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

Case Number : Suit 264/2007

Decision Date : 31 March 2009

Tribunal/Court : High Court

Coram : Andrew Ang J

Counsel Name(s) : Sean Lim (Hin Tat Augustine & Partners) for the plaintiff; Carrie Gill Kaur (Colin Ng & Partners LLP) for the defendant

Parties : Goh Guan Chong — AspenTech, Inc

Contract – Contractual terms – Admissibility of evidence – Company presenting draft version of employment contract to employee before employment – Whether draft admissible as extrinsic evidence to interpret employment contract

Contract – Contractual terms – Admissibility of evidence – E-mail correspondence between company's officers suggesting that company treated bonus to be paid to employee as compensation for loss of stock options – Whether e-mail correspondence admissible as extrinsic evidence to interpret employment contract

Contract – Contractual terms – Implied terms – Company paying bonus of S$290,000 to employee in twelve quarterly instalments – Whether bonus payable immediately upon termination of employee's employment

Contract – Contractual terms – Rules of construction – Employment contract stating that bonus be paid "through the payroll ... pending continued employment" – Whether employee entitled to bonus as soon as he entered company's employ

Contract – Formation – Acceptance – Company offering S$108,989.62 as full and final settlement of all outstanding issues with employee – Whether employee accepted company's offer

31 March 2009 Judgment reserved.

Andrew Ang J:

1 This is a case where a company, after having expended considerable effort in attracting a prospective employee, had a complete change of opinion regarding the employee after he joined it. This suit is the result of the failed and aborted relationship. The resolution of this case requires, *inter alia*, an interpretation of a clause in the employment letter pursuant to which the employee was taken on. In so doing, the court is required to consider whether evidence of previous negotiations and a draft contract may be adduced in evidence in support of interpretation of the final contract as signed.

The plaintiff's case

2 The plaintiff is an engineering graduate who has worked in the consultancy industry for many years. Prior to joining the defendant, the plaintiff was employed by one ATOS ORIGIN ("ATOS") and held the title of "Director, Enterprise Solutions, Asia Pacific". By the end of 2000, the plaintiff was enjoying a base salary of US$150,000 per annum together with bonuses and allowances. Under a stock option plan implemented by ATOS, he was periodically granted options to acquire the stock of ATOS at discounted prices. Besides, according to the plaintiff, he was told by his supervisor at ATOS to expect a 15% increase in the amount of cash he would receive from ATOS in 2001.

3 The plaintiff was approached by one Patrick Fang ("Patrick"), who worked as a recruitment agent – commonly called a "head-hunter" – to fill a vacancy in the defendant. Patrick arranged for the plaintiff to attend several interviews with various officers of the defendant, both in Singapore and in the United States of America. The plaintiff averred that he made clear at those interviews that he would only leave ATOS if the defendant provided a better remuneration package. After the interviews, Patrick informed the plaintiff that the defendant was prepared to offer the plaintiff an annual salary package of about US$250,000. On top of the annual salary, the defendant would also pay the plaintiff a cash bonus of US$200,000 ("the Sign-on Bonus"). This bonus is the bone of contention between the parties.

4 This Sign-on Bonus was offered to him in order to compensate him for the loss of his ATOS stock options, which he would suffer if he were to join the defendant. However, Patrick further explained that, since the amount of the Sign-on Bonus was not insignificant, the defendant desired to pay the Sign-on Bonus in instalments so that it would not face a cash flow problem. The plaintiff was agreeable to this arrangement. (Under cross-examination, the plaintiff maintained that the Sign-on Bonus was the main incentive that induced him to leave his employment with ATOS in favour of the defendant.)

5 Subsequently, Patrick showed the plaintiff a draft copy of the defendant's letter of offer of employment ("the Draft"). The relevant extracts of the Draft read as follows:

> Dear Henry:
>
> 1. I am delighted to offer you the position of Vice President, Supply Chain/Asian Operations, at Aspen Technology, Inc. Your starting salary will be $7,916.66 semi-monthly, which converts to $190,000 when annualized. You will report directly to Chuck Deise, Sr. Vice President of Consulting Services and Partnerships. Your start date will be February 12, 2001.
>
> 2. Your annual comp/bonus plan will be 33% at plan. Target is equivalent to $62,700 annually. The specifics of your plan will be discussed in greater detail and mutually agreed upon between you and Chuck Deise.
>
> 3. You will receive a sign-on bonus of $200,000 to be paid in twelve equal quarterly installments [*sic*] of $16,666.66. This first amount will be payable in March 2001 and be repeated during the first pay period of the last month of each quarter until December 2003. Should you leave AspenTech voluntarily during this time period, you will be responsible for payment in full of your sign-on bonus.
>
> 4. Subject to Board approval, you will receive an option to purchase 15,000 shares of AspenTech Common Stock. Once approved, these stock options will vest at 1/16 at the end of each calendar quarter, beginning with the first full quarter following the date of the grant. The options expire on the tenth anniversary of the initial grant assuming continued employment.
>
> [numbering added]

Upon being shown the above draft, the plaintiff sought clarification from Patrick regarding the import of the last sentence of paragraph 3. In particular, the plaintiff was interested to know if he was required to repay the Sign-on Bonus if he were to leave the defendant involuntarily. This might occur if he were to die while in employment or if the defendant became insolvent.

6 After checking with the defendant, Patrick subsequently informed the plaintiff that the Sign-on

Bonus was:

> … a guaranteed sum that [the plaintiff] would receive in full and as long as [the plaintiff] did not leave the Defendants voluntarily, [the plaintiff] would not have to repay the [Sign-on Bonus] to the Defendants and also that [his] wife would have no responsibility to do so even if [the plaintiff was] to die before December 2003 or otherwise.
>
> [see the plaintiff's affidavit of evidence-in-chief filed on 16 June 2008, at [20].]

The plaintiff then sought to have this worded more precisely in the formal letter of offer of employment but Patrick dismissed it as being unnecessary.

7 The next significant episode occurred when the plaintiff met with the defendant's Human Resource Director, one Amy Lau ("Amy"). The plaintiff again sought reassurance regarding the circumstances under which he would be required to repay the Sign-on Bonus. According to the plaintiff, Amy confirmed that the Sign-on Bonus would be paid to the plaintiff in full as long as the plaintiff did not leave the defendant voluntarily. Thus, in the event that the plaintiff left his employment with the defendant involuntarily, he would not be deprived of any outstanding payments, much less be required to repay the sums he had already received.

8 According to the plaintiff, it was upon such representations that he eventually signed the formal letter of offer of employment ("Employment Letter"). Although the Employment Letter was dated 4 January 2001, it seems clear that it was not actually signed on that day as discussions between the plaintiff and the defendant continued until as late as 8 January 2001. It was not clear why the date on the letter was never corrected to reflect the actual date the parties signed the letter. In any case, the germane parts of the Employment Letter recorded as follows:

> **Compensation & Benefit Package**
>
> 1. Your compensation package includes a base salary and an incentive compensation designed to give you an annual on-target total cash of S$461,130 (Singapore Dollars Four Hundred Sixty-one Thousand One Hundred and Thirty).
>
> 2. Your gross base salary will be S$346,710 (Singapore Dollars Three Hundred Forty-six Thousand Seven Hundred and Ten) per annum to be paid in thirteen (13) instal1ments [*sic*].
>
> 3. Your package also includes an incentive plan targeted at 33% of your base salary at plan. Target is equivalent to S$114,420 (Singapore Dollars One Hundred Fourteen Thousand Four Hundred and Twenty) annually. The specifics of your plan will be discussed in greater detail and mutually agreed upon between you and Chuck Deise.
>
> 4. You will also receive a sign-on bonus of S$348,000 (Singapore Dollars Three Hundred and Forty-eight Thousand) to be paid in twelve quarterly installments [*sic*] of S$29,000 (Singapore Dollars Twenty-nine Thousand). The first amount will be payable through March payroll assuming your commencement date being February 12, 2001, and be repeated through the payroll of the last month of each quarter until December 2003 pending continued employment. Should you leave AspenTech voluntarily during this period, you will be responsible for repayment in full of your sign-on bonus.
>
> 5. Subject to Board approval, you will receive an option to purchase 20,000 shares of AspenTech Common Stock. Once approved, these stock options will vest at 1/16 at the end of

each calendar quarter, beginning with the first full quarter following the date of the grant. The options expire on the tenth anniversary of the initial grant assuming continued employment.

