusal of Lord Esher MR's judgment will reveal that the learned Master of the Rolls did not *explicitly* adopt the "business efficacy" test as such. It might be usefully observed at this juncture that the third judge, Fry LJ, agreed with both Bowen LJ and Lord Esher MR (see [*The Moorcock*] at 71).

31 There was another test, which soon became equally famous. It was [stated] by MacKinnon LJ in another English Court of Appeal decision. This was the famous "*officious bystander*" test which was propounded in *Shirlaw v Southern Foundries (1926) Limited* [1939] 2 KB 206 at 227 ("*Shirlaw*") (affirmed, [1940] AC 701), as follows:

> If I may quote from an essay which I wrote some years ago, I then said: "Prima facie that which in any contract is left to be implied and need not be expressed is something so obvious that it goes without saying; so that, if, while the parties were making their bargain, an officious bystander were to suggest some express provision for it in their agreement, they would testily suppress him with a common 'Oh, of course!'"
>
> At least it is true, I think, that, if a term were never implied by a judge unless it could pass that test, he could not be held to be wrong.

Interestingly, the essay referred to above was in fact a public lecture delivered at the London School of Economics in the University of London: see Sir Frank MacKinnon, *Some Aspects of Commercial Law – A Lecture Delivered at the London School of Economics on 3 March 1926* (Oxford University Press, 1926) (and see, especially, p 13).

32 Both these tests are firmly established in the local case law[:] … see … for example, *Lim Eng Hock Peter v Batshita International (Pte) Ltd* [1996] 2 SLR 741 at 745–746, [13]–[15] (affirmed in *Batshita International (Pte) Ltd v Lim Eng Hock Peter* [1997] 1 SLR 241) and *Chai Chung Ching Chester v Diversey (Far East) Pte Ltd* [1991] SLR 769 at 778, [34] (affirmed in *Diversey (Far East) Pte Ltd v Chai Chung Ching Chester* [1993] 1 SLR 535), with regard to the "business efficacy" and [the] "officious bystander" tests, respectively.

[emphasis in original]

37 The *relationship* between the "business efficacy" and the "officious bystander" tests was also elaborated upon in *Forefront* ([35] *supra*), as follows (at [33]–[40]):

> 33 The relationship … between the tests is not wholly clear. Surprisingly, this appears to be the situation not only in the local context but also in England as well. In the recent English High Court decision of *John Roberts Architects Limited v Parkcare Homes (No 2) Limited* [2005] EWHC 1637 (TCC), for example, Judge Richard Havery QC was of the view (at [15]) that it was unnecessary for him to decide the point. And in the equally recent House of Lords decision of *Concord Trust v Law Debenture Trust Corpn plc* [2005] 1 WLR 1591, Lord Scott of Foscote merely referred (at [37]) to the fact that "[v]arious tests for the implication of terms into a contract have been formulated in various well known cases", and then proceeded to refer

specifically (only) to the "business efficacy" test in *The Moorcock* (set out at [29] above). [The court] would venture to suggest, however, that there ought – and can – be a resolution to this issue for reasons that [the court] will elaborate upon in a moment.

34 On one view, the "business efficacy" and [the] "officious bystander" tests are viewed as being wholly *different* tests (see, for example, the cases cited at [39] below). Looked at in this light, both tests could be utilised as alternatives. Such an approach, however, tends towards more complexity (and, possibly, confusion) in what is an already relatively general (even vague) area of the law.

35 On another view, however, the two tests are *complementary*. This is the view [the court prefers] as it is not only simple, albeit not simplistic, but is also consistent with the relevant historical context. In the English Court of Appeal decision of *Reigate v Union Manufacturing Company (Ramsbottom), Limited and Elton Copdyeing Company, Limited* [1918] 1 KB 592 ("*Reigate*"), for example, that great commercial judge, Scrutton LJ, observed (at 605) thus:

> A term can only be implied if it is *necessary in the business sense* to give *efficacy* to the contract; *that is*, if it is such a term that it can confidently be said that if at the time the contract was being negotiated some one had said to the parties, "What will happen in such a case," they would *both* have replied, "*Of course, so and so will happen; we did not trouble to say that; it is too clear*." Unless the Court comes to some such conclusion as that, it ought not to imply a term which the parties themselves have not expressed. [emphasis added]

36 An even cursory perusal of the above statement of principle by Scrutton LJ will reveal the *integration as well as [the] complementarity* of the "business efficacy" and [the] "officious bystander" tests. This is especially evident [from] the learned judge's use of the *linking* phrase "that is" in the above quotation. Indeed, the plain and natural meaning of this quotation is too clear to admit of any other reasonable construction or interpretation. And it is this: that the "officious bystander" test is the *practical mode by which* the "business efficacy" test is implemented. It is significant that the observations of Scrutton LJ in *Reigate* ([35] *supra*) *antedated* the more prominent pronouncement of the "officious bystander" test by Mac[K]innon LJ in *Shirlaw* ([31] *supra*) by *some two decades*. Of not insignificant historical interest, in this regard, is the fact that MacKinnon LJ was in fact Scrutton LJ's pupil and had close ties with him … on both professional as well as academic levels (see generally *The Dictionary of National Biography 1941–1950* (L G Wickham Legg & E T Williams eds) (Oxford University Press, 1959) pp 557–559 at p 557).

37 The following observations by Cross J in the English High Court decision of *Gardner v Coutts & Company* [1968] 1 WLR 173 at 176 may also be usefully noted:

> When one hears the words "implied term" one thinks at once of MacKinnon L.J. and his officious bystander. It appears, however, that the individual, *though not yet so characterised, first made his appearance as long ago as 1918 in a judgment of Scrutton L.J.* … [emphasis added]

38 [It] should [be mentioned] that there is now local authority that supports this approach as well: see the recent Singapore High Court decision of Judith Prakash J in *Telestop Pte Ltd v Telecom Equipment Pte Ltd* [2004] SGHC 267 at [68]. Reference may also be made to the following observation by Colman J in the English High Court decision of *South Caribbean Trading Ltd v Trafigura Beheer BV* [2005] 1 Lloyd's Rep 128 at [37], which is, however, rather more

cryptic (and may, on one reading at least be the opposite of [the view] proposed in this judgment at [35] above):

> The conceptual basis for any such implication [of a contractual term] could consist either of that derived from the other express terms or that derived from *business efficacy under the "officious bystander" approach* in *The Moorcock* (1889) 4 PD 64. [emphasis added]

39 It should, however, be noted that there are other possible approaches as well. For example, there is some authority in the local context which suggests that the "business efficacy" and [the] "officious bystander" tests can be utilised interchangeably, thus signalling that there is no real difference in substance between the two tests (see, for example, the Singapore Court of Appeal decisions of *Bank of America National Trust and Savings Association v Herman Iskandar* [1998] 2 SLR 265 at [45]; *Miller Freeman Exhibitions Pte Ltd v Singapore Industrial Automation Association* [2000] 4 SLR 137 at [42]; *Hiap Hong & Co Pte Ltd v Hong Huat Development Co (Pte) Ltd* [2001] 2 SLR 458 at [18]; *Tan Chin Seng v Raffles Town Club Pte Ltd (No 2)* [2003] 3 SLR 307 at [33]; and *Romar Positioning Equipment Pte Ltd v Merriwa Nominees Pty Ltd* [2004] 4 SLR 574 at [29]; as well as the Singapore High Court decision of *Loh Siok Wah v American International Assurance Co Ltd* [1999] 1 SLR 281 at [32]). There is yet other authority suggesting that these two tests are *cumulative* (see, for example, the Malaysian Federal Court decision of *Sababumi (Sandakan) Sdn Bhd v Datuk Yap Pak Leong* [1998] 3 MLJ 151 at 170). It might well be that the approach from complementarity may be very close, in practical terms, to this suggested approach. However, the former could nevertheless still lead to different results and, in any event, does not comport with the background described briefly above. Finally, there is some authority suggesting that both the "business efficacy" and [the] "officious bystander" tests are not only different but that the criterion of "necessity" is only applicable to the former test (see the Malaysian High Court decision of *Chua Soong Kow & Anak-Anak Sdn Bhd v Syarikat Soon Heng (sued as a firm)* [1984] 1 CLJ 364 at [7]). This last-mentioned approach is probably the least persuasive of all since the criterion of "necessity" ought to be equally applicable to both tests (see, in this regard, *Miller Freeman Exhibitions Pte Ltd v Singapore Industrial Automation Association*, cited earlier in this paragraph).

40 Given the persuasive historical and judicial background as well as the general logic concerned, [it is suggested] that the approach from complementarity ought to prevail (see [36] above). It should also be noted that none of the cases in the preceding paragraph suggesting different approaches actually canvasses the rationale behind the respective approaches advocated.

[emphasis in original]

"Terms implied in law"

38 The category of "terms implied in law" is broader, and has been described in *Forefront* ([35] *supra*), as follows (at [42]–[44]):

> 42 There is a *second* category of implied terms which is wholly different in its nature as well as [its] practical consequences. Under this category of implied terms, once a term has been implied, such a term will be implied in *all future* contracts of *that particular type*. The precise terminology utilised has varied. In the English Court of Appeal decision of *Shell UK Ltd v Lostock Garage Ltd* [1976] 1 WLR 1187 at 1196, for example, Lord Denning MR utilised the rubric of contracts "of common occurrence", whilst Lloyd LJ in the (also) English Court of Appeal decision of *National Bank of Greece SA v Pinios Shipping Co No 1* [1990] 1 AC 637 (reversed in the House

of Lords but not on this particular point) referred to such a category as encompassing "contracts of a defined type" (at 645). But the central idea is clear: it is that the term implied is implied in a *general* way for *all* specific contracts that come within the purview of a broader umbrella category of contracts (reference may also be made, for example, to the House of Lords decisions of *Scally v Southern Health and Social Services Board* [1992] 1 AC 294, especially at 307 and *Malik v Bank of Credit and Commerce International SA* [1998] AC 20 at 45).

43 To distinguish this particular category of implied terms from the first, legal scholars have referred to it as the category of "terms implied in *law*" (see generally, for example, Sir Guenter Treitel, *The Law of Contract* (Sweet & Maxwell, 11th Ed, 2003) ("Treitel") at pp 206–213). The first or former category has, in turn, been referred [to] as … the category of "terms implied in *fact*" (see generally Treitel, at pp 201–206).

44 The *rationale as well as test* for this broader category of implied terms is, not surprisingly, quite *different* from that which obtains for terms implied under the "business efficacy" and [the] "officious bystander" tests. In the first instance, the category is much broader inasmuch (as we have seen) the *potential* for application *extends* to *future* cases relating to the same issue with respect to the *same category* of contracts. In other words, the decision of the court concerned to imply a [term] "in law" in a particular case *establishes a precedent* for similar cases in the future for *all* contracts of *that particular type*, unless of course a higher court overrules this specific decision. Hence, it is my view that [the] courts ought to be as – if not more – careful in implying terms on this basis, compared to the implication of terms under the "business efficacy" and [the] "officious bystander" tests which relate to the *particular contract and parties only*. Secondly, the test for implying a term "in law" is broader than the tests for implying a term "in fact". This gives rise to difficulties that have existed for some time, but which have only begun to be articulated relatively recently in the judicial context, not least as a result of the various analyses in the academic literature (see, for example, the English Court of Appeal decision of *Crossley v Faithful & Gould Holdings Ltd* [2004] 4 All ER 447 at [33]–[46]).

