Y.E.S. F&B Group Pte Ltd *v* Soup Restaurant Singapore Pte Ltd (formerly known as Soup Restaurant (Causeway Point) Pte Ltd)
[2015] SGCA 55

Case Number	: Civil Appeal No 193 of 2014
Decision Date	: 02 October 2015
Tribunal/Court	: Court of Appeal
Coram	: Sundaresh Menon CJ; Chao Hick Tin JA; Andrew Phang Boon Leong JA
Counsel Name(s)	: Tan Gim Hai Adrian, Ong Pei Ching, Loh Jien Li and Lim Siok Khoon (Morgan Lewis Stamford LLC) for the appellant; Edwin Tong SC, Kenneth Lim Tao Chung, Lee May Ling and Chua Xinying (Allen & Gledhill LLP) for the respondent.
Parties	: Y.E.S. F&B GROUP PTE LTD — SOUP RESTAURANT SINGAPORE PTE LTD (PREVIOUSLY KNOWN AS SOUP RESTAURANT (CAUSEWAY POINT) PTE LTD)

Contract – Contractual terms – Express terms – Interpretation of term

[LawNet Editorial Note: This was an appeal from the decision of the High Court in [2014] SGHC 246.]

2 October 2015 Judgment reserved.

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

Introduction

1 Not surprisingly, the issue of interpretation has – in the nature of things – always been a central one in the common law of contract. As Lord Steyn aptly observed in an extrajudicial context (in "Contract Law: Fulfilling the Reasonable Expectations of Honest Men" (1997) 113 LQR 433 at 439), "[d]isputes about the meaning of contracts is one of the largest sources of contractual litigation".

2 Indeed, if the relatively recent proliferation of extremely scholarly texts on this particular issue from both England and Australia by an eminent judge as well as eminent professors and practitioners is anything to go by (see, for example, Sir Kim Lewison, *The Interpretation of Contracts* (Sweet & Maxwell, 5th Ed, 2011) (adapted for Australia in Sir Kim Lewison & David Hughes, *The Interpretation of Contracts in Australia* (Sweet & Maxwell, 2011)); Gerard McMeel, *The Construction of Contracts – Interpretation, Implication, and Rectification* (Oxford University Press, 2nd Ed, 2011); Richard Calnan, *Principles of Contractual Interpretation* (Oxford University Press, 2013); and J W Carter, *The Construction of Commercial Contracts* (Hart Publishing, 2013)), this issue has become even more important in recent times. In the final analysis, however, much depends – as this court has observed in *Fairview Developments Pte Ltd v Ong & Ong Pte Ltd and another appeal* [2014] 2 SLR 318 ("*Fairview Developments*") at [47] (see below at [30]) – on *both the* ***text*** ***as well as*** *the* ***context*** of the contract. This is no mere catchphrase. In our view, it captures *the essence* of what the court does – *and* ought to do – in the context of the ***interpretation*** of contracts. However, since the context of each case can vary so greatly, much of the difficulty for the court concerned lies in the sphere of ***application*** . The present appeal is yet another illustration in this particular regard.

The background facts

The parties

3 The appellant, Y.E.S F&B Group Pte Ltd ("YES"), was the defendant in the proceedings below. It is a Singapore incorporated company in the business of running food and beverage outlets, in particular, a chain of Chinese restaurants under the name *Dian Xiao Er*. YES was incorporated in 2002. It was founded by the husband and wife team of Mr Yik Kuen Koon ("Yik") – who appeared as the sole witness for YES in the trial below – and Ms Eliza Gunawan ("Eliza"). They are the current shareholders and directors of YES.

4 The respondent, Soup Restaurant Singapore Pte Ltd ("Soup"), was the plaintiff in the proceedings below. It is also a Singapore incorporated company which operates a chain of Chinese restaurants. These restaurants are run under the name *Soup Restaurant*. Soup is wholly-owned by its parent company, Soup Restaurant Group Limited ("SRGL"). Mr Mok Yip Peng ("Mok"), a director of Soup, appeared as its only witness in the trial below.

5 Today, YES and Soup are *competitors* in the food and beverage industry. However, it is important to bear in mind that, when the contract which is the subject of the present appeal was entered into (in October 2009 (see below at [13])), the complexion of their relationship was very different. At that time, YES and Soup were in fact *related companies* within the same corporate structure. By way of background, their previous relationship as sister companies began sometime in 2006. This was when SRGL and another of its subsidiaries, Soup Restaurant Investments Pte Ltd ("SRI"), acquired a majority stake of 50.98% in YES, thereby bringing YES into the SRGL group of companies, which included Soup. Yik and Eliza held the remaining 49.02% of shares in YES pursuant to this acquisition. However, as will become apparent in due course, fractures in the SRGL corporate group began to emerge in early 2010 and, by June 2012, Yik and Eliza had bought over all of SRGL and SRI's shareholding in YES; this was done pursuant to a settlement agreement that had been entered into to resolve a minority oppression suit commenced by Yik and Eliza (see below at [18]–[19]). The corporate relationship between YES and Soup was thus brought to a formal end, and this explains their present-day status as competitors.

6 The competition between the parties today is particularly evident in the shopping mall known as Vivocity where they occupy adjacent units under their respective leases with the landlord. At present, YES operates its *Dian Xiao Er* restaurant out of Unit #02-137/138 ("Unit 137") while Soup operates its *Soup Restaurant* business out of the neighbouring Unit #02-141 ("Unit 141"). However, this has not always been the case. At one point, when the relationship between the parties as sister companies was still good, they had entered into a sub-lease agreement pertaining to a part of Unit 141 with Soup as the sub-lessor and YES as the sub-lessee. Essentially, that agreement allowed for the space in Unit 141 to be shared and it is the interpretation of the terms of this agreement – in particular, for the purpose of discerning the *duration* for which it remains valid and subsisting – that forms the central focus of this appeal. The context surrounding the execution of this sub-lease agreement is, as alluded to earlier, of utmost importance; hence we turn to set out the relevant factual matrix in that regard.

YES's lease of Unit 137

7 YES was first to set up shop in Vivocity. This was sometime in October 2006 when it entered into a lease with the landlord to operate a *Dian Xiao Er* outlet. This lease was for a period of three years and so expired in October 2009. However, it did contain an option to renew for a further period of three years.

8 At the end of the aforementioned lease, the option was exercised by YES upon which it entered into a second lease with the landlord for Unit 137. For reasons which will become apparent later, it is of some importance to note two aspects of this second lease – first, that its expiry date was fixed as at 6 October 2012 and, secondly, that, unlike YES's initial lease in 2006, this subsequent lease did not contain an option to renew.

9 Presently, YES occupies Unit 137 on the terms set out in a third lease. This was negotiated with the landlord at the expiry of the second lease.

Soup's lease of Unit 141

10 It is undisputed that, during the period of YES's first lease (which began in 2006), its *Dian Xiao Er* outlet performed well. Therefore, sometime in April 2009, which was prior to the expiry of the said lease, the landlord offered YES the opportunity to expand its pre-existing business at Unit 137 by taking up a new lease of the adjoining Unit 141. YES was keen on the idea of expanding its business and approached Soup to inform the latter about the landlord's offer. YES and Soup, it should be mentioned, were already sister companies by this time. Discussions ensued between the parties. Importantly, it appears that Soup did not need the entire premises at Unit 141 as it expressed only an interest to be the main tenant of Unit 141; in this connection, Soup seemed happy to accommodate YES's interest in expanding its pre-existing outlet at Unit 137 as Soup was willing to set aside a part of Unit 141 for YES's use.

11 Based on the understanding reached in these discussions, Yik (of YES) brought Mok (of Soup) to meet representatives of the landlord in respect of Unit 141. It was duly made known to the landlord that Soup intended to lease Unit 141 to operate a *Soup Restaurant* outlet but that a part of this unit would be sub-leased to YES to expand its existing *Dian Xiao Er* outlet from Unit 137. In this last-mentioned regard, it is important to note that an email from Soup to the landlord dated 1 July 2009 demonstrates that Soup was aware that YES also had *specific* designs for its additional space in Unit 141, namely, that it was to be used for the expansion of *Dian Xiao Er's* kitchen and VIP rooms. Indeed, it was only after Soup had (as evidenced by this email) obtained the landlord's confirmation that YES could use the additional space for this purpose that it (*ie*, Soup) accepted the landlord's letter of offer dated 19 June 2009 for the lease of Unit 141.

12 The said letter of offer was subsequently reduced into a formal lease agreement dated 11 October 2010 ("the 2010 Lease Agreement"). Its terms provided that Soup's lease of Unit 141 was for a three year term, commencing on 19 October 2009 and expiring on 18 October 2012. It also provided that the fixed rent (inclusive of GST) payable would be $42,117.28 per month.

Soup sub-leases a part of Unit 141 to YES

13 On the same day that Soup's lease of Unit 141 commenced under the 2010 Lease Agreement, *viz*, 19 October 2009, it also entered into a sub-lease agreement with YES ("the Sub-Lease Agreement") to let out a strip of Unit 141 amounting to an area of 742.70 square feet ("the Sub-Leased Premises"). This was done pursuant to the parties' agreement to share Unit 141 which, as stated above, Soup had communicated to the landlord prior to accepting the 19 June 2009 letter of offer.

