FACTS OR INTERPRETATIONS?

"***In a perfect world, the court would have no difficulty saying what the legal text means because there would be equivalence between what the text said, and what its drafters meant. But this is the stuff of fantasy***."

– per Chief Justice Sundaresh Menon, delivering the 25th Singapore Law Review Lecture on 23 September 2013 on the topic *The Interpretation Of Documents: Saying What They Mean Or Meaning What They Say*.

"***There are no facts, only interpretations***."

– per Friedrich Wilhelm Nietzsche (15 October 1844 – 25 August 1900), German philosopher.

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One would have thought that the Court of Appeal's decision in *Zurich Insurance (Singapore) Ltd v. B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR (R) 1029 ("*Zurich Insurance*") heralded an era of certainty on the subject of contractual interpretation in Singapore. Yet, close to a decade on, practitioners and academics remain befuddled by divergent views as to the application of *Zurich Insurance* and our local courts when presiding contractual disputes remain saddled with the unenviable task of reconciling the mismatch between what is stated in texts and what the drafters meant.

The case of ***Lucky Realty Company Pte Ltd v HSBC Trustee (Singapore) Limited* [2015] SGCA 68** ("*Lucky Realty*") is no different. This appeal concerns the interpretation of a rent review clause in a lease agreement. On the Appellant's interpretation, the Appellant's remaining rental obligation to the Respondent was projected to be about $6 million; on the interpretation contended by the Respondent, however, the Appellant would have to pay a projected sum in excess of $45 million over the remaining life of the lease.

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FACTS

1. The dispute in *Lucky Realty* involved a piece of land known as "Lot 3041" owned by the Estate of the late Koh Sek Lim (who had on his death settled the land on certain trusts) in which the Appellant property developer held a 60-year leasehold interest at a fixed yearly rent of $3,877.15 for the entire duration of the Lease.

2. In the 1970s, the Appellant erected 4 buildings on Lot 3041 known as Blocks A, B, C and D. Lot 3041 was subsequently subdivided with three lots, two of which were acquired by the State and the remaining lot (i.e. Lot 5245N) was where Blocks A, B, C and D stood. The Appellant then sold the vast majority of the units in Blocks A, B and C by way of assignment of its interest in the Lease, leaving Block D which the Appellant sought to generate rental income from.

3. A dispute arose in 1994 concerning the Appellant's redevelopment of Block D from a market into a shopping centre, which the then trustee considered to be a breach of the Lease. Negotiations ensued and the Lease was varied by a Deed of Variation entered into in 1996. The Deed provided for a revised base yearly rent of $120,000 with a 5-yearly rent review mechanism allowing a 10% increase of the rent or "*the market rent prevailing*", whichever was higher ("rent review clause"). The Deed also stated the "*market rent prevailing*" to mean

that "*the valuation of the rental would be based on the existing development and not on an imaginary highest and best use consideration*". The description of the land as "Lot 3041" was not altered by the Deed although Lot 3041 had ceased to exist in its original form.

4. Thereafter, the yearly rent was reviewed twice without controversy to $132,000 in 1999 during the first rent review, and to $150,000 in 2004 during the second rent review. However, in 2006, the Respondent took over as trustee and contended at the third rent review in 2009, that it was entitled to increase yearly rent to the market rent prevailing for the *entirety of* Lot 5245N, which it valued at $1.3 million per annum.

5. The Appellant disagreed. The Respondent subsequently commenced proceedings against the Appellant seeking *inter alia*, a declaration that the rent review clause should be interpreted such that revisions to yearly rent were calculated by reference to the whole of Lot 5245N. Conversely, the Appellant argued that each rental revision should be calculated by reference to Block D only. The High Court Judge held in favour of the Respondent and the Appellant appealed.

DECISION OF THE COURT OF APPEAL

6. The appeal was allowed unanimously by the Honourable Chief Justice Sundaresh Menon and the Honourable Judges of Appeal Andrew Phang Boon Leong and Chao Hick Tin.

7. The Court of Appeal held that there was a clear and obvious context which was the negotiations by the parties that stemmed from a dispute in relation to Block D oriented to arriving at a mutually agreeable new rent. The Court of Appeal found that Block D was clearly featured prominently and was the *sine quo non* of these negotiations, therefore the parties must have proceeded on the basis that the fair market rental value was to be derived from a computation based on Block D alone and *not* the entirety of Lot 5245N.