[emphasis in original]

Particular attention should be paid to the last paragraph just quoted (*viz*, [44] of *Forefront*), where the point of difference (and, indeed, contrast) between "terms implied in fact" and "terms implied in law" is made (see also above at [35]).

39 However, as has been pointed out by this court in *Jet Holding Ltd v Cooper Cameron (Singapore) Pte Ltd* [2006] 3 SLR 769 ("*Jet Holding*"), the category of "terms implied in law" is not without its attendant difficulties (at [90]):

The category of "terms implied in law" is not without its disadvantages. A certain measure of uncertainty will always be an integral part of the judicial process and, hence, of the law itself. This is inevitable because of the very nature of life itself, which is – often to a very large extent – unpredictable. Such unpredictability and consequent uncertainty is of course a double-edged sword. It engenders both the wonder and awe as well as the dangers and pitfalls in life. Given this reality, however, one of the key functions of the courts is not to add unnecessarily to the uncertainty that already exists. Looked at in this light, the category of "terms implied in law" does tend to generate some uncertainty – not least because of the broadness of the criteria utilised to imply such terms, which are grounded (in the final analysis) on reasons of public policy.

40 That having been said, it is nevertheless clear that "terms implied in law" are now firmly established as part of our law. As this court observed in *Jet Holding* ([39] *supra*) at [91]:

> However, the category of "terms implied in law" has now been firmly woven into the tapestry of our local contract law. It also aids, on occasion at least, in achieving a just and fair result. Most importantly, perhaps, it has formed both the theoretical as well as practical basis for *statutory* implied terms, such as those found in the UK Sale of Goods Act 1979 (c 54) (applicable in Singapore *via* the [A]pplication of English Law Act (Cap 7A, 1994 Rev Ed) and reprinted as Cap 393, 1999 Rev Ed). [emphasis in original]

Our decision on the Second Main Issue

Introduction

41 It is unclear precisely which category of implied terms the appellant was relying upon. In his submissions before this court, he did not draw a clear distinction between "terms implied in fact" and "terms implied in law". Indeed, it would appear that it is only from the relevant part of the Statement of Claim that it can be surmised that the appellant was, in fact, relying on both categories in the alternative.

42 The implied terms which the appellant sought to rely upon are (as just mentioned) framed in the alternative and are to be found in para 14 of the Statement of Claim,[note: 27] as follows:

> [T]here was *an implied duty of good faith* between the [appellant] and [the first respondent] as between agent and principal. *Further or in the alternative, it was an implied term of the [A]gency [A]greement that the [first respondent] would not do anything to deprive the [appellant] from earning his commission.* [emphasis added; underlining in original omitted]

We shall hereafter refer to the former term (*ie*, that relating to the implied duty of good faith) as "the First Implied Term", and to the latter term (*ie*, that relating to the first respondent's obligation not to do anything to deprive the appellant from earning his commission) as "the Second Implied Term".

43 The First Implied Term is (as can be seen from the quotation in the preceding paragraph) premised on the general doctrine of good faith and (more importantly) appears to fall within the broader category of "terms implied in law". (Indeed, in addition to the broad manner in which the First Implied Term has been framed, two learned authors have, in fact, also recently observed that the more recent (Australian) decisions (see, for example, the New South Wales Court of Appeal decisions of *Renard Constructions (ME) Pty Ltd v Minister for Public Works* (1992) 26 NSWLR 234 ("*Renard*"), *Burger King Corporation v Hungry Jack's Pty Ltd* (2001) 69 NSWLR 558 and *Alcatel Australia Ltd v Scarcella* (1998) 44 NSWLR 349 ("*Alcatel*")) appear to prefer "the idea that the [implied term of good faith] should be regarded as one implied in *law*" [emphasis added] (see J W Carter & Elisabeth Peden, "Good Faith in Australian Contract Law" (2003) 19 JCL 155 ("Carter & Peden on 'Good Faith'") at 163).) The Second Implied Term is more specific and appears to fall within the narrower category of "terms implied in fact".

Is there an implied duty of good faith (based on a "term implied in law")?

44 It is clear, in our view, that if a term relating to good faith is to be implied into the Agency Agreement, that term *cannot* be premised on the broader category of "terms implied in *law*", especially having regard (in the context of the present appeal) to the general doctrine of good faith that constitutes the pith and marrow of the First Implied Term. Let us elaborate.

45 On a general level (which applies to both "terms implied in fact" as well as "terms implied in law"), an implied term, as R E Megarry so aptly put it, is "so often the last desperate resort of counsel

in distress" (see R E Megarry, *Miscellany-at-Law* (Stevens & Sons Limited, 1955) at p 210, an observation which was also cited by this court in *Panwah Steel Pte Ltd v Koh Brothers Building & Civil Engineering Contractor (Pte) Ltd* [2006] 4 SLR 571 at [8]). This is understandable as it is necessary to ensure that the concept of sanctity of contract is not undermined, except in exceptional circumstances and in accordance with the established legal rules and principles set out above (see also *Forefront* ([35] *supra*) at [29] (reproduced at [36] above)). This leads us to the next (and more specific) reason as to why a duty of good faith cannot be implied as a "term implied in law" into the Agency Agreement in the present case.

46 As noted above (at [38]), implying a "term implied in law" into a contract not only involves broader policy considerations, but also establishes a precedent for the future. Put simply, the implication of such a term into a contract would entail implying the same term in the future for *all* contracts of the *same* type. This would, in and of itself, require that caution should be exercised on the part of the court before implying a "term implied in law" (which, upon being implied into the particular contract at hand, would also, *ex hypothesi*, be implied into all future contracts of the same type as well). Indeed, the fact that broader policy considerations are (as just mentioned) involved where "terms implied in law" are concerned furnishes a *further* reason for caution as well. Moreover (and this is a separate, albeit related, point), in the present case, the *content* of the First Implied Term (with its correspondingly broad implications) involves a concept which is itself controversial (at least at the present time). More specifically, the concept concerned relates to the doctrine of *good faith*, to which our attention must now briefly turn.

47 The doctrine of good faith is very much a fledgling doctrine in English and (most certainly) Singapore contract law. Indeed, a cursory survey of the relevant law in other Commonwealth jurisdictions appears to suggest a similar situation. This is, perhaps, not surprising in view of the fact that, even in the academic literature (which has witnessed the most discussion as well as analysis of the doctrine), there are differing views as to what the doctrine of good faith means as well as how it is to be applied (and, for the operation of this doctrine in the somewhat different context of collective sales under s 84A(9)(*a*)(i) of the Land Titles (Strata) Act (Cap 158, 1999 Rev Ed), which provides that the Strata Title Board must not approve an application for a collective sale if it is satisfied that "the transaction is not in good faith", see this court's recent decision in *Ng Eng Ghee v Mamata Kapildev Dave* [2009] SGCA 14 at [126]–[133]).

48 In an extrajudicial lecture, for example, Lord Steyn identified both a subjective element as well as an objective element in the doctrine of good faith (see Johan Steyn, "Contract Law: Fulfilling the Reasonable Expectations of Honest Men" (1997) 113 LQR 433 ("Lord Steyn's 1997 article")). In so far as the former element was concerned, the learned law lord was of the view that there had to be a "threshold requirement … that the party must act honestly" (at 438), whilst, in so far as the latter element was concerned, there had to be "the observance of reasonable commercial standards of fair dealing in the conclusion and performance of the transaction concerned" (*ibid*). However, although Lord Steyn acknowledged the existence of the doctrine of good faith in the above-mentioned article, he was *not* prepared to advocate the introduction of a *general* duty of good faith in English contract law (see Lord Steyn's 1997 article at 439; see also similar pronouncements by Lord Steyn in two other articles, "Does Legal Formalism Hold Sway in England?" (1996) 49 CLP 43 ("Lord Steyn's 1996 article") at 52 as well as "The Role of Good Faith and Fair Dealing in Contract Law: A Hair-Shirt Philosophy?" [1991] Denning LJ 131 at 140).

49 There have, in fact, also been other formulations of the concept of good faith as well. One formulation is the famous "excluder thesis" advanced by Prof R S Summers in his seminal article, "'Good Faith' in General Contract Law and the Sales Provisions of the Uniform Commercial Code" (1968) 54 Va L Rev 195. Under this thesis, the concept of "good faith" is "a phrase which has no

general meaning or meanings of its own, but which serves to exclude many heterogeneous forms of bad faith" (at 196) – hence, the appellation "excluder" (*ibid*). Another formulation, the "forgone opportunities thesis", is by Prof Burton (see Steven J Burton, "Breach of Contract and the Common Law Duty to Perform in Good Faith" (1980) 94 Harv L Rev 369, especially at 373). Significantly, there was in fact a subsequent *debate* between the two writers just referred to in the present paragraph (see Robert S Summers, "The General Duty of Good Faith – Its Recognition and Conceptualization" (1982) 67 Cornell L Rev 810 and Steven J Burton, "More on Good Faith Performance of a Contract: A Reply to Professor Summers" (1984) 69 Iowa L Rev 497; see also, generally, Emily M S Houh, "The Doctrine of Good Faith in Contract Law: A (Nearly) Empty Vessel?" [2005] Utah L Rev 1, especially at 5–13, as well as Harold Dubroff, "The Implied Covenant of Good Faith in Contract Interpretation and Gap-Filling: Reviling a Revered Relic" (2006) 80 St John's L Rev 559 at 591–609).

50 It should be noted that there have also been vigorous arguments canvassed *against* the doctrine of good faith as well, notably by Prof Bridge (see Michael G Bridge, "Does Anglo-Canadian Contract Law Need a Doctrine of Good Faith?" (1984) 9 CBLJ 385, where, *inter alia*, *both* the views of Prof Summers and those of Prof Burton as noted in the preceding paragraph are subject to critique).

51 Indeed, the copiousness as well as the variety of (and, perhaps more importantly, the debates in) the academic literature (coupled with the relative dearth of case law) suggest that the doctrine of good faith is far from settled. The case law itself appears to be in a state of flux: see, for example (and most notably), the conflicting views expressed (in the Australian context) by Priestley JA in the New South Wales Court of Appeal decision of *Renard* ([43] *supra*) at 263–268 on the one hand and by Gummow J in the Federal Court of Australia decision of *Service Station Association Ltd v Berg Bennett & Associates Pty Ltd* (1993) 117 ALR 393 ("*Service Station Association*") at 401–407 on the other (it should be noted, however, that, in terms of the number of precedents, there appears to be some support for the approach adopted in *Renard*: see, for example, the Federal Court of Australia decision of *Hughes Aircraft Systems International v Airservices Australia* (1997) 146 ALR 1 at 36–37 *per* Finn J (*cf* the Privy Council's decision in the New Zealand case of *Pratt Contractors Ltd v Transit New Zealand* [2004] BLR 143, especially at [45]), the New South Wales Court of Appeal decisions of *Alcatel* ([43] *supra*) and *Vodafone Pacific Ltd v Mobile Innovations Ltd* [2004] NSWCA 15, as well as the Federal Court of Australia decision of *Garry Rogers Motors (Aust) Pty Ltd v Subaru (Aust) Pty Ltd* [1999] FCA 903; see also, generally, Elisabeth Peden, "Incorporating Terms of Good Faith in Contract Law in Australia" (2001) 23 Syd L Rev 222 ("Peden's 2001 article") and Tyrone M Carlin, "The Rise (and Fall?) of Implied Duties of Good Faith in Contractual Performance in Australia" (2002) 25 UNSW LJ 99).