…

6. Termination of employment by either party shall be subject to a notice period of three months except dismissal for cause.

[numbering added]

The Sign-on Bonus referred to in paragraph 4 is the Sign-on Bonus now expressed in Singapore dollars.

9 Thereafter, the plaintiff commenced employment with the defendant on 1 February 2001 as "Vice President, Supply Chain Consulting/Asian Operations". During his five months employment with the defendant, the plaintiff was primarily in charge of two projects, one in Thailand and the other in Korea. In both those projects, the plaintiff sat as a member of a "steering committee". As such the plaintiff was involved at the planning and co-ordination level of the projects. According to the plaintiff, various colleagues and customers commented positively about his work performance and he was unaware of any dissatisfaction with the same.

10 On 10 July 2001, the plaintiff was asked to attend a meeting with the defendant's John Ayala ("Ayala"), the plaintiff's immediate boss, and Amy. According to the plaintiff, it was at this meeting that Ayala informed the plaintiff that the defendant would be terminating his employment contract. However, neither Ayala nor Amy could provide the plaintiff with any legitimate reason for the termination. The plaintiff surmised that it was a cost-cutting measure. However, Amy did assure the plaintiff that the defendant would honour its obligations under the employment contract. She also requested that, to avoid any speculation among the staff, the plaintiff's departure be explained to them as being for his personal reasons.

11 Under such circumstances, the plaintiff told Amy that he expected the defendant to fulfil all its obligations under his employment contract. If the defendant did this, the plaintiff would consider Amy's request to have the cessation of his employment be presented as a resignation instead of a termination. By this time, the plaintiff had already received S$58,000 of the Sign-on Bonus, pursuant to paragraph 4 of the Employment Letter, leaving S$290,000 yet to be paid.

12 The next day, on 11 July 2001, the plaintiff met up with Amy again, during which Amy presented two documents to the plaintiff for his signature. The first was a letter, dated the same day, with the heading "Acknowledgement of Resignation". The letter referred to the plaintiff's "verbal notice of resignation on July 10, 2001" and stated that the defendant accepted his resignation with regrets ("Acknowledgement of Resignation"). The second document was entitled "Henry's payroll calculation from July 1 to 10, 2001" ("Payroll Calculation"). It purported to list out what was owed by the defendant to the plaintiff. On that list, the defendant included monthly wages, a 13th-month bonus as well as other allowances. Of particular importance is the fact that the defendant also included an amount stated as "Notice pay" for the sum of S$80,010, this being equivalent to three months' salary. The gross total owed by the defendant to the plaintiff was stated to be S$108,989.62.

13 After reading those two documents, the plaintiff refused to sign them. The plaintiff disagreed with the first document as it stated that he had resigned from the defendant. As for the Payroll Calculation, the plaintiff noted that it did not list other amounts which the plaintiff felt was owed to

him. This included the Sign-on Bonus and a variable bonus. Following the plaintiff's response, Amy offered to enquire about the Sign-on Bonus and the variable bonus and get back to the plaintiff.

14 On or about 17 July 2001, the plaintiff discovered that the defendant had, without the plaintiff's knowledge or consent, credited a sum of S$143,045.86 directly into his bank account. According to the plaintiff, this amount was made up of the S$108,989.62 (see [12] above) and reimbursement of expenses claimed by the plaintiff.

15 The plaintiff immediately instructed his solicitors to write to the defendant demanding payment of the Sign-on Bonus and the variable bonus. A series of correspondence then took place between solicitors for both parties. Only the most pertinent ones will be mentioned here. On behalf of the plaintiff, his solicitors demanded payment of the Sign-on Bonus and variable bonus on at least four occasions: 19 July 2001, 7 September 2001, 10 August 2006 and 11 September 2006. On each occasion, the plaintiff stated why he was entitled to the Sign-on Bonus and the variable bonus. The defendant's solicitors replied substantively to the plaintiffs letters on 14 August 2001, 23 August 2006 and 28 September 2006. In each letter, the defendant argued that the Sign-on Bonus was only payable if the plaintiff "remained in the continuous employ of [the defendant] during the relevant period". There was no allegation that the plaintiff had resigned. Indeed, the last-mentioned letter stated that the plaintiff's "employment had been terminated".

16 In the circumstances, the plaintiff commenced this action seeking four main prayers:

(a) damages to be assessed in relation to the variable bonus;

(b) the sum of S$290,000 or, alternatively, damages to be assessed in relation to the Sign-on Bonus;

(c) interest; and

(d) costs.

However, the plaintiff dropped prayer (a) during the trial after the defendant had forwarded to the plaintiff the defendant's financial statements for the year 2001 showing that the defendant did not make any profit for that year. On that basis, the plaintiff accepted that he was not entitled to the variable bonus.

17 With respect to prayer (b), the plaintiff's case is that he was entitled to the whole of the Sign-on Bonus as soon as he entered into employment with the defendant. He accepted that he would forfeit his right to the Sign-on Bonus if he voluntarily left the defendant's employ. However, he averred that it was an implied term that the outstanding instalments of the Sign-on Bonus would be immediately payable to him if his employment was terminated by the defendant.

The defendant's case

18 In almost all crucial aspects, the defendant's version of the facts differed significantly from the plaintiff's.

19 The defendant's version of the facts was mostly derived from the evidence given by Amy and the documentary evidence adduced in support thereof. According to Amy, the defendant first began considering the plaintiff for a position with the defendant in November 2000. Initially, discussions with the plaintiff were mostly conducted through Patrick who acted as the agent for the defendant. The

plaintiff also attended interviews with employees of the defendant. There was correspondence by e-mail between Patrick and employees of the defendant, discussing the suitability of the plaintiff and the latter's concerns. It is clear to me, upon perusal of the e-mail correspondence, that the defendant had a very good opinion of the plaintiff then and was anxious for the plaintiff to join the defendant.

20 Subsequently, the Draft ([5] *supra*) was presented by Patrick to the plaintiff during negotiations. Patrick then reported the substance of the negotiations between himself and the plaintiff to Amy. The latter, in turn, e-mailed Pete Limone and Chuck Deise, senior officers within the defendant, regarding the state of negotiations on 7 January 2001, as follows:

> Chuck/Pete.
>
> Had an update from Patrick of RR just now. He spent 3 hours with Henry over the weekend going thru our proposed offer …
>
> A few issues were raised and let me start with the easier ones –
>
> > 1. …
> >
> > 2. Repayment of the sign-on bonus – he questioned whether the intention is to repay whatever portion he had received by then or the full US$200K. I told Patrick it's the former. I indicated that I would be happy to refine the wording of that part of the offer to put his mind at ease.
> >
> > 3. He is also looking for clarity on the repayment condition e.g. if he dies in service, whether his wife would be liable to repay. He hopes we can spell out more specifically to protect his family for circumstances not under his control. I asked Patrick to emphasize our spirit in construing that clause that only if he leaves voluntarily that he would have to repay. Any scenario not intended by him would not be his responsibilities and that we can never have a conclusive legal document to spell out all the situations. I asked Patrick to convince him the current wording is sufficient. I believe it is taken care of.
> >
> > 4. …
>
> Patrick interpreted the sign-on bonus as something to offset the stock options he's foregoing whereas I position it as part of the cash package. The 15,000 stock options we are offering him is to compensate his stock-options loss …

Pete Limone then replied to the above e-mail the next day as follows:

> Amy, …
>
> I agree with you regarding the "voluntary" clause. We initially started with full repayment but I believe Chuck would be agreeable to restructuring the clause for clarity.
>
> The sign on bonus was for two purposes:
>
> > 1) to defray some of the loss regarding his options. He is walking away from stock valued at over $600k (US).
> >
> > 2) to serve as cash incentive to sweeten the pot. We all know the volatility of the stock

market.