14 The Sub-Lease Agreement is a simple two-page document. According to Mok, it was drafted by the company secretary of Soup, and apparently without any legal assistance. As the terms of this agreement are central to the present dispute, we set them out here in their entirety:

1. Soup Restaurant (Causeway Point) Pte Ltd (the "Company") had entered into an agreement (the "Agreement") with VivoCity Pte Ltd as trustee of VivoCity Trust (the "Landlord") on 19 June 2009 in respect of the lease of 1 HarbourFront Walk #02-141 VivoCity S(098585) to operate both "Soup Restaurant" and "Dian Xiao Er" ("DXE") brands.

2. Y.E.S F & B Group Pte Ltd ("YES") had sub-leased a part of the above space to operate DXE with the consent from the Landlord.

3. By entering into this agreement, YES agrees:

i) To be bounded by the same terms and conditions in the lease agreement between the Company and the Landlord on a back-to-back basis; and

ii) To pay the Company a monthly fixed rental of $9,284.64 (excluding prevailing GST) for an area of 742.70 square feet in advance on the first day of each month without demand.

4. *This agreement shall survive as long as* ***the Company's lease*** *with the Landlord is not terminated.*

[emphasis added in italics and bold italics]

15 The construction of cl 4 is the subject of much disagreement between the parties, in particular, the meaning to be attributed to the term "*the Company's lease*". What does this refer to? It was clear that the choice between the parties essentially boiled down to what, in broad terms, may be described as either a *generic* lease or a *particular* lease. At this juncture, it is convenient to elaborate upon the parties' respective positions:

(a) Soup preferred the narrower interpretation of cl 4. According to Soup, "the Company's lease" in cl 4 referred specifically to *that particular lease* which was in force between Soup and the landlord at the time the Sub-Lease Agreement was entered into, namely, the lease that was later formalised in the 2010 Lease Agreement. Soup therefore submitted that, by cl 4, the Sub-Lease Agreement terminated in tandem with the expiry of the 2010 Lease Agreement on 18 October 2012. From that point onwards, Soup argued that YES's continued occupation of the Sub-Leased Premises, despite Soup's requests for vacant possession (see below at [22]), was wrongful and thus claimed for damages flowing therefrom.

(b) YES adopted the alternative interpretation of cl 4. According to YES, "the Company's lease" in cl 4 was, in a sense, a blanket term that was not tied to any one particular lease – it was, instead, a broad reference to *any lease* which Soup had with the landlord in respect of Unit 141. The practical consequence of this reading of cl 4 was that, so long as Soup continued to lease Unit 141 from the landlord, Soup was in turn obliged to sub-lease the Sub-Leased Premises to YES on terms, as cl 3(i) makes clear, which were back-to-back with the head lease in force for the time being. On this view, YES submitted that Soup had no basis for demanding vacant possession of the Sub-Leased Premises from 18 October 2012 onwards because Soup had entered into a fresh lease for Unit 141 with the landlord (which expires only in April 2016 (see below at [26])); hence the Sub-Lease Agreement remained valid and subsisting by virtue of cl 4.

16 Which of these interpretations is correct is the central issue in this appeal. For the moment, though, we return to our narration of the facts.

17 Following on from the entry into the Sub-Lease Agreement, renovation works to extend *Dian*

Xiao Er's VIP rooms and kitchen were, as contemplated by the parties, duly commenced on the Sub-Leased Premises. These works took place in November 2009 and the total cost came up to the not insubstantial sum of about $210,000. This sum was paid by YES but it appears from the evidence that Soup was very much involved in the renovations of the Sub-Leased Premises as well. For example, an email dated 2 November 2009 demonstrates that it was Soup which had requested the landlord's permission for renovation works to be carried out on the Sub-Leased Premises. Further, in a separate email correspondence, it also appears that Soup made payment of the security deposit for the renovation works before seeking reimbursement from YES. This is reflective of the parties' then-existing good commercial relationship.

The minority oppression suit

18 However, not long after the renovation works were completed, the relationship between Soup and YES turned sour. In February 2010, Yik and Eliza were removed as directors of YES while Mok was appointed as its Chief Executive Officer. This led to a minority oppression suit commenced by Yik and Eliza against YES, SRGL and SRI on 4 November 2010. It is relevant to note, however, that Soup was not a party to this action.

19 The minority oppression suit was eventually resolved on 14 June 2012. This was when all the relevant parties (which did not include Soup) entered into a settlement agreement ("the Settlement Agreement"). It bears highlighting cl 5.4 of this agreement, which reads as follows:

> … [T]he Parties agree that the sub-leases in respect of the Dian Xiao Er outlets at the following locations shall not be terminated and shall continue up to the expiry of the current sub-leases without any change in the terms thereof:-
>
> | Outlet Location | C u r r e n t Expiry Date |
> |---|---|
> | Ang Mo Kio Hub | 17 January 2013 |
> | Vivocity | *6 October 2012* |
>
> [emphasis added in italics]

20 It will be noticed from the preceding paragraph that the expiry date of the Sub-Lease Agreement was stated in cl 5.4 of the Settlement Agreement as 6 October 2012; this is different from the date on which Soup's head lease for Unit 141 was due to expire (*viz*, 18 October 2012) but mirrors exactly the expiry date of YES's second lease for Unit 137 (see above at [8]). This point is of some relevance to Soup's submissions on appeal and we will return to elaborate on it in due course. For present purposes, it suffices to note that the 6 October 2012 expiry date in the Settlement Agreement was the original basis upon which Soup commenced the present action although, as alluded to at [15(a)] above, its claim finally came to rest on the wording in cl 4 of the Sub-Lease Agreement. This appears clearly from the procedural history of this matter.

21 Before turning to the procedural history, it should be mentioned for completeness that YES has since handed over the Sub-Leased Premises to Soup. This was pursuant to an offer made by YES, without admission of liability, on 22 May 2014. Soup accepted this offer and the handover was completed on 1 October 2014.

The procedural history

22 On 1 October 2012, Soup's solicitors wrote to YES, giving the latter notice to deliver vacant possession of the Sub-Leased Premises by 6 October 2012. YES did not comply with the notice and, after some further correspondence between the parties' solicitors, Soup commenced these proceedings on 22 October 2012.

23 In its original Statement of Claim, Soup pleaded that, pursuant to cl 5.4 of the Settlement Agreement, the Sub-Lease Agreement had expired by effluxion of time on 6 October 2012. Accordingly, Soup claimed that, by wrongfully refusing to yield up possession of the Sub-Leased Premises, YES was retaining possession of it as a trespasser. Soup thus sought, *inter alia*, vacant possession of the Sub-Leased Premises and damages.

24 During the course of proceedings, YES applied to strike out Soup's claim and this interlocutory matter came before Tay Yong Kwang J who made the observation that Soup was not a party to the Settlement Agreement; hence its reliance on that agreement appeared to raise an issue of privity. Nevertheless, Tay J refrained from striking out Soup's entire claim because, by then, Soup had proposed amendments to its original Statement of Claim, pleading the Settlement Agreement as an alternative basis for its claim of wrongful occupation while premising its claim primarily on cl 4 of the Sub-Lease Agreement. Tay J therefore ordered Soup to delete all references to the Settlement Agreement and refused to strike out Soup's entire claim.

The pleadings

25 In its Statement of Claim amended pursuant to Tay J's order, Soup duly removed all references to the Settlement Agreement. Its case was now based entirely on the Sub-Lease Agreement, the duration of which, as elaborated above at [15(a)], it further claimed was tied by cl 4 to the 2010 Lease Agreement. Since the 2010 Lease Agreement expired on 18 October 2012, Soup argued that so too did the Sub-Lease Agreement.

26 YES pleaded, on the other hand, that the Sub-Lease Agreement did not cease to have effect on 18 October 2012. This was because, prior to the expiry of the 2010 Lease Agreement, Soup had reached an agreement with the landlord over the renewal of its lease for Unit 141, which later came to be formalised in an agreement dated 26 November 2012. This new lease is the lease upon which Soup continues to occupy Unit 141 at present. It is for a term of three and a half years, commencing on 19 October 2012 and expiring only on 30 April 2016. Since YES understood cl 4 of the Sub-Lease Agreement as entitling it to possession of the Sub-Leased Premises for as long as Soup leased Unit 141 from the landlord, its case, given Soup's renewal of the head lease, was that the Sub-Lease Agreement continued in force beyond 18 October 2012.

The decision below

27 The Judge below agreed with Soup's construction of the Sub-Lease Agreement; hence he arrived at the conclusion that this agreement terminated on 18 October 2012 (in tandem with the 2010 Lease Agreement) and, accordingly, that YES was in wrongful possession of the Sub-Leased Premises therefrom and liable to pay damages (see *Soup Restaurant Singapore Pte Ltd (formerly known as Soup Restaurant (Causeway Point) Pte Ltd) v Y.E.S. F&B Group Pte Ltd* [2014] SGHC 246 ("the Judgment")). The essence of the Judge's reasoning may be found at [17] of the Judgment, where he observed as follows:

> … [T]he Head Lease [*ie*, the 2010 Lease Agreement] commenced on 19 October 2009 and terminated by effluxion of time on 18 October 2012 when its three-year term came to an end. It follows that the sub-lease also terminated on 18 October 2012 because:

(a) cl 1 of the sub-lease agreement refers to the Head Lease and not to any other lease agreement;

(b) Schedule 1 of the Head Lease states that the term of the Head Lease was for three years and expired on 18 October 2012;

(c) in law, the existence of a sub-lease is premised on the subsistence of the head lease from which it is derived (see [13] above); and

(d) cl 4 of the sub-lease agreement acknowledges the legal position stated above …, *ie*, the sub-lease would end upon the termination of the Head Lease.