52 However, two writers have recently argued vigorously that good faith is inherent in *all* aspects of the law of contract and that there is therefore *no* reason for any term concerning good faith to be *implied* into a contract (see generally Carter & Peden on "Good Faith" ([43] *supra*) as well as Elisabeth Peden, *Good Faith in the Performance of Contracts* (LexisNexis Butterworths, 2003) at ch 6). Peden is of the view (at para 1.10 of *Good Faith in the Performance of Contracts*) that:

> [T]he principle of good faith should be seen not as an implied term, but rather as a principle that governs the implication of terms and [the] construction of contracts generally.

In a similar vein, the learned authors of Carter & Peden on "Good Faith" argue that good faith is not an independent concept, but, rather, something "already inherent in contract doctrines, rules and principles" (at 163). They take the view that, where the court implies a term of good faith, the court is implying either a term which is actually redundant or a term which, by definition, would impose a more onerous requirement. Such a term must be justified, the learned authors contend, by reference to the *particular* circumstances of each case and not by a general principle (*ie*, that of good faith).

Reference may also be made to S M Waddams, "Good Faith, Unconscionability and Reasonable Expectations" (1995) 9 JCL 55, and the differing views adopted in two leading textbooks (see generally N C Seddon & M P Ellinghaus, *Cheshire and Fifoot's Law of Contract: Ninth Australian Edition* (LexisNexis Butterworths, 2008) at paras 10.43–10.47; *contra* (and not surprisingly perhaps) J W Carter, Elisabeth Peden & G J Tolhurst, *Contract Law in Australia* (LexisNexis Butterworths, 5th Ed, 2007) at ch 2).

53 It is true, as Prof McKendrick pertinently points out, that "there are signs that the traditional English hostility towards a requirement of good faith might be abating" (see Ewan McKendrick, *Contract Law* (Palgrave Macmillan, 7th Ed, 2007) ("McKendrick") at p 265) and that "[t]he courts have adopted a more sympathetic stance on a number of occasions recently" (*ibid*) (see also the cases cited therein (*ibid*); and *cf* the oft-cited observations by Bingham LJ in the English Court of Appeal decision of *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd* [1989] QB 433 at 439, which observations were reiterated in the (also) English Court of Appeal decision of *Timeload Limited v British Telecommunications plc* [1995] EMLR 459 at 468 *per* Sir Thomas Bingham MR). However, this is still far from a ringing endorsement of the doctrine of good faith as such (and see generally Prof McKendrick's own essay, "Good Faith: A Matter of Principle?", in *Good Faith in Contract and Property* (A D M Forte ed) (Hart Publishing, 1999) at ch 3). Indeed, the more open approach under English law in recent years may be due in no small part to the fact that there are, owing to the civil law influences that have become relevant as a result of the UK's membership of the European Community (and see in this regard Hugh Collins, "Good Faith in European Contract Law" (1994) 14 OJLS 229 as well as *Good Faith in European Contract Law* (Richard Zimmermann & Simon Whittaker eds) (Cambridge University Press, 2000)), express references to "good faith" in the Unfair Terms in Consumer Contracts Regulations 1999 (SI 1999 No 2083) (UK) and the Commercial Agents (Council Directive) Regulations 1993 (SI 1993 No 3053) (UK) (see McKendrick at p 265; reference may also be made to the House of Lords decision of *Director General of Fair Trading v First National Bank plc* [2002] 1 AC 481), none of which applies in the Singapore context.

54 Prof Furmston confirms the observation which we have just made in the preceding paragraph, *ie*, that the doctrine of good faith, although not lacking in supporters, particularly from theoretical as well as aspirational perspectives (see, for example, Roger Brownsword, "'Good Faith in Contracts' Revisited" (1996) 4 CLP 111 and, by the same author, "Two Concepts of Good Faith" (1994) 7 JCL 197), is nevertheless still far from being an established doctrine under English law, as follows (see M P Furmston, *Cheshire, Fifoot and Furmston's Law of Contract* (Oxford University Press, 15th Ed, 2007) at pp 32–33):

> Do the parties owe each other a duty to negotiate in good faith? Do the parties, once the contract is concluded, owe each other a duty to perform the contract in good faith? Until recently, English lawyers would not have asked themselves these questions or, if asked, would have dismissed them with a cursory 'of course not'. On being told that the German civil code imposed a duty to perform a contract in good faith or that the Italian civil code provides for a duty to negotiate in good faith, a thoughtful English lawyer might have responded by suggesting that the practical problems covered by these code positions were often covered in English law but in different ways. *This may still be regarded as the orthodox position but the literature of English law has begun to consider much more carefully whether there might not be merit in explicitly recognising the advantages of imposing good faith duties on negotiation and performance.* This view is reinforced by the fact that other common law systems have already moved in this direction [citing § 1**I**203 of the American Uniform Commercial Code, § 205 of the American Law Institute's *Restatement (Second) of Contracts* as well as *Renard* ([43] *supra*), but not *Service Station Association* ([51] *supra*)]. … *It is not inconceivable that on appropriate facts and with skilful argument, English law may make* ***tentative*** *steps in the same direction*.

[emphasis added in italics and bold italics]

55 Indeed, it would appear that even a more *limited* reform in the context of recognising a duty of good faith in the negotiation of contracts is met by the obstacle presented by the House of Lords decision of *Walford v Miles* [1992] 2 AC 128 ("*Walford*"), where Lord Ackner, who delivered the leading judgment, stated (at 138):

> [T]he concept of a duty to carry on negotiations in good faith is inherently repugnant to the adverserial [*sic*] position of the parties when involved in negotiations. Each party to the negotiations is entitled to pursue his (or her) own interest, so long as he avoids making misrepresentations. To advance that interest he must be entitled, if he thinks it appropriate, to threaten to withdraw from further negotiations or to withdraw in fact, in the hope that the opposite party may seek to reopen the negotiations by offering him improved terms. … A duty to negotiate in good faith is … unworkable in practice as it is inherently inconsistent with the position of a negotiating party.

It should, however, be noted that Lord Steyn has commented that the above ruling in *Walford* is "surprising" (see Lord Steyn's 1997 article ([48] *supra*) at 439). The learned law lord has also (in an extrajudicial lecture) stated that, "[w]hile [he does] *not* argue for the introduction of a *general* duty of good faith in contract law, it is difficult to see why an express agreement to negotiate in good faith should be invalid" [emphasis added] (see Lord Steyn's 1996 article ([48] *supra*) at 52) (on the issue of whether there is a duty of good faith in the context of contract negotiations, reference may also be made to A F Mason, "Contract, Good Faith and Equitable Standards in Fair Dealing" (2000) 116 LQR 66 at 80–83 and, generally, the *contrasting* approach adopted in the New South Wales Court of Appeal decisions of *Coal Cliff Collieries Pty Ltd v Sijehama Pty Ltd* (1991) 24 NSWLR 1 and *Australis Media Holdings Pty Ltd v Telstra Corporation Ltd* (1998) 43 NSWLR 104; although *cf* J W Carter & M P Furmston, "Good Faith and Fairness in the Negotiation of Contracts: Part I" (1994) 8 JCL 1 and, by the same authors, "Good Faith and Fairness in the Negotiation of Contracts: Part II" (1995) 8 JCL 93). It should also be observed that – for the moment at least – *Walford* appears to be good law in the Singapore context (see, for example, the Singapore High Court decisions of *Climax Manufacturing Co Ltd v Colles Paragon Converters (S) Pte Ltd* [2000] 1 SLR 245 at [32], *United Artists Singapore Theatres Pte Ltd v Parkway Properties Pte Ltd* [2003] 1 SLR 791 at [214] and *Grossner Jens v Raffles Holdings Ltd* [2004] 1 SLR 202 at [43]). On a broader level, in fact, discourse on the doctrine of good faith continues and the legal topography in this particular area of the law is far from settled (see, for example (in addition to the legal literature already cited above), *Good Faith in Contract: Concept and Context* (Roger Brownsword, Norma J Hird & Geraint Howells eds) (Ashgate, 1999) ("*Good Faith in Contract*") and Vanessa Sims, "Good Faith in Contract Law: Of Triggers and Concentric Circles" (2005) 16 KCLJ 293).

56 The situation in other jurisdictions does not appear to be much clearer. For instance, we have already seen (at [51] above) that the situation in the *Australian* context is, at best, ambiguous.

57 It is also interesting to note that one learned commentator has recently pointed to the fact that the *American* doctrine of good faith in contract law (which is firmly established as an implied covenant under both § 1**I**203 of the Uniform Commercial Code and § 205 of the American Law Institute's *Restatement (Second) of Contracts*, albeit in relation to the performance and enforcement of contracts as opposed to pre-contract negotiations) is no longer as settled as it used to be thought and is also apparently in a state of flux (see Howard O Hunter, "The Growing Uncertainty about Good Faith in American Contract Law" (2004) 20 JCL 50, which was written almost a decade after the somewhat sanguine essay by Prof Farnsworth (see E Allan Farnsworth, "Good Faith in Contract Performance" in *Good Faith and Fault in Contract Law* (Jack Beatson & Daniel Friedmann eds)

(Clarendon Press, 1995) at ch 6)).

58 In Canada, there was a proposal by the Ontario Law Reform Commission to the effect that *legislation* should give recognition to the doctrine of good faith in the performance and enforcement of contracts based on § 205 of the (American) *Restatement (Second) of Contracts* referred to in the preceding paragraph (see ch 9 of Ontario Law Reform Commission, *Report on Amendment of the Law of Contract* (1987)). However, that was over two decades ago. Further, the doctrine may well be in a state of flux not only in the American context (as noted briefly in the preceding paragraph), but also (apparently) in the Canadian context as well (see generally David Stack, "The Two Standards of Good Faith in Canadian Contract Law" (1999) 62 Saskatchewan L Rev 201).

59 A valuable (albeit somewhat dated) comparative overview of the doctrine of good faith can be found in a work already referred to, *viz*, *Good Faith in Contract* ([55] *supra*). It is also significant in the present regard because there appear (from this particular work) to be substantive difficulties with the doctrine of good faith even in jurisdictions where it has been legislatively mandated – which difficulties appear to be general ones that are unlikely to have altered with the passage of time since this work was published.

60 In the circumstances, it is not surprising that the doctrine of good faith continues (as mentioned at [47] above) to be a fledgling one in the Commonwealth. Much clarification is required, even on a theoretical level. Needless to say, until the theoretical foundations as well as the structure of this doctrine are settled, it would be inadvisable (to say the least) to even attempt to apply it in the practical sphere (see also *Service Station Association* ([51] *supra*), especially at 406–407 (*per* Gummow J); *cf* Peden's 2001 article ([51] *supra*) at 228–230). In the context of the present appeal, this is, in our view, the strongest reason as to why we cannot accede to the appellant's argument that this court should endorse an implied duty of good faith in the Singapore context. The First Implied Term should not, therefore, be implied into the Agency Agreement.

