Lucky Realty Co Pte Ltd *v* HSBC Trustee (Singapore) Ltd
[2015] SGCA 68

Case Number	: Civil Appeal No 135 of 2014
Decision Date	: 04 December 2015
Tribunal/Court	: Court of Appeal
Coram	: Sundaresh Menon CJ; Chao Hick Tin JA; Andrew Phang Boon Leong JA
Counsel Name(s)	: Julian Tay Wei Loong, April Cheah Wenyi and Kee Shu'en Theodora (Lee & Lee) for the appellant; Edwin Tong SC, Lee Bik Wei, Lee May Ling and Ang Ann Liang (Allen & Gledhill LLP) for the respondent.
Parties	: LUCKY REALTY COMPANY PTE LTD — HSBC TRUSTEE (SINGAPORE) LIMITED

Contract – Contractual terms – Express terms – Interpretation

[LawNet Editorial Note: The decision from which this appeal arose is reported at [2015] 3 SLR 885.]

4 December 2015

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

Introduction

1 The present appeal (against the decision of the High Court judge ("the Judge") in *HSBC Trustee (Singapore) Ltd v Lucky Realty Co Pte Ltd* [2015] 3 SLR 885 ("the GD")) was yet another in a series of cases on contractual interpretation which has come before this court in recent times. It underscored, once again, the difficulties which lie in the sphere of *application* of the law (a point which this court also noted in its recent decision in *Y.E.S F&B Group Pte Ltd v Soup Restaurant Singapore Pte Ltd (formerly known as Soup Restaurant (Causeway Point) Pte Ltd)* [2015] 5 SLR 1187 ("*YES*") at [2]). Indeed, it was precisely because this court differed from the views of the Judge with respect to the interpretation of a clause of the contract in the relevant *context* that we allowed the appeal. In essence, whilst the Judge was of the view that the evidence adduced by the lessee ("the Appellant") with respect to the rent review clause in a lease agreement ("the Contract") that had been varied between the parties did *not* relate to a clear or obvious context, we were of the view that the relevant evidence *did* evince a clear and obvious context that supported the Appellant's case. We now give the detailed grounds for our decision. However, before proceeding to do so, we should give a brief summary of the applicable principles. These were in fact set out in some detail in *YES* and therefore need not be rehearsed *in extenso* in this judgment. Indeed, the parties appeared to be *ad idem* that these were the applicable principles and, as already mentioned, the principal difficulty lay, rather, in the *application* of those principles to the rent review clause in the Contract as varied.

The applicable principles

2 As this court has already observed in *YES* (at [41]), this court's decisions in *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR(R) 1029 ("*Zurich Insurance*") and *Sembcorp Marine Ltd v PPL Holdings Pte Ltd and another and another appeal* [2013] 4 SLR 193 ("*Sembcorp Marine*") "represent the lodestars in the Singapore legal landscape in so far as contractual interpretation is concerned". Whilst the courts ought to be concerned with *both* the text *and* the context, it is important to emphasise that the *text* of the contractual document ought always

to be *the first port of call* (see also *YES* at [32]). As we observed in our brief grounds which were delivered in relation to the present appeal, absent the text, the contract cannot be constructed out of context alone. That having been said, it is clear that if the text of the contract is ambiguous, the context is – potentially at least – of signal importance. However, as this court also observed in *Zurich Insurance* (at [132(d)]), "[t]he 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*** " [emphasis added in italics, bold italics and underlined bold italics]. Indeed, as we have already noted, herein lies the nub of the difference in views between the Judge and this court. To reiterate, the Judge was of the view that the relevant evidence did *not* relate to a *clear or obvious* context, whereas this court was of a *different* view altogether.

3 We should also note that, in *YES*, this court also considered the situation where the meaning of the text in a contract is *plain and unambiguous but* would lead to *an absurd result* (based on the objective evidence available). We were of the view (at [31]) that the court concerned should first ascertain, via a very careful analysis of the text and context, whether the text is indeed plain and unambiguous in the first place. We also observed (*ibid*) that there might nevertheless be *exceptional* cases where the text in the contract 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. This would, in the nature of things, be extremely rare (*ibid*), and would occur only "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" (see *YES* at [32]) [emphasis in original]; this court then proceeded to elaborate upon this last-mentioned point as follows (*ibid*):

> 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 at the time they entered into the contract*** . 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* [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 ***present*** . 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]). [emphasis in original]

4 Whilst the fact situation in the present appeal does ***not*** relate to contractual text that is *plain and unambiguous*, an issue that was in fact raised was that the decision arrived at by the Judge would lead to an absurd and uncommercial result. However, given the reasons for our decision in this appeal (which are set out below), this particular issue is *irrelevant* and therefore not one which we took into account as the basis for our decision.

5 Finally, we would observe – particularly in relation to the present appeal – that, wherever possible, the court should have regard to all the objective evidence that is relevant to the case. In particular, there should, as far as is possible, be recourse to relevant *documentary* evidence – especially where (as is the case here) *a great number of years have passed*. As this court observed in *OCBC Capital Investment Asia Ltd v Wong Hua Choon* [2012] 4 SLR 1206 (at [41]):

> Much emphasis was placed (especially by the Respondent) on the *oral testimony* given by various witnesses in the court below. Unfortunately, very little of the testimony relied upon by the Respondent was in fact helpful, being neutral at best and either irrelevant or ambiguous at worst. It bears mention that the first port of call for any court in determining the existence of an alleged contract and/or its terms would be the relevant *documentary* evidence. Where (as in the present case) the issue is whether or not a binding contract *exists* between the parties, a contemporaneous written record of the evidence is obviously more reliable than a witness's oral testimony given well after the fact, recollecting what has transpired. Such evidence may be coloured by the onset of subsequent events and the very factual dispute between the parties. In this regard, *subjective* statements of witnesses *alone* are, in the nature of things, often unhelpful. Further, where the witnesses themselves are not legally trained, counsel ought not – as the Respondent's counsel sought to do in oral submissions before this court – to forensically parse the words they use as if they were words in a statute. This is not to state that oral testimony should, *ipso facto*, be discounted. On the contrary, *credible* oral testimony can be helpful to the court, especially where (as we shall see below in relation to supporting the Appellant's case) such testimony is given for the purpose of *clarifying the existing documentary evidence*. There is, however, no magic formula in determining the appropriate weight that should be given to witness testimony. Much would depend on the precise factual matrix before the court. However, it bears reiterating that the court would always look first to the most reliable and objective evidence as to whether or not a binding contract was entered into between the parties and such evidence would tend to be *documentary* in nature. [emphasis in original]

6 This court had further elaborated on the vagaries of witnesses' ability to remember and recall certain details (and therefore (implicitly) the relative importance of contemporaneous objective documentary evidence) in *Sandz Solutions (Singapore) Pte Ltd and others v Strategic Worldwide Assets Ltd and others* [2014] 3 SLR 562 at [46]–[56]. To summarise, the following points were noted:

> (a) First, the original perception of the event may never have entered the witness's memory in the first place, or may have been so sketchy as to render (memory) retrieval difficult or impossible (at [49]).
>
> (b) Second, the witness's original perception of the event may be defective or illusory, or tainted with wrong associations (at [49]).