Our decision

28 The crux of both parties' arguments on appeal remain broadly the same – YES continues to advance the interpretation that "the Company's lease" in cl 4 of the Sub-Lease Agreement refers to a *generic* head lease for Unit 141, while Soup stands by its view (as adopted by the Judge below) that the duration of the Sub-Lease Agreement is tied to the *particular* head lease that was in force at the time of entry into the Sub-Lease Agreement, *viz*, the lease as embodied in the 2010 Lease Agreement (see above at [15]).

29 In order to determine which of these contrasting interpretations is correct, it is no doubt important to first have regard to the applicable principles that govern the interpretation of contracts.

The applicable principles

The principles stated

30 As already alluded to at the outset of this judgment, what is crucial in relation to the resolution of the present appeal is a nuanced consideration of both the text as well as the context of the contract in question, *viz*, the Sub-Lease Agreement. As this court observed in *Fairview Developments* (at [47]):

> The reality is that there is often more than one immutable meaning to words, and *a fortiori*, to phrases (see the decision of this court in [*PT Bakrie Investindo v Global Distressed Alpha Fund 1 Ltd Partnership* [2013] 4 SLR 1116] at [1]–[3]). When faced with rival meanings, the court must, in carrying out its role of giving effect to the objective intentions of the contracting parties, consider the relevant contractual, contextual and commercial background against which the document containing the disputed words and phrases came about. This can be summed up in the fundamental principle referred to above (at [4]), *viz*, *text and context* (and on the concept of context, see generally J W Carter, *The Construction of Commercial Contracts* (Hart Publishing, 2013) at chs 6 and 7). [emphasis in original]

31 It is, of course, not inconceivable that the *text* itself might be *plain and unambiguous inasmuch as it admits of one clear meaning*. Correlatively, this would also mean that there is a *coincidence* between both text and context inasmuch as there is nothing untoward in the context which militates against what is the plain language of the text itself. But what if the meaning of the text concerned is plain and unambiguous but would lead to an absurd result (based on the objective evidence available (this would include, in a commercial case, arriving at a result which demonstrated an absence of business common sense))? As we shall see, this is not the situation in the present appeal as the relevant contractual text is *not*, in fact, plain and unambiguous. However, we should think – at least

by way of a preliminary observation – that, in such a situation, the court concerned ought to undertake a very careful analysis of the text and context in order to ascertain whether the text is indeed plain and unambiguous. It seems to us that, if the text is in fact plain and unambiguous, giving effect to it would usually *not* (simultaneously) engender an *absurd* result. Indeed, should an absurd result ensue, this would, in our view, be a strong indication that the text concerned is probably *inconsistent with* the relevant *context*. The question then arises as to whether or not, *having regard to the relevant context*, the text (on a *re*-examination) is in fact as plain and unambiguous as was originally *thought* to be the case (see also the observations of this court in *Sandar Aung v Parkway Hospitals Singapore Pte Ltd (trading as Mount Elizabeth Hospital) and another* [2007] 2 SLR(R) 891 at [29]). We do note, however, that there may be *exceptional cases* where the text is so clearly plain and unambiguous that the court is compelled to give effect to the meaning contained therein, *notwithstanding* that an *absurd* result would ensue (a point which we deal with in more detail in *the next paragraph*). Nevertheless, we are also of the view that, in the nature of things, this would be *an extremely rare* situation – not least because the law ought generally to lead to a *just and fair* result (as opposed to an *absurd* one). As we note below (at [35]), both text and context tend to *interact* with each other and that the courts ought therefore to eschew an excessively formulaic and/or mechanistic approach.

3 2 *However*, *an important caveat* is necessary at this particular juncture: there must be a *balance* between the text and the context. In other words, the context *cannot* be utilised as an excuse by the court concerned to *rewrite* the terms of the contract according to *its* (*subjective*) view of what it thinks the result ought to be in the case at hand. To this end, the court must always base its decision on *objective* evidence. More specifically, whilst there is a need to avoid an absurd result, this aim cannot be pursued at all costs; it must necessarily give way if the objective evidence clearly bears out a ***causative connection*** between the absurd result or consequences on the one hand and the intention of the parties at the time they entered into the contract on the other. What we mean by this, essentially, is that if the objective evidence demonstrates that the parties had contemplated the absurd result or consequence, the court is not free to disregard this to reach what may seem to it to be a more commercially sensible interpretation of the contract. Avoiding an absurd result is thus ***one factor*** (albeit a not unimportant one) which is considered in the entire process of interpretation by the court. Put simply, the court ***must*** ascertain, based on ***all the relevant objective evidence*** , ***the intention of the parties <u>at the time they entered into the contract</u>*** . In this regard, the court should ***ordinarily*** start from the working position that the parties did not intend that the term(s) concerned were to produce an absurd result. *However*, this is *only* a *starting point – and no more*. It might, for example, well be the case that the *objective* evidence demonstrates that the parties were *aware of* the absurd result that might ensue from the said term(s), but *nevertheless proceeded* to enter into the contract in question (this was indeed what was, in effect, the finding of the majority of the court in the recent UK Supreme Court decision of *Arnold v Britton and others* [2015] 2 WLR 1593 ("*Arnold*"), which we will consider in a little more detail below). In this last-mentioned situation, the fact that an absurd result might ensue is ***irrelevant*** inasmuch as the ***causative connection*** referred to above is ***<u>present</u>*** . It bears reiterating that what the court *cannot* do is to *ignore and disregard* the *intention of the parties* (based on the objective evidence), thus *rewriting* the term(s) of the contract for them based on *the court's* (*subjective*) view of what is just and fair by way of looking at an absurd result through the lenses of *ex post facto* rationalisation when, *instead*, the parties were, on the objective evidence, perfectly cognisant of the possibility of an absurd result ensuing *at the time they entered into the contract (but nevertheless chose to proceed with entry into the said contract)*. Admittedly, the line between interpreting the terms of a contract and rewriting it is a very fine one, and much will, in the final analysis, depend upon *the precise facts and context* before the court (as *manifested in the objective evidence* itself). Finally, it should also never be forgotten that, although the relevant context is also important, the ***text*** ought always to be ***the first port of call*** for the court (see also the Singapore High Court decision of *HSBC*

Trustee (Singapore) Ltd v Lucky Realty Co Pte Ltd [2015] 3 SLR 885 ("*HSBC Trustee*") at [59] (citing the decision of this court in *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR(R) 1029 ("*Zurich Insurance*") at [57]) as well as *per* Lord Hope DP in the UK Supreme Court decision in *Multi-Link Leisure Developments Ltd v North Lanarkshire Council* [2011] 1 All ER 175 ("*Multi-Link Leisure Developments*") at [11]).

33 It is also very important to emphasise that the role of context set out in the preceding two paragraphs relates *only* to the need to place the court in the position of the party which drafted the instrument and *not* the drafter's subjective intention as such (a distinction which was emphasised by this court in *Sembcorp Marine Ltd v PPL Holdings Pte Ltd and another and another appeal* [2013] 4 SLR 193 ("*Sembcorp Marine*") (see below at [40])).

34 On the *opposite end* of the spectrum, the *text* concerned might itself be *ambiguous* (*ie*, without even considering the relevant context). In such a situation, it is clear that the relevant *context* will *generally* be of *the first importance*.

35 However, as already noted, one ought not to take the propositions set out in the preceding paragraphs too far for, depending on the precise facts of the case, the text and context would often ***interact*** with each other. For example, as already noted above (at [31]), what might look like a plain and unambiguous text might not in fact be so if one has regard to the relevant context – at which point the context is also helpful in aiding the court in interpreting the text concerned. Much would, in the final analysis, turn on the ***precise facts*** of the case (which would, holistically speaking, include not only the text but also the context as well). It is important to observe that the process of contractual ***interpretation*** is a *dynamic* one. It is certainly not an unbridled exercise in raw judicial discretion: hence, the *general principles* which constitute the *legal* ***structure*** within which the process of contractual interpretation takes place. However, we also need to acknowledge the *practical reality* to the effect that, in the sphere of ***application*** of these general principles, the ***precise facts*** are (as just noted) of the first importance. There is – and can be – no magic formula or legal silver bullet. Contractual interpretation is (often at least) hard work, centring on a meticulous and nuanced (yet practically-oriented) analysis of the relevant text and context. ***Put simply, the court is always to pay close attention to both the text <u>and</u> context in every case – noting that both <u>interact</u> with each other.***

36 This may be an apposite point at which to address related issues arising from the relevant provisions of the Evidence Act (Cap 97, 1997 Rev Ed) ("the Act") (see also generally Goh Yihan, "Contractual Interpretation in Indian Evidence Act Jurisdictions: Compatibility with Modern Contextual Approach?" (2013) 13 Oxford Univ Commonwealth LJ 17). Section 94(*f*) of the Act ("s 94(*f*)") is (especially in the context of the present appeal) of particular significance, and reads as follows:

> **Exclusion of evidence of oral agreement**
>
> **94**. When the terms of any such contract, grant or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to section 93, no evidence of any oral agreement or statement shall be admitted as between the parties to any such instrument or their representatives in interest for the purpose of contradicting, varying, adding to, or subtracting from its terms subject to the following provisions:
>
> …
>
> (*f*) any fact may be proved which shows in what manner the language of a document is

related to existing facts.