8. What is particularly instructive is the 4-step process of *interpretation* that the Court of Appeal had adopted in arriving at its decision:

   (a) First: Look within the contract. The text of the contractual document ought to be the first port of call. In interpreting the terms, however, the Court of Appeal found the Lease to provide little guidance.

   (b) Second: Ascertain the relevant portion of the contract that warranted scrutiny. The crucial words, the Court of Appeal found, were the words in the rent review clause, specifically, whether "*existing development*" pertained to the entire Lot 5245N or simply to Block D.

   (c) Third: Consider the materials that could have shed light on what "*existing development*" meant. Looking *within* the contract, the Court of Appeal found little guidance. Looking *beyond* the contract, the Court of Appeal found that the contemporaneous correspondence that led up to the agreement, however, was illuminating. The correspondence showed that the rent review clause was arrived at through negotiations that stemmed from a dispute in relation to Block D.

(d) Fourth: Decide whether the evidence relied on to support the interpretation of the contract provides a clear and obvious context, bearing in mind the focus of the inquiry (identified in the second step). In doing so, the Court of Appeal welcomed a more practical approach, recognising that while the contract was far from ideal and there were factors that seemed to cloud the context, "*if each and every imperfection or remotely ambiguous phrase in a contract were sufficient to muddy the context, it would be nigh impossible to even construct a context in most cases*"

ANALYSIS

9. As a preliminary observation, parties embroiled in such disputes today are largely *ad idem* that the legal principle applied by Singapore's Courts is the "contextual approach" to the interpretation of terms, as the Appellant and Respondent were in this case. This approach is undergirded by a philosophy that seeks the *common intention* of the parties, even if, occasionally, this might yield an understanding that departs from the literal meaning of the words used in the contract.

10. However, the principal difficulty lies in the sphere of *application* of this "contextual approach" as the context of each case often varies so vastly. The most challenging part of this interpretative exercise is in determining the disputes as to admissibility of each piece of extrinsic evidence *first*, and *then* approaching the question of whether these evidence provide a clear and obvious context to the question before the court, for which no mechanic formulaic exists (see the Court's third and fourth step above). As the case of *Lucky Realty* presents, the final step requires a fair amount of separating the wheat from the chaff and the Court of Appeal eschewed a punctilious approach for this exercise, with which, it opined, it would be nigh impossible to even construct a context in most cases.

11. In our view, the most compelling feature of *Lucky Realty* appears to be the departure from the conservative course that our courts have hitherto charted, towards the robust approach (adopted by New Zealand but eschewed by English law) to admit extrinsic evidence of prior negotiations.

12. For a long time since *Zurich Insurance*, our Courts have rejected the English position of a blanket prohibition on all evidence of pre-contractual negotiations, which has no equivalent in our Evidence Act. A possible shift towards a positive formulation was hinted by the Court of Appeal's remarks in the case of *Xia Zhengyan v Geng Changqing* [2015] SGCA 22 involving the interpretation of a sale and purchase agreement that the parties had "*[u]nfortunately… failed to make any submissions on whether [the] draft agreements, which fall under the broader category of pre-contractual negotiations, are, as a matter of law, admissible and relevant for the purposes of contractual interpretation*" which tragically led the Court of Appeal to restate that the issue was still left open.

13. *Lucky Realty*, however, was precisely decided on prior negotiations. Although the Court of Appeal might not have expressly stated that the Singapore courts now recognise "prior negotiations" as a category of admissible extrinsic evidence to aid in contractual interpretation, the reasoning behind the Court of Appeal's decision speaks for itself. Poignantly, the Court of Appeal's findings were predicated on the "*contemporaneous correspondence*" in the "*final stages of negotiations*" and embarked on a thorough analysis of the parties' prior negotiations that went down to the detail of the "*subject titles of the letters in the correspondence*".

14. Yet, the Court of Appeal did not openly recognise the robust approach to contractual interpretation, despite a slew of pre-contractual correspondence that plainly evinced the *objective* intent of *both* parties and the *purpose* of the contract in question (thereby quelling the fears of the English courts that prior negotiations are always "*drenched in subjectivity*").

15. Alas, even after *Lucky Realty*, one is left to wonder when such change may come.

Lee & Lee Senior Partner Julian Tay, and Associates April Cheah and Theodora Kee acted for the successful Appellant.

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