However, in spite of the e-mail above, Amy maintained (both in her affidavit of evidence-in-chief and under cross-examination) that the Sign-on Bonus was to retain the plaintiff in his employment with the defendant until December 2003 and not to make up for his loss of ATOS stock options when he joined the defendant.

21 Subsequently, Amy met with the plaintiff for the signing of the Employment Letter. However, Amy's recollection of the conversation prior to the signing was the complete opposite of the plaintiff's. According to Amy, they had specifically discussed the second sentence of paragraph 4 of the Employment Letter and Amy had made it abundantly clear to the plaintiff that he would continue to receive the payments for the Sign-on Bonus only if he remained employed by the defendant. Should the plaintiff's employment be terminated, he would not be entitled to any part of the Sign-on Bonus left unpaid. Furthermore, Amy also averred that she had emphasised to the plaintiff that the Sign-on Bonus was a mere cash incentive to encourage him to stay in the employ of the defendant until, at the very least, December 2003. According to her, the plaintiff understood and agreed to those terms.

22 After the plaintiff commenced his employment with the defendant, Amy recalled that there were various complaints on different occasions made against the plaintiff with regard to his work performance as well as his claiming exorbitant and unnecessary expenses. However, the plaintiff failed to improve his performance despite being warned of the complaints.

23 Consequently, on 10 July 2001, John Ayala and Amy met with the plaintiff. Here again, Amy's version of this meeting was vastly different from the plaintiff's. According to Amy, the plaintiff was informed that the defendant was dissatisfied with his performance and that he had failed to improve. As such, both John Ayala and Amy indicated that it would be best if the plaintiff's employment with the defendant ceased. Upon being so informed, the plaintiff indicated that he would prefer to resign instead of being fired as he did not want his reputation to be tarnished. The defendant agreed to accept the plaintiff's resignation.

24 On 11 July 2001, Amy presented the plaintiff with the two documents (as stated in [12] above). Amy claimed that she had made it clear to the plaintiff that the payment of S$108,989.62 would only be made as full and final settlement of all outstanding issues between the plaintiff and the defendant. If the plaintiff was agreeable to this, Amy would arrange for the transfer of the sum directly into the plaintiff's bank account. The plaintiff indicated that he was agreeable to those terms. Accordingly, the defendant transferred the said sum to the plaintiff.

25 In its defence and counterclaim, the defendant counterclaimed for the following:

(a) Refund of the sum of S$58,000 being the portion of the Sign-on Bonus which the plaintiff had already received;

(b) The sum of S$150,088 or, alternatively, damages to be assessed being the wages and allowances the plaintiff received during his employment with the defendant;

(c) The sum of S$78,066 or, alternatively, damages to be assessed being the false travelling expenses the plaintiff had claimed from the defendant; and

(d) The sum of S$108,989.62 or, alternatively, damages to be assessed being the payment made in full and final settlement of all claims between the parties.

However, during the first day of trial, the defendant's counsel withdrew counterclaim (b) and (c), as stated above. She also obtained leave to reduce the amount claimed under (d) from S$108,989.62 to S$80,010. The difference represented the salary and allowances which the defendant had to pay the plaintiff whether or not the plaintiff had resigned.

26 The defendant averred that the plaintiff was not immediately entitled to the Sign-on Bonus as soon as he entered into the defendant's employ. Rather, the Sign-on Bonus payments accrued quarterly. Thus, the plaintiff would only receive the agreed instalments of the Sign-on Bonus if he remained in the employ of the defendant. Furthermore, if the plaintiff left the defendant before December 2003, the plaintiff had the additional obligation to repay all sums received in respect of the Sign-on Bonus.

The decision of the court

27 Having the benefit of all the evidence and submissions by both parties, I decide in favour of the plaintiff. I shall explain the reasons for my decision by addressing each of the following issues in turn:

(a) Whether the sum of S$108,989.62 as subsequently reduced to S$80,010 was paid in full and final settlement of all outstanding issues between the parties as at 11 July 2001.

(b) Whether the plaintiff resigned from his employment with the defendant on 10 July 2001.

(c) If the plaintiff is found not to have resigned, whether, on a proper construction of the Employment Letter, the plaintiff is entitled to the sum of S$290,000 representing the remainder of the Sign-on Bonus unpaid.

(d) If (c) is resolved in the plaintiff's favour, whether the S$290,000 was payable on 10 July 2001 (when the plaintiff's employment was terminated).

Whether S$80,010 was paid in full and final settlement

28 This issue is addressed first since a finding in favour of the defendant will make the other issues moot.

29 The heart of the problem lies in the fact that the plaintiff and Amy have provided testimonies completely at odds with each other. The plaintiff testified that on 11 July 2001 he met Amy who presented him with the Acknowledgement of Resignation and Payroll Calculation (see [12] above). The plaintiff maintained that he refused to sign the documents and Amy agreed to get back to him regarding his concerns. There was no mention of a full and final settlement. On the other hand, Amy testified that she had made clear to the plaintiff that payment of the S$108,989.62 would only be made in full and final settlement of all outstanding issues between the plaintiff and the defendant as at 11 July 2001. According to Amy, the plaintiff was agreeable to this.

30 I find the plaintiff's testimony more credible than that of Amy for a number of reasons. First, the two documents clearly do not bear the plaintiff's signature. The Acknowledgement of Resignation has the signature of Amy while the Payroll Calculation was signed by Amy and a certain Geraldine Ong. There was a space where the plaintiff was supposed to sign his name in the Payroll Calculation but it is blank. If the plaintiff did agree, as averred by Amy, why did he not sign either of the documents?

31 Second, neither the Acknowledgement of Resignation nor the Payroll Calculation stated that payment of the sum of S$108,989.62 would be in full and final settlement of all issues between the

parties. In fact, in the Acknowledgement of Resignation, the defendant had referred to the sum as merely "[d]etails of the final pay calculations" and not as full and final settlement of all issues. If it was true that the defendant had intended for the sum to be paid in full and final settlement of all claims between the parties, it would have been natural for the defendant to so state in one, or both, of the documents in order to make that intention indisputable.

32 Third, in letters sent by the defendant's solicitors to the plaintiff (see [15] above), it was never once raised that the defendant and the plaintiff had settled all issues by payment of the S$108,989.62. In each case, the defendant's response to the plaintiff's assertions was considered and, one would assume, comprehensive. Yet, the defence of full and final settlement was not mentioned. I believe the first time it was raised was in the defendant's defence and counterclaim.

33 Fourth, Amy's testimony was not convincing. In her affidavit of evidence-in-chief, she stated as follows:

> 28. I made it emphatically clear to the Plaintiff that the said sum was in full and final payment/settlement of all the outstanding issues between the Plaintiff and the Defendant and he would not be entitled to any further payment.
>
> 29. The Plaintiff also raised the issue of the alleged Compensatory Bonus with me and I made it clear that those payments would only be made pending continued employment, as provided for in the letter of employment.
>
> …
>
> 31. **The Plaintiff informed me that he was agreeable to the same**. …
>
> [emphasis added]

However, during cross-examination, Amy conceded that the plaintiff had not agreed to not being paid the Sign-on Bonus. The relevant portions of the cross-examination are reproduced as follows:

> Q And at paragraph 29, you said that he raised the issue of the sign-on bonus and you told him that it would be paid only pending continued employment, correct?
>
> A That is correct.
>
> Q So when you told him that, regarding the sign-on bonus, what did the plaintiff say?
>
> A I do not remember exactly what he said, but I had the impression that he disagreed.
>
> Q He disagreed? So he disagreed that he was not entitled to the sign-on bonus?
>
> A That's what I remember.

