

Similar fact evidence in contractual interpretation: Bhoomatidevi d/o Kishinchand Chugani Mrs Kavita Gope Mirwani v Nantakumar s/o v Ramachandra and another [2023] SGHC 37

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Published in International Journal of Evidence & Proof (2024). DOI: 10.1177/13657127231225472

Abstract:

In the recent Singapore High Court case of Bhoomatidevi d/o Kishinchand Chugani Mrs Kavita Gope Mirwani v Nantakumar s/o v Ramachandra and another [2023] SGHC 37, the claimant argued, inter alia, that evidence of a prior contract between the first defendant and a third party should be admitted to prove that the defendant had entered into a loan agreement with her in his personal capacity. Justice Lee Siu Kin dismissed her claim, applying s. 14 of the Evidence Act.

Keywords:

Contractual interpretation, Indian Evidence Act, similar fact, similar fact evidence, Singapore

I. Introduction

It has become trite law that the contextual approach will be used in contractual interpretation.¹ Yet a balance must be struck between text and context. Courts cannot use the context of a contract to rewrite its terms.² This tension was foregrounded by the recent Singapore High Court case of Bhoomatidevi d/o Kishinchand Chugani Mrs Kavita Gope Mirwani v Nantakumar s/o v

¹ Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd [2008] 3 SLR(R) 1029 at [114].

² Y.E.S. F&B Group Pte Ltd v Soup Restaurant Singapore Pte Ltd (formerly known as Soup Restaurant (Causeway Point) Pte Ltd [2015] 5 SLR 1187 at [32].

Ramachandra and another.³ There, the claimant sought to adduce evidence of a prior contract between the first defendant and a third party to prove that the defendant had entered into a loan agreement with her in his personal capacity. Justice Lee Seiu Kin dismissed her claim, applying s. 14 of the Evidence Act ('EA').⁴

Given the paucity of Singapore case law concerning the use of similar fact evidence ('SFE') in contractual interpretation, this case note will summarise the relevant sections of the High Court's decision before evaluating the court's application of s. 14, as well as the wider significance of the decision.

Facts and decision

The facts are straightforward and can be briefly summarised. The key issue regarding SFE was whether it was B or C who was liable to pay the sums owed under the loan agreement.⁵ A claimed that B signed a loan agreement with her in his personal capacity, and is therefore personally liable to her for repayment of the loan. B claims that C was the proper party to the loan agreement. A sought to adduce a similar agreement that B entered with D to prove that B has repeatedly induced others to enter into contracts under the false impression that they were contracting with B in his personal capacity. A claimed that B's method was to personally enter into a loan agreement, refuse to return the money and then, when sued, turn around and evade liability by claiming that the agreement was made with C and not with him.⁶

The court first established the admissibility of SFE under ss. 14 and 15 of the Evidence Act.⁷ However, it dismissed the applicability of s. 15 because it dealt with 'facts bearing on [the] question [of] whether [the] act was accidental or intentional' and therefore did not appear to be relevant.⁸ This correctness of this decision will be examined below.

Next, the court determined that s. 14 was relevant.⁹ Specifically, the court examined illustration (g), which traces its origin to the English case of *Gerish v Chartier*.¹⁰ Illustration (g) provides:

(g) *A* is sued by *B* for the price of work done by *B* upon a house of which *A* is owner by the order of *C*, a contractor.

A's defence is that *B*'s contract was with *C*.

The fact that *A* paid *C* for the work in question is relevant as providing that *A* did in good faith make over to *C* the management of the work in question, so that *C* was in a position to contract with *B* on *C*'s own account and not as agent for *A*.

In *Gerish*, the plaintiff sued the defendant to recover the value of certain iron railing and coping for 12 houses. The defendant asserted that there was no contract between himself and the plaintiff because he had contracted with a builder named Amos, whom the defendant alleged gave the order for the goods in question. To prove this, the defendant sought to adduce the statement of accounts between himself and Amos. Maule J held that this evidence was admissible because it showed that the defendant conducted himself 'like a party who was dealing with Amos as a principal, and not as an agent' and hence, the 'defendant was not seeking to evade payment for goods ordered for his benefit, but that he had actually

3. ("*Bhoomatidevi*") [2023] SGHC 37.