(c) Third, a witness's ability to recollect and the accuracy of his recollections are inversely proportional to the length of time that has elapsed from the occurrence of the events (at [50]).

(d) Fourth, the tendency is for the imagination to supply what the memory does not recall – whether unconsciously or sub-consciously (at [51]–[54]).

We endorse these observations and find them equally applicable in this case, which involves both documentary evidence and the recollection of a particular witness, Ms Lydia Sng ("Ms Sng").

The background facts

Parties to the dispute

7 The lessor was HSBC Trustee (Singapore) Ltd ("the Respondent"), a Singapore incorporated company which provides professional trustee services. By way of a deed of appointment dated 17 January 2006, the Respondent was appointed trustee to the estate of Mr Koh Sek Lim ("Mr Koh"). Mr Koh had passed away in 1948. His will settled a plot of land known as Lot 3041V on certain trusts. In 1975, the trustee of Lot 3041V was the Public Trustee. On 30 August 1991, OCBC Trustee Limited took over as the trustee. In 2006, as stated above, the Respondent took over (in turn) as the trustee. As the Judge noted (at [3] of the GD), this change of trustees was of no legal relevance to the dispute before him; neither was it an issue on appeal.

8 The lessee was the Appellant, a Singapore incorporated company in the business of real estate development and part of a group of companies under Far East Organization.

The Contract

9 On 25 February 1975, the Public Trustee demised Lot 3041V to the Appellant for a term of 60 years commencing 1 March 1977. The Appellant was to pay a yearly rent of $3,877.15. The Contract, a brief four-page document, contained *no provision for the rent to be varied*. The operative part of the Contract reads as follows:

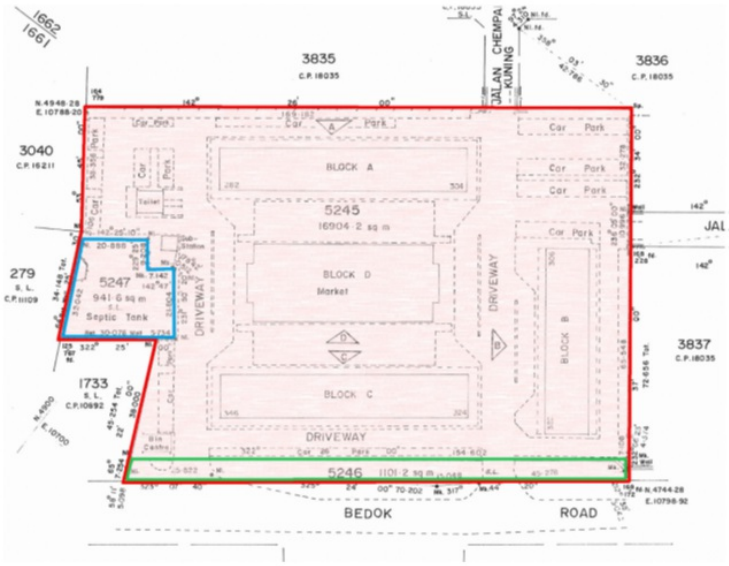
> I, THE PUBLIC TRUSTEE ... the proprietor of the land hereinafter described HEREBY LEASE unto [the Appellant] ... all such my estate or interest in the said land ...
>
> DESCRIPTION OF LAND
>
> | Reference to Land-Register | | Mukim | Lot | Description of Land (whether whole or part) |
> |---|---|---|---|---|
> | Volume | Folio | | | |
> | 102 | 138 | XXVII | 3041 | The whole of Lot 3041 of Mukim XXVII together with the buildings in the course of construction thereon. |
>
> TO BE HELD by the Lessee as tenant for the term of sixty (60) years commencing [1 March 1977] YIELDING AND PAYING therefor on [19 March 1975] for fifty-nine (59) years and on the same date [on every] succeeding year during the said term at the office of The Public Trustee the yearly rent of $3,877-15 … SUBJECT to the covenants conditions and powers implied by law in

instruments of lease (or to such of them as are not hereinafter expressly negatived or modified) AND SUBJECT also to the covenants and conditions hereinafter contained.

10 One of the "covenants and conditions" – cl 1(iii) – obliged the Respondent to proceed forthwith "to erect, cover in and complete fit for immediate occupation the buildings on the demised land".

Development and subdivision of the land

11 Between 1967 and 1977, the Appellant erected four two-storey buildings on the land. The buildings are known as Blocks A to D. Thereafter, two main changes occurred. First, Lot 3041V was subdivided into one large lot – Lot 5245N – and two smaller lots – Lots 5247L and 5246X. The latter were compulsorily acquired by the State. Lot 5245N, which was what was left of Lot 3041V after the subdivision and compulsory acquisition, was about 11% smaller (from 18,947 square metres to 16,904.2 square metres). This is depicted as follows (see the GD at [7]):



The entire shaded area in the above diagram was Lot 3041V, whereas Lot 5245N excluded the areas Lot 5247L *and* Lot 5246X which are clearly designated in the above diagram at its left-hand side and at the bottom, respectively. The land area occupied by Block D (designated in the above diagram) is approximately 2,032.8 square metres.

12 Despite the reduction in the size of the land, and despite the fact that there had been no variation to the "Description of Land" provision in the Contract, the Appellant continued to pay the same rent.

13 Second, Lot 5245N was subdivided into a total of 119 strata units comprising (a) 33 strata shops on the first storey of Blocks A, B and C, (b) 33 strata flats on the second storey of the three blocks, (c) a single strata market on the first storey of Block D and (d) 52 strata shops on the second storey of Block D.

14 The Appellant sold off 64 of the 66 units in Blocks A, B and C to third party purchasers. It did so by assigning to these purchasers the benefit of its remaining term under the Contract over those units. Unbeknownst to the Respondent, the Appellant did not reserve the right to charge these purchasers any ground rent. The Appellant retained the remaining two units in Blocks A, B and C and all the units in Block D for leasing purposes. It had also converted part of Lot 5245N into common

property (which includes a car park) that has been managed by a Management Corporation.