Amy further admitted that the plaintiff did not expressly agree to accepting the S$108,989.62 in full and final settlement of what was due to him. The germane parts of the cross-examination went as follows:

> Q Ms Lau, you have stated in your affidavit, paragraph 31, you said that "He informed me that he was agreeable." Are you changing your evidence now?

A I am not changing my evidence.

Q So you are saying that he agreed to it?

A Yes.

Q You remember clearly?

A Yes.

Q Did he say, "All right, I agree"? What did he say?

A He kept quiet.

Q And by his keeping quiet, you assume that he agreed?

A Yes, because after I explained about the sign-on bonus, he did not raise any further objection, then I asked him to handle the separation, the return of company properties with the HR officer.

Clearly, if the plaintiff had kept quiet, he could not be said to have "informed [Amy] that he was agreeable" to the same, as alleged by Amy in her affidavit. Thus, Amy's testimony is suspect.

34 Finally, confirmation that the plaintiff was telling the truth was provided by Amy herself when she agreed that there had been no full and final settlement:

Q And [the plaintiff] has never subsequently told you that he agreed to those payment as full and final settlement, right?

A Correct.

Q In fact according to what you said earlier on, you did subsequently speak to him on the issues of the sign-on bonus, the variable bonus as well as the stock options, right?

A That is correct.

Q So therefore, Ms Lau, there was no full and final settlement reached between the defendants and the plaintiff, correct?

A Correct.

35 Neither can it be said that the plaintiff's retention of the S$143,045.86 after it was transferred to his bank account on 17 July 2001 constituted assent of such action. After all, in his mind, he was fully entitled to the entire sum even without agreeing to the offer. Furthermore, he had immediately thereafter instructed his solicitors to demand payment of the Sign-on Bonus. This cannot, by any stretch of the imagination, be objectively construed as a final and unqualified assent to the terms of the alleged offer by Amy.

Whether the plaintiff resigned

36 The next issue is whether the plaintiff resigned from his employment, as claimed by the defendant, or whether his employment was terminated, as alleged by the plaintiff. Here again, on a

balance of probabilities, the plaintiff's testimony is more credible.

37 First, there is evidence that the defendant had, prior to 10 July 2001, contemplated terminating the plaintiff's employment. In a document entitled "Notification and Communication Plan", the following was recorded:

> **Notification and Communication Plan**
>
> July 9 (Monday), 2001
>
> 1 . John Ayala sits down with Henry Goh [the plaintiff] to go thru performance review and advises corporate decision of separation.
>
> 2 . Amy Lau joins Ayala in the notification to go thru termination procedures and agree on official statement for release.
>
> 3. Lau continues meeting w/Goh on termination procedures.
>
> 4. Ayala communicates official statement to Bonner and Turner.
>
> [emphasis in original]

At the top of this document, someone had scribbled the date "07/06/01". I cannot discern if it means 7 June 2001 or 6 July 2001 but, in either case, the date was before the meeting of 10 July 2001. This document corroborates the plaintiff's account of the facts.

38 The defendant's willingness to pay the plaintiff a sum of S80,010 as "Notice pay" as provided in the Payroll Calculation makes it highly unlikely that the plaintiff resigned. If he did, there would have been no reason for the defendant to pay three months' salary in lieu of notice.

39 Amy sought to explain that the "Notice pay" was paid to the plaintiff because the defendant did not want the plaintiff to serve his notice period. However, this was unconvincing. If the plaintiff had given the requisite three months' notice of resignation, all that the defendant needed to do was to inform him that his attendance at work was dispensed with. There was no need to pay him three months' salary in advance. And, if indeed it was payment of salary in advance, why was it not described as such rather than as "Notice pay"?

40 The last factor that persuades me that the plaintiff had not resigned but, in fact had had his employment terminated by the defendant was the response by the defendant's solicitors to the plaintiff's demands for payment of the Sign-on Bonus. In all three substantive replies on 14 August 2001, 23 August 2006 and 28 September 2006, the solicitors for the defendant argued that the plaintiff was not entitled to the Sign-on Bonus because the payment of the Sign-on Bonus was contingent upon the plaintiff continuing employment with the defendant. However, they did not invoke the defendant's right clearly set out in the last sentence of paragraph 4 of the Employment Letter.

41 That sentence clearly stated that if the plaintiff left the defendant's employ voluntarily, he had to repay the Sign-on Bonus in full. Any lawyer with even a cursory look at the Employment Letter would have seen this and would have immediately seized upon it. It would have put paid to the plaintiff's claim for the Sign-on Bonus. Significantly, this line of argument was first raised by the defendant only in its defence and counterclaim. This delay suggests that the defence was an

afterthought fabricated to defeat the plaintiff's claim.

42 The letter of 28 September 2006 from the defendant's solicitors to the plaintiff puts this beyond reasonable doubt. Paragraph 4 of the letter stated as follows:

> 4. As your client's employment **had been terminated**, he is certainly not entitled to further installments [*sic*] of the sign-on bonus.
>
> [emphasis added]

43 The defendant argued that, in their letters to the defendant, the solicitors for the plaintiff similarly did not assert that the plaintiff had not resigned. In my view, this alleged omission was not as critical to the plaintiff's case as the failure by the defendant to argue that the plaintiff had in fact resigned. In the absence of any assertion by the defendant that the plaintiff had resigned, it would not have been obvious to the plaintiff's solicitors to aver that his services had been terminated by the defendant; they could have proceeded on the basis that that was a fact in the light of the circumstances, especially since the plaintiff had been given "Notice pay". Therefore, I do not accord much weight to the fact that the solicitors for the plaintiff omitted to mention this in their letters to the defendant.

44 The defendant also tried to argue that the plaintiff had a motive for resigning: he wanted to prevent his reputation from being adversely affected if he was sacked. It is highly unlikely, in my view, that his fear of damage to his reputation would have outweighed his desire to receive the Sign-on Bonus in full. After all, the Sign-on Bonus was the critical element which induced him to join the defendant in the first place. The defendant's argument, therefore, did not persuade me.

45 In light of the foregoing, the only reasonable conclusion I can arrive at is that the plaintiff's employment had indeed been terminated by the defendant.

Whether the plaintiff is entitled to the sum of S$290,000

46 The resolution of this issue turns on an interpretation of paragraph 4 of the Employment Letter. For convenience, I will break the paragraph into its three component sentences as follows:

> Paragraph 4
>
> (a) You will also receive a sign-on bonus of S$348,000 (Singapore Dollars Three Hundred and Forty-eight Thousand) to be paid in twelve quarterly installments [*sic*] of S$29,000 (Singapore Dollars Twenty-nine Thousand).
>
> (b) The first amount will be payable through the March payroll assuming your commencement date being February 12, 2001, and be repeated through the payroll of the last month of each quarter until December 2003 pending continued employment.
>
> (c) Should you leave AspenTech voluntarily during this period, you will be responsible for repayment in full of your sign-on bonus.

47 The plaintiff's arguments were as follows. First, a plain reading of the paragraph revealed an objective intention that the plaintiff was to be entitled to the Sign-on Bonus as soon as he entered the defendant's employ. This could be seen from the following factors:

(a) The ordinary meaning of the word "sign-on" means "to join" so that the Sign-on Bonus was

payable as soon as the plaintiff joined the defendant.

(b) The plaintiff was to receive a lump sum of "S$348,000" rather than a certain amount periodically. The reference to quarterly instalments only referred to the manner of payment.

(c) Sentence (b), as stated in [46] above, was merely descriptive of the mode and time of payment of the quarterly instalments. Thus, the phrase "pending continued employment" meant that the plaintiff would be paid through the payroll during his employment. Sentence (b) did not have the effect of limiting the plaintiff's entitlement to the Sign-on Bonus to the period when he was employed.

(d) The natural and ordinary meaning of the word "pending" also supports the above interpretation as "pending" means "during".

