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# Contractual Interpretation in Singapore After Zurich Insurance: Continued Refinement

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# Contractual Interpretation in Singapore after *Zurich Insurance*: Continued Refinement

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***Soon Kok Tiang v DBS Bank Ltd* [2010] SGHC 360**

Ever since Lord Hoffmann's authoritative restatement of the principles relating to the interpretation of contracts in *Investors Compensation Scheme v West Bromwich Building Society*,[1] various common law courts and academics have weighed in with their views on two main issues: whether the contextual approach articulated in Investors in fact represents a step forward from the traditional literal approach; and, accepting the operation of the contextual approach, whether there remains room for the exclusion of certain extrinsic evidence in interpreting contracts. But the foremost consideration underpinning these issues is that of the perceived uncertainty which the contextual approach brings. The Singapore High Court in *Soon Kok Tiang v DBS Bank Ltd*[2] added its voice to the growing list of local cases grappling with contractual interpretation. In doing so, it may provide an opportunity for the further refinement of the principles relating to contractual interpretation in Singapore.

## Facts and decision

*Soon Kok Tiang* concerned the action by investors of a series of callable basket credit-linked notes known as "DBS High Notes 5" ("the HN5") to recover their investment sums under the said notes. The HN5 had been terminated due to the global financial crisis in 2008. The defendant bank informed the plaintiffs that no sum would be due or payable to them because of this. This rendered the plaintiffs' investments in the HN5 worthless.

The plaintiffs' legal strategy to recover their investment was to argue that the HN5 were void at the time of their issuance and that the principal sums they had paid ought therefore to be returned to them. The HN5 were said to be void because a material term of the contract underlying the HN5, which concerns the calculation of the sum payable in the event of early termination, was uncertain. It was uncertain because (it was argued) four possible (and contradictory) methods of calculation were included in various parts of a document known as the "Pricing Statement". The Pricing Statement was one of the documents distributed to interested investors. Key to resolving this issue was identifying which parts of the Pricing

* http://law.nus.edu.sg/about_us/faculty/staff/profileview.asp?UserID=lawgohy.
1 [1998] 1 WLR 896.
2 [2010] SGHC 360 ("*Soon Kok Tiang*").

Statement were included in the eventual contract in respect of the HN5. Only if the entire Pricing Statement formed the contract was it possible to argue that there was any contradiction between the methods of calculation. Having decided that the point of offer was when the interested investor submitted the requisite Application Form, the High Court ruled that one had to look at the terms of the Application Form to decide if the Pricing Statement was incorporated in its entirety or just partly. The crucial section of the Application Form was Section B, which read:

> This is an application for DBS High Notes 5 (SGD Tranche Notes), a medium-term structured note of 5.5-year tenor designed to be held to maturity. I/We have read, acknowledged and agreed with the *Terms and Conditions on the reverse of this form and the Terms and Conditions set out in DBS High Notes 5 Pricing Statement in particular Appendix A – Terms and Conditions and Procedures for Application, Acceptance and Cancellation before signing*. I/We was/were advised to ensure that I/we have assessed suitability of the product against my/our risk attitude, financial means, and investment objectives. Please debit my/our account for the application of DBS High Notes 5 (SGD Tranche Notes) according to my/our instructions above. I/We confirm that the information provided above is complete, true and accurate. [emphasis added by the court]

The interpretation issue concerned the meaning of the words "Terms and Conditions set out in DBS High Notes 5 Pricing Statement in particular Appendix A". According to the defendant, this expression was meant to include only those parts in the Pricing Statement with the heading "Terms and Conditions". In contrast, the plaintiffs' position was that this expression included the entire Pricing Statement and rendered everything in the Statement as "Terms and Conditions" in the HN5 contract.

On this point, the High Court decided for the plaintiffs. (However, it did eventually rule in favour of the defendant overall on the basis that there was no contradiction in a material term of the contract, and hence the contract was not void.) Concentrating solely on the interpretation issue, two points arise from the Court's decision that warrant further discussion.

## Two points arising from the High Court's decision

*What is the admissible background evidence?*

The first point concerns the admissible background evidence. The High Court, after referring to the important Court of Appeal decision of *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd*,[3] proceeded to consider the background knowledge which informed both parties on the HN5 contract. One key document was the "Base Prospectus", which was (again) issued to interested investors. There were, however, varying versions of the Base Prospectus, each of which seem to support either party's argument on the interpretation issue. The Court preferred the version submitted by the plaintiff on the basis that it could not have access to the other versions which were in the exclusive possession of the defendant.

