Rockline Ltd and another *v* Silverlink Holdings Ltd and another (Schroder Venture Managers Inc and another, third parties) and another suit
[2010] SGHC 251

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

Decision Date : 26 August 2010

Tribunal/Court : High Court

Coram : Choo Han Teck J

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

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

Contract

26 August 2010 Judgment reserved.

Choo Han Teck J:

1 In *Rockline Ltd and another v Silverlink Holdings Ltd and another* [2010] SGHC 127 ("the Main Judgment") I found in favour of the plaintiffs on the failure of the defendants to issue the "SAP Notes". Subsequently, parties were ordered to submit on the appropriate remedies and reliefs. This is my decision on the question of the reliefs.

2 The plaintiffs sought an order for the Rockline Note to be issued directly to Rockline, and for the Superon Note to be issued directly to Superon. The plaintiffs also submitted that the effective interest was 5.07% for the SAP Notes, which should be capitalised as principal. It was also contended that the redemption premium was 20.28%. Further, the plaintiffs took the position that the Rockline Note and Superon Note ought to have been issued on 17 August 2003 and 27 November 2002 respectively. Apart from the above, the plaintiffs argued that the Debenture and Share Pledge Agreement ("the Security Documents") should be declared as security for the SAP Notes, and that AVL should be declared as holding the security as trustee for the plaintiffs prior to its assignment to Overseas Holding Limited ("OHL"). In this connection, the plaintiffs submitted that the court ought to declare that the novation of the security was wrongful, and that OHL was not a bona fide purchaser for value without notice. It followed that OHL must be declared to hold the security on trust for the plaintiffs. Lastly, the plaintiffs claimed damages from the defendants for, *inter alia*, costs of enforcement, loss of chance to exit its investment in Silverlink in November 2007, and damages arising from the loss of rights pertaining to the non-issuance of the SAP Notes.

3 The plaintiffs contended that the Rockline and Superon Notes should have been issued on 17 August 2003 and 27 November 2002 respectively. The defendants' case was that SAP's advisors had acquiesced to the deferment of the issuance of the SAP Notes when negotiations on the Debenture Pledge Agreement ("DPA") were ongoing. They submitted that the interest as well as the

redemption premium should therefore have commenced after 4 November 2003 when the negotiations failed. In any event, the defendants contended that Superon tendered its shares in Argent only in June 2003, and an encumbrance on the said shares was cleared only on or about 15 July 2003.

4 In the Main Judgment (at [14]), I expressed my doubts as to whether advisors to transactions such as the present one had the authority to bind their principals. Looking at the evidence (or lack of it), I am not convinced that the SAP entities (as opposed to their advisors) had acquiesced to the deferment. However, I agree with the defendants that the earliest date for Superon to tender its indirect interest in Silverlink would be after the resolution of the encumbrance issue. In the circumstances, I find that the Superon Note ought to have been issued on 15 July 2003, and the Rockline Note on 17 August 2003. Accordingly, interest and redemption premium would run from those dates.

5 In the Participation Agreement involving SVAPF and Argent, it was agreed that Silverlink would be allowed to block SVAPF's conversion notice provided that both Silverlink's board and shareholders had given their approval. In that event, the repayment date of the SVAPF Note would be extended by two years from 30 June 2008 to 30 June 2010, and the annual redemption premium would be doubled from 10% to 20%. Counsel for the plaintiffs submitted that the variations made in the Participation Agreement ought to apply to the SAP Notes as well as the SVAPF Note. I do not think so. First, the claims for enhanced benefits were not pleaded in the present suit. Secondly, the amendments were made by way of a separate agreement to which SAP was not a party. [note: 1] Under the Rockline Repurchase Agreement ("RRA"), the Note to be issued to Rockline was to be "a secured convertible note to be issued by the Purchaser in substantially the form and substance of the [SVAPF] Note with necessary amendments but otherwise ranking pari passu with the [SVAPF] Note". In my view, this meant that the SAP Notes were to be identical to the SVAPF Note as at the time of the RRA. In the absence of any tag-along rights, I could not see how the plaintiffs could have the benefit of someone else's side agreement to which they were not parties to and with which they had no contractual right to tag-along. As for the plaintiffs' submissions that Mr Thadani had confirmed on the witness stand that the plaintiffs had been wrongfully denied the enhanced benefits and that the varied rights were supposed to apply to the SAP Notes as well, [note: 2] the evidence in fact showed that neither Mr Thadani nor Silverlink had taken any position in this respect.