(e) From a reading of the whole document, it could be discerned that "pending" was not used by the defendant to mean "subject to". This could be seen from the fact that the words "subject to" were used in paragraphs 5 and 6 (see [8] above) when the defendant so intended.

(f) In any case, paragraph 4 should be construed *contra proferentum* against the defendant as it drafted the Employment Letter.

48 The plaintiff further argued that extrinsic evidence also supported his case. This is because of the following:

(a) The Sign-on Bonus was a crucial consideration to the plaintiff in deciding to resign from ATOS to join the defendant. It would not make commercial sense for the plaintiff to agree to a clause where the defendant could rob him of the Sign-on Bonus simply by terminating his employment.

(b) E-mail between the defendant's employees revealed that the Sign-on Bonus was paid to compensate the plaintiff for his loss of ATOS stock options. This showed that he was to be entitled to the Sign-on Bonus as soon as he joined the defendant.

(c) The defendant's representatives, Patrick and Amy, assured the plaintiff that the Sign-on Bonus was a guaranteed sum during negotiations with the plaintiff.

(d) Comparing the Draft with the Employment Letter, it could be seen that when the phrase "pending continued employment" was added to the Employment Letter, it was added together with the references that the Sign-on Bonus would be paid through the payroll. This supported the plaintiff's contention that the said phrase was a reference to the payroll only.

Since the plaintiff was entitled to the Sign-on Bonus as soon as he joined the defendant, the defendant should be made to pay S$290,000, representing the balance of the Sign-on Bonus the plaintiff had yet to receive.

49 On behalf of the defendant, the following contentions were made. First, the plain reading of the Employment Letter indicated an objective intention that the plaintiff was only entitled to Sign-on Bonus payments for as long as he remained employed. This was because of the following considerations:

(a) The ordinary meaning of the word "pending" means "subject to" or "contingent upon" so

that the phrase "pending continued employment" means that the plaintiff would only receive the Sign-on Bonus subject to his remaining employed by the defendant.

(b) The use of the word "payroll" was also suggestive that the Sign-on Bonus would only be paid during employment as there would be no payroll without employment.

(c) Sentence (c) ([46] above) must be read as following from sentence (b). Since sentence (c) dealt with a situation where the plaintiff had to repay Sign-on Bonus payments already made, sentence (b) must, naturally, be dealing with situations where the plaintiff would not be entitled to future Sign-on Bonus payments.

(d) The plaintiff's argument that he was entitled to the Sign-on Bonus as soon as he joined the defendant could not be right in light of sentence (c). The plaintiff could not be so entitled if the defendant could claw back the Sign-on Bonus under sentence (c).

50 The defendant further argued that this plain reading is supported by extrinsic evidence, as follows:

(a) In Amy's negotiations with the plaintiff, she had made it clear that the Sign-on Bonus was a carrot to ensure continuous employment.

(b) In changing the wording of the Draft to that used in the Employment Letter, e-mail correspondence revealed that employees of the defendant were addressing the issue of what should happen if the plaintiff's employment was terminated by the defendant. Thus, the addition of the words "pending continued employment" was indicative that the Sign-on Bonus payment would not be paid if the plaintiff's employment was terminated, whether voluntarily or involuntarily on his part.

51 As can be seen from the above submissions, both the plaintiff and the defendant had relied on extrinsic evidence to support the "plain" reading they gave to the Employment Letter. In particular, both used internal e-mail correspondence between the defendant's employees, negotiations leading up to the signing of the Employment Letter as well as the Draft to substantiate their claims. On the use of extrinsic material in the interpretation of contract, the judgment of the Court of Appeal in *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR 1029 ("*Zurich Insurance*") is the leading authority. In many ways, it is a watershed case.

52 In order to appreciate the significance of the principles introduced in *Zurich Insurance*, it is necessary to embark on a brief history of the common law treatment of extrinsic evidence. Traditionally, the English courts adopted a strictly literal interpretation of contracts and the meaning of a contract was to be found within the four corners of the contract: see *Lovell and Christmas Ltd v Wall* (1911) 104 LT 85. While this promoted certainty of contracts and inexpensive judicial rulings on the interpretation thereof, such an approach had its shortcomings. The most disturbing of these was the fact that it was wholly unrealistic, if not unjust, to interpret a contract divorced from the context in which the parties had found themselves. As such, in the 1970s, the House of Lords delivered several judgments which departed from a strict literal interpretation and held that contracts must be understood within their "context": see *Prenn v Simmonds* [1971] 1 WLR 1381 and *Reardon Smith Line Ltd v Yngvar Hansen-Tangen* [1976] 1 WLR 989.

53 Such departure from the strict approach continued gradually thereafter. The highwater mark of the contextual approach towards contractual interpretation was reached in the seminal case of

Investors Compensation Scheme Ltd v West Bromwich Building Society [1998] 1 WLR 896 ("*Investors Compensation Scheme*"). In that case, Lord Hoffmann re-stated the principles applicable to contractual interpretation (at 912–913). I set out these principles in full as follows:

> (1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having 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.
>
> (2) The background was famously referred to by Lord Wilberforce as the "matrix of fact", but this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to the exception to be mentioned next, it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.
>
> (3) ***The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent***. They are admissible only in an action for rectification. The law makes this distinction for reasons of practical policy and, in this respect only, legal interpretation differs from the way we would interpret utterances in ordinary life. ***The boundaries of this exception are in some respects unclear. But this is not the occasion on which to explore them***.
>
> (4) The meaning which a document (or any other utterances) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax: see *Mannai Investments Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] AC 749.
>
> (5) The "rule" that words should be given their "natural and ordinary meaning" reflects the common sense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had. Lord Diplock made this point more vigorously when he said in *Antaios Compania Naviera SA v Salen Rederierna AB* [1985] AC 191, 201:
>
>> "if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business commonsense, it must be made to yield to business commonsense."
>
> [emphasis added]

54 While all of the above principles are helpful, of particular relevance to the present case are the words in bold. The reasons for excluding previous negotiations have since been discussed by academics. One of them, Ewan McKendrick, argued in his book *Contract Law* (Oxford University Press, 2nd Ed, 2005 at p 416) as follows:

> Why does the law generally declare inadmissible evidence of pre-contractual negotiations? A

number of possible reasons can be given. The first is that the test to be applied by the courts when seeking to ascertain the meaning of a term in a contract is objective, not subjective. This being the case, the courts should not concern themselves with subjective statements by either party as to the meaning to be ascribed to a particular term. The law does not wish to encourage parties to make self-serving statements in the course of negotiations and then produce them in evidence when a dispute breaks out in relation to the meaning of that particular term. Secondly, it is claimed that evidence of pre-contractual negotiations is not helpful on the basis that the parties' positions are in a state of flux pending the conclusion of the contract and the court should not be asked to speculate upon the reasons that led the parties to make changes to the various drafts that were produced before agreement was finally reached. … But the arguments are not all one way. In the first place it can be argued that the second objection is one that relates to the weight to be given to the evidence, not its admissibility. While it may be the case that evidence of pre-contractual negotiations will, in many cases, be 'unhelpful' this should not prevent it being admissible in those cases in which it is helpful. Secondly, in so far as the courts state that they seek to adopt an interpretation that is commercially sensible …, the pre-contractual negotiations may provide very good evidence of the commercial aims of the parties, in the sense that they will provide evidence of what the parties were bargaining about and where the conflicts between them arose.

55 As can be seen, the reasons for excluding such extrinsic evidence (*ie*, previous negotiations), while allowing all others, are not altogether convincing. This is especially so in light of the fact that traditionally, at common law, evidence of negotiations was allowed to be admitted in order to clarify ambiguities (as opposed to varying, adding or subtracting from the terms of the contract). The English Court of Appeal decided in *Proforce Recruit Ltd v The Rugby Group Ltd* [2006] EWCA Civ 69, as follows (at [31]):

> Also, as stated in Chitty on Contracts para 12.119, evidence of facts about which the parties were negotiating is admissible to explain what meaning was intended and evidence of what the parties said in negotiations is admissible to show that the parties negotiated on an agreed basis that the words used bore a particular meaning.