The Court's approach, with respect, must be correct. Both parties must commonly know the relevant background information. In preferring one party's version over another, the Court's approach must not be mistaken for preferring the subjective intentions of one party over the other, something expressly forbidden either under Lord Hoffmann's restatement or the Court of Appeal's approach in *Zurich Insurance*. However, one point of interest is that the defendant's preferred version was "registered with the Monetary Authority of Singapore". If, by doing so, that version had become part of the public domain, then that version must be taken to be relevant common background information since the test is not whether the

[3] [2008] 3 SLR(R) 1029 ("*Zurich Insurance*").

plaintiffs actually knew about this, but whether a reasonable person in the plaintiffs' position ought to have been taken to know about this particular version. As Lord Hoffmann said in *Investors Compensation*:[4]

> The background was famously referred to by Lord Wilberforce as the "matrix of fact", but this phrase is, if anything, an understated description of what the background may include. *Subject to the requirement that it should have been reasonably available to the parties* ... it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man. [emphasis added]

Thus in *Scott v Martin*,[5] a planning permission in existence at the date of the conveyance was admissible in evidence. It was a public document that could have been available to a purchaser of land.

*Whether context behind contract must clearly render language of contract ambiguous before departure from plain meaning is allowed?*

The second point concerns the High Court's invocation of the Court of Appeal's "threshold requirement" in *Zurich Insurance* that the contractual context must be clear and obvious, and render the contractual language ambiguous before departure from plain language is allowed. The Court reasoned that the use of the words "in particular" in the disputed expression "Terms and Conditions set out in DBS High Notes 5 Pricing Statement in particular Appendix A" conveyed a plain meaning that the entire Pricing Statement was incorporated as terms and conditions of the HN5 contract. (Appendix A contained the terms and conditions and procedures for application, acceptance and cancellation.) To elaborate, the "Terms and Conditions" section of the Pricing Statement makes no mention of Appendix A. However, the words "in particular" include Appendix A. What then was Appendix A part of? It could not have been part of the "Terms and Conditions" section of the Pricing Statement since that section did not make reference to Appendix A. Appendix A must therefore be part of the entire Pricing Statement. Thus, the disputed expression referred to the entire Pricing Statement, with especial highlighting of Appendix A. Since the background evidence was equivocal and did not suggest an alternative meaning, the plain meaning prevailed.

As is well known presently, the Court of Appeal in *Zurich Insurance* reaffirmed the Singapore courts' endorsement of Lord Hoffmann's restatement and established the threshold requirement mentioned above. At its core, the decision is representative of the reluctance of other common law courts to fully embrace the contextual approach on the notion of "uncertainty". To the extent that an equivocal adoption of the contextual approach promotes uncertainty in approach inasmuch as it does uncertainty in result, perhaps the "threshold requirement" might be refined sometime in the future for the following reasons.

First, the Court of Appeal appeared to draw a distinction between "plain" and "non-plain" meaning when it alluded to the need for the "threshold requirement" to be fulfilled before a departure from the plain language could be sanctioned. This distinction is not new and, indeed, was indirectly referred to by Lord Mustill in *Charter Reinsurance v Fagan*[6] when he said that the interpretive process would usually start and end with the ordinary meaning of the words used. The problem with this distinction is that there is only one true meaning under the contextual approach, ie, the contextual meaning.[7] In fact, in ascertaining the "plain" meaning of words, the High Court in *Soon Kok Tiang* is really engaging in a *prior* interpretation. If it subscribes to the contextual approach, this prior interpretation would

[4] [1998] 1 WLR 896 at 912–913.
[5] [1987] 1 WLR 841.
[6] [1997] AC 317 at 384.
[7] See, for *eg*, *Static Control Components Ltd v Egan* [2004] 2 Lloyd's Rep 429 at 435.

actually be an unrecognised (and perhaps unintentional) departure from that approach. There would be simultaneously a literal and contextual interpretation of the contract.[8]

Secondly, the logical nexus between the threshold requirement and the aims of the contextual approach may require reconsideration. Contextual interpretation, as Lord Hoffmann said in *Investors Compensation*, is concerned with how a reasonable person would objectively perceive the meaning of the words with all the reasonably available background knowledge. If this is so, it would not matter whether that background knowledge (or context) is not clear or obvious; that should be a matter of the weight (as opposed to admissibility) which the court ascribes to such context, and should certainly not preclude the court from adopting a contextual meaning as opposed to the plain meaning.