Deed of variation

15 In 1995, the Respondent's predecessor and the Appellant agreed to vary the terms of the rent. The impetus behind the variation – or at least the negotiations that led up to the variation – centred on a dispute over the Appellant's redevelopment of Block D. This is a crucial facet of the background to the dispute at hand and we therefore propose to document it fully in the following paragraphs.

16 The dispute arose in February 1994. At that point in time, the Appellant had begun redevelopment works on Block D – to convert it from a market to a shopping centre. The Respondent's predecessor alleged that in commencing redevelopment works, the Appellant was in breach of cl 1(vi) of the Contract, which obliged the Appellant to obtain the consent of the lessor before making any "alterations or additions" to any of the buildings on the land. The Respondent's predecessor alleged that the Appellant had sought no such consent before embarking on its redevelopment.

17 At the time, the Appellant denied having been in breach of the Contract. Its position seemed to be that because it had obtained written permission from the Urban Redevelopment Authority, it had satisfied its obligation under cl 1(vi) (and was therefore not in breach of the said clause). Its (presumably) alternative position, which it only raised later, was that the obligation to obtain consent from the lessor was simply a technical one. Nevertheless, it proceeded to engage the Respondent's predecessor in negotiations.

18 On 26 May 1994, a meeting with the Committee of Beneficiaries of the estate was convened for the Respondent's predecessor to seek the advice of real estate consultancy firm Knight Frank Cheong Hock Chye & Baillieu ("Knight Frank") on how to proceed with the negotiation. Ms Sng was present on behalf of Knight Frank. The relevant portion of the minutes read as follows:

> This meeting was called to seek the advice of [Knight Frank] on how to proceed with the negotiation on rental.
>
> …
>
> Ms Lydia Sng … informed the Committee that she was unable to obtain the development plan from Lucky Realty to prepare the valuation. She therefore had to use the URA Bedok Development Guide Plan as the guide for her valuation.
>
> … she had to calculate the rental based on the plan given to her by the Trustee. … Her valuation, based on an assumed site area of 35,908 square foot at $150 per square foot based on a gross plot ratio of at least 1.2 is as follows:
>
> | | | |
> |---|---|---|
> | 35,908 x $150 | = | $5,386,200 |
> | Ground rent (5%) | = | $269,310 |
> | Rent per month | = | $22,442 |
>
> Ms Lydia Sng mentioned that certain discount would have to be made to the $22,442 rental she calculated since Lucky Realty had developed the land. …

…

Mr Alan Koh [one of the members on the Committee of Beneficiaries] suggested that Ms Lydia Sng prepare another valuation based on the whole site since the breach is on the whole site. … The valuation for the whole site would be used as an issue for bargaining during negotiation for the revision of the rental clause.

Ms Lydia Sng opined that it would be very difficult and almost impossible to do this valuation because … she did not have the plot ratio to the land …

…

After a long discussion, the Committee unanimously decided [that] … Ms Lydia Sng will provide an indicative value based on the whole site. …

19 The negotiations thereafter took place by way of a series of letters between February and September 1995. Most of these letters carried the following subject title:

ESTATE OF KOH SEK LIM DECEASED

LOT 3041 MUKIM 27 BEDOK SHOPPING CENTRE

Some of the letters – particularly those from Knight Frank to the Appellant – contained a further sub-title which read "BREACH OF LEASE BY LUCKY REALTY CO. LTD ("LUCKY REALTY")"

20 On 11 February 1995, Ms Sng, who represented *the Respondent's predecessor*, wrote to the Appellant offering to "settle the matter amicably based on a rental of $23,000/- per month". *The Appellant* responded on 23 February 1995, through Mrs Dorothy Chan ("Mrs Chan"), with a counter-offer of $10,000 per month. On 21 March 1995, Ms Sng responded, rejecting the counter-offer. She made a counter-offer of her own: (a) increasing the rental to $15,000 per month and (b) implementing a mechanism for the rental to be increased thereafter in two-year terms. On 19 May 1995, Mrs Chan responded lamenting the bad business at Bedok Shopping Centre (thereby implicitly rejecting this offer).

21 On 25 July 1995, the Respondent's predecessor wrote, through Mr Tan Tiong Cheng (also from Knight Frank), to the Appellant with a new counter-offer as follows:

(a) The rent shall be increased to $11,000 per month from 15 June 1994, which will be referred to as "the TOP date" as this was the date on which the Appellant received the Temporary Occupation Permit in respect of Block D; and

(b) The yearly rent shall be revised every five years from 15 June 1994 to the "market rent prevailing at the time of such revision" or an increase of 10% of the immediately preceding yearly rent, whichever is the higher.

22 On 3 August 1995, Mrs Chan responded stating:

I have informed you on the telephone that I am unable to accept the market rent prevailing at the time of such revision. Perhaps you could define in this specific case what the market rent prevailing means. [emphasis in original]

23 On 4 August 1995, Mr Tan Tiong Cheng replied stating:

> We refer to your letter of 3/8/95 and our subsequent telephone conversation.
>
> We are pleased to confirm that the market rent prevailing at the time of such revision in your specific case means that the valuation of the rental would be based on the existing development and not some imaginary highest and best use consideration.
>
> …
>
> [emphasis in original]

24 On 23 September 1995, Ms Sng wrote to the Appellant with a "computation of the fair market rental value". This letter was sent by fax and by post. The copy of the letter which was exhibited in the Affidavit of Ms Ong Sook Mor, Director at Far East Organization, and which was relied on by the parties on appeal, carried a notation that it was "RECEIVED ON 26 SEP 1995". The relevant portion of the text of the letter reads as follows:

> We refer to the discussions your Mrs Dorothy Chan had with our Mr Tan Tiong Cheng and are pleased to enclose, as requested, ***our computation of the fair market rental value*** .
>
> Our file notes show that the computation was originally faxed to you in October 1994.
>
> [emphasis added in bold italics]

The "computation of the fair market rental value", which was annexed to the letter, was based on the characteristics of the land occupied by Bedok Shopping Centre (*ie*, 2,032.8 square metres, plot ratio of 1.82 and tenure of 43 years). The computation yielded $25,000 per month.

25 That same day, *ie*, 23 September 1995, the Appellant wrote to Knight Frank indicating that it accepted the following terms and conditions:

> (a) The rent shall be increased to $10,000 per month as at 15 June 1994, the TOP date.
>
> (b) The yearly rent shall be revised every five years from 15 June 1994 to the market rate prevailing at the time of such revision or an increase of 10% of the immediately preceding yearly rent, whichever is the higher. The market rent is to be determined by the lessor or, in the event of dispute, by a competent and reputable valuer to be appointed by the lessor whose decision shall be final.
>
> (c) The market rent prevailing at the time of such revision means that the valuation of the rental would be based on the existing development and not some imaginary highest and best use consideration.