Having said that, however, the rule regarding draft agreements at common law was entirely different. Evidence of drafts was inadmissible as seen in *National Bank of Australasia Ltd v Falkingham & Sons* [1902] AC 585 where Lord Lindley held:

> Drafts of this deed were prepared, and objections were made to them as prepared; but ultimately the deed as printed in the record was executed … No claim is made to rectify this deed. The drafts cannot therefore properly be received in evidence to alter its language; still less to explain or assist in the interpretation of the deed as finally executed.

56 It was against this background that *Zurich Insurance* was decided in Singapore. In his written judgment, V K Rajah JA thoroughly examined the judicial history of contractual interpretation, both in Singapore and at common law, before summarising the approach to be adopted in Singapore (at [132]) 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 [of the Evidence Act] 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 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 word (*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).

[emphasis added]

For completeness, paragraphs [125], [128] and [129] of *Zurich Insurance*, referred to in (d) above, reads as follows:

125 Turning to the first issue, we endorse Lord Hoffmann's view that extrinsic material is admissible if:

(a) it is relevant – *ie*, it would affect the way in which the language of the document would have been understood by a reasonable man (see *BCCI v Ali* ([57] *supra*) at [39] (reproduced at [57] above)); and

(b) it was reasonably available to all the contracting parties (see *Investors Compensation Scheme* ([56] *supra*) at 912 (reproduced at [56] above)).

Such material is not confined to conventional empirical facts (such as the existence of an object or the occurrence of an event), but can include the state of the law, as in cases in which the court takes into account that parties are unlikely to have intended to agree to something which is unlawful or legally ineffective (see *BCCI v Ali* at [39]). However, it must always be borne in mind that the purpose of interpretation is to give effect to the intention of the parties *as objectively ascertained*. Objective ascertainment of the parties' intentions (known as "the objective principle") is the cornerstone of the theory of contract and permeates our entire approach to contractual interpretation.

…

128. Crucially, the context of the contract must be clear or obvious. This was emphasised in *Sandar Aung* ([105] *supra*), where the court stated (at [29]) that it would:

> … go so far as to state that even if the plain language of the contract appears otherwise clear, the construction consequently placed on such language should not be inconsistent with the context in which the contract was entered into *if this context is clear or even obvious* … [emphasis added]

The court added that (*ibid*):

> It might well be the case that if a particular construction placed on the language in a given contract is inconsistent with what is the ***obvious context in which the contract was made***, then *that* construction might *not* be as clear as was initially thought and might, on the contrary, be evidence of an ambiguity. [emphasis added in bold italics]

129 We have already emphasised the importance of contractual certainty (see [111] above). In our view, the benefits of adopting, via proviso (*f*) to s 94, 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. This is not a call for a retreat to literalism. In our view, this threshold requirement to some extent addresses the central weakness of contextualism – uncertainty. 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 in original]

57 From the above quotations, it is clear that the Court of Appeal in Singapore has decided to follow the general principles of contextual interpretation as laid down in *Investors Compensation Scheme* subject to two refinements. First, under the principles in *Investors Compensation Scheme*, the use of extrinsic evidence is subject to the condition that the evidence be reasonably available to

the parties. However, under *Zurich Insurance*, extrinsic evidence must, in addition to being reasonably available to both parties, be relevant and relate to a clear or obvious context. Thus, there are altogether three requirements. Second, in *Investors Compensation Scheme*, parties' contractual negotiations cannot be adduced as extrinsic evidence for contractual interpretation. The Singapore Court of Appeal in *Zurich Insurance* appears to have decided that extrinsic material, including negotiations leading up to the formation of the agreement, is admissible for the interpretation of latently ambiguous terms as long as the aforementioned three conditions are fulfilled. At the least, with particular reference to previous negotiations and subsequent conduct, the court was of the view that there should be no absolute or rigid prohibition against their admissibility.

58 While drafts were not expressly dealt with in *Zurich Insurance*, my view is that drafts of contracts which satisfy the three conditions ought also to be admissible. There would appear, in principle, no reason to differentiate drafts from contractual negotiations. In fact, parties often negotiate by amending draft after draft of contracts. 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 agreement may well assist the court objectively to discern the contractual intention of the parties as embodied in the final agreement. This is not to say that such evidence will invariably be helpful. Where the parties' respective positions are changing with each draft, there may be scant assistance obtainable by referring to the drafts, the paramount principle being to objectively discover the common intention of the parties. 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 draft agreements as extrinsic evidence.

59 In *Yoshimoto v Canterbury Golf International Ltd* [2001] NZLR 523, the New Zealand Court of Appeal allowed reference to be made to a draft agreement to assist the court in discovering what the parties intended a certain clause in the final agreement to mean. Thomas J mounted a formidable criticism of the common law principle disallowing evidence of pre-contractual negotiations in the following passages:

> [76] I would also reiterate that, for the purposes of this case, I am not seeking to entirely abrogate the rule that evidence of prior contractual negotiations is not receivable to ascertain the meaning of a contract. What I am suggesting is that the rule should not be treated as an absolute and rigid rule to the point where the Court is called upon to impose an interpretation which does not accord with the parties' actual intention. The objective basis would remain. But that basis would be enhanced by approaching the task of determining what the contract would convey to a reasonable person without artificially restricting the background knowledge available to the parties at the time they completed the contract. Subject to the caution which I will shortly stress, that background knowledge should be able to include reference to matters that might otherwise come under the general heading of negotiations where such a reference would undoubtedly assist to ascertain the true meaning of the parties' contract. Thus, in this case, the clause in the draft agreement and the deleted recital E would assist the reasonable person reading the words of the contract to determine what the parties intended cl 6.3 to mean, as distinct from their subjective intentions divorced from the wording used.
>
> [77] Nor is it remotely suggested that such evidence be received without caution. Obviously, the evidence must be reliable. No doubt documentary evidence will tend to be more reliable than oral evidence. The reason usually given to justify the exclusion of prior negotiations is that the parties' position will change with each passing communication until the final agreement which records a consensus. That reason is essentially a generality. Whether or not this is so and, if so, the extent to which it is so, will depend on the particular circumstances of each case. Those particular circumstances can be taken into account in determining the weight, if any, to be given

> to the evidence of the prior negotiations.
>
> [78] In so far as what I have urged is not a total rejection of the rule excluding evidence of prior negotiations, it is unnecessary to address the perceived policy reasons for that rule. Relaxing the absolute and rigid nature of the rule can be done without corroding the underlying policy.

Although, on appeal, the Privy Council reversed the New Zealand Court of Appeal holding that this was not a suitable occasion to re-examine the scope of the principle, it was referred to favourably by Lord Nicholls in *Bank of Credit and Commerce International SA v Ali* ("*BCCI v Ali*") [2002] 1 AC 251.

60 Applying the principles as stated above, I am of the view that the plaintiff became entitled to the Sign-on Bonus as soon as he entered the employment of the defendant. A plain reading of the Employment Letter, the contextual circumstances and the use of extrinsic evidence persuade me that the plaintiff's interpretation better reflects, objectively speaking, the intention of the parties.

61 I will first address the interpretation of paragraph 4 of the Employment Letter ([46] above) on a plain reading.

62 As defined in *The Oxford English Dictionary*, vol XI (Oxford: Clarendon Press, 2nd Ed, 1989): "pending" means, *inter alia*, "during" or "throughout the continuance of". Nowhere is "pending" defined to mean "subject to" or "contingent upon" as asserted by the defendant. *Black's Law Dictionary* (Thomson West, 8th Ed, 2004) is to similar effect. This supports the plaintiff's claim that the word "pending" in paragraph 4 should be read to mean "during" and not "subject to" continued employment.