6 Next, the plaintiffs argued that they could have prevented the blocking of the conversion notice since one of the sub-conditions to Condition 9 of the SAP Notes required their prior written consent before the passing of any Silverlink shareholder's resolution (which under condition 10.2 of the Participation Agreement is required to block a conversion). However, I do not think that this could have assisted the plaintiffs. Being in a position to prevent a conversion and being entitled to a binding variation are distinct propositions. Further, I do not accept the plaintiffs' claim that its right to convert had any connection with the expiry date of the SAP Notes, the two being separate considerations. The interest provided for under the SAP Notes was on an "actual/360 basis" (see condition 4(C) of the Notes). The plaintiffs submitted that this meant that the actual payable interest would be 5.07%, and that the redemption premium ought to be 10.14%. Since the plaintiffs' pleaded case was for 5% and 10% respectively, they cannot now ask for a higher effective rate of interest or redemption premium. Lastly, the plaintiffs contended that interest ought to be capitalised. This was also not pleaded. Apart from pointing out the obvious defect, the defendants also pointed to the fact that no evidence had been put forward to show that the plaintiff would have given a capitalisation notice to Silverlink if the SAP Notes had been issued. Although this might have been an academic issue (as the SAP Notes were never issued), silence and inaction cannot discharge the burden of proof. The plaintiffs ought to have prayed for and proven their case for capitalised interest.

7 I had found that AVL did agree to hold the SAP Notes as nominee for SAP although there was no agreement on SVAPF Control. This finding was necessary from an issue that arose at trial (see prayer 1 of the Third Party Notice *i.e.* whether "it was agreed [that]... Anchor Victory would hold and control the Superon Note and the Rockline Note..."). The plaintiffs now seek a declaration that AVL held the Security Documents as trustee for them. In this respect, the defendants' position was aligned with the plaintiffs as the former also took the view that the plaintiffs "are protected by the security created by the Debenture and Share Pledge Agreement". [note: 3] However, as pointed out by counsel for the third parties, AVL's involvement in these proceedings was limited only to the Third Party Notice and the Statement of Claim filed by the defendants. In other words, AVL had not been subject to any claim(s) by the plaintiffs. In the circumstances, I agree with counsel that the declaratory relief sought for by the plaintiffs should not be granted as that would prejudice the third parties. It follows that there is no necessity for me to decide on the substantive defences raised by AVL in its written submissions.

8 OHL was a non-party to the action who had been accorded "liberty to address the court on terms as the court may direct at the end of trial". In view of the latter directions, I was prepared to hear OHL as to the appropriate remedies and relief. OHL, through its counsel, made no submissions. In the plaintiffs' written submissions, the latter sought a declaration that OHL was not a *bona fide* purchaser (of the security) for value without notice and as such, presently holds the Debenture and Share Pledge Agreement on trust for the plaintiffs. In this regard, it should also be recalled that the plaintiffs had opposed OHL's application to intervene in the action. It also follows that as in the case of AVL, OHL had not been subject to any claims by the plaintiffs. For the same reasons, no orders ought to be made against it. In any case, the substantive defences raised by AVL must first be determined before any liability on OHL's part could arise.