37 It has been firmly established that s 94(*f*) constitutes not an exception to s 94 as such but is, rather, a substantive and fundamental rule of interpretation in its own right (although it must also be read with ss 95 to 100 of the Act). Reference may be made to the comprehensive analysis of this court in *Zurich Insurance* (especially at [67]–[133]). More importantly (particularly for the purposes of the present appeal), the court in *Zurich Insurance* clearly endorsed the *contextual approach* to contractual interpretation – interpreting, in this particular regard, s 94(*f*) in a "permissive" manner "which does *not* make *ambiguity a prerequisite for* the admissibility of extrinsic evidence in aid of contractual interpretation" [emphasis added] (see at [114] and [115]). Indeed, the court also observed (at [121]) that "the contextual approach to contractual interpretation, as accepted by our courts … is *statutorily embedded* in proviso (*f*) to s 94" [emphasis added]. ***This approach is wholly consistent with that which we have set out above (at [31]) in relation to the role of context in a situation where the language of the term(s) is clear and unambiguous.***

38 However, the court in *Zurich Insurance* also proceeded (at [122]) to furnish the following observation as a safeguard of sorts:

> One qualification to our endorsement of the contextual approach, must, however, be made. In the light of the continued robustness of the parol evidence rule in our law, the courts must remain ever vigilant to ensure that, in interpreting a contract, extrinsic evidence is only employed to illuminate the contractual language and not as a pretext to contradict or vary it. The courts are allowed to depart from the plain and ordinary meaning of the contract to some extent. The very recognition that surrounding circumstances may create ambiguity about the language used in a contract involves acceptance that words do not have fixed and clearly delineated meanings. Rather, words are sometimes penumbral; the context of the contract breaks down the rigidly-defined boundaries of meaning, introduces hues and shades, and defines the contours and limits of the penumbra. Thus, even in its ostensibly conservative reasoning in [*Citicorp Investment Bank (Singapore) Ltd v Wee Ah Kee* [1997] 2 SLR(R) 1], the Court of Appeal only required that the meaning imputed by the court be one which "the words are reasonably adequate to convey" (*id* at [63] (see the passage quoted at [83] above)). The question of whether this restriction has been breached is one of degree.

39 The court also elaborated upon what extrinsic evidence is admissible in aid of contractual interpretation as well as the way in which the task of interpretation is to be carried out. The guidance is both comprehensive and nuanced and we will say no more about it (see generally at [124]–[133]), save to note the following summary by the court (at [132]):

> 132 To summarise, the approach adopted in Singapore to the admissibility of extrinsic evidence to affect written contracts is a pragmatic and principled one. The main features of this approach are as follows:
>
> (a) A court should take into account the essence and attributes of the document being examined. The court's treatment of extrinsic evidence at various stages of the analytical process may differ depending on the nature of the document. In general, the court ought to be more reluctant to allow extrinsic evidence to affect standard form contracts and commercial documents (see [110] above).
>
> (b) If the court is satisfied that the parties intended to embody their entire agreement in a written contract, no extrinsic evidence is admissible to contradict, vary, add to, or subtract from its terms (see ss 93–94 of the Evidence Act). In determining whether the parties so

intended, our courts may look at extrinsic evidence and apply the normal objective test, subject to a rebuttable presumption that a contract which is complete on its face was intended to contain all the terms of the parties' agreement (see [40] above). In other words, where a contract is complete on its face, the language of the contract constitutes *prima facie* proof of the parties' intentions.

(c) Extrinsic evidence is admissible under proviso (*f*) to s 94 to aid in the interpretation of the written words. Our courts now adopt, via this proviso, the modern contextual approach to interpretation, in line with the developments in England in this area of the law to date. Crucially, ambiguity is not a prerequisite for the admissibility of extrinsic evidence under proviso (*f*) to s 94 (see [114]–[120] above).

(d) The extrinsic evidence in question is admissible so long as it is relevant, reasonably available to all the contracting parties and relates to a clear or obvious context (see [125] and [128]–[129] above). However, the principle of objectively ascertaining contractual intention(s) remains paramount. Thus, the extrinsic evidence must always go towards proof of what the parties, from an objective viewpoint, ultimately agreed upon. Further, where extrinsic evidence in the form of prior negotiations and subsequent conduct is concerned, we find the views expressed in McMeel's article ([62] *supra*) and Nicholls' article ([62] *supra*) persuasive. For this reason, there should be no absolute or rigid prohibition against evidence of previous negotiations or subsequent conduct, although, in the normal case, such evidence is likely to be inadmissible for non-compliance with the requirements set out at [125] and [128]–[129] above. (We should add that the relevance of subsequent conduct remains a controversial and evolving topic that will require more extensive scrutiny by this court at a more appropriate juncture.) Declarations of subjective intent remain inadmissible except for the purpose of giving meaning to terms which have been determined to be latently ambiguous (see [50] above; see also sub-para (e) below).

(e) In some cases, the extrinsic evidence in question leads to possible alternative interpretations of the written words (*ie*, the court determines that latent ambiguity exists). A court may give effect to these alternative interpretations, always bearing in mind s 94 of the Evidence Act. In arriving at the ultimate interpretation of the words to be construed, the court may take into account subjective declarations of intent (see [50] above). Furthermore, the normal canons of interpretation apply in conjunction with the relevant provisions of the Evidence Act, *ie*, ss 95–100 (see [75]–[80] and [131] above).

(f) A court should always be careful to ensure that extrinsic evidence is used to explain and illuminate the written words, and not to contradict or vary them. Where the court concludes that the parties have used the wrong words, rectification may be a more appropriate remedy (see [123] above).

40 The decision in *Zurich Insurance* should also be read with the decision of this court in *Sembcorp Marine*, which not only affirmed the principles laid down in *Zurich Insurance* but also *supplemented* them. Whilst the relevant part of this particular decision (at [24]–[75]) merits close study, the following extracts from [54]–[55], [64]–[65] and [72]–[75] are particularly germane in the context of the present appeal:

> 54 Lord Penzance rejected this contention. Referring to a principle laid down by Lord Abinger in *Doe D Simon Hiscocks v John Hiscocks* (1839) 5 M & W 363, Lord Penzance held (at 317–318):
>
> It is beyond dispute, that *evidence as to the circumstances* under which the testator wrote

> his will, as to the different names and circumstances of the people about him, and other surrounding matters, *is admissible* in such a case. … so that I am at liberty to put myself in the position of the testator in order, from the surrounding circumstances, *to judge under what state of things he wrote his will*. [emphasis added]

However, Lord Penzance did not stop there, for this principle by Lord Abinger was one of general application rather than one governing the admissibility of the declarations of the testator, which was the real issue in the case. As to that, Lord Penzance held (at 324):

> And if there has been a mistake, whether of omission or otherwise, in consequence of which neither of the two sons is distinctly or accurately described, *is not an ambiguity created*; and is any other course open to the Court, *if the rest of the will and the surrounding circumstances do not solve the difficulty*, ***than to admit parol evidence of the testator's intention?*** [emphasis added in italics and bold italics]

55 Three points are clear. First, the admissibility of surrounding circumstances to place the court in the position of the party which drafted the instrument (dealt with in the first extract quoted at [54] above) is a separate and distinct question from whether parol evidence of the drafter's subjective intention (dealt with in the second extract quoted at [54] above) may be admitted. Evidence of surrounding circumstances is admissible without restriction. Second, ambiguity is required before the court would be permitted to admit parol evidence of the drafter's intentions. Third, if surrounding circumstances are sufficient to resolve the interpretative exercise, there would be no ambiguity and such parol evidence should not be admitted.

…

64 A lingering question remains: what exactly is extrinsic evidence of surrounding circumstances that is admissible without restriction under s 94(*f*) of the EA? The short answer, as suggested by the cases referred to by Sir James, would be such extrinsic evidence of "facts and circumstances which were (or ought to have been) in the mind of the [drafter] when he used those words" (see [62] above). Parol evidence of the drafter's subjective intention does not constitute such surrounding circumstances. Of course, the line between these two types of evidence may not always be clear, but that is an issue that can be developed through case law.

65 Where then does this leave us in relation to the robust approach? The following propositions seem clear:

> (a) First, the admissibility of extrinsic evidence generally is governed by the rules of evidence and not by the rules of contractual interpretation (which are governed by the substantive law of contract).
>
> (b) Second, the rules governing the admissibility of extrinsic evidence in Singapore are to be found first in the EA, then in the common law.
>
> (c) Third, the general admissibility of extrinsic evidence under s 94(*f*) of the EA must be read together with the exclusionary provisions of the EA, in particular, ss 95 and 96.
>
> (d) Fourth, extrinsic evidence of surrounding circumstances is generally admissible under s 94(*f*). However, it was and properly remains the position that extrinsic evidence in the form of parol evidence of the drafter's intentions is generally inadmissible unless it can in some way be brought within the exceptions in ss 97 to 100.