This letter, too, was sent by fax and post.

26 On 18 December 1995, the Appellant purported to register the variation of the Contract. However, the registration proved *ineffective*. This was because, as notified by the Registry of Land Titles and Deeds in letters dated 23 February, 29 July and 5 August 1996, the variation had to be lodged against all the subsidiary strata certificates of titles. This had not been done. The parties withdrew their registration and eventually decided against attempting to re-register.

27 Instead, the parties reflected their agreement in a *deed of variation* dated 17 December 1996. The relevant portion of the deed reads as follows:

> **THIS DEED OF VARIATION** is made [on 17 December 1996] Between [the Appellant] (hereinafter called "the Lessees") … and OCBC TRUSTEE LIMITED … (hereinafter called "the Lessors") …
>
> (iii) The Lessees have at the request of the Lessors agreed to vary the terms set out in the said Instrument of Lease [*ie*, the Contract] in the manner hereinafter appearing.
>
> **NOW THIS DEED WITNESSETH** that the Lessees **HEREBY COVENANT** with the Lessors that the terms of the said Instrument of Lease shall be varied as follows:
>
> That the following paragraph appearing at the bottom of page 1 of the instrument of Lease reproduced below:
>
> "TO BE HELD by the Lessee as tenant for the term of sixty (60) years commencing [1 March 1977] YIELDING AND PAYING therefor on [19 March 1975] for fifty-nine (59) years and on the same date [on every] succeeding year during the said term at the office of The Public Trustee the yearly rent of $3,877-15 … SUBJECT to the covenants conditions and powers implied by law in instruments of lease (or to such of them as are not hereinafter expressly negatived or modified) AND SUBJECT also to the covenants and conditions hereinafter contained."
>
> be deleted and the following clauses be substituted in its place:
>
> (a) TO BE HELD by the Lessee as tenant for the term of sixty (60) years commencing [1 March 1977] YIELDING AND PAYING therefor from [19 March 1975 to 14 June 1994] the yearly rent of $3,899-15 and from [15 June 1994] the revised yearly rent of $120,000 SUBJECT to the covenants conditions and powers implied by law in instruments of lease (or to such of them as are not hereinafter expressly negative or modified) AND SUBJECT also to the covenants and conditions hereinafter contained.
>
> (b) The yearly rent shall be revised every five (5) years from [15 June 1994] to the market rent prevailing at the time of such revision or an increase of 10% of the immediately preceding yearly rent, whichever is the higher. The market rent shall be determined by the Lessor or in the event of dispute the rent determined by a competent and reputable valuer to be appointed by the Lessor whose decision shall be final. The market rent prevailing at the time of such revision means that the valuation of the rental would be based on the existing development and not on an imaginary highest and best use consideration.
>
> (c) That save as above varied, the said Instrument of Lease and all powers provisions covenants and conditions contained or implied therein or subsisting thereunder shall remain in full force and effect as between the Lessor and the Lessee."

Subsequent increments

28 Thereafter, the Appellant adhered to (*ie*, paid) the rent as per the Contract as varied. From 15 June 1994 to 14 June 1999, the rent was $120,000 per annum (*ie*, a rent of $10,000 per month). The first rent increase in 1999 – by 10% to $132,000 per annum – was uncontentious. The Respondent's predecessor informed the Appellant of this increase on 21 May 1999. The Appellant

complied, paying a total of $660,000 ($132,000 x 5) for the period spanning 15 June 1999 to 14 June 2004.

29 The second rent increase, too, went smoothly. On 7 June 2005 (before the Appellant had paid its rent for the period of June 2004 to June 2005), the Respondent's predecessor informed the Appellant of this second increase – from $132,000 to $150,000 based on the market rental value of the property in 2004. The Appellant once again complied, paying a total of $750,000 ($150,000 x 5) for the period spanning 15 June 2004 to 14 June 2009.

The disputed increment

30 On 8 May 2009, the Respondent wrote to the Appellant to increase the annual rent to $1.3m for the period commencing 15 June 2009. This $1.3m was based on the projected market rate as at 15 June 2009, as determined by the Respondent. The Appellant replied on 13 May 2009, indicating its astonishment (at the proposed increase) and lamenting how the "world financial turmoil has taken its toll on all sectors of businesses". It asked that the rent be adjusted, instead, to $165,000 per annum (based on a 10% increase). The full response reads as follows:

> We refer to your letter dated 08 May 2009.
>
> We are astonished by the proposal to revise the annual rent to S$1,300,000/- from the existing S$150,000/- ; an increase of 8.66 times. For your information, the annual rental income (after property tax and maintenance charges but before taxation) derived from the units belonging to us is below S$1,000,000/-.
>
> The world financial turmoil has taken its toll on all sectors of businesses especially the property market with falling sale and rental prices. In the light of the difficult times, we are appealing to your goodself to moderate the revision to an annual rent of S$165,000/- (i.e. an increase of 10% of the immediately preceding yearly rent) with effect from 15 June 2009 to 14 June 2014.

31 On 20 May 2009, the Respondent wrote back. It stated that $1.3m, which was the market rate as determined by its valuation, was higher than $165,000 and should therefore be the appropriate new rent. It stated that if the Appellant disagreed with its valuation, it should obtain a valuation report of its own.

32 On 1 June 2009, the Respondent disclosed its own valuation report (by Chesterton International Property Consultants Pte Ltd) dated 28 May 2008, which indicated that the annual ground rent of the entire Lot 5245N (*ie*, all 16,904.2 square metres) was valued at $1.3m.

33 The Appellant replied on 15 June 2009, disagreeing with the $1.3m figure. It did not provide any valuation report of its own to contradict that of the Respondent's. Rather, it argued that the market annual rent should only pertain to Block D, and not the entire Lot 5245N. Although the Appellant had never responded to the Respondent with a valuation of its own, it had subsequently tendered, in evidence, a valuation by Ms Sng indicating that the annual ground rent for Block D alone as at 15 June 2009 was $168,000.