Thirdly and more fundamentally, the two aforementioned difficulties may represent a reluctance of the Court of Appeal in *Zurich Insurance* to depart wholly from the traditional approach on fears of "uncertainty", a concern that resonates similarly with the courts of other jurisdictions. In England, for example, Lord Hobhouse in *Shogun Finance Ltd v Hudson*[9] referred to the rule that other evidence may not be adduced to contradict the provisions of a contract as the reason why English commercial law is preferred to other systems "which do not provide the same certainty". In this regard, it is important to recognise that certainty is not an amorphous word incapable of precise meaning; on the contrary, it is submitted that it is important to realise which aspect of certainty is of concern. The present concern with certainty as guaranteed by the traditional approach is result-based: it focuses on the premise that the words of a contract, as understood by a reasonable person, will be conclusive of its meaning and hence yield consistent and predictable results. Yet, it does not recognise that even under the traditional (and objective) approach, the court may adopt different interpretations of the words as contained in the contract, simply because there is a range of acceptable, objective and reasonable meanings which a court can come to.

This may mean that the certainty of real concern is not in the result, but in the approach. If this is correct, then it may be that the contextual approach, a method of interpretation as much as the traditional approach, will lead to "uncertainty", as the Court of Appeal in *Zurich Insurance* (as well as the courts of other jurisdictions) has pointed out. The contextual approach, if applied consistently, will yield certainty in approach as much as the traditional approach. While it could lead to uncertain results, that is a result of the judicial decision-making process rather than any inherent fault in the methodology. Therefore, the Court of Appeal's concern with certainty in causing it to impose the "threshold requirement" may lead instead to uncertainty in that its adoption of the contextual approach may be incomplete and does not, as discussed, accord with the aims of that approach in ensuring that all background knowledge (or context), however unsatisfactory in quality, is made available to the court for its interpretation of the contract.

## Contractual interpretation in Singapore generally

Thus the High Court's approach in *Soon Kok Tiang* has provided perhaps some food for thought concerning the further refinement of contractual interpretation in Singapore. However, more generally speaking, the principles relating to contractual interpretation have been greatly improved in terms of both substance and clarity after Zurich Insurance.

Indeed, while the Court of Appeal in *Zurich Insurance* might have implicitly displayed some reluctance in its adoption of the contextual approach, in a move which is as refreshing as it is bold, the Court departed from the present English position[10] (reaffirmed by the House of

[8] See further Aharon Barak, *Purposive Interpretation in Law* (Princeton University Press, 2005) at 12–14.
[9] [2004] 1 AC 919 at 944.
[10] Embodied in *Investors* and *Full Metal Jacket Ltd v Gowlain Building Group* [2005] EWCA Civ 1809.

Lords in *Chartbrook v Persimmon Homes*[11]) by accepting the possibility of admitting extrinsic evidence in the form of prior negotiations and subsequent conduct. Indeed, the predominant academic opinion seems to be that there is no reason why such extrinsic evidence should be excluded given that they legitimately form a part of the context from which contextual meaning can be ascertained.[12] The traditional objection to the inclusion of such evidence is again premised on certainty.[13] However, as regards the specific aspect of certainty of concern, the cases hint at the need to preserve certainty in result, which, as discussed, is difficult to guarantee. While the consideration of subsequent conduct may result in a different meaning being given to a contract as opposed to when such conduct is not considered, that does not mean that all certainty in the meaning of contracts is undermined. The meaning of contracts, whether or not subsequent conduct is considered, will always fluctuate depending on the particular judge interpreting it. Certainty in result can never be assured, but certainty in approach can be, and if the courts consistently consider subsequent conduct in pure pursuit of the contextual approach, then there is just as much possible certainty without and with the consideration of such extrinsic evidence. That may be the next step in the continued refinement of contractual interpretation in Singapore.

[11] [2009] 3 WLR 267.

[12] See, *eg*, McMeel, "Prior Negotiations and Subsequent Conduct – The Next Step Forward for Contractual Interpretation" (2003) 119 LQR 272 and Nicholls, "My Kingdom for a Horse: The Meaning of Words" (2005) 121 LQR 577.

[13] See, *eg*, *Full Metal Jacket* at [17].