Should a term be implied "in fact"?

61 Our decision on the First Implied Term does not conclude the Second Main Issue (as set out at sub-para (b) of [24] above) in favour of the respondents. It will be recalled that the appellant also argued that the Second Implied Term (reproduced at [42] above) ought to be implied into the Agency Agreement either in addition or as an alternative to the First Implied Term. The Second Implied Term is much more specific and would (as already pointed out above at [43]) fall within the *other* category of implied terms, *viz*, "terms implied in *fact*" (*cf* the recent English Court of Appeal decision of *Socimer International Bank Ltd v Standard Bank London Ltd* [2008] 1 Lloyd's Rep 558, although *cf*, in turn, Elisabeth Peden, "'Implicit Good Faith' – or Do We Still Need an Implied Term of Good Faith?" (2009) 25 JCL 50). It will also be recalled that, for this particular category of implied terms, whether the term in question ought to be implied into the contract depends upon the *particular factual matrix* concerned (see above at [35]). Hence, a close scrutiny of the relevant facts of the present proceedings is imperative. It should, however, be observed at this juncture that, although it is possible to incorporate the doctrine of good faith into a contract under this narrower category of implied terms (*cf* Peden's 2001 article ([51] *supra*) at 227–228), this would not, in our view, be a very persuasive argument, having regard to the state of flux that the doctrine of good faith continues to be in (see generally the analysis above at [46]–[60]). However, *even if* the *doctrine* of good faith is not *directly* applicable as such (*ie*, as a "term implied in fact"), this does *not necessarily* mean that the *concept* of good faith would also be excluded (see also Carter & Peden on "Good Faith" ([43] *supra*) and *Good Faith in the Performance of Contracts* ([52] *supra*) at ch 6). Nevertheless, what *is* clear in the context of an analysis based on the category of "terms implied in *fact*" is that, whilst the *concept* of good faith (or, more likely, the elements thereof) might be present, the focus of the court

would, as already stated earlier in the present paragraph, be on the *particular factual matrix* before it.

62 We earlier observed (at [45] above) that the caveat by R E Megarry (as set out at, likewise, [45] above) is a *general* one and applies *equally* to the situation where it is sought to imply a "term implied in fact" (as opposed to a "term implied in law") into a contract. Indeed, this is implicit, in any event, in the two tests that are applicable for the purposes of determining whether a "term implied in fact" should be implied into a contract, *viz*, the "business efficacy" and the "officious bystander" tests, respectively (see [36] above). Underlying both tests, in this regard, is the concept of *necessity*.

63 The contractual relationship between the appellant and the first respondent in the present appeal is one of agency. Indeed, one of the key provisions in the Agency Agreement is cl 6, which reads as follows (also reproduced above at [8]):

> Commission
>
> The Company [*ie*, the first respondent] shall pay the Remisier [*ie*, the appellant] a commission equivalent to 40% of the commission charged by the Company to clients on transactions that are dealt by or through the Remisier in the name of [the] Company during the period twelve months from the date of commencement of this Agreement. Thereafter, the commission rate will be adjusted to 50% of the commission charged by the Company to clients on transactions that are dealt by or through the Remisier in the name of [the] Company.

64 It would appear, at first blush, that the appellant is not entitled to claim any commission from the first respondent simply because the transactions upon which his claim is based ("the relevant transactions") were not completed in accordance with the terms of cl 6. This, however, is precisely why the appellant argues for the implication of the Second Implied Term, namely, that the first respondent would not do anything to deprive him from earning his commission. Put simply, the argument advanced by the appellant is that he *would have* had *at least the opportunity* to complete the relevant transactions pursuant to cl 6 (and thereby earn the corresponding amount of commission) had the first respondent not intervened and (crudely put) "hijacked" those transactions by dealing with both Sandt and Aktieninvestor directly. That is why, the appellant argues, the court must imply the Second Implied Term into the Agency Agreement. The appellant cited a number of cases to support his argument that this particular term ought to be implied into the Agency Agreement. We should point out at this juncture that, as a matter of general principle, the courts should treat case precedents in the context of "terms implied in *fact*" with some caution. This is because, by the very nature of this category of implied terms, whether or not such a term is to be implied into a contract is heavily dependent upon the *particular factual matrix* concerned. There may, of course, be situations where the factual matrix of the case at hand is on all fours with that to be found in an earlier case. However, such situations will, in the nature of things, be relatively rare. Hence, where "terms implied in fact" are concerned, prior decisions ought, in our view, to be utilised (at best) as guides only (in particular, as guides for general principles), unless (as just mentioned) the fact situation before the court is on all fours with that in the prior case(s) relied on. In the present appeal, the fact situations in the cases cited by the appellant in support of his claim based on the Second Implied Term are *not* on all fours with the fact situation before this court. Indeed, as we shall see, those cases involve *more compelling* fact situations which clearly merited the implication of the terms in question. Let us elaborate.

65 The leading decision in the context of the present appeal is probably that of the House of Lords in *Luxor (Eastbourne), Limited v Cooper* [1941] AC 108 ("*Luxor*"). Although the decision is

somewhat dated, we find that the *general principles* enunciated therein are still helpful today. Because of its importance, we need to examine this particular decision in some detail. Before proceeding to do so, however, it should be noted that, in the leading textbook on the law of agency by Prof F M B Reynolds, *Bowstead and Reynolds on Agency* (Sweet & Maxwell, 18th Ed, 2006) ("*Bowstead and Reynolds*"), the issue is raised (at para 7–035) as to whether or not, instead of focusing on the question of implied *terms*, the House in *Luxor* ought to have focused on the question of an implied collateral *contract* on the basis of the "*unilateral contract*" analysis, as opposed to the "*bilateral contract*" analysis (as to the difference between these two modes of analysis, see *id* at para 7–038). However, notwithstanding the interesting questions raised from the perspective of conceptual analysis, it is clear (as Prof Reynolds himself accepts (*id* at para 7–035)) that *Luxor* was in fact decided on the basis of implied *terms*.

66 Simplifying the fact situation in *Luxor* ([65] *supra*) somewhat, in that case, an agent ("the plaintiff agent") sued his two principals ("the defendant companies") for commission which he alleged the latter had agreed to pay him in relation to the introduction by him of purchasers of the property of these companies. Unfortunately, however, the sale to these purchasers never took place as the defendant companies sold the property in question to *another party*. The plaintiff agent thus premised his claim (for commission or, alternatively, damages for breach of contract) on the basis of an *implied term* in the contract between him and the defendant companies to the effect that the latter undertook not to do anything to prevent him from earning his commission ("the alleged implied term in *Luxor*"). The plaintiff agent's claim was dismissed by Branson J at first instance, but that decision was reversed and the claim upheld by the English Court of Appeal. The defendant companies then appealed to the House of Lords.

67 It should be noted, at the outset, that *Luxor* ([65] *supra*) was decided *before* the broader category of "terms implied in law" had been formulated; in other words, it dealt with the narrower category of "terms implied in fact" (which focuses, as we have noted at [35] above, on the presumed intention of the contracting parties). We are likewise presently dealing with this latter category where the Second Implied Term is concerned, having rejected the attempt by the appellant to imply the First Implied Term based on the former category for the reasons detailed above (at [44]–[60]). It should also be noted that it has been argued persuasively that (see *Bowstead and Reynolds* ([65] *supra*) at para 7–038):

> Since the contract for an agent working for commission seems to be too varied to rank as one of which general incidents are worked out, … there will only be implications [of terms] on the basis of "business efficacy", and such implications have hitherto been rare.

Indeed, we would tend to agree with this view and, consequently, most terms implied in this particular context – namely, that involving what we shall hereafter refer to as a "commission contract", *ie*, a contract under which an agent is entitled to be paid commission if a certain event ("the Event"), which involves the rendering of some service or the doing of some work by the agent on behalf of its principal, occurs – would be "terms implied in fact" as opposed to "terms implied in law".

68 Returning to the facts of and the holding in *Luxor* ([65] *supra*), the House of Lords held that the alleged implied term in *Luxor* (*viz*, that the defendant companies would "do nothing to prevent the satisfactory completion of the transaction so as to deprive the [plaintiff agent] of the agreed commission" (*id* at 115)) could *not* be implied in favour of the plaintiff agent. It is significant that Viscount Simon LC noted (at 116) that the plaintiff agent "was *not* appointed [as the] *sole agent*, and there might have been half-a-dozen competitors for the proffered commission" [emphasis added] (and, on the topic of sole or exclusive agency, see generally *Bowstead and Reynolds* ([65] *supra*) at para 7–036). On the substantive issue proper, the learned law lord was of the view that the alleged

implied term in *Luxor* could *not* be implied in favour of the plaintiff agent because it was *by no means clear* that the defendant companies (which were the vendors of the subject property) would have *acquiesced in giving up all their freedom of choice by binding themselves irrevocably to sell to the purchaser recommended by the plaintiff agent (and no other purchaser)* (see *Luxor* at 116–117). As Viscount Simon put it (*id* at 117):

> The owner [*ie*, the principal] is offering to the agent a reward if the agent's activity helps to bring about an actual sale, but that is no reason why the owner should not remain free to sell his property through other channels.

He added (*id* at 118):

> If it really were the common intention of [the] owner and [the] agent that the owner should be bound in the manner suggested [*ie*, to sell only to the purchaser introduced by the agent], there would be no difficulty in so providing by an *express* term of the contract. [emphasis added]

Again, in a similar vein, the learned law lord observed a little later in his judgment, as follows (*id* at 120–121):

> The agent is promised a reward in return for an event, and the event has not happened. He runs the risk of disappointment, *but if he is not willing to run the risk he should introduce into the express terms of the contract the clause which protects him.* [emphasis added]

69 Viscount Simon accepted, however, that there might be situations where the court *would* be prepared to imply a term (along the lines of the alleged implied term in *Luxor* ([65] *supra*)) in favour of the agent (*id* at 118):

> … If A employs B for reward to do a piece of work for him which requires outlay and effort on B's part and which depends on the continued existence of a given subject-matter which is under A's control … there may be an implied term that A will not prevent B [from] doing the work by destroying the subject-matter. And, generally speaking, where B is employed by A to do a piece of work which requires A's co-operation (e.g. to paint A's portrait), it is implied that the necessary co-operation will be forthcoming (e.g. A will give sittings to the artist). But the work which the [plaintiff agent] was invited to do was to produce an offer for the [defendant companies'] property – a piece of work which does not require the [defendant companies'] co-operation at all (except in giving a prospective purchaser reasonable opportunity to inspect the property which no doubt would be an implied term) – and I am unable to deduce from the fact that the [plaintiff agent] was invited to produce an offer the implication that the [defendant companies] promised the [plaintiff agent] that they would accept [the offer procured by the plaintiff agent] unless "just excuse" for refusal existed.