34 Up till parties appeared in court, the Appellant had been paying the (previous) rent of $150,000 per annum.

The Respondent's application to the Judge

35 On 28 April 2014, the Respondent filed Originating Summons No 391 of 2014, applying for the following:

> 1. A Declaration that based on a proper construction of the Deed of Variation between OCBC Trustee Limited and the Defendant dated 17 December 1996 (the "Deed of Variation"), read with the terms of the lease between the Public Trustee and the Defendant dated 25 February 1975 (the "Lease"), the revision to the yearly rent every five years is to be calculated by reference to the whole area of Lot 5245N Mukim 27 (formerly Lot 3041 Mukim 27) (the "Land") and not a part of the Land only.
>
> 2. An Order that the yearly rent for the periods between (a) 15 June 1999 and 14 June 2004 and (b) 15 June 2004 and 14 June 2009 be recalculated based on the proper construction of the Deed of Variation as set out in paragraph 1 above and paid accordingly by the Defendant.
>
> 3. An Order that, thereafter for the remainder of the term of the Lease, every revision to the yearly rent be based on the proper construction of the Deed of Variation as set out in paragraph 1 above.
>
> 4. Interest on such sums payable under paragraphs 2 and 3 above pursuant to Section 12 of the Civil Law Act (Cap. 43, 1999 Rev. Ed).
>
> 5. Costs.
>
> 6. Such further and/or other relief as this Honourable Court deems fit.

36 Parties appeared before the Judge on 25 July 2014. The Respondent indicated it was no longer pursuing the second prayer. Also, the third prayer related only to rent from 2009 onwards. In effect, the first two rent increments would have gone unaffected however the proceedings panned out. The only issue was the amount of rent that the Appellant should pay from 2009 onwards (see the GD at [21]).

The decision below

37 After hearing submissions, the Judge allowed the application (making an order in terms of prayer 1) with the following brief grounds:

> In my view, the contextual approach still requires one to start from the language and then look at the context. Without deciding the difficult issues of law involved, I am prepared to give the benefit of the doubt and have regard to the contextual material. But I am unable to find in that material a clear indication that the words used in the variation should not mean what they say. In my view in 1995, the parties reopened the lease and reached a commercial settlement on terms satisfactory to both to allow the lease to continue despite the defendant's breach. The defendant's consideration was agreeing to let the plaintiff increase the rent. There is nothing in contextual material from which I can draw an objective inference that the parties' outward manifestation of their intent was that the yearly rent was to be for Block D alone.

38 On 21 August 2014, the Appellant filed its notice of appeal. The Judge issued the GD on 13 April 2015, in which he made the following key points:

> (a) The Appellant's argument in relation to the estoppel by convention was rejected because estoppel could not extinguish the Respondent's contractual right to collect rent from 2009

onwards (which was the only relevant timeframe in question) (see the GD at [151]). For this reason, the only issue before the court was whether, "on a true construction of the lease, [the Appellant's] obligation to pay the "yearly rent" and the [Respondent's] right to achieve the prevailing "market rent" extends to the whole of Lot 5245N or whether it is confined to Block D only" (see the GD at [23]).

(b) Under Singapore law, contracts are construed by the contextual approach (see the GD at [25]). This approach entails the following:

(i) As distilled from *Zurich Insurance*, the focus in construing the Contract must remain on ascertaining the objective intention of the parties. The subjective intentions are immaterial (see the GD at [30]).

(ii) An exercise in construction must ascribe to the words and phrases chosen by the parties in the contract some meaning. That meaning must be a legitimate meaning. It is wrong to give those words a meaning beyond the contours of their penumbral meaning. It is equally wrong to give those words no meaning at all (see the GD at [32]).

(iii) The contextual approach not only permits but obliges the court to have regard to evidence extrinsic to the words used by the parties in the contract in order to give effect to the intention of the parties objectively ascertained. In admitting extrinsic evidence, the following criteria must be satisfied (see the GD at [34], citing *Zurich Insurance* at [132]):

(A) the evidence must be relevant;

(B) it must be reasonably available to all the contracting parties; and

(C) it must relate to a clear or obvious context.

(iv) In drawing from *Sembcorp Marine*, the interplay between the law of contract and the law of evidence must be acknowledged (see the GD at [40]). Although the Evidence Act (Cap 97, 1997 Rev Ed) ("the EA") did not apply in this case – given that proceedings were commenced by originating summons and evidence was presented in the form of affidavits – the common law of evidence (which was consistent with the EA) applied (see the GD at [53]–[56]).

(c) The contextual approach was to be carried out by starting with the parties' words in the specific part of the Contract as varied (see the GD at [61] and [69]). The specific part reads as follows:

I, THE PUBLIC TRUSTEE ... HEREBY LEASE unto [the Appellant] ... [t]he whole of Lot 3041 of Mukim XXVII together with the buildings in the course of construction thereon,

(a) TO BE HELD by the Lessee … for … sixty (60) years … YIELDING AND PAYING therefor [from 19 March 1975 to 14 June 1994] the yearly rent of $3,877-15 and from [15 June 1994] the revised yearly rent of $120,000 SUBJECT to the covenants conditions and powers implied by law … AND SUBJECT also to the covenants and conditions hereinafter contained.

(b) The yearly rent shall be revised every five (5) years from [15 June 1994] to the market rent prevailing at the time of such revision or an increase of 10% of the

immediately preceding yearly rent, whichever is the higher. … The market rent prevailing at the time of such revision means that the valuation of the rental would be based on the existing development and not on an imaginary highest and best use consideration.

(c) That save as above varied, the said Instrument of Lease and all powers provisions covenants and conditions contained or implied therein or subsisting thereunder shall remain in full force and effect as between the Lessor and the Lessee

It was clear that what was being leased was the whole of Lot 3041V, including the buildings in the course of construction upon it. The objective meaning of the terms "yearly rent" and "market rent" in cl (b) was the yearly rent and market rent of the whole of Lot 3041V (see the GD at [70] and [71]).

(d) The second step was to consider the rest of the Contract as varied – in particular, the words "buildings in the course of construction thereon". The parties' intention objectively ascertained as at the time of the 1995 variation was that the phrase "buildings in the course of construction thereon" referred to buildings that the Appellant bound itself contractually in 1975 to construct upon Lot 3041V (see the GD at [74]). This again suggested that "yearly rent" and "market rent" referred to the whole land as well as the buildings on that land.

(e) The third step was to consider extrinsic evidence. The extrinsic evidence in relation to the changes to the land – in particular, that some of the land had been compulsorily acquired and that the relevant portion of the land had become Lot 5245N (as opposed to Lot 3041V) – was admissible and led to the conclusion that "Lot 3041" in the Contract as varied should be construed as "Lot 5245N" (see the GD at [85]). There were four other aspects of extrinsic evidence that the Appellant sought to admit. These were dealt with by the Judge as follows:

(i) First, evidence of the parties' pre-contractual negotiations. This mainly comprised evidence from Ms Sng, who represented the Respondent's predecessor in the negotiations that led up to the 1995 variation, and the minutes of the meeting on 26 May 1994 (see above at [18]). The Appellant relied on this to argue that the common basis of the parties' negotiations leading up to the 1995 variation was that its obligation to pay rent was confined to Block D. Both these pieces of evidence were inadmissible because they served no purpose other than to establish the parties' subjective intentions (see the GD at [107]–[111]). Such extrinsic evidence was inadmissible as there was no ambiguity; aside from the change from Lot 3041V to Lot 5425N, the Appellant's obligation to pay rent was unambiguous before the 1995 variation and remained unambiguous after the 1995 variation (see the GD at [99] and [100]). Even if the evidence was admissible, it would fail to meet the *Zurich Insurance* criteria as it did not relate to a clear or obvious context (see the GD at [122]). For instance, it was unclear why Ms Sng never prepared a valuation based on the whole of Lot 5245N (although she was requested to do so according to the minutes of the meeting on 26 May 1994). Also, it was not clear how the initial $120,000 per annum figure was arrived at (see the GD at [125]–[128]).

