

The Construction of Commercial Contracts BY J.W. CARTER [Oxford: Hart Publishing, 2013. lxii + 674 pp. Hardcover: £125.00]

The Construction of Commercial Contracts by Professor J.W. Carter is an ambitious book. Its stated aim is to “explain as a coherent whole the principles which regulate the construction of commercial contracts” (at p. vii). As will be seen, it more than meets this lofty aim, and is a valuable contribution to an area of work that is not only difficult, but also of immense practical importance. The book achieves its aim by explaining construction as constituting three separate stages: the identification of context (and terms), the determination of the meaning (and legal effect) of a contract, and, finally, the application of a contract to the factual circumstances that have arisen (see p. vii). This central thesis is primarily supplemented by detailed references to English and Australian law, but references to other Commonwealth jurisdictions (including Singapore), as well as the UNIDROIT principles, CISG and the American Restatement (Second) of Contracts, are also made where relevant. The structural result is a book neatly organised around seven parts, with Parts I to III setting out the general concepts and themes behind the book, in addition to the general principles that apply to the construction of commercial contracts. Parts IV and V discuss the first of the three stages of construction, that is, discerning the context of the contract. Part VI discusses the meaning of the contract, and Part VII finishes off with the application of the contract. But quite apart from the structural clarity with which the book is organised, the book is also appropriately presented to different audiences. For the academic or student who may be interested in the conceptual background to the rules of construction, the book does not disappoint. The book, just to raise one of many examples, devotes a considerable number of thoroughly researched pages to discussing the history and evolution of the parol evidence rule. For the practitioner

who may be interested in a quick reference material to the present law, the book has conveniently-placed 'articles' that summarise the law cogently and accessibly.

The book's central thesis that construction is best understood as a series of separate stages is timely. The lack of an established structure within construction makes it difficult for the subject to be approached clearly, which is exacerbated by the fact that issues within construction tend to shade into each other. The separation of construction into stages is also well supported by case law. As the book points out, Lord Wilberforce had in *Reardon Smith Line Ltd v. Yngvar Hansen-Tangen* [1976] 1 W.L.R. 989 (H.L.), distinguished between ascertaining the meaning or legal effect of the words used, and how the words of a contract apply to a factual situation (at p. 7). In addition, Lord Wilberforce also held that the contract must be placed in its context before construction can properly begin. This separation is also likely to resonate with readers in Singapore. As is perhaps well known, the interpretation of contracts in Singapore must now be discussed in the light of the important Court of Appeal decision of *Zurich Insurance (Singapore) Pte Ltd v. B-Gold Interior Design & Construction Pte Ltd* [2008] 3 S.L.R.(R.) 1029 [*Zurich Insurance*], which is supplemented by *Sembcorp Marine Ltd v. PPL Holdings Pte Ltd* [2013] SGCA 43 [*Sembcorp Marine*]. Contractual interpretation in Singapore, as outlined in *Zurich Insurance*, inevitably involves a discussion of the parol evidence rule and the so-called contextual approach. Whilst related, it is important to realise that they are not the same. While the parol evidence rule governs the admissibility of extrinsic evidence to aid in the interpretation of contracts, it does not directly tell us *how* to interpret. That is informed by the contextual approach. This distinction is recognised by the prescribed two-step framework in the interpretation of contracts in *Zurich Insurance*. The first step is to consider whether the extrinsic evidence sought to be adduced can in fact be admitted. The Court of Appeal in *Zurich Insurance*, after an extensive study of the relevant case law, concluded that although the parol evidence rule (as embodied in s. 94 of the *Evidence Act* (Cap. 97, 1997 Rev. Ed. Sing.)) still operates as a restriction on the use of extrinsic material to affect a contract, extrinsic material is admissible for the purpose of interpreting the language of the contract. Assuming that the contract is one to which the parol evidence rule applies, no extrinsic evidence is admissible to contradict, vary, add to or subtract from its terms. This is followed by the second step of interpreting the contract. While the Singapore courts do not yet (expressly, at least) identify a third step of application, such a step is implicit in the courts' decisions in this area.