70 In the final analysis, everything must, as a matter of *general principle*, depend on the precise factual matrix of the case at hand as well as on the general principles of the common law of contract. As Lord Russell of Killowen (with whom, it should be noted, Lord Thankerton agreed (*id* at 129)) put it (*id* at 124–125):

> A few preliminary observations occur to me. (I.) Commission contracts are subject to no peculiar rules or principles of their own; the law which governs them is the law which governs all contracts and all questions of agency. (2.) No general rule can be laid down by which the rights of the agent or the liability of the principal under commission contracts are to be determined. In each case these must depend upon the exact terms of the contract in question, and upon the

true construction of those terms. And (3.) contracts by which owners of property, desiring to dispose of [their property], put [the property] in the hands of agents on commission terms, are not (in default of specific provisions) contracts of employment in the ordinary meaning of those words. No obligation is imposed on the agent to do anything. The contracts are merely promises binding on the principal to pay a sum of money upon the happening of a specified event, which involves the rendering of some service by the agent. There is no real analogy between such contracts, and contracts of employment by which one party binds himself to do certain work, and the other binds himself to pay remuneration for the doing of [that work].

71 That having been said, Lord Russell found no reason to imply the alleged implied term in *Luxor* ([65] *supra*) in favour of the plaintiff agent on the facts before him. In his view, the fact that the agent, under a commission contract in which the Event was the sale of the principal's property, might not receive any commission if the principal sold the subject property to a purchaser other than the purchaser procured by the agent was of no legal relevance inasmuch as "[t]he agent [took] the risk in the hope of a substantial remuneration for comparatively small exertion" (*id* at 125; see also *id* at 120–121 *per* Viscount Simon (reproduced above at [68])). However, Lord Russell too, like Viscount Simon (see *Luxor* at 118 (reproduced at [69] above)), was prepared to imply a term (along the lines of the alleged implied term in *Luxor*) in favour of the agent in certain *other* circumstances (see *Luxor* at 126):

> *The position will no doubt be different if the matter has proceeded to the stage of a binding contract having been made between the principal and the agent's client*. In that case it can be said with truth that a "purchaser" has been introduced by the agent; *in other words the event has happened upon the occurrence of which a right to the promised commission has become vested in the agent. From that moment no act or omission by the principal can deprive the agent of that vested right*. [emphasis added]

In a similar vein, he observed later in the judgment thus (*id* at 128–129):

> [I]n my opinion there is no necessity in [commission] contracts for any implication; and the legal position can be stated thus:– *If according to the true construction of the contract the event has happened upon the happening of which the agent has acquired a vested right to the commission* (by which I mean that it is debitum in praesenti even though only solvendum in futuro), *then no act or omission by the principal or anyone else can deprive the agent of that right; but until that event has happened the agent cannot complain if the principal refuses to proceed with, or carry to completion, the transaction with the agent's client.* [emphasis added]

72 And, like Viscount Simon (*id* at 118 (reproduced at [69] above)), Lord Russell was of the view that, where the Event involved the carrying out by the agent of some work which required the principal's co-operation, a term ought also to be implied to the effect that "the principal [would] do nothing to prevent the agent from doing the work which the contract [bound] him to do" (see *Luxor* ([65] *supra*) at 128). However, as already mentioned, the factual scenario in *Luxor* was quite different (*id* at 126):

> … I do not favour the view that an agent who has not earned his commission according to the express terms of the contract is entitled to damages for breach of some term to be implied. I see no necessity which compels the implication.

73 Turning to Lord Wright's judgment in *Luxor* ([65] *supra*), it is clear that the learned law lord was likewise of the view that there was no magical formula which governed commission contracts and that, "when deciding disputes in regard to commission [contracts]" (*id* at 130), everything would

depend on the precise terms as well as the context of the contract in question (see also *id* at 124 *per* Lord Russell (reproduced above at [70])). As Lord Wright pertinently observed (see *Luxor* at 130):

> [W]hat is in question in all these cases [involving commission contracts] is the interpretation of a particular contract. I deprecate in general the attempt to enunciate decisions on the construction of agreements as if they embodied rules of law. To some extent decisions on one contract may help by way of analogy and illustration in the decision [on] another contract. But however similar the contracts may appear, the decision as to each must depend on the consideration of the language of the particular contract, read in the light of the material circumstances of the parties in view of which the contract is made.

74 Lord Wright also issued a salutary reminder that the court ought not to rewrite contracts for the parties, utilising the implied term as a convenient tool or instrument for this purpose (*id* at 137–138):

> There have been several general statements by high authorities on the power of the Court to imply particular terms in contracts. It is agreed on all sides that the presumption is against the adding to contracts of terms which the parties have not expressed. The general presumption is that the parties have expressed every material term which they intended should govern their agreement, whether oral or in writing. But it is well recognized that there may be cases where obviously some term must be implied if the intention of the parties is not to be defeated, some term of which it can be predicated that "it goes without saying," some term not expressed but necessary to give to the transaction such business efficacy as the parties must have intended. *This does not mean that the Court can embark on a reconstruction of the agreement on equitable principles, or on a view of what the parties should, in the opinion of the Court, reasonably have contemplated. The implication [of the term in question] must arise inevitably to give effect to the intention of the parties.*
>
> These general observations do little more than warn judges that they have no right to make contracts for the parties. Their province is to interpret contracts. But language is imperfect and there may be, as it were, obvious interstices in what is expressed which have to be filled up. Is there then any reason in the present case for thinking that there is some defect in expression or something omitted because it seemed too obvious to express? I cannot find any such reason.
>
> [emphasis added]

75 In so far as the particular contract between the plaintiff agent and the defendant companies in *Luxor* ([65] *supra*) was concerned, Lord Wright made the following observations, which merit setting out in some detail (*id* at 138–140):

> *[T]he vendor [*ie*, the principal] retains the right which belongs to him as property owner to dispose of his property as he thinks fit. There is no obligation between him and the potential purchaser, assuming, what is not here in question, that he has given no binding option. He may as between himself and the other party [*ie*, the potential purchaser] discontinue the negotiations for any reason or want of reason however capricious or selfish.* But it is said that as between himself and the agent the position is different. There is, it is said, a binding contract with the agent, and at least an inchoate right to commission [vested] in *the agent* who, in a case like the present, *may have done everything on his part requisite to earn his commission*. *But even so his contract is in terms that his right to commission should depend on a particular event, namely, the completion of the sale. His claim to commission when the sale is not completed … involves the contention that the principal [by] virtue of the contract with the*

commission agent has surrendered the freedom to dispose of or retain his own property which he unquestionably enjoys vis-a-vis [*sic*] *the other negotiating party. The commission agreement is, however, subordinate to the hoped for principal agreement of sale. It would be strange if what was preliminary or accessory should control the freedom of action of the principal in regard to the main transaction which everyone contemplates might never materialize. I cannot think that a property owner can be held, [by] virtue of a commission contract like this, to have bound himself by mere implication to complete the sale or to pay damages to the agent. Express words are in my opinion necessary to effect this result.* …

The case that the suggested term [*ie*, the alleged implied term in *Luxor*] is not properly to be implied becomes, in my opinion, even clearer when account is taken of some of the more general aspects of the course of business in these matters. *It is well known that in the ordinary course a property owner intending to sell may put his property on the books of several estate agents with each of whom he makes a contract for payment of commission on a sale. If he effects a sale to the client introduced by one agent, is he to be liable in damages to all the others for preventing them from earning their commission? Common sense and ordinary business understanding clearly give a negative answer.* Or suppose that having employed one agent whose client has made an offer, he receives a better offer from a buyer introduced by another agent and concludes the purchase with [that buyer]. It seems out of the question that he is thereby rendering himself liable in damages to the former agent. Or suppose that owing to changed circumstances he decides that he will not sell at all and breaks off negotiations with the agent's client, is he to be liable for damages to the agent? I can find no justification for such a view. *I am assuming a commission contract not containing special terms such as to impose an obligation on the vendor actually to sell through the particular agent to the potential purchaser introduced by that agent.* Contracts containing such terms, though not perhaps usual, are possible. But it is said that in the absence of special terms an obligation of that nature can be implied, subject, however, to the qualification that the owner retains his freedom to deal as he likes with his own [property] and to discontinue negotiations, *but only so long as in doing so he acts with reasonable excuse or just cause. I find it impossible to define these terms in this connection. If the commission agent has a right to claim commission or damages if the vendor abandons the negotiations and does not complete the sale, his doing so [*ie*, the vendor's abandonment of negotiations and non-completion of the sale] is a breach of contract vis-à-vis the agent and it is immaterial to the agent how sensible or reasonable the vendor's conduct may be from his [*ie*, the vendor's] own point of view. Such a qualified implication seems to me too complicated and artificial. The parties cannot properly be supposed to have intended it, nor can it be taken to be necessary to give business efficacy to the transaction. But I do not discuss this aspect further because, as already explained, I find no basis for the implication, whether general or qualified. And the great difficulty which the Courts have found in defining or applying the idea of "just cause or reasonable excuse" further goes to show that it is not an implied term necessary to give business efficacy to what the parties must have intended. Nor is the suggested implication made more plausible by expressing it in a negative form as an implied term that the principal will not prevent the agent [from] earning his commission. Such a term must be based upon something which under the contract the principal has agreed to do, of such a nature that failure to do it carries the consequence that the agent cannot earn the commission which would have become due if the principal had done what he had promised. For the purposes of the present problem this promise must be that he would complete the contract. Thus it all comes back to the same issue, namely, that there must be some breach of contract for which damages can be claimed.* …

[emphasis added]

76 Although Lord Wright was of the view that, in entering into a commission contract, "[t]he agent in practice [took] what [was] a business risk" (*id* at 141; see also *id* at 120 (*per* Viscount Simon) and 125 (*per* Lord Russell) (reproduced above at [68] and [71], respectively)), he did observe that there might nevertheless be exceptional situations where the agent was entitled to a remedy even though the Event (in the context of *Luxor* ([65] *supra*), the sale of the principal's property) had not occurred (*id* at 141–142; see also *id* at 126 and 128–129 *per* Lord Russell (reproduced above at [71])):

> I am assuming that the commission contract is of the type exemplified in this case. *The agent may, however, secure a form of contract to which what I have said does not apply. But it is necessary to reserve certain eventualities in which an agent may be entitled to damages where there is a failure to complete [the sale of the principal's property] even under a contract like the contract in this case. For instance, if the negotiations between the vendor [*ie*, the principal] and the purchaser have been duly concluded and a binding executory agreement has been achieved, different considerations may arise. The vendor is then no longer free to dispose of his property [as he pleases]. Though the sale is not completed the property in equity has passed from [the vendor] to the purchaser. If [the vendor] refuses to complete he would be guilty of a breach of agreement vis-à-vis the purchaser. I think, as at present advised, that it ought then to be held that he is also in breach of his contract with the commission agent, that is, of some term which can properly be implied. But that question and possibly some other questions do not arise in this case and may be reserved.* Furthermore, I have been dealing with a contract in regard to the sale of real property and there may be differences where the commission [contract] is in regard to transactions of a different character. On the whole, however, my opinion is that the contract in question means what it says, that the simple construction is the true construction and that there is no justification for the equitable reconstruction which the [English] Court of Appeal, following authorities which bound it, has applied. I would allow the appeal. [emphasis added]

In a similar vein, the learned law lord observed later in his judgment (see *Luxor* at 149–150):

> It may well be, as I have already stated, that as soon as a binding executory contract is effected between the employer [*ie*, the principal] and the purchaser, a different state of things arises. The property is transferred in equity and the seller [*ie*, the principal] can be specifically ordered to complete. The agent may then fairly claim that he is entitled to his commission or at least to substantial damages and a term of that nature may, I think, as at present advised be implied in the contract. It cannot have been contemplated that when a binding contract with the purchaser has been made on the agent's mediation, the principal can as between himself and the agent break that contract without breaking his contract with the agent. I understand that this was the view of Scrutton L.J. [in *George Trollope & Sons v Martyn Brothers* [1934] 2 KB 436], and though the question does not arise in this case, I am as at present advised in agreement with it. In that case it may fairly be said that the employer prevented the fulfilment of the condition [*ie*, the Event] and was in default under the commission [contract] just as much as under the agreement of sale. But while negotiations are still in progress, it is a different matter.

