

LEGAL UPDATE

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CASE UPDATE

PRE-CONTRACTUAL NEGOTIATIONS AND DRAFTS MAY BE ADMISSIBLE FOR INTERPRETING AMBIGUOUS TERMS

Goh Guan Chong v Aspentech, Inc [2009] SGHC 73

Executive summary

The Singapore High Court has affirmed that pre-contractual negotiations and drafts may be admissible for interpreting latently ambiguous terms in the final contract as long as they:

- (i) are relevant;
- (ii) are reasonably available to the parties in the situation in which they were at the time of the contract; and
- (iii) relate to a clear or obvious context.

This principle is subject to one possible exception: extrinsic evidence that was available to only one party may be used against that party to show its subjective intention, so as to reveal what the objective intention of the parties could *not* be.

Background facts

The Defendant was keen to recruit the Plaintiff as Vice-President of its Supply Chain Consulting/Asian Operations. As part of its efforts to entice the Plaintiff to join it, the Defendant offered to pay the Plaintiff, among other things, a cash bonus of \$348,000 payable in quarterly instalments (the “**Sign-on Bonus**”).

The Plaintiff was first shown a draft (the “**Draft**”) of the letter of employment (the “**Employment Letter**”) which contained the Sign-on Bonus clause. He sought clarification from both the recruitment agent and the Defendant’s human resource director as to whether or not he would have to repay the Sign-on Bonus if he left the Defendant involuntarily, eg. if he were to die or if the Defendant became insolvent. The Plaintiff was assured that he would receive the full Sign-on Bonus as long as he did not leave Defendant voluntarily.

The Plaintiff signed the Employment Letter and commenced employment with the Defendant. Within a few months, the Defendant terminated his employment. At this point, \$290,000 of the Sign-on Bonus remained unpaid.

The Defendant argued that the Sign-on Bonus was payable only if the Plaintiff remained in its employ. The Plaintiff took the view that he was entitled to the whole of the Sign-on Bonus as soon as he commenced employment and that it was an implied term that the outstanding instalments would be immediately payable if his employment was terminated by the Defendant.

Decision

The court ruled that the Plaintiff was entitled to the full Sign-on Bonus as soon as he entered the Defendant's employ. However, the Sign-on Bonus was payable only in accordance with the agreed instalment schedule.

In reaching its decision, the court had to consider whether extrinsic evidence of previous negotiations, e-mail correspondence between the Defendant's employees and the Draft could be adduced in evidence to interpret the final Employment Letter.

The Singapore position on pre-contractual negotiations

The Singapore Court of Appeal in *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR 1029 ("**Zurich Insurance**") had decided that pre-contractual negotiations leading up to the formation of the contract are admissible to interpret latently ambiguous terms as long as the extrinsic evidence: (i) is relevant; (ii) is reasonably available to both parties at the time of the contract; and (iii) relates to a clear or obvious context. A latently ambiguous term may be one in respect of which possible alternative interpretations exist.

Exception regarding availability

As highlighted in **Zurich Insurance**, one of the requirements for admissibility is the reasonable availability of the evidence to all the parties at the time of the contract. However, the court noted that evidence available only to *one* party at the time of contract is not inevitably of no value. While such evidence rightly cannot be used to conclusively reveal the contracting parties' objective intention, it may be used *against the maker* of those statements to disclose his subjective intention. In so doing, the evidence may reveal what the objective intention of the parties could *not* be. This will occur where, for example, the evidence available only to one party contradicts what that party asserts was the objective intention of the parties.

Drafts

Drafts were not expressly dealt with in **Zurich Insurance**. However, the court's view was that earlier drafts of the concluded contract which satisfy the three conditions of relevance, availability and context ought also to be admissible. There would, in principle, appear to be no reason to differentiate between drafts and pre-contractual negotiations. Documentary evidence of negotiations as they appear in drafts would tend to be more reliable than oral evidence.

Analysing these drafts and comparing them with the final signed contract may well assist the court to objectively discern the contractual intention of the parties as embodied in the final contract. However, the court also recognised that, where the parties' respective positions keep changing with each draft, scant assistance may be obtained by referring to the drafts. Nonetheless, while the weight (if any) given to drafts as extrinsic evidence will differ from case to case, there ought to be no absolute prohibition against admitting drafts as extrinsic evidence.

Application to the facts

The parties attempted to adduce evidence of:

- (i) pre-contractual negotiations leading to the signing of the Employment Letter;
- (ii) e-mail correspondence between the Defendant's employees prior to the signing of the Employment Letter; and
- (iii) the Draft.

Pre-contractual negotiations | The court ruled that evidence of these negotiations relating to the offer of the Sign-on Bonus was admissible as the requirements of relevance, availability and context were met. The court accepted the Plaintiff's evidence that the Defendant had represented that the Sign-on Bonus was a "*guaranteed sum*" and that he would be entitled to it unless he left the Defendant voluntarily.

E-mail correspondence | The e-mail correspondence that the Defendant sought to rely on to support its case was held to be inadmissible as it did not satisfy the requirement that the evidence must have been reasonably available to all contracting parties at the time of contract. (This e-mail correspondence only became available to the Plaintiff upon discovery.)

However, the e-mail correspondence used by the Plaintiff to support his case was admissible. The correspondence revealed the Defendant's subjective intention that the Plaintiff was entitled to the Sign-on Bonus as soon as he joined the Defendant and not only after a certain minimum period of employment (which the Defendant had asserted was the parties' common intention).

The Draft | The court took the view that the Draft was unhelpful and irrelevant to the exercise of objectively ascertaining the contractual intentions of the parties as both the Draft and the Employment Letter had been worded by the Defendant, with no input from the Plaintiff. Therefore, any insight proffered by the Draft would only point to the Defendant's subjective intention and fail the test of relevance.

Further, the Draft did not show why the disputed clause on the Sign-on Bonus was worded the way it was. Both parties' explanations of that clause were equally plausible and this would remain so even with the benefit of the Draft. The Draft therefore did not show that the Defendant's subjective intention contradicted what the Defendant asserted was the common intention of the parties in the disputed clause.

Comment

The case re-affirms that the Singapore courts have moved towards a contextual approach to contractual interpretation ie. contracts must now be interpreted against the background in which they were entered. Pre-contractual negotiations – and earlier drafts of contracts – are now admissible for the purposes of interpreting contractual terms which may bear more than one plausible meaning, as long as they fulfill the criteria of relevance, availability and context.

If you would like more information about this case or wish to discuss how it may potentially affect you or your business, please feel free to contact litigation and dispute resolution lawyers in Drew & Napier LLC (please refer to the Directors' profiles on our [website](#)), or:

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