The book's discussion of the preliminary stage of placing the contract in its proper context is both learned and extensive. Chapter 6 discusses the role of context in the construction process and includes an in-depth discussion of the historical background. Chapter 7 touches on the scope of context, an important area in a period when context has been said to include almost anything. If there is a particular chapter that will interest readers in Singapore, it will be Chapter 8, which discusses the difficult issue of the exclusion of certain types of extrinsic evidence. In Singapore, the admissibility of extrinsic evidence to interpret contracts is subject to several restrictions, even though the Court of Appeal has indicated in *Zurich Insurance* and *Sembcorp Marine* that the scope of admissible evidence is very wide. Most prominently, whether the extrinsic evidence is admissible depends on whether it is: (a) relevant (*i.e.* it would affect the way in which the language of the document

would have been understood by a reasonable man); (b) reasonably available to all the contracting parties; and (c) relates to a clear and obvious context. The admissible evidence is also said to be very broad and is not confined to empirical facts. In addition to these rules set down in *Zurich Insurance*, the *Evidence Act* also governs the admissibility of extrinsic evidence in Singapore. Given the close affinity between the *Evidence Act* and the old common law concerning the exclusion of extrinsic evidence, the book's discussion on the subject will be a valuable addition in the local context. As mentioned above, the book includes a detailed discussion of the evolution of the parol evidence rule at common law, particularly its effect on the evidence in relation to terms and construction.

Insofar as evidence to construction is concerned, the book's discussion on evidence of the parties' prior negotiations and subsequent conduct is just as detailed as other parts. In summarising the justifications (at p. 268) and criticisms (at pp. 269, 270) for the exclusion of prior negotiations, the book offers an obvious resource for Singapore readers interested in considering the admissibility of such evidence in Singapore. In this regard, *Zurich Insurance* arguably departed from the present English position (embodied in *Investors Compensation Scheme Ltd v. West Bromwich Building Society* [1998] 1 W.L.R. 896 (H.L.) and, more recently, *Chartbrook Ltd v. Persimmon Homes Ltd* [2009] 1 A.C. 1101 (H.L.)) by accepting the possibility of admitting extrinsic evidence in the form of prior negotiations and subsequent conduct. However, it was also held that such evidence would likely be inadmissible for non-compliance with the requirement that the parties' intentions be objectively ascertained and the threshold requirement that the context be clear and obvious. However, this apparently broad approach has since been cut back by comments made by the Court of Appeal in *Sembcorp Marine*, to the effect that the question remains open for future consideration, and that even if such evidence were allowed in the future, that should be done with "full consciousness of the concerns [relating to admissibility]... and in compliance with the pleading requirements... prescribed" (at para. 75).

The book's discussion on the admissibility of subsequent conduct (at pp. 270-275) is likewise going to find an interested audience in Singapore (and elsewhere). In *Gay Choon Ing v. Loh Sze Li Terence Peter* [2009] 2 S.L.R.(R.) 332, the Court of Appeal held that subsequent conduct that was in direct contradiction of the terms of the concluded contract could not be admitted to interpret the contract concerned, although it also noted the sentiments in *Zurich Insurance* that the admissibility of such evidence requires further scrutiny in the future. A detailed scrutiny has so far not been undertaken, but there have been Singapore cases that have tangentially discussed the issue. For example, in *Lian Hwee Choo Phebe v. Maxz Universal Development Group Pte Ltd* [2009] 2 S.L.R.(R.) 624, the Court of Appeal held that a contract must generally be interpreted as at the date it was made and in light of the circumstances prevailing on the date. In doing so, it endorsed the long-standing objection against the use of subsequent conduct in interpreting contracts stated in *James Miller & Partners Ltd v. Whitworth Street Estates (Manchester) Ltd* [1970] A.C. 583 (H.L.), that is, to interpret a contract beyond its date of creation would result in "a contract [meaning] one thing the day it was signed, but by reason of subsequent events meant something different a month or a year later" (at 603). However, to be fair, the court probably did not intend to endorse this objection specifically in relation to the use of subsequent conduct. The point remains, however, that the admissibility

of subsequent conduct to interpret contracts in Singapore remains an open question, and the book can only add to the existing scholarship that might be useful in this undecided area in Singapore law.