63 "Pending" is also used as a preposition to mean "until" or "while awaiting". It is to this sense perhaps that the phrase "subject to" approximates when the latter expression is loosely used. However, this meaning of "pending" would make little sense in the context of sentence (b) ([46] *supra*). I am inclined to the view therefore that the word "pending", absent other considerations, should be read to mean "during" so that the phrase "pending continued employment" means "during continued employment". This view finds some support from the fact that the phrase "subject to" is used appropriately in other parts of the Employment Letter when its ordinary or natural meaning (*ie*, "conditional upon") is intended. Why then was it not used in paragraph 4 if that was the intent?

64 When the rest of the Employment Letter is examined, it seems to me that the better view is that the plaintiff was entitled to the Sign-on Bonus as soon as he joined the defendant. The use of the phrase "sign-on" to describe the Sign-on Bonus is particularly telling. As admitted by Amy herself, "sign-on" means "to join". As such, a "sign-on bonus", ordinarily, can only mean a bonus paid to someone for him to join an entity. I cannot fathom how the phrase "sign-on bonus" could be read to mean "retention bonus" as asserted by the defendant. Next, it is significant that the Sign-on Bonus was worded as being "S$348,000 … to be paid in twelve quarterly instalments of S$29,000". In other words, it was a sum certain payable by instalments. If the Sign-on Bonus was indeed a retention bonus, it would more likely have been phrased as "S$29,000 every quarter" subject to the maximum aggregate of S$348,000 or some equivalent phraseology.

65 The defendant asserts that sentence (b) ([46] above) must be read as defining the circumstances where the plaintiff would not be entitled to future Sign-on Bonus payments. This will make paragraph 4 internally organised as sentence (c) then goes one step further to deal with situations where the plaintiff would have to repay instalments already received. This is one possible explanation why paragraph 4 was written the way it was. However, this paragraph is no less coherent as interpreted by the plaintiff. The plaintiff's interpretation would mean that sentence (a) deals with

the quantum of the Sign-on Bonus, sentence (b) deals with the mode of payment, and sentence (c) deals with repayment of the Sign-on Bonus. This is, at least, an equally reasonable construction of paragraph 4. (However, this construction leaves open the question when the balance of the Sign-on Bonus is to be paid after the defendant has terminated the plaintiff's employment. This will be dealt with later.)

66 The use of the word "payroll" also does not aid the defendant's case in any meaningful manner. It does not naturally suggest, as argued by the defendant, that the Sign-on Bonus is payable only when there is a "payroll". It is quite possible that the use of the word "payroll" is only with reference to how the Sign-on Bonus is to be paid, not whether it is to be paid.

67 Finally, the defendant argued that the plaintiff's interpretation (that he became entitled to the Sign-on Bonus as soon as he joined) cannot be correct in light of sentence (c). I disagree. It is perfectly possible that the parties agreed to the plaintiff being so entitled to the Sign-on Bonus on the condition subsequent that he would forfeit his right to the Sign-on Bonus if he resigned.

68 Having considered the meaning of the words, we would do well to remind ourselves of what Lord Hoffmann said in *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] AC 749 at 775:

> It is of course true that the law is not concerned with the speaker's subjective intentions. But the notion that the law's concern is therefore with the "meaning of his words" conceals an important ambiguity. The ambiguity lies in a failure to distinguish between the meanings of words and the question of what would be understood as the meaning of a person who uses words. The meaning of words, as they would appear in a dictionary, and the effect of their syntactical arrangement, as it would appear in a grammar, is part of the material which we use to understand a speaker's utterance. But it is only a part; another part is our knowledge of the background against which the utterance was made. It is that background which enables us, not only to choose the intended meaning when a word has more than one dictionary meaning but also, in the ways I have explained, to understand a speaker's meaning, often without ambiguity, when he has used the wrong words.

The same distinction is pithily expressed in *Investors Compensation Scheme* ([53] *supra*)

69 We should therefore look at the "matrix of facts" or the context in which the Employment Letter was signed. It is clear to me that before the plaintiff was hired by the defendant he was not looking for a new job. It was the defendant who was trying hard to woo him. That the plaintiff eventually succumbed to the enticement of the defendant was due primarily to the Sign-on Bonus. The plaintiff averred that this was the critical factor. Given this background, it would hardly have made commercial sense for the plaintiff to agree to a clause whereby he could be deprived of the Sign-on Bonus if it the defendant terminating his contract. Given that the defendant was anxious to secure the services of the plaintiff, it is not the least bit remarkable that it would agree to a clause whereby it would continue to pay the Sign-on Bonus even if it terminated the plaintiff's employment. The defendant's protection is in sentence (c) of paragraph 4 ([46] above) whereby the employee is required to return the Sign-on Bonus if he resigned before December 2003. Each party therefore is protected against the other's unilateral action in terminating the contract. Such a construction better accords with commercial sense.

70 I go on further to consider the extrinsic evidence.

71 In the main, three types of extrinsic evidence were adduced before me. First, e-mail correspondence between employees of the defendant was relied upon by both parties as supporting

their respective cases. In line with Investment Compensation Scheme ([57] *supra*), *Zurich Insurance* held that before extrinsic evidence can be used to shed light on the objective intention of the contracting parties, it must be reasonably available to all the contracting parties ([56] above). In the present case, only the defendant's employees, such as Pete Limone, Amy and Chuck Deise, were privy to the e-mail correspondence. Until discovery, the plaintiff had no knowledge of this correspondence. Thus, the e-mail correspondence alone cannot be evidence of the objective intention of the parties.

72 This, however, does not mean that extrinsic evidence that was only available to one party is necessarily valueless. While such extrinsic evidence rightly cannot be used to conclusively reveal what the contracting parties' objective intention was, it may be used against the maker of statements therein to show the subjective intention of such party. In so doing, such evidence may reveal what the objective intention of the parties could not be. This will occur where the extrinsic evidence available to one party contradicts what that same party asserts was the objective intention of both parties.

73 This principle is best illustrated in the present case. Here, Pete Limone's reply to Amy's e-mail of 7 January 2001 clearly demonstrates that the defendant treated the Sign-on Bonus as compensation to the plaintiff for his loss of ATOS stock options as well as to "sweeten the pot" (see [20] above). In other words, the reason for offering the offering the Sign-on Bonus to the plaintiff was to entice the plaintiff to join the defendant. This suggests that the defendant intended for the plaintiff to be entitled to the Sign-on Bonus as soon as he joined the defendant and not only after a certain minimum period of employment, as asserted by the defendant. If the former was the subjective intention of the defendant, then it is very likely that the objective intention of both contracting parties could not have been the latter as asserted by the defendant.

74 Amy testified that the bonus was offered in order to retain the plaintiff for a certain minimum period. Of course, having decided to give the plaintiff the Sign-on Bonus, it was perfectly understandable that the defendant would seek to ensure that the plaintiff remained with the defendant for a certain minimum period. However, that latter consideration was the result of the decision to give the plaintiff the Sign-on Bonus and not the motivation for so doing. In my view, therefore, the internal e-mail between Pete Limone and Amy supports the plaintiff's contention that he became entitled to the Sign-on Bonus as soon as he entered the employment of the defendant.

75 The defendant also argued that a separate set of e-mail correspondence reveals that the words "pending continued employment" were added to cater to the scenario where the plaintiff's employment by the defendant was terminated but not due to the plaintiff's voluntary actions. On 4 January 2001, Amy had sent an e-mail to Pete Limone as follows:

> Pete,
>
> …
>
> 2. The repayment of sign-on bonus – if [the plaintiff] involuntarily leaves the company, do we need him to repay the full [sum]?

Pete Limone replied on the same day, saying:

> Amy, …
>
> Item 2. A very good question. Let's have the sentence [i.e. sentence (b) of paragraph 4] read.

> The first amount will be payable through March payroll assuming your commencement date being February 12, 2001, and be repeated through the payroll of the last month of each quarter until December 2003, pending continued employment.