9 The plaintiffs contended that they had suffered damage that was beyond the value of the SAP Notes even if the principal, interest and redemption premium due were eventually repaid. Their claims for damages can be grouped under three broad categories: (i) Loss of security; (ii) Loss of chance to exit their investment in Silverlink; and (iii) Loss of rights under the SAP Notes.

i. Loss of security

The plaintiffs' original (and pleaded) case was that Silverlink failed to take steps to ensure that the SAP Notes would be secured by the Security Documents (see para 49(c)). They now contend that Silverlink had breached condition 10(A) of the SAP Notes by agreeing to the novation of the Security from AVL to OHL, causing them to lose the security. The plaintiffs claimed for costs of enforcement which they would now have to incur for having lost the Debenture and Share Pledge Agreement as security [note: 4]. The said condition 10(A) provided as follows:

> The Company may not assign, transfer or otherwise dispose of all or any part of its rights or obligations under the Note without the prior written consent of the Noteholder.

In my view, the submission advanced by the plaintiffs was predicated on the assumption that AVL held the Security Documents for the benefit of the SVAPF Note as well as the SAP Notes. As I have indicated earlier, this issue was beyond the court's jurisdiction because AVL had not been subject to any claim from the plaintiffs. While it appeared that the Security Documents were intended to cover both the SVAPF Note and the SAP Notes, the questions of whether the documentation in fact provided for them (which AVL disputes) and whether AVL had agreed to hold the Security as trustee for the plaintiffs were not issues in this action. In view of the aforesaid, I make no finding as to whether the defendants are liable for wrongful novation.

ii. Loss of chance to exit the investment

The plaintiffs sought damages arising from their loss of chance to exit their investment in Silverlink together with SVAPF and Lee Hing in November 2007. They averred that SVAPF would not have been able to sell the SVAPF Note to OHL without SAP's consent to the novation, and SAP could have made it a condition of their consent that OHL purchase the SAP Notes at face value and buy-out Asia Atlas' and Rockline's shares in Silverlink. The plaintiffs claim herein was essentially one for the loss of chance to sell their shares (or those of entities related to them) in Silverlink. In *Auston International Group Ltd and another v Ng Swee Hua* [2009] 4 SLR(R) 628, the Court of Appeal reaffirmed *Allied Maples Group Ltd v Simmons & Simmons* [1995] 1 WLR 1602 in relation to loss of chance. In my opinion, the plaintiffs' claim for loss of chance failed as no evidence was led on the issue, notwithstanding the fact that the plaintiffs already had the benefit of counsel at the point OHL appeared. This strongly suggested that the "chance" was a speculative one (as opposed to a substantial one).

iii. Loss of rights under the SAP Notes

There was no doubt that the SAP Notes conferred a range of rights to their holder. The plaintiffs averred that the loss of the general undertakings had rendered them "financially blind", while the loss of the veto rights denied them the opportunity to influence Silverlink's business decisions and to protect their investment in Silverlink. Damages were also sought for the loss of conversion rights. The loss of a right or undertaking does not in itself entitle a party to substantial damages. One must prove, on a balance of probabilities, that he or she had suffered damage as a result of the breach. For instance, the loss of conversion rights must be attended by proof that the plaintiffs would have exercised those rights if not for the breach, and have incurred a loss for not being able to do so. Likewise, the loss of "veto rights" resulting in an inability to influence business decisions must also be matched with evidence of actual damage. As in the claim for loss of chance, the plaintiffs did not lead any evidence to prove that they had incurred any damage.

10 There was, however, an instance of loss of an undertaking which entails greater attention. This relates to the US$40m pro-rata rights issue at US$1 per share. It is the plaintiffs' case that they have the right to veto any Silverlink rights issue by virtue of Condition 9(B)(ii)(dd) of the SAP Notes, which essentially required the plaintiffs' prior written consent. The plaintiffs submitted that they had been massively diluted and that the defendants ought to pay damages on the basis that their Silverlink shares were worth US$10 apiece (which was the price OHL paid earlier) if not for the rights issue. The plaintiffs' claim in this respect was essentially one for minority oppression masquerading as a claim for loss of veto right. It is clear that a separate claim ought to have been filed in which the plaintiffs ought to have explained, *inter alia*, why they did not take up their entitlement of the pro-rata rights. As far as the SAP entities *qua* creditors (*viz* the SAP Notes) were concerned, the rights issue was no doubt a positive development as US$40m had been injected into Silverlink by way of additional share capital, thereby improving the prospects of recovery for all creditors. No loss could possibly have flown from the rights issue to SAP in its capacity as creditor.