...

72 From this perspective, a robust approach unaccompanied by sufficient safeguards may be counterproductive. More fog, not less, might ensue. In our judgment, it is time to refine our approach by synchronising our rules of pleading and evidence with the contextual approach to contractual construction laid down in *Zurich Insurance* ([34] *supra*). This is necessary because the broad language associated with the contextual approach is susceptible to being misunderstood and misapplied. The utility of the contextual approach is to place the court in the best possible position to ascertain the parties' objective intentions by interpreting the expressions used by the parties in the relevant instrument in their proper context; it is not a licence to admit all manner of extrinsic evidence. To do otherwise would be to ignore the salutary words of caution in *Zurich Insurance* (at [127] and [129]):

> 127 Thus, the extrinsic material sought to be admitted must always go towards proof of what the parties, from an objective viewpoint, ultimately agreed upon. … *[T]he focus on the narrow task of ascertaining the parties' objective intention ought to prevent parties from adducing or trawling through large amounts of allegedly useful background material, often in misguided Micawberian attempts to persuade a court to favour their subjective interpretations of the contract*. …
>
> 129 We have already emphasised the importance of contractual certainty … In our view, the benefits of adopting … the contextual approach to contractual interpretation (*viz*, flexibility and accord with commercial common sense) will be maximised and its costs (*viz*, increased uncertainty and added litigation costs) minimised if, as a threshold requirement for the court's adoption of a different interpretation from that suggested by the plain language of the contract, the context of the contract should be clear and obvious. … *It is necessary and desirable to lay down this threshold requirement in order to achieve the right balance between commercial certainty and the imperative of giving effect to the objective intentions of the contracting parties*.
>
> [emphasis added]

73 We hasten to add that although the contextual approach is most frequently engaged in the context of interpretation, this is not to say that the contextual approach is irrelevant when it comes to other aspects of construction such as implication or rectification. Indeed, it is trite that the court must have regard to the context at the time of contracting when considering the issue of implication. Therefore, to buttress the evidentiary qualifications to the contextual approach to the construction of a contract, the imposition of four requirements of civil procedure are, in our view, timely and essential:

> (a) first, parties who contend that the factual matrix is relevant to the construction of the contract must plead with specificity each fact of the factual matrix that they wish to rely on in support of their construction of the contract;
>
> (b) second, the factual circumstances in which the facts in (a) were known to both or all the relevant parties must also be pleaded with sufficient particularity;
>
> (c) third, parties should in their pleadings specify the effect which such facts will have on their contended construction; and
>
> (d) fourth, the obligation of parties to disclose evidence would be limited by the extent to

which the evidence are relevant to the facts pleaded in (a) and (b).

74 These four requirements are entirely consonant with the limits prescribed in *Zurich Insurance* at [132(d)] that for extrinsic evidence to be admissible, it must be "relevant, reasonably available to all the contracting parties and [must relate] to a clear or obvious context". Further, this would go some way towards ameliorating the practical concerns we have traced above. In general, extrinsic facts that are placed before the court in a manner that is not consistent with the above requirements will not be accorded any weight when a court is construing a contract. Adverse cost consequences may also be imposed, where appropriate. We are mindful that the courts cannot actively police the parties in the documents that they voluntarily disclose. Conversely, we should not be thought, in any way, to be inviting parties or their counsel to withhold relevant documents. The key point is that parties should be clear about the specific aspects and purpose of the factual matrix which they intend to rely on. These pleading requirements should result in the evidence on the record being aligned accordingly.

75 Before leaving this issue, we make one final observation. Asst Prof Goh has, after a comprehensive survey of the historical literature on the law governing the admissibility of prior negotiations, argued that the seemingly blanket exclusionary rule against the admissibility of prior negotiations was a product of a historical misstep by the courts and is inconsistent with the EA: Goh Yihan, "The Case for Departing From the Exclusionary Rule Against Prior Negotiations in the Interpretation of Contracts in Singapore" (2013) 25 SAcLJ 182. We prefer to leave for another occasion the consideration of whether this argument is to be accepted in principle; and if so, whether evidence of prior negotiations should nonetheless be excluded as irrelevant or unhelpful for the policy reasons set out by Lord Hoffmann in *Chartbrook* ([25] *supra*) at [34]–[36] and [38]; or on the ground that it may amount to parol evidence of subjective intent and not fall within ss 97 to 100 of the EA. Whichever way that may eventually be resolved, any future attempt to rely on such material should be made with full consciousness of the concerns already expressed and in compliance with the pleading requirements we have just prescribed.

4 1 *Zurich Insurance* and *Sembcorp Marine* represent the lodestars in the Singapore legal landscape in so far as contractual interpretation is concerned (see also *HSBC Trustee* at [25] as well as the useful exposition on both these decisions in Goh Yihan, "The New Contractual Interpretation in Singapore: From *Zurich Insurance* to *Sembcorp Marine*" [2013] Sing JLS 301). Both decisions emphasise, *inter alia*, the signal importance of context in the sphere of contractual interpretation.

42 Finally, it should also be noted that the idea that the use of context is not only very important but also does not contravene the parol evidence rule inasmuch as it is utilised merely as an aid to interpretation is one that has also been articulated in other jurisdictions. In the recent Supreme Court of Canada decision of *Sattva Capital Corporation (formerly Sattva Capital Inc) v Creston Moly Corporation (formerly Georgia Ventures Inc)* [2014] 2 SCR 633, for example, Rothstein J (delivering the judgment of the court) observed thus (at [60]):

> The parol evidence rule does not apply to preclude evidence of surrounding circumstances. Such evidence is consistent with the objectives of finality and certainty because it is used as *an interpretive aid* for determining the meaning of those words. The surrounding circumstances are facts known or facts that reasonably ought to have been known to both parties at or before the date of contracting; therefore, the concern of unreliability does not arise. [emphasis added]

However, we should also note that the role of context in contractual interpretation appears still to be in a state of flux in certain other jurisdictions – for example, in Australia (see, for instance, the recent and comprehensive article by Prof J W Carter, "Context and Literalism in Construction" (2014) 31 JCL

100 at 108–111, which also comprises an excellent comparative analysis of the positions in other jurisdictions as well).

43 At this juncture, we pause to note that there have also been a few recent UK Supreme Court decisions focusing on contractual interpretation. We shall consider a couple of them briefly but, for reasons which we shall state, they do not – we hasten to add – detract from the general principles which we have set out above.

A coda – recent UK Supreme Court decisions

44 Not surprisingly, there have been numerous decisions on contractual interpretation across the Commonwealth (one, from the Supreme Court of Canada, has already been referred to briefly above at [42]). In particular, there have been a few UK Supreme Court decisions, a couple of which merit our brief attention (in addition to *Multi-Link Leisure Developments* which was also referred to briefly above at [32]).

45 The first decision is *Rainy Sky SA v Kookmin Bank* [2011] 1 WLR 2900 ("*Rainy Sky*") (which was also referred to briefly by this court in *Master Marine AS v Labroy Offshore Ltd and others* [2012] 3 SLR 125). It concerned the interpretation of a particular clause in advance payment bonds issued by the defendant bank and which was relied upon by the plaintiffs in claiming the refund of instalments paid pursuant to contracts entered into with a shipbuilder. Lord Clarke of Stone-cum-Ebony JSC handed down the judgment (with whom Lord Phillips of Worth Matravers PSC, Lord Mance, Lord Kerr of Tonaghmore and Lord Wilson JJSC agreed). Lord Clarke observed thus (at [14]):

> For the most part, the correct approach to construction of the bonds, as in the case of any contract, was not in dispute. The principles have been discussed in many cases, notably of course, as Lord Neuberger of Abbotsbury MR said in *Pink Floyd Music Ltd v EMI Records Ltd* [2010] EWCA Civ 1429, para 17, by Lord Hoffmann in *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] AC 749, passim, in *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896, 912F–913G and in *Chartbrook Ltd v Persimmon Homes Ltd* [2009] AC 1101, paras 21–26. I agree with Lord Neuberger (also at para 17) that those cases show that the ultimate aim of interpreting a provision in a contract, especially a commercial contract, is to determine what the parties meant by the language used, which involves ascertaining what a reasonable person would have understood the parties to have meant. As Lord Hoffmann made clear in the first of the principles he summarised in the *Investors Compensation Scheme* case [1998] 1 WLR 896, 912H, the relevant reasonable person is one who has all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.

46 And, in a similar vein, the learned judge later observed as follows (at [30]):

> … As stated in a little more detail in para 21 above [quoted below at [48]], it is in essence that, where a term of a contract is open to more than one interpretation, it generally appropriate to adopt the interpretation which is most consistent with business common sense. …

47 However, it should be noted that Lord Clarke also observed (at [23]) that "[w]here the parties have used *unambiguous* language, the court *must* apply it" [emphasis added]. We do not think that this observation is to be taken so strictly as to *wholly* discount the possibility of utilising the relevant *context* to assist in the process of contractual interpretation in the manner we have set out above at [31]–[42] (and *cf* Paul S Davies, "Interpreting Commercial Contracts: A Case of Ambiguity?" [2012] LMCLQ 26 at 27–28). Indeed, this particular issue was raised squarely before the UK Supreme Court in

a subsequent decision, *viz*, *Arnold* – which we will consider in more detail below (at [50]–[56]).