77 And, like both Viscount Simon and Lord Russell (*id* at, respectively, 118 and 128 (reproduced at, respectively, [69] and [72] above)), Lord Wright was also of the view that another exception would occur where the principal prevented the agent from performing its part of the bargain, which performance would entitle the agent to the commission promised under the commission contract. Indeed, Lord Wright was of the view that such conduct should, *in and of itself*, constitute a wrong (which would generally be a *breach of contract*) (see *Luxor* ([65] *supra*) at 148–149):

> When a defendant [*ie*, the principal] is charged by a plaintiff [*ie*, the agent] with having

prevented the plaintiff from fulfilling a condition on which his right to payment depends, it must, in my opinion, be shown that the defendant's act which prevented [the plaintiff from fulfilling the requisite condition] … was wrongful, and the wrong would be generally a breach of the contract. Thus in *Mackay* v. *Dick* [(1881) 6 App Cas 251], the maker of an excavating machine was required by the contract to send the machine for the purpose of being tested to the railway cutting which the buyer was engaged in constructing, and the buyer was only to be liable to pay for [the machine] if it there in [*sic*] working satisfied the test. This House held that the [buyer] had prevented fulfilment of the condition because they held that, it being the buyer's duty under the contract to provide the necessary facilities, he had failed to do so. Hence his default prevented the seller from satisfying the condition. The seller could therefore say that he had done all that lay on him to fulfil the condition and was to be taken to have implemented it. The test was only not satisfied because of the buyer's default. Thus when it is said in the present case that the [defendant companies] prevented the [plaintiff agent] from completing the contract it must be shown that the [defendant companies] broke some term of the contract between them and the [plaintiff agent]. The [defendant companies] cannot be held liable on the ground of prevention where all that happened was that they did, or omitted to do, something which as between themselves and the [plaintiff agent] they were free to do or omit to do. I question if there is any exception to this principle, but I am clear that there is no exception material to this case. Since … in my opinion there was no such implied term as the [plaintiff agent] claims, there can be no case of prevention rendering the [defendant companies] liable.

78 Lord Wright neatly summarised many of the points made above towards the end of his perceptive judgment thus (*id* at 150–151):

It may be said that on the view of Scrutton L.J. [in *George Trollope & Sons v Martyn Brothers* [1934] 2 KB 436], and on the view which I have been propounding, the prospect of the agent getting his reward is speculative and may be defeated by the arbitrary will of the principal. That may perhaps be so in some cases. But it is I think clear that under a contract like the present [*ie*, a commission contract under which the Event is the sale of the principal's property] the agent takes a risk in several respects; thus, for instance, the principal may sell independently of the agent to a purchaser other than the purchaser introduced by [the agent], or where the [agent's] employment is not as sole agent, [the principal] may sell through another agent. Why should not the agent take the chance also of the employer [*ie*, the principal] changing his mind and deciding not to sell at all? It is said that according to the term which, it is suggested, should be implied [the principal] can change his mind if he has a reasonable excuse or just cause. But then why should his freedom to dispose of his property be fettered even in this way? And what is a reasonable excuse or just cause? Is it to be decided from the point of view of the owner [*ie*, the principal] or from the point of view of the commission agent? It is just the difficulty of applying these vague phrases which has already led to so much litigation on this question. In my opinion the implied term is unworkable. Even in this case [*ie*, *Luxor*] Branson J. has taken one view [at first instance] and the [English] Court of Appeal another. If the suggested implied term is discarded, a contract such as the present will be simple and workable. Commission agents may sometimes fail to get the commission that they expected, but they will be relieved from disputes and litigation. And they can always, if they desire, demand what they consider [to be] a more favourable form of contract.

79 Lord Romer, who delivered the final judgment of the House, also emphasised many of the points made by his colleagues above, as follows (*id* at 153–155):

The [plaintiff agent] was not employed by the [defendant companies] to find a purchaser. He was not employed to do anything at all, and would have committed no breach of his agreement

with the [defendant companies] had he remained entirely inactive. There was no "contract of agency." *If A and B agree that B shall do some work for A for reward, it is no doubt an implied condition of the agreement that A shall not prevent B from performing his part of the contract, i.e., doing the work and so earning his reward. But I can see no ground whatsoever for implying any such condition where B is under no contractual obligation to do the work but has merely been promised by A a reward in the event of his doing it.* If B is under no obligation to do the work, why should A be under an implied obligation not to prevent him [from] doing it? In a case of this sort B will lose the reward should he fail for any reason to do the work. It is the risk that he runs and that he must be taken as being willing to run. I can find no reason for thinking that in such a case it matters in the least whether B's failure to do the work is due to his own volition or to some act on the part of A. …

… *But there are exceptional cases where in a contract of employment the employer [*ie, *the principal] is under a positive obligation. If, for instance, I employ an artist to paint my portrait I subject myself to the positive obligation of giving him the requisite sittings. The question, then, to be determined* upon the hypothesis that I mentioned just now *is this: Where an owner of property employs an agent to find a purchaser, which must mean at least a person who enters into a binding contract to purchase, is it an implied term of the contract of agency that, after the agent has introduced a person who is ready, willing and able to purchase at a price assented to by the principal, the principal shall enter into a contract with that person to sell at the agreed price subject only to the qualification that he may refuse to do so if he has just cause or reasonable excuse for his refusal?* This qualification must plainly be added, for the [plaintiff agent] does not contend, and no one could successfully contend, that the obligation of the principal to enter into a contract is an unconditional one.

In my opinion the question must be answered in the negative. Any such implied condition would be either wholly unreasonable or … void for uncertainty. If it means that the employer is to enter into a contract on such terms as the purchaser may require it is obviously unreasonable. If it means that the contract is to contain such terms as to commencement of title, date of completion, requisitions, restrictive covenants and so forth as may be just and reasonable it would be void for uncertainty. For who can possibly judge what in such a case is just and reasonable as between the employer and the agent? Because it is the position as it affects the agent that would have to be considered. Nothing for which the [employer] might stipulate as to the terms of the contract could be considered unjust or unreasonable as between him and the purchaser. Take the present case. The offer of the proposed purchaser introduced by the [plaintiff agent was purportedly] … accepted by the directors of the [defendant] companies at a board meeting held on October 2, 1935. As all the directors were personally interested in the matter the resolution passed was a nullity. But even if it bound the [defendant companies] the acceptance of the offer resolved upon was an acceptance "subject to contract." The object of inserting these words in an acceptance is well known. It is to save the vendors from being bound by an "open contract" and leaves them at liberty to insist on such terms being embodied in the contract as they may think right. *If the [plaintiff agent's] contention be right, however, the [defendant companies] were under an implied obligation to insert only such terms as might eventually be held by some unspecified tribunal to be just and reasonable as between them and the [plaintiff agent]. The contention, I confess, appears to me to be utterly absurd.* …

[emphasis added]

80 Returning to the facts of the present appeal, it might be argued that *Luxor* ([65] *supra*) can be distinguished inasmuch as the case related to a much clearer (and easier) fact situation. In particular, the defendant companies had sold the property concerned to an *entirely different*

purchaser altogether from the purchaser introduced by the plaintiff agent, whereas, in the present appeal, there was an actual (or, *vis-à-vis* Aktieninvestor, a potential) relationship between the agent (*ie*, the appellant) and the purchasers concerned (*ie*, Sandt and Aktieninvestor). Although this is not an unpersuasive argument, one must return to *general principles*. And, in so far as general principles are concerned, the decision in *Luxor* does set out at least four fundamental – and useful – guidelines which (as we shall see) are of assistance in the context of the present appeal.

81 The *first* guideline is perhaps an obvious one and is, in any event, *inherent* in any attempt to imply a term into a contract. It is that the court will *not rewrite* the contract for the parties based on its own sense of the justice of the case. The key focus is simply (in relation to "terms implied in fact") to give effect to the *presumed* intention of *the parties*. The word "presumed" is important simply because the term concerned is not, *ex hypothesi*, expressed by the parties. However, it is implied by the court if it is necessary to give business efficacy to the contract and is such that, (pursuant to the "officious bystander" test) if *the parties* had been asked by an officious bystander as to whether or not they would have included it in the contract had it not slipped their minds at the time the contract was concluded, they would unhesitatingly have responded, "Oh, of course!"

82 The *second* – and perhaps most important – guideline laid down in *Luxor* ([65] *supra*) ("the Second Guideline") is that the court will *not* interfere with the *freedom* of any contracting party, except in the most exceptional circumstances. Hence, in *Luxor*, the House refused to impose fetters on the right of the defendant companies to sell their property as they deemed fit. It also, as we have seen (at [68], [71] and [78] above), observed that the plaintiff agent had taken a business risk in laying the necessary groundwork for a successful purchase of the defendant companies' property, upon the completion of which purchase he would have received his commission. Indeed, this important point centring on the principal's freedom to, *inter alia*, deal with its property as it deems fit is emphasised by the law lords throughout *Luxor* (see the comments by Viscount Simon (*id* at 117), Lord Wright (*id* at 138–140) and Lord Romer (*id* at 153–155) as reproduced at [68], [75] and [79], respectively; see further *Luxor* at 143 *per* Lord Wright). As Lord Wright aptly put it (*id* at 145):

> These cases [*ie*, the cases discussed at 143–144 of *Luxor*], no doubt, deal with a different type of commission [contract], but they illustrate how essential it is to examine the express terms of the contract and *how difficult it is to imply in these cases a term restricting in the interests of an agent the freedom of a principal to deal with his own property or business according to his own judgment.* [emphasis added]

83 The *third* guideline set out in *Luxor* ([65] *supra*) ("the Third Guideline") is related to – and arises from – the Second Guideline: It is that, in balancing the rights of the contracting parties, the court may, in *exceptional* circumstances, nevertheless imply a term in favour of the agent so as to entitle the agent to claim commission even though the Event has not occurred. One of the most obvious situations where this may be done (which is, in fact, covered in *Luxor* itself at, *inter alia*, 126 and 141–142 (see the passages reproduced above at [71] and [76], respectively)) is where the agent has done all that it can and is obliged to do pursuant to the commission contract to bring about the Event. Put simply, there is *nothing more* that *the agent* need (or, indeed, can) do in order to be entitled to the commission promised under the commission contract. The problem that arises is that, in the usual case (absent any express term to the contrary), where the Event is a transaction between the principal and a third party introduced by the agent, the agent would only be entitled to be paid its commission *after the completion of the transaction concerned (the agent being the effective cause of that transaction since it introduced the third party to the principal)*. If, for example, the principal refuses to complete the transaction even though it has already entered into a binding contract with the third party, the agent would, strictly speaking, not be entitled to its commission. In such circumstances, however, the court will imply a term that the principal will not

refuse to complete the transaction, given the fact that the agent has done all that it can do to bring about the transaction and, being the effective cause of that transaction, has a legal right to commission, which right (as Lord Russell and Lord Wright put it in *Luxor* at, *inter alia*, 126 and 129 as well as 141–142, respectively (see the passages reproduced above at [71] and [76])) has, in a manner of speaking, been "vested" in the agent.