According to the defendant, Pete Limone's response showed that the Sign-on Bonus would not be paid if the plaintiff's employment was terminated, whether voluntarily or involuntarily on his part; hence, it could not have been the intention of the parties for the plaintiff to be entitled to the Sign-on Bonus as soon as he entered the defendant's employ.

76 In my view, that the e-mail correspondence, as reproduced in [75], is not admissible in evidence. This is because it fails the requirement in *Zurich Insurance* that extrinsic evidence, to be admissible, must be reasonably available to all contracting parties. The e-mail correspondence was not available to the plaintiff. Unlike the e-mail correspondence in [20], which was used in [73] to show that the subjective intention of the defendant revealed in that correspondence belied the common intention that the defendant contended for, this set of e-mail correspondence is sought to be used to support its case. Clearly, even if it reflects the defendant's intention, this particular set of e-mail correspondence has no bearing on the common intention of the parties.

77 Even if the e-mail correspondence, as reproduced in [75] above were admissible, it is clear that Pete Limone did not answer Amy's query. Instead, he re-drafted sentence (b) of paragraph 4 in a manner that left it open to construction either way. Why did he adopt this language? Given the clarity of Amy's question, Pete Limone could not have misunderstood her. In the circumstances, I can only surmise that Pete Limone had wanted the plaintiff to believe that the latter was entitled to the Sign-on Bonus from the start of employment, while secretly entertaining the hope that the re-drafted sentence (b) (which was eventually adopted in the Employment Letter) might be interpreted otherwise in the event there was a dispute. Since the defendant had chosen to resort to ambiguity rather than state clearly what it intended, it must live with the risk of having the clause interpreted against it. Thus, in my view, sentence (b) of paragraph 4 must be construed *contra proferentum*.

78 I note, at this point, that the plaintiff's affidavit of evidence-in-chief, filed on 16 June 2008, stated (at [22]) that Amy represented to the plaintiff, just prior to the signing of the Employment Letter, that the Sign-on Bonus would be paid to the plaintiff in full as long as he did not leave the defendant's employ voluntarily. If the plaintiff was telling the truth, the defendant's argument, as explained in [75], would hold even less weight since Amy's representation to the plaintiff would override whatever Pete Limone may have earlier intended. However, this representation was not pleaded by the plaintiff. I therefore cannot take the alleged representation into consideration.

79 Apart from the e-mail correspondence, both the plaintiff and the defendant referred to negotiations that took place before the Employment Letter was signed. As expounded in *Zurich Insurance*, in order for evidence of previous negotiations to be considered, it must pass the tests of relevance, availability and context. In my view, these requirements are met.

80 Unfortunately, as might be expected, the plaintiff and the defendant presented conflicting versions of those negotiations. The plaintiff averred that both Patrick and Amy represented to him during those negotiations that the Sign-on Bonus was a guaranteed sum and that the plaintiff would be entitled to the whole sum if he left the defendant involuntarily. On the other hand, Amy testified that she had explicitly told the plaintiff that the Sign-on Bonus was a carrot to ensure continued employment and that the plaintiff was not entitled to it if he left the employ of the defendant, whether voluntarily or otherwise before December 2003. According to Amy, the plaintiff agreed to this before the signing of the Employment Letter took place and the Sign-on Bonus was paid on this understanding. Between those two directly conflicting testimonies, it is my view that the plaintiff's

was more credible. On more than one occasion, Amy had admitted the she did not tell the truth and that her evidence before the court was inconsistent. As such, the truth of the matter probably lies closer to the plaintiff's account than Amy's, especially in light of my analysis of the evidence from the e-mail correspondence. If indeed Amy had told the plaintiff that he would not be entitled even if his employment was terminated by the defendant, it is highly unlikely the plaintiff would have signed the agreement. Why would he "walk away from stock options valued at over $600,000 (US)" (see Pete Limone's reply to Amy referred to in [20] above.

81 The last piece of extrinsic evidence adduced was the Draft. The plaintiff tried to use the Draft to show that the words "pending continued employment" only refer to the payment method and not the obligation to pay the Sign-on Bonus. As I concluded in [58] above, in the light of *Zurich Insurance*, there ought to be no absolute prohibition against allowing draft agreements as extrinsic evidence. However, in the present case, I am of the view that the Draft is not helpful and therefore not relevant to the exercise of objectively ascertaining the contractual intentions of the parties. This is because both the Draft and the Employment Letter were worded by the defendant. The plaintiff had no say in the matter. As such, any insight provided by the Draft, at the most, would only point to the subjective intention of the defendant. It does not pass the test of relevance as established in *Zurich Insurance*.

82 Furthermore, the Draft does not come within the exception explained in [72] and [73]. This is because the Draft does not show why paragraph 4 of the Employment Letter was constructed the way it was. As explained in [65] above, both the plaintiff's and the defendant's explanation of paragraph 4 of the Employment Letter are equally plausible. This would remain so even with the benefit of the Draft. Thus, the Draft does not show that the defendant's subjective intention, as revealed therein, contradicts what the defendant asserts was the common intention of the parties in paragraph 4 of the Employment Letter.

83 In the result, taking all the evidence holistically, I am of the view that the objective intention of the parties was that the plaintiff became entitled to the Sign-on Bonus as soon as he entered the defendant's employ.

Whether the S$290,000 was payable on 10 July 2001

84 This leaves the issue as to when the balance of the Sign-on Bonus, *ie*, S$290,000 became payable, given that the plaintiff's employment was terminated by the defendant. There are two possible arguments. First, as asserted by the plaintiff, the S$290,000 was payable on 10 July 2001 when the plaintiff's employment was terminated. Second, it may also be argued that the S$290,000 was payable by instalments as stipulated in sentence (a) of paragraph 4 ([46] above], save that it was no longer payable "through the payroll". On either construction, the S$290,000 would have been payable by now. Nevertheless, a resolution of this issue is necessary to determine how interest on the S$290,000 sum should be computed.

85 Since the plaintiff is asserting that the S$290,000 should have been paid on 10 July 2001, it is for him to persuade the court. However, the plaintiff does not go beyond arguing that such a term should be implied. I do not agree that it is necessary to imply such a term into the Employment Letter.

86 A term may be implied in two situations: to give "business efficacy" to the contract or to supply an obvious but unexpressed intention of the parties (the "officious bystander" test). See *Chitty on Contracts*, vol 1 (Sweet & Maxwell, 30th Ed, 2008) at para [13-004]).

87 In my view, business efficacy does not require me to imply a term that the plaintiff was entitled to the balance of the Sign-on Bonus as soon as his employment was terminated by the defendant. On the contrary, this would be inconsistent with his evidence that Patrick had told him that the Sign-on Bonus was payable by instalments to avoid the defendant having a cash flow problem. The plaintiff's argument also does not succeed on the officious bystander test. Such a term is not so obvious that: "if while the parties were making their bargain, an officious bystander were to suggest some express provision for it in the agreement, they would testily suppress him with a common, 'Oh, of course!'" see: *Shirlaw v Southern Foundries (1926) Ltd* [1939] 2 KB 206 at 227.

88 As such, I hold that the payment schedule as provided for in sentence (a) of paragraph 4 ([46] above) should have been adhered to despite the termination. Interest shall be computed accordingly.

Conclusion

89 In the result, I find in favour of the plaintiff. I hold that there was no full and final settlement between the plaintiff and the defendant, that the plaintiff did not resign, and that the plaintiff was entitled to the Sign-on Bonus as soon as he entered the defendant's employ pursuant to the Employment Letter, but that the Sign-on Bonus was only payable in accordance with the schedule provided in sentence (a) of paragraph 4 ([46] above). Accordingly, I order that the defendant pay to the plaintiff the balance of the Sign-on Bonus in the sum of S$290,000 together with interest on each instalment of the same as and when it fell due at 5.33% until payment.

90 I also dismiss all of the defendant's counterclaims as listed in [25] above. Costs to the plaintiff to be taxed unless agreed.

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