48 Lord Clarke also observed (more generally) thus (at [21]):

> The language used by the parties will often have more than one potential meaning. I would accept the submission made on behalf of the appellants that the exercise of construction is *essentially one* ***unitary*** *exercise* in which the court must consider the language used and ascertain what a reasonable person, that is a person who has all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract, would have understood the parties to have meant. In doing so, the court must have regard to all the relevant surrounding circumstances. If there are two possible constructions, the court is entitled to prefer the construction which is consistent with business common sense and to reject the other. [emphasis added in italics and bold italics]

It should be noted, at this juncture, that Lord Clarke's observations which have just been quoted are wholly consistent with the interactive approach towards contractual interpretation which we have mooted above (at [35]).

49 In *Rainy Sky* itself, both parties had accepted that there were two possible interpretations of the clause concerned and the court held – in accordance with the principles noted above – that it ought to adopt the interpretation which was most consistent with business common sense.

50 The second decision from the UK Supreme Court is that in *Arnold* (which we mentioned briefly above at [32]). As already alluded to, this was a decision in which the court gave effect to what it found to be the clear and unambiguous language of the term concerned. A similar approach was also adopted in its earlier decision (on appeal from Scotland) in *Aberdeen City Council v Stewart Milne Group Ltd* 2012 SLT 205 ("*Aberdeen City Council*"). However, as *Arnold* is a very recent decision and includes a discussion of *Aberdeen City Council* as well, we will focus on it instead.

5 1 *Arnold* concerned the interpretation of service charge contribution provisions with regard to the leases of a number of chalets in a caravan park in South Wales. There was a common thread (or, more accurately, consequence) running throughout the various clauses: if the respondent landlord were correct in its interpretation of the clauses concerned, the initial service charge of £90 per annum was to be increased on a compound basis by 10% every three years. The appellant lessees, on the other hand, argued that the respondent's interpretation could not be the correct interpretation as it would result in "an increasingly absurdly high annual service charge in the later years of each of the 25 leases" (see *Arnold* at [10]). The court held that the language of the clauses was clear and unambiguous and ought to be given effect to. The fact that such an interpretation would work out very badly against the appellants was not a relevant legal factor, given the clarity of the clauses in question. Lord Neuberger of Abbotsbury PSC (with whom Lord Sumption and Lord Hughes JJSC agreed) emphasised (at [16]–[23]) seven factors which we think are useful and which we therefore set out in full as follows:

> 16 For present purposes, I think it is important to emphasise seven factors.
>
> 17 First, the reliance placed in some cases on commercial common sense and surrounding circumstances (eg in *Chartbrook*, paras 16-26) should not be invoked to undervalue the importance of the language of the provision which is to be construed. The exercise of interpreting a provision involves identifying what the parties meant through the eyes of a reasonable reader, and, save perhaps in a very unusual case, that meaning is most obviously to be gleaned from the language of the provision. Unlike commercial common sense and the surrounding circumstances,

the parties have control over the language they use in a contract. And, again save perhaps in a very unusual case, the parties must have been specifically focussing on the issue covered by the provision when agreeing the wording of that provision.

18 Secondly, when it comes to considering the centrally relevant words to be interpreted, I accept that the less clear they are, or, to put it another way, the worse their drafting, the more ready the court can properly be to depart from their natural meaning. That is simply the obverse of the sensible proposition that the clearer the natural meaning the more difficult it is to justify departing from it. However, that does not justify the court embarking on an exercise of searching for, let alone constructing, drafting infelicities in order to facilitate a departure from the natural meaning. If there is a specific error in the drafting, it may often have no relevance to the issue of interpretation which the court has to resolve.

19 The third point I should mention is that commercial common sense is not to be invoked retrospectively. The mere fact that a contractual arrangement, if interpreted according to its natural language, has worked out badly, or even disastrously, for one of the parties is not a reason for departing from the natural language. Commercial common sense is only relevant to the extent of how matters would or could have been perceived by the parties, or by reasonable people in the position of the parties, as at the date that the contract was made. Judicial observations such as those of Lord Reid in *Wickman Machine Tools Sales Ltd v L Schuler AG* [1974] AC 235, 251 and Lord Diplock in *Antaios Cia Naviera SA v Salen Rederierna AB (The Antaios)* [1985] AC 191, 201, quoted by Lord Carnwath JSC at para 110, have to be read and applied bearing that important point in mind.

20 Fourthly, while commercial common sense is a very important factor to take into account when interpreting a contract, a court should be very slow to reject the natural meaning of a provision as correct simply because it appears to be a very imprudent term for one of the parties to have agreed, even ignoring the benefit of wisdom of hindsight. The purpose of interpretation is to identify what the parties have agreed, not what the court thinks that they should have agreed. Experience shows that it is by no means unknown for people to enter into arrangements which are ill-advised, even ignoring the benefit of wisdom of hindsight, and it is not the function of a court when interpreting an agreement to relieve a party from the consequences of his imprudence or poor advice. Accordingly, when interpreting a contract a judge should avoid re-writing it in an attempt to assist an unwise party or to penalise an astute party.

21 The fifth point concerns the facts known to the parties. When interpreting a contractual provision, one can only take into account facts or circumstances which existed at the time that the contract was made, and which were known or reasonably available to both parties. Given that a contract is a bilateral, or synallagmatic, arrangement involving both parties, it cannot be right, when interpreting a contractual provision, to take into account a fact or circumstance known only to one of the parties.

22 Sixthly, in some cases, an event subsequently occurs which was plainly not intended or contemplated by the parties, judging from the language of their contract. In such a case, if it is clear what the parties would have intended, the court will give effect to that intention. An example of such a case is *Aberdeen City Council v Stewart Milne Group Ltd* 2012 SCLR 114, where the court concluded that "any … approach" other than that which was adopted "would defeat the parties' clear objectives", but the conclusion was based on what the parties "had in mind when they entered into" the contract: see paras 21 and 22.

23 Seventhly, reference was made in argument to service charge clauses being construed

"restrictively". I am unconvinced by the notion that service charge clauses are to be subject to any special rule of interpretation. Even if (which it is unnecessary to decide) a landlord may have simpler remedies than a tenant to enforce service charge provisions, that is not relevant to the issue of how one interprets the contractual machinery for assessing the tenant's contribution. The origin of the adverb was in a judgment of Rix LJ in *McHale v Earl Cadogan* [2010] HLR 412, para 17. What he was saying, quite correctly, was that the court should not "bring within the general words of a service charge clause anything which does not clearly belong there". However, that does not help resolve the sort of issue of interpretation raised in this case.

52 However, what are the more general implications of *Arnold* in situations where the language of the term(s) is clear and unambiguous? In particular, has *Arnold* reduced (even drastically) the role of *context* in such a situation? More importantly, is *Arnold* at variance with what we have stated (above at [31]–[42]) is the position in *Singapore* in such situations – especially the proposition to the effect that *context* is *still important* ***even in*** *situations where the language of the term(s) is clear and unambiguous*? We would suggest that *Arnold* is in fact ***consistent with*** the Singapore position. Let us elaborate.

53 It is significant that Lord Hodge JSC (who agreed with Lord Neuberger) was of the view that the *context* in *Arnold* was of *limited* assistance; as he observed (at [72] and [75]):

> 72 The *context*, whether internal to the contract or otherwise, *provides little assistance* in this case. Beyond the words of the relevant clauses, there is the context of the other provisions of each of the 25 individual leases which are at issue. They are long leases, having a term of 99 years. The court in interpreting the leases can and should take into account the great difficulty in predicting economic circumstances in the distant future and ask itself whether the parties really intended to do so.
>
> …
>
> 75 While there are infelicities in the language of the relevant clauses in some of the leases and no clear explanation of minor changes in drafting, I am not persuaded that the meaning of the language is open to question when full weight is given to *the very limited factual matrix* with which the courts have been presented in this case. We are invited to construe that which reads on a first consideration as a fixed service charge with an escalator to deal with future inflation, as a variable service charge which is subject to a cap to which the escalator applies. I find that very difficult. In my view there is nothing in the relevant context to support the construction of the clause as creating a cap, other than the view, which events have fully justified, that it was unwise of the lessees to agree to a fixed service charge with an escalator based on an assumption that the value of money would diminish by 10% per year.
>
> [emphasis added]

54 As (if not more) significantly, Lord Carnwath JSC (who *dissented*) was *also* of a similar view; in his words (at [94]), "[w]e know *very little* about the background to the present dispute" [emphasis added].