(ii) Second, the fact that the increased rent under the 1995 variation was back-dated to the TOP Date. Although it was true that parties agreed to impose the fixed rent with retrospective effect by reference to the TOP Date (see the GD at [129]), there was no clear or obvious context to this. For instance, the date could have been chosen because that was when the Appellant, in the Respondent's predecessor's view, breached the Contract. Alternatively, the date could have been chosen because at least part of the contractual objective of any lessee's obligation to seek the lessor's consent before redeveloping any part

of the land in question was to give the lessor an opportunity to renegotiate the rent in order to capture for itself some of the enhanced economic benefit that might accrue to the lessee from the redevelopment; the economic benefit (if any) in this case would only have accrued from the TOP Date (see the GD at [132]). In short, it was impossible to say that this extrinsic evidence supplied a clear or obvious context (see the GD at [133]).

(iii) Third, the Appellant sought to establish that the term "existing development" in cl (b) referred to Block D only. The specific aspects of evidence relied on by the Appellant were (A) that Block D was the subject of the alleged breach of the Contract that sparked negotiations and (B) that the Respondent's predecessor was aware that the Appellant had assigned its interest in almost all of the units in Blocks A to C to third parties. Neither involved a clear or obvious context. An objective observer would wonder why the Respondent's predecessor, which had a right to ground rent for the whole of Lot 5245N, would give up that right (see the GD at [139]). Furthermore, cl (c) clearly expressed the parties' intention to preserve the contractual force of the rest of the Contract (see the GD at [140]).

(iv) Fourth, evidence of the parties' conduct subsequent to the 1995 variation in deciding not to procure all the assignees of strata units in Blocks A, B and C to enter into a variation of all of their leases to reflect the variation of the Contract. This failed to supply a clear or obvious context. For instance, it may have been possible that the parties simply decided against procuring all the assignees' cooperation in the light of the cost, time and inconvenience involved in such a task and that the variation only affected the Appellant's contractual obligation to pay rent to the Respondent (and its predecessor) but not the assignees' contractual obligations or proprietary rights (see the GD at [144]).

In the alternative, even if the evidence did satisfy the *Zurich Insurance* criteria, construing the terms "yearly rent" and "market rent" in the Contract as varied as "yearly rent for Block D" and "market rent for Block D" went so far beyond even the penumbral meaning of those words that it amounted to rewriting the contract, which was impermissible in the construction process (see the GD at [146]).

The parties' submissions

The Appellant's submissions

39 In its appeal, the Appellant argued the Judge erred in five respects. First, the Judge erred in his exercise of the contextual approach to interpretation. His sequential approach, which began with a consideration of the contractual wording without regard to the objective commercial context, was over-complicated and inconsistent with *Zurich Insurance*. Instead, he should have simply asked what meaning the disputed words would have conveyed to a reasonable reader (in the light of all the admissible evidence).

40 Second, the Judge erred in refusing to admit the affidavit evidence of Ms Sng. Ms Sng's evidence, which showed that the initial rent that had been set in the deed of variation was a rent applicable to Block D only, was admissible pursuant to s 94(*f*) of the EA. It went to the parties' mutual objective intent, as opposed to simply the Appellant's subjective intent. Further, it satisfied the *Zurich Insurance* criteria as it related to a clear or obvious context. The documents exhibited in Ms Sng's first affidavit demonstrate it was a valuation of Block D only that was sent to the Appellant in October 1994, and it was that valuation and no other that formed the basis of the parties' dealings. The objective observer would hence have been in no doubt that the parties were intending to fix a

rent for Block D only. Alternatively, even if the evidence went to subjective intent, it was admissible as there was a latent ambiguity in the deed of variation. This ambiguity related to the phrase "to the market rent prevailing at the time of such revision", which could refer either to the whole of Lot 5245N or only to Block D.

41 Third, the Judge erred in refusing to admit the three other pieces of contextual evidence as follows:

(a) In relation to the decision to back-date the rent increase to the TOP Date, the Judge erred in finding it did not relate to a clear or obvious context. The date was specifically linked to Block D and Block D alone.

(b) In relation to the phrase used in the deed of variation, "existing development", the Judge erred in finding it did not relate to a clear or obvious context. It was clear parties entered into a dispute specifically in relation to the Appellant's redevelopment of Block D. The "existing development" is clearly Block D, and this evidence supports the Appellant's case that the rent payable only relates to Block D.

(c) In so far as parties' subsequent conduct in eventually deciding against registering the variation of the Contract was concerned, the Judge erred in finding it did not relate to a clear or obvious context. Since lodging the variation against each of the assignees' leasehold interests was never done, there was no question of the Appellant increasing the ground rent of the assignees; the focus of the parties was hence entirely on Block D.

42 Fourth, the Judge erred in holding that the subject matter of the Contract as varied was the entirety of Lot 5245N. This was because the Appellant had assigned most of its leasehold interest in the land away, such that it was only the lessee of Block D (and two units in Blocks A, B and C). It was hence illogical and inconsistent with reality to conclude that the subject matter of the Contract as varied was the entirety of Lot 5245N.

43 Fifth, the Judge erred in construing the rent review provision. The Judge should have looked at the language of the deed of the variation in its objective commercial context. This included the fact that the initial rent was set at $120,000 per annum and that the Appellant had assigned away the rest of the land except for Block D (and two other units). Further, the Judge had erred in discounting the Appellant's arguments on commercial absurdity, finding instead that this was a situation of the Appellant's own making because it had chosen not to collect ground rent from the assignees. This was wrong because at the time of the assignment, the Appellant was only paying a fairly nominal ground rent. Had the Judge taken these factors into account, he would have found that the rent review provision was intended to determine the rent payable in respect of Block D only.

The Respondent' submissions

44 The Respondent essentially sought to support the Judge's decision. First, it argued that the Judge was correct to embark on the process of interpretation by turning first to the Contract as varied. In this respect, the words "yearly rent" in cl (b), on a plain reading, must have referred to the entire Lot 5245N (which included all four Blocks A to D and the common property). This was also supported by cl (c), which expressly preserved the provisions in the Contract that were not varied.