The book's discussion of the meaning and application of the contract is very welcome. Indeed, as the book points out, very little has been done by way of theoretical analysis of the concept of meaning in the common law of contract (at p. 357). A theoretical framework, such as the one presented by the book, allows for a better understanding of the process of discerning meaning, even if the meaning of a contract is a very practical issue. In doing so, the book advances five main elements as constituting the theoretical analysis of meaning: (a) the concepts of meaning and legal effect in construction; (b) a "perspective rule"; (c) the concept of a "standard of interpretation"; (d) the "choice of meaning" process; and (e) what factual raw material is available in construction. This discussion is likely to find especial relevance in Singapore. In this regard, the Court of Appeal in *Zurich Insurance* cautioned that the contextual approach did not allow a court to contradict or vary the terms of a contract on the pretext of "interpreting" it. It noted that neither ambiguity nor the existence of an alternative technical meaning is a prerequisite for the court's consideration of extrinsic material. Instead, the court will *first* take into account the plain language of the contract together with relevant extrinsic material that is evidence of its context. Then, if, in the light of this context, the plain language of the contract becomes ambiguous (*i.e.* it takes on another plausible meaning) or absurd, the court will be entitled to put on the contractual term in question an interpretation which is different from that demanded by its plain language. The existing canons of interpretation continue to be relevant as well, although they are only a guide and not exhaustive. Stated thus, the Singapore approach appears simple, but the simplicity can be explained by various binding provisions in the *Evidence Act*. Nonetheless, the book's discussion of the elements described above can shed light on why the approach is as such in Singapore, and how such the approach is justified.

The book's discussion on the third and final stage of construction, *viz.* application, sheds practical light on how the concepts of context and meaning are to be actually applied to a real contract. Thus, the book's stated objective in this regard is largely to discuss how contracts are to be applied in particular fact situations (at p. 493). Although the Singapore courts have not expressly identified such a third stage of the construction process, this may be implicit in their analyses. For example, it was said in *Zurich Insurance* that the interpretation of standard form contracts and documents intended for commercial circulation should generally be guided by a restrictive examination of the context. Thus, in *Ascend Foodstuff Solution Pte Ltd v. Lim Tian Sye Trading as Eng Kee Chye Huat* [2009] SGDC 31, a tenancy agreement, which is required by s. 6(d) of the *Civil Law Act* (Cap. 43, 1999 Rev. Ed. Sing.) to be in writing, was treated as a type of contract where extrinsic evidence could not be considered so readily. The District Court held that this was one type of contract where the courts "must exercise restraint in its interpretation so as not to engender commercial uncertainty and encourage pointless litigation" (at para. 35). Similarly, the Court of Appeal noted in *Master Marine AS v. Labroy Offshore Ltd* [2012] 3 S.L.R. 125 that a performance bond was a document which the court should be restrained in its examination of the external context and extrinsic evidence. Like a standard form contract, there is a presumption for these documents that all the

terms of the agreement are recorded within it. Indeed, because the purpose of such documents is to ensure expediency in payment, there is commercial sense in ensuring that the beneficiary and bank can determine quickly if the demand is valid simply by looking at the bond instrument itself, and not to the external context. While conceived as an aspect of admissibility, these decisions can easily be explained on the basis of the book's third stage of construction as well.

In summary, *The Construction of Commercial Contracts* is a worthy addition to any collection. It sets out to explain the principles of the construction of contracts, and it has certainly done so. It is certain to appeal not only to the academic searching for conceptual understanding of some of the most difficult areas of the interpretation of contracts, but also to the practitioner who seeks a quick reference to the present law. Its contributions to the scholarship in this area of law are immense, and contract scholars will certainly find its influence difficult to ignore in future works to come. While this review has concentrated mainly on the relevance of this book in the Singapore context, that is only because of the context in which this review appears, and should not be misunderstood as suggesting the book has a limited, Singaporean audience. Far from it: *The Construction of Commercial Contracts* is highly recommended to any reader interested in this difficult area of law in any jurisdiction.

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