55 Given that the *context* in *Arnold* was of *limited* assistance, it is not surprising, in our view, that the majority of the court gave full effect to what it felt was the clear and unambiguous language in the clauses concerned. In this regard, the absurd result in that decision was – consistently with our analysis above (at [32]) – ***aptly justified as being in accord*** with the intention of the parties at the time that they entered into the contract concerned. We would venture to suggest that the situation

might have been quite different had the relevant context been clearer and therefore more helpful. Indeed, even though Lord Carnwath was of the view that the context was of limited assistance, he nevertheless proceeded to consider much more general and broader facts (including the historic inflation figures), thereby expanding, so to speak, the scope of the factual matrix which (in turn) assisted him in arriving at a different decision from that of the majority. Thus, it is not that the context was not referred to; it is that, pursuant to the unitary approach, the context was looked at but it did not change anything with regard to the text. The learned judge was clearly influenced by the result of the case that ensued from the decision of the majority. He clearly felt that this was "an unusual case" (see at [108]). And this brings us back to the balance which we observed (above at [32]) ought to be sought – especially in hard cases such as these. The majority in *Arnold* had, it is suggested, in mind the old adage that hard cases make bad law and that they could not arrive at a decision in favour of the appellants in a *principled* fashion in that case. This harks back to (in particular) the third and fourth points enunciated by Lord Neuberger (and quoted above at [51]). Indeed, Lord Neuberger himself was (at [32]) cognisant of "the unattractive consequences" arising from the decision of the majority (*cf* also *HSBC Trustee* at [147]–[149]).

56 It should also be noted that Lord Hodge reiterated (at [76] and [77]) Lord Clarke's observation in *Rainy Sky* to the effect that interpretation is a "*unitary*" process or exercise which (as we have already noted above at [48]) is wholly consistent with the *interactive* approach we have mooted above (at [35]).

57 In summary, it is our view that the UK Supreme Court decisions (in particular, *Rainy Sky* and *Arnold*) are in fact *consistent with* the principles which obtain in the Singapore context (and which, as already mentioned, are contained in the decisions of this court in both *Zurich Insurance* and *Sembcorp Marine*).

Application of the law to the facts

58 Turning to the facts of the present appeal, the crucial text is deceptively simple. It is to be found in cl 4 of the Sub-Lease Agreement and bears reproduction once again, as follows:

> This agreement shall survive as long as ***the Company's lease*** with the Landlord is not terminated. [emphasis added in bold italics]

59 As we alluded at [31] above, the text in this case is neither plain nor unambiguous. In particular, the lack of clarity pertains to the use of the term "the Company's lease" in cl 4, the interpretation of which carries no little practical significance given that it has a direct bearing on the duration of the Sub-Lease Agreement itself and, therefore, the outcome of this appeal. However, the Judge appears to be of the view that there was *no* ambiguity in cl 4. Examining his reasoning at [17] of the Judgment (which we have reproduced earlier at [27] above), it is clear that, although he did not explicitly focus on the particular words "the Company's lease" in cl 4, he had taken this to refer to the lease which was formalised in *the 2010 Lease Agreement*. He relied, for this purpose, on *cl 1* of the Sub-Lease Agreement, which he first read as referring to the 2010 Lease Agreement and then implicitly took as being the same agreement that was being referred to in cl 4 as "the Company's lease".

60 With respect, we disagree with the Judge's reasoning. It is useful to reproduce cl 1 of the Sub-Lease Agreement again in order to scrutinise it carefully:

> 1. Soup Restaurant (Causeway Point) Pte Ltd (the "Company") had entered into an agreement (the "Agreement") with VivoCity Pte Ltd as trustee of VivoCity Trust (the "Landlord") on 19 June

2009 in respect of the lease of 1 HarbourFront Walk #02-141 VivoCity S(098585) to operate both "Soup Restaurant" and "Dian Xiao Er" ("DXE") brands.

61 It may be observed from a close reading of cl 1 that the Judge's reasoning is doubtful in two respects. First, it is clear that cl 1 does not refer to the 2010 Lease Agreement as such. It makes reference, instead, to the landlord's letter of offer dated 19 June 2009 (which was later accepted by Soup). It might be said that this is not a material error because the lease agreement as contained in the letter of offer was, in any event, reduced formally into the 2010 Lease Agreement. That may well be so but the second (and more important) observation we make regarding cl 1 is that the letter of offer to which it refers has already been defined as the "Agreement". On a plain and ordinary reading of the Sub-Lease Agreement as a whole, we think that this in itself provides good ground for the view that "the Company's lease" in cl 4 might in fact mean *something other than* the letter of offer. In short, what could be said of the Judge's reasoning is that it seems, with respect, to mistake the precise document that is being referred to in cl 1 of the Sub-Lease Agreement but, even if that is immaterial, there is, at a more fundamental level, no apparent connection between cl 1 and cl 4 because the relevant terms used (the "Agreement" as opposed to "the Company's lease") are clearly different; hence, it is questionable to rely on the language in the former in order to interpret the latter.

62 This leaves us in the position of being unable to agree with the Judge that, *looking purely at the face of the Sub-Lease Agreement itself*, it may be said with the requisite certainty that "the Company's lease" in cl 4 refers to the 2010 Lease Agreement. This is not the equivalent of saying, however, that "the Company's lease" in cl 4 does *not* refer to the 2010 Lease Agreement. The point, simply, is that such an interpretation (which is the one that Soup prefers) is not one that is *plain and unambiguous* from the ***text*** alone – and not that this interpretation is foreclosed as a possibility. This is especially so given that there is, importantly, still the ***context*** to be considered. After all, as we have explained at [35] above, text and context ***interact*** with one another in the holistic exercise of contractual interpretation and, particularly in situations such as this where the text is ambiguous, it is the context that comes to the fore (see above at [34]). While the context may ultimately turn out to be only of limited assistance, as was the case in *Arnold*, we do not find that to be the case here. A proper appreciation of the context surrounding the parties' entry into the Sub-Lease Agreement is helpful in shedding light on what the text – in particular "the Company's lease" in cl 4 of the Sub-Lease Agreement – truly means. In this regard, we find that the relevant context supports the interpretation advanced by YES, namely, that "the Company's lease" in cl 4 in fact refers to a *generic* head lease that Soup had with the landlord in respect of Unit 141.

63 What, then, is the relevant context in this case? We commence with the fact that the Sub-Lease Agreement was a document drafted without any legal assistance. It was drafted, instead, by laypersons in the business context. This is an important factor inasmuch as it informs and guides the way in which the court should construe the document. As was emphasised in the recent decision of this court in *Xia Zhengyan v Geng Changqing* [2015] 3 SLR 732 ("*Xia*") (especially at [50]), there may – depending on the precise facts and context concerned – be cases where the court ought to eschew a strict construction of the relevant language of the contract and adopt instead a more *common-sense* approach that considers *the reasonable and probable expectations that the parties would have had*. This would, for example, be the case where, in *Xia*, the contract had been drafted by laypersons without the benefit of legal advice in a language other than the English language (in that case, in Chinese). The context of the present case was, broadly speaking, somewhat similar.

64 In determining the parties' reasonable and probable expectations when entering into the Sub-Lease Agreement, we are led to the second important contextual factor, which is the fact that both YES and Soup were commercially-related sister companies within the SRGL group of companies at that

point in time. This is a weighty consideration as it helps to contextualise one's understanding of the overall environment within which the negotiations leading up to the Sub-Lease Agreement had taken place. In our view, it is only a natural consequence of the parties' then subsisting commercial relationship that their negotiations, while still conducted at arms' length, would nevertheless have been attended by a degree of mutuality and a desire to explore and develop synergies with one another; this was how Unit 141 came to be *shared* in an arrangement which met the objectives of both parties in so far as Soup was able to establish a presence in Vivocity and YES could expand its business incrementally. Indeed, such collaboration was reflected in how, despite being offered Unit 141 first, YES brought Soup into discussions with the landlord and, after further deliberations, it was finally agreed that Soup would lease Unit 141 on the basis that it would be shared with YES. In fact, Soup made certain that it had obtained the landlord's approval for this sharing arrangement before accepting the letter of offer dated 19 June 2009.

65 Given the good relationship of the parties which prevailed at the time – and the absence of anything to suggest otherwise – we find it reasonable to infer that the parties would have expected their close commercial partnership to continue for the foreseeable future. Conflict was not at the forefront of their minds; *sharing* the premises at Unit 141 in a way which met both their respective aims was. That being so, it militates against Soup's preferred construction of cl 4 which effectively attributes to the parties the mutual expectation at the material time that, come what may after the expiry of the 2010 Lease Agreement in three years, Soup could eject YES from the Sub-Leased Premises without being required to even have any recourse to its views.

66 We are fortified in what we have just stated by a third contextual factor which, in the final analysis, is perhaps also the most compelling in the entire factual matrix. This concerns the fact that both parties were aware of the particular purpose for which the Sub-Leased Premises was to be used by YES, namely, that it was for expanding YES's kitchen and VIP rooms. It was thus common knowledge between the parties that the Sub-Leased Premises was to constitute an *integral* part of YES's business. This is particularly important because, if Soup knew full well of the precise purpose for which the Sub-Leased Premises was to be used, then it is hardly a leap of logic to surmise that, as an established player within the same industry, it would also have been able to appreciate the scale and costs of the renovation works necessary to fulfil that purpose. Therefore, even though the actual renovation works on the Sub-Leased Premises were in fact only carried out *after* the Sub-Lease Agreement was entered into – and the total incurred cost of about $210,000 known only subsequent to that – we think that it is fair to say that Soup must certainly have had a general idea of the kind of resources YES was intending to pour into the renovation *at the time of the Sub-Lease Agreement itself*.