84 Another obvious situation where the court may imply a term in favour of the agent under the Third Guideline (which situation is also covered in *Luxor* ([65] *supra*) (see above at [69], [72], [76], [77] and [79])) is where the principal attempts to conduct itself in such a manner as to prevent the agent from performing its part of the bargain. Such conduct on the principal's part strikes at the very heart of the commission contract, and it would surely be wrong to allow the principal to benefit from what is, in essence, its own wrong. In this scenario, it is eminently logical and commonsensical to imply into the commission contract a term to the effect that the principal will not conduct itself so as to prevent the agent from fulfilling its part of the bargain. This accords not only with the "business efficacy" test, but also with the unanimous answer in the positive which the contracting parties would have given had an officious bystander intervened at the time they entered into the contract and asked if they intended to include the said term in their contract (pursuant to the "officious bystander" test).

85 A possible variation of the situation referred to in the preceding paragraph is where it is proved by the agent that there has been a *wilful default by the principal in order (and solely) to avoid payment of the commission to the agent* (see, in particular, the House of Lords decision of *L French and Company, Limited v Leeston Shipping Company, Limited* [1922] 1 AC 451 ("*L French and Company*")). This appears, however, to be a much more *specific* (and, indeed, *more limited*) situation, which is clearly *not* established where it can be proved that the principal is merely exercising the contractual *freedom* which is the basis of the *Second Guideline* (see above at [82] as well as *L French and Company*, especially at 456). The Second Guideline (*viz*, that the court will not usually interfere with the freedom of any of the contracting parties) is the *general* rule, to which only limited exceptions would apply pursuant to the Third Guideline. One must, however, be careful about the particular situation posited in this paragraph. Indeed, it would appear that the clearest example in this regard would be one where the agent has done all that it has undertaken to do pursuant to the commission contract, but the principal nevertheless indulges in conduct in order (and solely) to avoid paying commission to the agent. However, it would be realised by now that we have, in effect, come full circle – and back to the very situation set out in the first example given in respect of the Third Guideline, *viz*, where the right to the commission concerned has been "vested" in the agent (see [83] above).

86 The *fourth* guideline set out in *Luxor* ([65] *supra*) is an obvious one. It is not only related to the Third Guideline, but is also referred to expressly by at least two of the law lords in *Luxor* (at 118 and 120–121 *per* Viscount Simon as well as at 139 *per* Lord Wright (see the passages reproduced at, respectively, [68] and [75] above)). It is that there is nothing preventing the agent from insisting on an *express term* that fetters the freedom of the principal. An obvious example, in the context of a commission contract where the Event is the sale of the principal's property or product, would be a *sole (or an exclusive) agency clause* which mandates that the principal can only effect the sale of the property or product concerned through the agent – and no other party. There may be issues relating to inequality of bargaining power, but, in what is essentially a free market context, this is only to be expected. Indeed, the law will not interfere unless it can be demonstrated that certain lines have been crossed (for example, if undue influence or economic duress has been applied by one party on another). Although the line between mere commercial or market pressure on the one hand and undue influence or illegitimate pressure on the other may be a fine one, it undoubtedly exists – as it must in the even (and practical) balance which the courts endeavour to maintain between the

smooth functioning of commerce on the one hand and the prevention of legally unacceptable conduct on the other.

87 Other decisions do not, with respect, really add to the four general guidelines laid down in *Luxor* ([65] *supra*), as set out at [81]–[86] above. They are all applications, in one way or another, of one or more of these guidelines. The English Court of Appeal decision of *Alpha Trading Ltd v Dunnshaw-Patten Ltd* [1981] QB 290 ("*Alpha Trading*"), for example, was a clear instance of the operation of one of the exceptions referred to under the *Third Guideline* (namely, that delineated at [83] above). In that case, the plaintiff *had done all that it had to do under its commission contract* with its principal, the defendant. The defendant, however, was unwilling or unable to perform its part of the bargain in that it failed to complete the sale to the buyers introduced by the plaintiff (the completion of the sale being the Event). In the circumstances, therefore, it was not surprising that the court affirmed the decision of the trial judge, who had implied a term into the commission contract to the effect that the defendant would not fail to perform its contract with the buyers introduced by the plaintiff so as to deprive the plaintiff of its remuneration under the commission contract (see also the English Court of Appeal decision of *Martin-Smith v Williams* [1999] EMLR 571 and the English High Court decision of *George Moundreas & Co SA v Navimpex Centrala Navala* [1985] 2 Lloyd's Rep 515 at 517). Indeed, the court in *Alpha Trading* cited and relied upon Lord Wright's observations in *Luxor* at 141–142 (see the passage reproduced at [76] above). Most importantly, perhaps, the following observations by Templeman LJ in *Alpha Trading* (at 306), which were relied upon heavily by the appellant in the present appeal, must be looked at in the context that the court in that case was applying the exception referred to at [83] above (*cf* also *Bowstead and Reynolds* ([65] *supra*) at para 7-040):

> In my judgment, it is necessary to imply a term which prevents a vendor [*ie*, the principal], *in these circumstances*, from playing a dirty trick on the agent with impunity *after making use of the services provided by that agent in order to secure the very position and safety of the vendor*. It is necessary to imply a term which prevents the vendor from acting unreasonably to the possible gain of the vendor and the loss of the agent. In my judgment, the term [properly] to be implied in the present circumstances is that the [vendor] will not deprive the [agent] of [its] commission by committing a breach of the contract between the [vendor] and the purchaser which releases the purchaser from its obligation to pay the purchase price. [emphasis added]

Indeed, the learned judge proceeded to observe further that the result in *Luxor* might have been *different* if the fact situation in that case had been different (see *Alpha Trading* at 306):

> The position [in *Luxor*] would have been different if the vendor, as in the present case, [had] not only received the benefit of the [agent's] work in finding a purchaser but [had] also made use of the [agent's] services by entering into a contract which bound that purchaser for the benefit of the vendor on terms acceptable to and dictated by the vendor.

The observations just quoted merely *restate* the *exception* referred to under the *Third Guideline* (see [83] above; reference may also be made to the observations of Lawton LJ in *Alpha Trading* at 308).

88 What is important for the purposes of the present appeal is that there is no comparable fact situation which clearly warrants the invocation by this court of the above exception and, hence, the implication of the Second Implied Term.

89 Having regard to our analysis of the various cases discussed above (at [66]–[87]), we are, in effect, thrown back to the factual matrix of the *present* appeal. This is not surprising as the primary focus when assessing whether a particular "term implied in fact" should be implied into a contract will,

by virtue of the nature of such a term, invariably be on the precise factual matrix of the case at hand, as pointed out above (at, *inter alia*, [70]). Put simply, therefore, the question which we have to consider in this appeal is: Does the particular factual matrix before this court give rise to circumstances that make it necessary to imply the Second Implied Term into the Agency Agreement (based on both the "business efficacy" as well as the "officious bystander" tests, bearing in mind that (as stated at [37] above) these two tests are complementary, with the latter being the practical mode by which the former test is implemented)?

90 It is important to reiterate at this juncture that, *unlike* a decision relating to the category of "terms implied in law", the decision on the Second Implied Term (which is a "term implied in fact") in this appeal does *not* set a precedent for future cases involving contracts similar to the Agency Agreement. Everything depends, in the final analysis, on the precise factual matrix before the court.

91 Turning to the relevant facts in the present appeal, although we were attracted, at first blush, by the arguments of general fairness made before us by counsel for the appellant, Mr Kelvin Lee, we find that the *precise facts* compel us to ultimately arrive at a different conclusion. However, we should state that we arrive at such a conclusion with some reluctance. This is one of the rare instances where there is an apparent gap between justice and fairness – or, to put it more precisely, between what the law can achieve and a fairer result that can be achieved only via *extralegal* means. In most instances, the two would coincide and no difficulties would arise. This is, unfortunately, not one of them. Where such (thankfully, rare) instances arise, the above-mentioned gap would (in most instances and as just alluded to) be best bridged by the parties themselves in the extralegal sphere. For example, in the present appeal, the first respondent could have offered the appellant some compensation (albeit not the full amount claimed) without any admission of legal liability. After all, it is more than a little odd to find a stockbroking firm competing with its own remisiers. On the other hand, the appellant ought not to have insisted on being paid the full amount of the commission claimed because, as we shall see, it was by no means clear that he would in fact (or even in law) be entitled to that amount. The right (and fair) thing to do, therefore, would have been for the parties to arrive at a compromise themselves. But, this was not to be. The appeal, for better or worse, is before us. In the circumstances, there is no compromise which this court can effect. Hence, one party will have to prevail over the other. As just mentioned, this is one of the rare instances where an all-or-nothing decision does not reflect the true fairness of the case. As we shall note in the conclusion to our judgment below, however, there are general lessons here for litigants in general and members of the stockbroking industry in particular.