45 Second, the Judge was correct to refuse to admit the extrinsic evidence relied upon by the Appellant. This was in relation to three respects, as follows:

(a) First, in relation to the words "yearly rent" and "market rent" in cl (b), the Appellant sought to admit extrinsic evidence to manipulate these words without any regard to the express terms of the Contract as varied. Further, much of the evidence in this respect simply evinced the subjective intentions of the parties or related parties (in particular, Ms Sng). Also, as the Judge had rightly noted, the evidence did not relate to a clear or obvious context. For instance, it was purely the Appellant's speculation that the selection of the TOP Date as the date on which the increased rent took effect was indicative of the "yearly rent" pertaining only to Block D; there could have been many other reasons (as the Judge had noted at [132] of the GD) why that date was selected.

(b) Second, in respect of the words "existing development", the Appellant's resort to extrinsic evidence was again in blatant defiance of the clear words of the Contract as varied. The relevant part of cl (b) read, "the existing development **and not on an imaginary highest and best use consideration**" [emphasis in original] – the portions in bold clearly indicated that "existing development" pertained to the use of the land; not the area. Further, the evidence that the Appellant relied on – to the effect that the negotiations that led to the variation stemmed from a dispute in relation to Block D – did not relate to a clear or obvious context; just because Block D was the subject matter of the dispute that sparked negotiations did not mean that any resolution reached as a result of those negotiations had also to relate to (and only to) Block D.

(c) Third, the Appellant's reliance on the decision against registering the variation against the subsidiary proprietors was unfounded because there was no clear or obvious context behind that decision. Furthermore, it was trite as a matter of law that the Appellant continued to bear contractual obligations in relation to the payment of rent, pursuant to the Contract as varied, to the Respondent; the decision against registering the variation did not, and could not, change this.

46 Third, the Judge was correct to find that the subject matter of the Contract as varied was Lot 5245N. The relevant point in time to construe the subject matter of the Contract (which would presumably be the same as the subject matter of the Contract as varied) was when Lot 3041V was extinct. At that point in time, the Appellant had yet to sell off its interest in most of the units in Blocks A to C. The subject matter was hence the land formerly marked as Lot 3041V less the two small parcels which had been acquired, *ie*, Lot 5245N.

47 Fourth, the interpretation afforded by the Judge did not lead to an absurd result. Although the result of his interpretation was that the Appellant would have to pay far more in rent and possibly incur a monetary loss, that did not mean it was objectively absurd. Any seeming "absurdity" could be reconciled by the Appellant's decision not to reserve a contractual right to collect ground rent from the assignees to which it had sold off its interest in most of the land; it was this decision of the Appellant's that led it to its dire financial situation at present.

Our decision

48 As we have intimated above, we allowed the appeal after hearing arguments by counsel for the parties. However, we did not – and do not – agree with all of the Appellant's points. It is, in our view, unnecessary to set out all the Appellant's points in detail, indicating which specific points we disagree with. We propose, instead, to briefly set out the steps that led to our decision, pointing out the aforementioned points of disagreement in the process.

49 We begin with the Appellant's contention that the Judge was incorrect in his approach to interpretation. We did not agree with this. On the contrary, we found that the Judge was correct to

have embarked on the process of interpretation by having regard first to the very words of the Contract as varied (see above at [2]).

50 It bears repeating that the dispute before this court – and the court below – pertained to the ambit of the rent review clause. This led us to the second step in our deliberation of the case: ascertaining the relevant portion of the Contract that warranted scrutiny. The crucial words, we found, were the words in cl (b) (reproduced above at [27]) as follows: "[t]he market rent prevailing at the time of such revision means that the valuation of the rental would be based on the existing development and not on an imaginary highest and best use consideration". Specifically, the challenge was to ascertain if "existing development" pertained to the entire Lot 5245N or simply to Block D.

51 Third, we considered the materials that could have shed light on what "existing development" meant. Looking within the Contract (as varied), we found little guidance. In fact, the "Description of Land" – which still referred to "Lot 3041" – was not simply unhelpful, it was ambiguous in itself (in that it referred to a plot of land that no longer existed). We note that even if the "Description of Land" referred to Lot 5245N (or that if the ambiguity in the clause as it stood could be resolved in favour of Lot 5245N, as the Judge had noted in the GD at [78]–[85]), this would *not* be *dispositive* of the question before this court (*ie*, the ambit of the *rent review clause*). Looking beyond the Contract, we found that the contemporaneous correspondence (that led up to the agreement on 23 September 1995) provided significant guidance. From the correspondence, we were able to glean the following:

(a) Clause (b), as well as the entire variation to the Contract, was arrived at through negotiations that stemmed from a dispute in relation to Block D; this was undisputed.

(b) The negotiations involved the Respondent, on the one hand, attempting to procure an increase in the rent payable and the Appellant, on the other, seeking to keep any rent increase as low as possible. The Respondent commenced negotiations with the offer to increase monthly rent to $23,000 with no rent review clause (see above at [20]). The Appellant responded with a counter-offer of $10,000 (similarly with no rent review clause) (also above at [20]). The subsequent correspondence marked their attempts to seek some form of compromise.

(c) The Respondent's third offer was for the rent to be increased to $11,000 per month as at the TOP Date and for rent to be revised thereafter on a five-year basis based on the "market rent prevailing" at the time of the revision (see above at [21]). This was met with a request by the Appellant to "define … what the market rent prevailing means" (see above at [22]). The Respondent replied stating "the market rent prevailing … means that the valuation of the rental would be based on the existing development and not some imaginary highest and best use consideration" (see above at [23]); these were the very same words found in cl (b).