4. Evidence Act 1893 ("EA") (2020 Rev Ed).

5. *Bhoomatidevi d/o Kishinchand Chugani Mrs Kavita Gope Mirwani v Nantakumar s/o v Ramachandra and another* [2023] SGHC 37 at [12].

6. *Ibid.* at [51].

7. *Ibid.* at [52].

8. *Ibid.* at [53].

9. *Ibid.* at [53].

10. ("*Gerish*") [1845] 135 ER 439.

paid the person with whom alone he had contracted'.¹¹ In essence, Amos was the main contractor; the plaintiff was a sub-contractor. Once again, the relevance of this illustration will be examined below.

Furthermore, the court cited the Malaysian case of *Nai Yau Juu v Pasdec Corp Sdn Bhd & Anor*.¹² There, counsel attempted to argue that an offer had been accepted by the issuance of a receipt. To support this argument, evidence of one PW3 was adduced to substantiate that there was 'a similar "offer" received from the first defendant' and a 'similar intention to make an offer for sale which offer was also accepted by payment of RM3,000 and then completed by the issuance of a receipt'.¹³ The court held that there was 'nothing additional to prove that the conduct of the first defendant in issuing the receipt to another party had constituted an intention to manifest something binding'.¹⁴ Notably, this evidence was adduced on the basis of s. 14 of the Malaysian Evidence Act 1956, which is *in pari materia* to s. 14 of the Evidence Act in Singapore.

Applying these cases, the court held that evidence of prior conduct had to go towards showing B's intention, objectively ascertained, at the time of contracting.¹⁵ On the facts, the manner in which B contracted with C is 'not, *without more*, necessarily indicative of the objective intentions' of B and A at the time of contract formation.¹⁶

Observations

The decision in *Bhoomatidevi* raises some questions in the present case. First, it is unclear why illustration (g) is relevant. Second, if, in the alternative, Explanation 1 to s. 14 is the true basis for the decision, it appears that SFE can never be used to prove contractual intention. Third, while s. 14 is undoubtedly applicable, it is unclear why s. 15 is not. Indeed, should s. 15 apply, what would be required to satisfy its requirement for a 'series of similar occurrences'?

Bhoomatidevi also sheds some light on the use of SFE in civil cases more generally. First, it clarifies the primary of the EA. Second, it clarifies the role of s. 11 as an admissibility gateway for SFE. We deal with these issues, *seriatim*.

The irrelevance of illustration (g)

In applying s. 14, the High Court cited illustration (g). As discussed earlier, illustration (g) reflects the ratio of *Gerish v Chartier*.¹⁷ With respect, however, *Gerish* was not relevant to the facts of the case. In *Gerish*, evidence of a contract between one Amos and the defendant was adduced to rebut the plaintiff's claim that Amos was acting as an agent on behalf of the defendant. This was to claim in unjust enrichment for works done on the defendant's property as Amos, the main contractor, had gone bankrupt. The court held that the contract between Amos and the defendant proved that the defendant never intended to contract with the plaintiff. Rather, the works done were ordered by Amos as a main contractor, sub-contracting work to the defendant. Put another way, evidence of the main contract was adduced to disprove the existence of an implied contract between the *contractee-defendant* and the *sub-contractor-plaintiff*.

11. *Bhoomatidevi d/o Kishinchand Chugani Mrs Kavita Gope Mirwani v Nantakumar s/o v Ramachandra and another* [2023] SGHC 37 at [54]; citing *Gerish* at p440.

12. ("*Nai Yau Juu*") [2005] 3 MLJ 431.

13. *Ibid.* at [24].

14. *Bhoomatidevi d/o Kishinchand Chugani Mrs Kavita Gope Mirwani v Nantakumar s/o v Ramachandra and another* [2023] SGHC 37 at [56]; citing *Nai Yau Juu* at [24].

15. *Ibid.* at [55].

16. *Ibid.* at [57].

17. [1845] 135 ER 439.

Conversely, A sought to adduce evidence of a prior loan agreement with D wherein B acted as the principal, to prove that B was also the principal to the loan agreement with A. The High Court rejected this argument, applying *Gerish* for the proposition that ‘it is clear that the evidence sought to be admitted must go directly towards showing the state of mind that exists in reference to the particular matter in question’.¹⁸ In doing so, it held that evidence of *one* former loan agreement with a third party did not show B’s state of mind vis-à-vis the contract with A. While this proposition is likely true, *Gerish* did not stand precisely for this proposition. Rather, *Gerish* merely illustrated the use of a contemporaneous contract to disprove the existence of a contract between two non-contracting parties. With respect, by failing to distinguish *Gerish* from its facts, the High Court in *Bhoomatidevi* may have misapplied *Gerish* and illustration (g) of s. 14.