11 For the above reasons, I find that that the plaintiffs' losses have not been proved, and they did not suffer any damages beyond the value of the principal, interest and redemption premium. They are each therefore entitled to only nominal damages of $100.

12 The last substantive issue pertains to whether the defendants should be ordered to issue the SAP Notes. Specific performance is an equitable remedy that is usually granted only when damages would not be adequate. In the present instance, the plaintiffs contended that without the SAP Notes, it would, *inter alia*, be difficult for them to enforce the Security as a court is "not likely to be able to interpret the provisions of the Debenture and Share Pledge Agreement". [note: 5] The plaintiffs also

claimed that without the SAP Notes, they remained unsecured creditors of Silverlink.

13 First there was no reason to suggest that the Security Documents could not be understood without the SAP Notes. Secondly, the plaintiffs' assertion that they would be rendered unsecured without the SAP Notes was not consistent with the position they had taken against the third parties. Their position against AVL was that the latter held the Security Documents as trustee for the plaintiffs, notwithstanding that it was common ground among all parties that the SAP Notes had never been issued. As such, based on the plaintiffs' own case, I saw no necessity in making any orders in relation to the SAP Notes. Lastly, it had emerged that the defendants had made an offer to pay the plaintiffs the principal sums on the SAP Notes as well as furnish a bank guarantee for the contractual interest and redemption premium. If the plaintiffs had accepted the defendants' offer of security and part-payment, which appeared wholly reasonable, the issue of security today would largely be moot.

14 Pre-judgment interest (see s 12 of the Civil Law Act (Cap 43, 1999 Rev Ed)) and post-judgment interest (see O 42 r 12 of the Rules of Court (Cap 322, R 5, 2006 Rev Ed)) are at the discretion of the court. The defendants submitted that pre-judgment interest (from 30 June 2008 onwards) should not be awarded as they had earlier offered to pay the plaintiffs the outstanding principal sums as well as furnish a bank guarantee for the interest and redemption premium. The utility of bank guarantees in relation to pre-judgment interest was somewhat limited as a party would still be kept out of his or her monies. However, the offer to pay the principal sums upfront should entail a significant reduction on the pre-judgment interest. In the circumstances, it would be fair to fix pre-judgment interest for the principal sums at 2% per annum computed from 1 July 2008 to the day immediately prior to this judgment (based on a rough estimate of the average 6-month US$ LIBOR from July 2008 to July 2010). Pre-judgment interest for the contractual interest and redemption premium shall be fixed at 5.33% per annum for the same stated period, while post-judgment interest shall stand at 5.33%.

15 In conclusion, the following orders are made:

a. For the Superon Note, Silverlink and/or Argent are to pay Superon the principal sum of US$6,391,182.00, interest at 5% per annum and redemption premium at 10% per annum computed from 15 July 2003 to 30 June 2008. Simultaneous to the payment, Silverlink, Argent and Superon are to complete the transfers of shares as agreed in the Superon Repurchase.

b. For the Rockline Note, Silverlink is to pay Rockline the principal sum of US$11,120,800.00, interest at 5% per annum and redemption premium at 10% per annum computed from 17 August 2003 to 30 June 2008.

c. Pre-judgment interest on the principal sums at 2.00% per annum, and on the contractual interest and redemption premium at 5.33% per annum. The pre-judgment interest shall run from 1 July 2008 to the day immediately prior to this judgment.

d. Nominal damages of $100 are awarded to each of the two plaintiffs.

e. Post-judgment interest on items (a)–(d) above are to run at 5.33% per annum.

I will hear parties, including OHL, on costs at a later date.

[note: 1] Pg 30 of Plaintiffs' submissions on Remedies

[note: 2] Pg 26 and 76 of Plaintiffs' submissions on Remedies

[note: 3] Pg 34of the Defendants' reply submissions on Remedies

[note: 4] Pg 92 and 116 of Plaintiffs' submissions on Remedies

[note: 5] Pg 50 of the Plaintiffs' submissions on Remedies