(d) Shortly thereafter, the Respondent sent the Appellant its "computation of the fair market rental value". The computation was (as was apparent on the face of the document) based on the land area of Block D alone (although the phrase "Bedok Shopping Centre" was used instead of Block D). There was some dispute as to when exactly this computation was sent and whether it was sent to both parties. It bears repeating that Ms Sng – the sender of the letter (and computation) in question – was, at the time of the negotiations in 1995, acting for the Respondent's predecessor. It was undisputed that Ms Sng had sent the letter to Mrs Chan (of the Appellant). But there was no indication on the letter that it was copied to the Respondent's predecessor. It was also unclear if the letter eventually made its way to the Respondent. The Respondent took the position that the first time it saw the letter (and the computation) was when Ms Sng's affidavit (which annexed the letter) was filed. The Appellant took the position that the first time it (the Appellant) saw the computation was when it was faxed to it in October

1994. The Respondent argued this was not the case (by lamenting the lack of evidence of this October 1994 fax); it further argued that the computation had only reached the Appellant (for the first time), with the letter on *26* September 1995 (based on the "Received on" timestamp; see above at [24]). In response to this, the Appellant pointed out that even if it had only received the computation (with the letter) on 26 September 1995 *by post*, it would nevertheless have received both documents on the same day it was sent (*ie*, 23 September 1995) *by fax*, given that the letter was sent both by post and fax (see above at [24]). In the midst of all these arguments and counter arguments, it was important to focus on the crucial feature of this letter (and the computation), which was: whether *both* of the parties that were negotiating at the time were aware of the computation *before* the agreement (on 23 September 1995) was reached. It was clear the Respondent's predecessor was aware of it – in fact, it was the one that sanctioned the valuation (which resulted in the computation by Ms Sng). Whether the computation was eventually copied to the Respondent's predecessor (when it was sent to the Appellant on 23 September 1995) and whether the Respondent's predecessor had also, in the midst of the negotiations, sanctioned *other* valuations (for instance, based on the entire site; see above at [18]) which never manifested in a computation that was used were irrelevant for our purposes. What was left was to ascertain if the Appellant was aware of the computation *before* agreeing to the variation. Even taking the Respondent's case at its highest (*ie*, that the computation was not faxed to the Appellant in October 1994), we note that, at the very least, the computation would have reached the Appellant by fax on 23 September 1995 *before* it agreed to the variation. We therefore found that the Appellant, too, would have been aware of the computation before the agreement.

Against this context, it was clear that the relevant phrase in cl (b) was included as a result of a specific inquiry by the Appellant, and that in the final stages of negotiations, the Respondent elucidated on the "fair market rental value" by disclosing a computation which was based on the area of Block D alone. It was also clear that Block D featured prominently throughout – in particular, it (or rather, a dispute in relation to it) was the *sine qua non* of the negotiations (which eventually led to the variation), a point which was repeatedly reinforced through the subject titles of the letters in the correspondence (see above at [19]).

52 At this juncture, and for clarity this may be described as the fourth step in our reasoning, we confronted the difficulty the Judge faced with relying on certain pieces of extrinsic evidence. It is clear, as established in *Zurich Insurance*, that the context that is relied on to support the interpretation of a contract must be clear and obvious. The Judge found that most of the evidence did not relate to, or supply, a clear or obvious context. With respect, we disagreed. As intimated above (at [51(d)]), some of the factors which may be seen as clouding the context were, in fact, red herrings. We deal with the other possible (counter) arguments below. In brief, we found that there was a clear and obvious context in this case, and this context (to the Contract as varied) was precisely as described above: negotiations by the parties oriented to arriving at a mutually agreeable (new) rent (that may be subject to review). What was also clear was that *both* parties proceeded on the basis that:

(a) future revisions to the rent would be based on the *market rent prevailing at the time of such revision*, which *would be based on the existing development*; and

(b) fair market rental value was informed by a computation based on the area of Block D.

53 It could be argued (in an attempt to demonstrate that the context was not, after all, clear and obvious) that the computation provided was simply a method to arrive at the *initial* figure (of increased rent) *only*, and that *subsequent* rent reviews would not be subject to this computation. But

there was no indication that the computation was confined to the *initial* figure *alone*. We fully agree that the initial figure may have been heavily influenced by the computation. This was clear from the Respondent's first offer (of $23,000) which was very close to, and hence likely based on, the computation (of $25,000). But to take this point to fruition, what must also be established to make good the argument just mentioned is that the computation related *only* to the initial figure. However, there was nothing on the evidence to indicate this. Although the first offer did not involve any rent review clause, subsequent offers did. It bears repeating that the computation was sent to the Appellant when the standing offer (which was eventually accepted) *included* a rent review clause. Not only was there no evidence that parties intended to confine the (relevance of the) computation to the initial increase, based on the manner in which the computation was disclosed on 23 September 1995 (*ie*, when the standing offer incorporated a rent review clause and shortly after the clarification on what "market rate prevailing" meant), it was clear and obvious that it related to, and informed, the entire rent review clause.

54 Another argument pertained to an alternative interpretation of "existing development". Counsel for the Respondent argued that "existing development", read in the context of "existing development and not some imaginary highest and best use consideration", simply meant to address the "use" of the land (*ie*, what was constructed on the land) and not the size of the land (see also above at [45(b)]). Building upon this, the Respondent made the point that if the ambit of the rent review clause were intended to be confined to Block D alone, it "would have been a simple matter for the [Appellant] to expressly identify 'Block D' in the [Contract]". This, with respect, did not take the Respondent very far. It was eminently clear that the Contract as varied was far from ideal. But if each and every imperfection or remotely ambiguous phrase in a contract were sufficient to muddy the context, it would be nigh impossible to even construct a context in most cases; indeed, a more practical approach is required. Furthermore, in this particular case, the manner in which "existing development" featured (in a response to the Appellant's inquiry on what "market rent prevailing" meant and followed soon after by the sending of the basis of computation to the Appellant) was consonant with a reference to the size of the land (as opposed to the use of the land).

55 We found that all the other issues that were raised (such as the interest in the land that the Appellant had assigned away by the time of 23 September 1995, the conduct of the parties subsequent to the agreement or, for that matter, cl (c) in the Contract as varied and its relevance (see above at [44])) tended to detract from the issue at hand: the meaning of the words "existing development". Undoubtedly, those issues carried with them a great deal of ambiguity. For instance, it was not entirely clear what the ramifications of the Appellant's assignment of most of its interest in the land were. Neither was it clear what exactly the Respondent's predecessor knew of this assignment (although it was clear it did not know that the Appellant did not reserve a right to charge the assignees any ground rent: see above at [14]). But those ambiguities – like those issues – were not the focus of our inquiry; neither did they have any bearing on what the phrase "existing development" meant. There was hence no reason for us to be concerned with finding all the answers in respect of those issues. This was because the ambiguity in relation to those issues did not operate to muddy the context that we were concerned with. We hasten to add that this was a case of interpreting the words "existing development", not reading the words "Block D" into parts of the Contract as varied (see above at [38(e)] where we recorded the Judge's disagreement to this effect). The latter, we agree with the Judge, would not fall within the remit of contractual interpretation.

56 In respect of the issue we were concerned with, we found that the context – as elaborated on above at [51] – demonstrated that both the Respondent's predecessor and the Appellant proceeded on the basis that "existing development" referred to Block D in the lead up to the agreement on 23 September 1995.

Conclusion

57 For the reasons set out above, we allowed the appeal with costs, and with the usual consequential orders.