One possible way to distinguish the two cases would be to highlight that in *Gerish*, the three parties were contemporaneously involved in the same transaction, albeit in different capacities. Here, although these unsecured loans were obtained to fund the same business endeavour, Mrs Kavita and Samy were not approached at the same time. Thus, perhaps in *Gerish*, the evidence might not have been similar fact evidence in a pure sense. However, this leaves open the question of what precisely is required for evidence of prior contracts to be adduced as extrinsic evidence in contractual interpretation.

The application of Explanation 1 of s. 14

It may be that that despite the court’s discussion of illustration (g) and *Gerish*, the true basis for its position is Explanation 1 to s. 14. Explanation 1 provides that the SFE must prove a state of mind that exists in reference to the particular matter in question.¹⁹ This means that the SFE must prove B’s intention, objectively ascertained, at the time of contracting with A.²⁰ Citing *Nai Yau Juu* to illustrate that evidence of prior conduct in another contract is insufficient to prove ‘an intention to manifest something binding’ in the present,²¹ the court concluded that ‘the manner in which [B] contracted with [D] is not, *without more*, necessarily indicative of the objective intentions of [B] and [A] in the present case’.²²

By applying Explanation 1 in this way, and insisting that the adduced evidence refer specifically to ‘the particular matter in question’, it appears that evidence of a party’s intention when entering into a prior contract can *never* be admitted via s. 14 to prove that same party’s intention when entering into a present contract in dispute. This decision is certainly in line with the degree of specificity required by the illustrations of s. 14.

The relevance of s. 15

While the High Court correctly applied s. 14, it opted not to apply s. 15, finding it to be irrelevant because s. 15 only determined ‘whether an act was accidental or intentional’.²³ However, s. 15 also determines whether an act was ‘done with a particular knowledge or intention’.²⁴ Both ss. 14 and 15 serve as admissibility provisions for evidence seeking to prove the *mens rea* element of an act. Where the illustrations to s. 14 demonstrate the requirement of a high degree of specificity, s. 15 requires a ‘series of similar

18. *Bhoomatidevi d/o Kishinchand Chugani Mrs Kavita Gope Mirwani v Nantakumar s/o v Ramachandra and another* [2023] SGHC 37 at [55].

19. *Ibid.* at [55].

20. *Ibid.* at [55].

21. *Ibid.* at [55]; citing *Nai Yau Juu* at [24].

22. *Ibid.* at [57].

23. *Ibid.* at [53]; citing s 15 EA.

24. EA, s 15.

occurrences²⁵ before evidence of those prior occurrences may be adduced as evidence. These sections simply ‘cater to different situations and are meant to be used as independent gateways’.²⁶ Therefore, it is unclear why s. 15 was removed from the court’s analysis and deemed irrelevant to determining whether B *intended* to contract with A as a principal or an agent of Benshaw.

Perhaps the court decided that one prior contract was not sufficient to show a ‘series’.²⁷ Nevertheless, had this been the reason why s. 15 was excluded, the court could have taken the opportunity to clarify precisely how many prior contracts would suffice to satisfy s. 15.

The primacy of the Evidence Act

Bhoomatidevi is significant more generally for two further reasons. First, the court held that it was ‘widely accepted that the concept of similar fact evidence is reflected in ss. 14 and 15 of the EA’²⁸ although it did not apply any kind of balancing exercise. This stands in contrast to the line of cases following *Tan Meng Jee v Public Prosecutor*.²⁹

The Court of Appeal in *Tan Meng Jee* held that the admission of SFE should be governed by the balancing test adopted by the House of Lords in *Boardman’s* case.³⁰ For years since, cases have cited *Tan Meng Jee* with approval. For example, the High Court in *PP v Purushothaman a/l Subramaniam* cited *Tan Meng Jee* for the proposition that the prejudicial effect of SFE may sometimes be outweighed because ‘similar facts can be so probative of guilt that to ignore it via the imposition of a blanket prohibition would unduly impair the interests of justice’.³¹ Furthermore, the High Court in *PP v Ranjit Singh Gill Menjeet Singh* held that the common law balancing test of weighing the probative force of a piece of evidence against its prejudicial value had been superimposed onto ss. 14 and 15 of the EA.³² Indeed, the primary of the common law PVPE test has continued to be affirmed in recent civil³³ and criminal³⁴ decisions.