92 The appellant's case, as delineated above (at [42]), is a straightforward one. One of the key issues (if not *the* key issue) is whether or not the appellant would have been legally entitled, in the first place, to have the relevant transactions placed through him as agent. In this regard, it is clear that the first respondent was *not legally bound* to allot the placement shares which are the subject matter of the present appeal ("the Placement Shares") through the appellant, notwithstanding the fact that Sandt, at least, had opened a trading account with the first respondent through the appellant. In other words, the first respondent had a *discretion* as to whom to allot the Placement Shares to or (as it turned out) to even choose to deal directly with its customers without going through its remisiers (this was also the evidence given by Mr Ng Eng Tiong ("Mr Ng"), a director of the Institutional Dealing and Sales Department in UOB Kay Hian Private Limited,[note: 28] which evidence, although given on behalf of the respondents, is not, in our view, either illogical or unreasonable). It does not seem to us right that we should, through the implication of a "term implied in fact", compel the first respondent to give up all its discretion and deal solely via remisiers *merely* on the basis that the customer concerned had opened a trading account with the first respondent through the remisier concerned. Parties in the position of the first respondent might also have their own legitimate commercial interests to pursue – for example, the development of relationships with those whom they

perceive to be long-term (and key) clients. Such a business strategy is not uncommon and is to be expected. Indeed, this appears to have been the first respondent's approach with regard to both Sandt and Aktieninvestor, as evidenced by the first respondent's waiver of the commission with regard to the relevant transactions. For instance, the first respondent did not charge any commission in respect of Sandt's subscription for placement shares in Natural Cool and Swiber (see [11] and [17] above). It is clear from cl 7.2 of the first respondent's general trading terms and conditions for transactions effected through SGX (which terms and conditions bind all account holders of the first respondent) that the first respondent maintains the discretion to waive commission:[note: 29]

> Fees, commission and other charges *may* be chargeable in connection with your Account or for our Services as we may specify from time to time. *We may waive any such fees, brokerage, commissions and other charges.* [emphasis added]

93 Significantly too, Aktieninvestor itself subscribed for shares in the *second respondent* pursuant to the Share Subscription Agreement (see [11] above). It is also not uncommon for customers themselves to have *more than one* trading account with the same stockbroking firm (this was also the evidence given by Mr Ng[note: 30] and, although his evidence was given on behalf of the respondents, we again see no reason to doubt what is essentially logical and even commonsensical) and even with a number of stockbroking firms. And, such trading accounts can conceivably also be opened directly with the stockbroking firm itself without the customers going through remisiers. A customer may well choose to engage the services of *more* than one remisier or dealer as most investors like to have the flexibility of dealing with two or more trading representatives (this was also the evidence given by Mr Ng).[note: 31] Indeed, the evidence in the present appeal reveals that Sandt had opened his trading account with the first respondent through the appellant *with no intention of dealing with the first respondent solely and exclusively through the appellant*. On the contrary, Sandt testified that he would *not* have dealt through the appellant for the *Placement Shares in any event.*[note: 32]

94 Further, it bears mentioning that while the appellant sought to complain about three accounts (*viz*, Sandt's individual trading account with the first respondent, which was opened through the appellant on 6 March 2006 (see [10] above), Orchid Emarb's corporate trading account with the first respondent, which was opened through the appellant on 15 March 2006 (see likewise [10] above) and Aktieninvestor's corporate trading account with the first respondent (which account, the appellant argued, would have been opened through him *but for* the alleged interception of the account opening forms)), it was undisputed that Orchid Emarb *did not* subscribe for any placement shares and that, for certain trades done by Orchid Emarb through the appellant, the latter was, in fact, *paid* commission (see [17] above).

95 Applying the "business efficacy" and the "officious bystander" tests, it is clear, in our view, that we cannot (notwithstanding having some sympathy for the appellant's situation) accede to the appellant's submission that the Second Implied Term should be implied into the Agency Agreement. Looked at in the context of the stockbroking business, it would not conduce towards business efficacy to imply such a term – not least because the first respondent cannot be taken (in the absence of an express term to the contrary) to have fettered its freedom and discretion in the context of the allotment of placement shares, having regard (in particular) to the fact that customers themselves have the freedom to trade through multiple trading accounts even within the same stockbroking firm. Indeed, having regard to Sandt's testimony (which was accepted by the Judge), it is clear that Sandt did not want to transact through the appellant in so far as the Placement Shares were concerned (see [93] above), but had desired to deal directly with the first respondent instead (which he was, in our view, at perfect liberty to do). One may frown upon the fact of such *intra*-firm competition (especially when it is effected by the stockbroking firm itself). However, there is nothing

illegal or contrary to public policy involved in such competition. It is important, once again, to emphasise the fact that the appellant was never appointed as a sole agent with respect to the Placement Shares and the customer (here, Sandt) was free to deal with the first respondent through whomever he wished. Indeed, had an officious bystander asked the first respondent and the appellant at the time they entered into the Agency Agreement whether they would have unanimously incorporated the Second Implied Term (*viz*, that the first respondent would not do anything to deprive the appellant from earning his commission) into their agreement, the response would have been far from unanimous. One can, in fact, imagine the representative of the first respondent saying in a resounding voice, "Oh, of course *not*!"

96 We have, thus far, dealt in effect only with the situation involving Sandt. It will be recalled that Aktieninvestor did not even open a trading account with the first respondent through the appellant. This is because, so the appellant argues, the first respondent had "hijacked" Aktieninvestor as its own customer. However, as noted above (at [93]), there was *nothing* to prevent Aktieninvestor from opening more than one trading account with the first respondent. In fact, *none* of the Placement Shares which Aktieninvestor subscribed for went through *any* trading account with the first respondent; instead, Aktieninvestor subscribed for those shares through BBY Pty Ltd (see [17] above). It also bears repeating that Aktieninvestor subscribed for shares in *the second respondent* (see [11] above), which suggests that there was at least the potential of a *direct long-term relationship* in the offing between Aktieninvestor and the respondents (or, at least, that such a relationship was what the respondents had hoped for). We do not think it would be right to imply the Second Implied Term, which would, in effect, impose fetters on the freedom of Aktieninvestor and, more importantly, the first respondent as to whom they wish to deal with. In any event, even if Aktieninvestor had opened a trading account with the first respondent through the appellant, Aktieninvestor would have been in exactly the same position as Sandt *vis-à-vis* the appellant, *ie*, it would not have dealt with the first respondent solely and exclusively through the appellant. More importantly, as we have already explained above, this situation would not justify this court implying the Second Implied Term in favour of the appellant.

97 In the circumstances, we cannot imply the Second Implied Term into the Agency Agreement based on the precise factual matrix of the present appeal. However, a note of caution must be reiterated here. As we stated earlier, in determining whether a "term implied in fact" should be implied into a contract, everything depends, in the final analysis, upon the actual facts (and, we should add, the context) of the case before the court. In this appeal, the fact that *placement* shares were involved was (as we have seen) a significant factor. There may, however, well be *other* fact situations where the court *would* imply a term (along the lines of the Second Implied Term) in favour of the remisier. For example, if the first respondent had embarked upon a deliberate and systematic campaign of sabotaging the appellant at every possible turn, it would be both logical as well as necessary for this court to imply a term to the effect that such conduct would not be permitted. This hypothetical scenario would, in fact, be similar to the scenario in the example given in *Luxor* ([65] *supra*) at 148–149 *per* Lord Wright (see the passage reproduced above at [77]) as well as the scenario under the Third Guideline as set out at [84] above, and may well be even more extreme than those two scenarios in the light of the systemic nature of the conduct which we have just mentioned. Indeed, it might even be argued that, under such extreme circumstances, a "term implied in law", and not just a "term implied in fact", should be incorporated into the contract between the remisier and the stockbroking firm so as to prevent such wrongful conduct by the latter. However, this hypothetical scenario is clearly *not* the situation which we are faced with in the present appeal.

Conclusion

98 For the reasons given above, the appeal is dismissed with costs, with the usual consequential

orders to follow.

99 As we have already mentioned, the decision in this appeal is premised on the precise facts before this court, which centre on the discretion that necessarily vests in the first respondent *vis-à-vis* the allotment of placement shares. As also observed above (at [91]), it is unfortunate – to say the least – that the parties did not arrive at a just and fair compromise among themselves because this would, in our view, have produced the fairest result. On a more general level, it may well be the case that the situation will resolve itself where the stockbroking firm concerned indulges in conduct that (whilst not contrary to law) might nevertheless be viewed as undesirable in the industry, in so far as the reputation of that firm might result in an exodus of its remisiers. This would constitute an *extralegal* sanction of sorts. We do not, however, in any way suggest that this was, in fact, the situation based on the facts before us in the present appeal. Returning to the more general issue at hand, we would hasten to add that, where the relevant factual matrix justifies it, the court might nevertheless be prepared to imply either a "term implied in fact" or a "term implied in law" in favour of the agent *in addition to* such extralegal measures as it (the agent) might be able to avail itself of. Where an *express* term (which does not lack any ambiguity) exists, that would of course be the ideal solution (see, for example, the recent English Court of Appeal decision of *The County Homesearch Co (Thames & Chilterns) Ltd v Cowham* [2008] 1 WLR 909).

[note: 1]See para 12 of the Statement of Claim (Amendment No 2) filed on 16 November 2007 ("the Statement of Claim") (reproduced at Appellant's Core Bundle ("ACB") vol 2, p 14).

[note: 2]See para 13 of the Statement of Claim (at ACB vol 2, p 15).

[note: 3]See para 14 of the Statement of Claim (at ACB vol 2, p 15).

[note: 4]*Ibid.*

[note: 5]See para 3 of the Appellant's Case.

[note: 6]See ACB vol 2 at pp 30–31 and 33.

[note: 7]See para 16 of the Statement of Claim (at ACB vol 2, p 15).

[note: 8]See para 44 of the appellant's affidavit of evidence-in-chief ("AEIC") filed on 30 November 2007 (at Record of Appeal ("ROA") vol 3(A), p 73).

[note: 9]See para 8.2.3 of the Respondents' Case.

[note: 10]See para 4.3.3 of the Respondents' Closing Submissions dated 7 April 2008 (at ROA vol 3(D), p 1054).

[note: 11]See the "Account Opening Form for Securities Trading Account (Individual)" completed by Sandt (at ROA vol 5(A), pp 1225–1226).

[note: 12]See para 21 of the Statement of Claim (at ACB vol 2, p 17).

[note: 13]See ROA vol 5(A) at p 1238.

[note: 14]See the "Account Opening Form for Securities Trading Account (Corporate)" completed on

behalf of Orchid Emarb (at ROA vol 5(A), pp 1227–1228).

[note: 15]See ROA vol 5(A) at pp 1440–1441.

[note: 16]See ROA vol 5(B) at pp 1715–1722.

[note: 17]See Exhibit "NGH-15" of the appellant's AEIC filed on 30 November 2007 (at ROA vol 3(A), p 160).

[note: 18]See Exhibit "NGH-15" of the appellant's AEIC filed on 30 November 2007 (at ROA vol 3(A), pp 159–160).

[note: 19]See Exhibit "NGH-15" of the appellant's AEIC filed on 30 November 2007 (at ROA vol 3(A), p 159).

[note: 20]See Exhibit "NGH-15" of the appellant's AEIC filed on 30 November 2007 (at ROA vol 3(A), pp 158–159).

[note: 21]See Exhibit "NGH-15" of the appellant's AEIC filed on 30 November 2007 (at ROA vol 3(A), p 158).

[note: 22]*Ibid*.

[note: 23]See p 245 of the certified transcript of the notes of evidence ("the Notes of Evidence") for the hearing on 10 March 2008 (at ROA vol 3(D), p 908).

[note: 24]See the "Account Opening Form for Securities Trading Account (Corporate)" completed on behalf of Aktieninvestor (at ROA vol 5(C), pp 1813–1814).

[note: 25]See ROA vol 4 at pp 1178A–1178B.

[note: 26]See ROA vol 5(A) at pp 1445–1446.

[note: 27]At ACB vol 2, p 15.

[note: 28]See paras 6.1.1–6.1.3 of Mr Ng's AEIC filed on 4 October 2007 (at ROA vol 3(B), p 389).

[note: 29]See ROA vol 5(A) at p 1470.

[note: 30]See para 4.2.1 of Mr Ng's AEIC filed on 4 October 2007 (at ROA vol 3(B), p 385).

[note: 31]See paras 4.2.1–4.2.2 of Mr Ng's AEIC filed on 4 October 2007 (at ROA vol 3(B), p 385).

[note: 32]See pp 203–204 of the Notes of Evidence for the hearing on 7 March 2008 (at ROA vol 3(C), pp 862–863).