67 This supports our view that it would be highly incongruous to find that, with no say whatsoever in the matter, YES could legitimately be forced out of the Sub-Leased Premises at the end of three years. That would entail fairly drastic commercial consequences for YES as it involved YES having to scrap all of the renovation works that it had invested in a mere three years ago, the disruption and consequential reorganisation of its operations on Unit 137, and, as Yik gave evidence on, the retrenchment of staff who would no longer be required for a downsized restaurant business. As counsel for YES, Mr Adrian Tan ("Mr Tan") persuasively pointed out, it would not have made any business sense at all for YES to have invested so much in expanding its operations if it had known all along that the Sub-Lease Agreement was only to be for a fixed period of three years. Simply put, the investment was ***disproportionate*** to a three year lease. Therefore, the better view of cl 4 is, as YES submits, that it provides for the Sub-Lease Agreement to subsist for so long as Soup had a valid head lease in respect of Unit 141.

68 These were not, however, the only relevant contextual factors. Counsel for Soup, Mr Edwin

Tong SC ("Mr Tong"), did highlight others in his attempt to buttress Soup's interpretation of cl 4 but, ultimately, we do not find these to be particularly weighty in comparison with those which we have just canvassed above.

69 First, Mr Tong pointed out that it was highly significant that, when the Sub-Lease Agreement was concluded in October 2009, YES could not have been certain that its own lease for Unit 137 – which expired on 6 October 2012 without an option to renew – would continue. We accept that this is true as a matter of fact. Short of a contractual provision which *guaranteed* that YES could continue to lease Unit 137 beyond 6 October 2012 (of which there was none), it could *not* have been said with *absolute certainty* then that the landlord would be agreeable to renewing YES's lease. That having been said, this argument should be considered within the wider context prevailing at the material time. One should recall that YES had been in Vivocity since 2006, its *Dian Xiao Er* business at Unit 137 was performing well, the landlord recognised this, and this recognition was reflected in the fact that the landlord approached YES to offer YES the opportunity to expand its business into Unit 141. Given the totality of the circumstances, we are of the view that, notwithstanding the lack of a contractual option to renew in its lease of Unit 137, YES had *good grounds* to believe that, when the time came, it would be able to reach a satisfactory agreement with the landlord in respect of continuing on Unit 137. Indeed, it seems to us that, absent a swift downturn in the fortunes of YES, it would have been illogical for the landlord to have, with one hand, invited YES to expand its business into Unit 141 and, with the other, take away the main frontage of its restaurant at Unit 137 by refusing to renew the lease for those premises.

70 Secondly, Mr Tong also sought to impress upon us that it was commercially absurd that cl 4 could refer to a generic lease because, if that interpretation were correct, then YES was effectively agreeing to bind itself (as cl 3(i) of the Sub-Lease Agreement provided) on a back-to-back basis to contractual terms as yet unknown and over which it had no control. In particular, Mr Tong argued that a party in YES's position at the time of signing the Sub-Lease Agreement in 2009 could not have been certain of what the rent for Unit 141 might be in subsequent head leases between Soup and the landlord. The rent could well increase, as indeed it has under the terms of Soup's current lease with the landlord.

71 This argument might appear attractive at first blush but, on closer examination, we find that it says no more than that what YES had agreed to accept were the ordinary risks and vagaries associated with the property rental market which, it should be added, YES was *already* exposed to in respect of its own lease over Unit 137. In other words, as Mr Tan pointed out, an increase in the rent for Unit 141 was, from YES's perspective, an expected business expense which would have to be factored in with regard to its existing premises as well. Moreover, it is not inconceivable that YES would have been ready and willing to pay its proportionate share of any increase in the rent under the back-to-back arrangement – simultaneously with any increase in the rent of its *existing* premises in Unit 137 – bearing in mind the fact that (as we have also already noted above) both its existing premises as well as the Sub-Leased Premises in Unit 141 formed an *integral* part of its business.

72 Mr Tong also sought to introduce another closely related element of uncertainty into the factual matrix as at 2009 which, in his submission, undermined YES's preferred construction of cl 4. In this regard, he pointed out that another possible consequence of the landlord raising the rent for the head lease of Unit 141 was that it might also turn out to be too high *from Soup's perspective*. In such a scenario, Soup might legitimately decide not to renew the lease with the landlord. If so, would that not lead to the same result as the one entailed by Soup's preferred construction of the Sub-Lease Agreement, *viz*, that YES would have to vacate the Sub-Leased Premises by 18 October 2012? It therefore appeared that, even on YES's own construction of the Sub-Lease Agreement, it risked having its considerable investment in the renovation of the Sub-Leased Premises unwound after just

three years. In our view, this was indeed a possible outcome. However, we consider that this was yet another business risk which YES would have factored into its consideration at the time of entering into the Sub-Lease Agreement. In our view, what YES did *not* accept was the *additional* risk of *not* being able to continue operating out of the Sub-Leased Premises *even if* Soup had continued leasing Unit 141 from the landlord. That seems to us to be inconsistent with the parties' predominant purpose at the time of contracting, which was simply to *share* the Sub-Leased Premises.

73 Finally, Mr Tong moved beyond the context surrounding the parties' entry into the Sub-Lease Agreement to rely, further, on the parties' *subsequent conduct*. In particular, and as alluded to earlier at [20] above, he said that it was of some significance that the expiry date of the Sub-Lease Agreement as stated in cl 5.4 of the Settlement Agreement was 6 October 2012 instead of 18 October 2012. According to Mr Tong, Yik had specifically requested for the expiry date to be brought forward from the latter to the former and that this gave rise to a telling inference – it was clearly because *Yik knew that the Sub-Lease Agreement expired on 18 October 2012 in tandem with the lease under the 2010 Lease Agreement* that he was so keen to bring the expiry date forward to coincide with YES's own lease for Unit 137 (which expired on 6 October 2012); this was in order to avoid YES having to pay unnecessarily for an additional 12 days' rent in respect of the Sub-Leased Premises should YES's lease for Unit 137 not be renewed. As Mr Tong submitted, this conduct on the part of YES when negotiating the Settlement Agreement helped to shed light on when YES itself understood the Sub-Lease Agreement to expire (*viz*, 18 October 2012).

74 As we pointed out to counsel during the hearing, there was not much assistance to be derived from the parties' *subsequent* conduct when the object of the interpretive exercise was to discern the parties' intentions *at the time of entering into the contract*. Indeed, there are dangers in placing too much weight on such evidence because it can, with the benefit of hindsight, be shaped to suit each party's position (see, for similar observations, *HSBC Trustee* at [50]). In any event, we have difficulties with the inference that Mr Tong had sought to draw from the mere fact that the expiry date of the Sub-Lease Agreement was stated as 6 October 2012 in the Settlement Agreement. This is because, as Mr Tan pointed out, the evidence appeared to suggest that YES did not have sight of the 2010 Lease Agreement until *after* these proceedings were commenced *in October 2012*; hence, it is unclear how YES would have even known that Soup's lease for Unit 141 expired on 18 October 2012 when the Settlement Agreement was entered into *in June 2012*. For example, in an email dated 5 October 2012, Soup's solicitors rejected a request by YES's solicitors for a copy of the 2010 Lease Agreement on grounds that YES was not entitled to this document, and not that YES was already in possession of this document. In any event, there is an innocuous explanation for the 6 October 2012 expiry date in the Settlement Agreement, which is simply that, with the parties' relationship having already broken down by the time of the Settlement Agreement, they no longer wanted to carry on with any sharing arrangement in respect of Unit 141. From YES's perspective, therefore, what it had hoped to do was to merge its lease of the Sub-Leased Premises with its own lease for Unit 137 and, to that end, to have the expiry dates of both coincide on 6 October 2012. Indeed, subsequent to the Settlement Agreement, YES did propose such a merger to the landlord and Soup was initially receptive of this (although it subsequently changed its mind and claimed possession over Unit 141 in its entirety) (see the Judgment at [25]). Accordingly, we do not think that much can be read into the terms of the Settlement Agreement as informing the construction of the Sub-Lease Agreement.

75 Having taken into account the relevant context as a whole, it appears to us that Mr Tan's emphasis on the specific language in cl 4 is not a mere exercise in semantics. As we have already noted, this is a contract that was drafted by business people who oversaw related (and sister) business entities. It is a very rough and ready agreement – short and clearly not drafted with the benefit of legal advice. It is clear, in our view, that the parties had intended (in cl 4) that YES would continue to be a sub-lessee of Soup with regard to the Sub-Leased Premises so long as Soup

continued to lease Unit 141 from the landlord. With this business expectation in mind, YES embarked on the expansion of its kitchen and VIP rooms and took the risk that it would – in the medium to long term – be able to recoup the costs that it had incurred for this purpose.

76 We therefore find that it is inconsistent with this context to read the specific text in cl 4 as entitling Soup to sole possession of Unit 141 the moment the 2010 Lease Agreement expired on 18 October 2012. That does not reflect the reasonable commercial expectations of the parties at the time of the Sub-Lease Agreement, when relations were still good. Accordingly, we hold that YES was not in wrongful possession of the Sub-Leased Premises beyond 18 October 2012; hence, Soup's claim for damages on this basis fails.

Conclusion

77 For the reasons set out above, we allow the appeal with costs. The usual consequential orders will follow.

Copyright © Government of Singapore.