Instead, *Bhoomatidevi* joins the ranks of cases that have insisted on the primacy of the EA. For example, the High Court in *Public Prosecutor v Mas Swan bin Adnan and another* held that admissibility of SFE ‘has to be determined according to the categories of relevance under ss. 14 and 15 and *Tan Meng Jee* is inconsistent with the EA in so far as it allows for the exclusion of similar fact evidence that is otherwise deemed relevant under those provisions’.³⁵ Likewise, in *Rosman bin Abdullah v PP*, the Court of Appeal held that SFE may be utilised in the ‘*limited* manner envisaged within a *strict* application’ of ss. 14 and 15 of the EA.³⁶

The role of s. 11 of the EA

Second, the court’s identified ss. 14 and 15, instead of s. 11, as the relevant provisions to admit SFE that was adduced to prove B’s state of mind. This seems to indicate, at least, that s. 11 cannot be used to admit SFE to prove *mens rea*.

25. *Ibid.*, s 15.

26. Chen Siyuan and Lionel Leo, *The Law of Evidence in Singapore*, 3rd ed. (Sweet & Maxwell, 2022) at [5.025].

27. EA, s 15.

28. *Bhoomatidevi d/o Kishinchand Chugani Mrs Kavita Gope Mirwani v Nantakumar s/o v Ramachandra and another* [2023] SGHC 37 at [52].

29. (“*Tan Meng Jee*”) [1996] 2 SLR(R).

30. *Ibid.* at [48].

31. [2014] SGHC 215 at [50].

32. [2017] 3 SLR 66 at [17].

33. *Ong Kian Peng Julian v Singapore Medical Council* [2023] 3 SLR 1756 at [42].

34. *PP v Sriharan K Raja Rajan* [2020] SGHC 121 at [25]; *PP v Muhammad Shafiq bin Shariff* [2021] 5 SLR 1317 at [87]–[88]; *PP v Tan Yi Rui Tristan* [2023] SGHC 173 at [102]–[103].

35. [2011] SGHC 107 at [107].

36. [2017] 1 SLR 10 at [32].

However, the High Court in *PP v Teo Ai Nee* held that the SFE, which was tendered to prove intention, could be admitted via s. 11.³⁷ Conversely, the High Court in *Lee Kwang Peng v PP* held that SFE could only be admitted via s. 11 to prove 'probative similarities of action'.³⁸ Confusingly, the High Court in *PP v Lee Chee Soon Peter* simply held that s. 11 allowed for the admission of SFE where its probative value outweighs its prejudicial effect, due possibly to its striking similarity.³⁹ Most recently, the High Court in *Jason Grendus v Stephen David Lynch* held that similar facts which are unconnected with the facts in issue and which are inadmissible under ss. 14 and 15 cannot be admitted under s. 11.⁴⁰ It remains unclear, therefore, whether SFE can be admitted via s. 11, and if so, whether the evidence can be tendered to prove *mens rea* or *actus reus*.

Conclusion

In conclusion, although *Bhoomatidevi* has precluded the use of SFE to prove contractual intention under s. 14, such evidence may yet be tendered under s. 15. Ostensibly, the restrictive approach to contractual interpretation might operate to render inadmissible, as a matter of principle, SFE to prove contractual intention, whether under ss. 14 or 15 of the EA. This author looks forward to the law being clarified in a future decision.

Acknowledgements

I am grateful to Chen Siyuan, Soh Kian Peng, and Erica Wee for their guidance and advice on this article. All errors remain my own.


Declaration of conflicting interests

The author declared no potential conflicts of interest with respect to the research, authorship, and/or publication of this article.

Funding

The author received no financial support for the research, authorship, and/or publication of this article.

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37. [1995] 1 SLR(R) 450 at [79].

38. [1997] 2 SLR(R) 569 at [42].

39. [2010] SGHC 311 at [32].

40. [2021] SGHC 191 at [239].