Christopher Bathurst Prize 2015
Problem Question

This year, in a variation on the usual format, candidates are being asked to prepare a written advice for their clients (Figaro Insurance Plc and Wotan Insurance Co) in the following hypothetical (but still very "real life") scenario. Details of the task are given in the instructions below, which you have just received. Candidates will see from the final paragraph that they are asked to prepare a written advice of no longer than 5,000 words by 10 July 2015.

Scarpia Bank Corporation v (1) Figaro Insurance Plc & (2) Wotan Insurance Co

In September 2013 Scarpia Bank Corporation ("**Scarpia**"), a Singaporean investment bank with a branch in the UK, decided to take out some insurance after suffering heavy losses on claims brought against it in the wake of the global financial crisis. It therefore approached Figaro Insurance Plc ("**Figaro**"), which offered to provide a Primary Civil Liability Policy with a retention[1] of SGD$50m *"for each and every Claim (i.e. civil claim or regulatory investigation) arising out of the operations of Scarpia Bank Corporation"* and an aggregate limit of liability of SGD$100m ("**the Primary Policy**"). Figaro also put Scarpia in contact with Wotan Insurance Co ("**Wotan**"), which offered a Secondary Civil Liability Policy with a retention of SGD$10m and an aggregate limit of liability of SGD $50m ("**the Secondary Policy**"). The purpose of the Secondary Policy was to provide cover for losses which fell within the retention in the Primary Policy and so would not be recoverable from Figaro.

Scarpia wished to include aggregation clauses in the Policies to limit the number of retentions which the insurers could apply. Figaro and Wotan agreed in private email correspondence between themselves that it would make commercial sense if the aggregation clauses were the same in both Policies, and settled upon the following draft wording between themselves: *"any claim or series of claims arising out of or in connection with the same originating cause shall be considered a single Claim"* ("**the**

[1] In insurance contracts, a "retention" is the amount of loss which an insured must incur itself before the liability of the insurers kicks in. Therefore, under the Primary Policy, Figaro would only be liable for losses over SGD$50m arising out of each Claim.

Aggregation Wording").[2] Further, Figaro and Wotan were concerned about the recent spate of allegations of market rigging by investment banks. They therefore both insisted, in a meeting with Scarpia in Singapore in November, that exclusion clauses be inserted into the Policies excluding liability in respect of claims arising out of LIBOR rigging and other forms of market manipulation (in return for a reduced premium). Scarpia was happy in principle for such clauses to be included, and the parties agreed that they would approach the contract in good faith.

Unfortunately, the exclusion clauses were drafted (based on the notes of that meeting) by a trainee in-house lawyer at Figaro, Ms Cherubino, and read as follows: *"all liability arising out of LIBOR rigging etc. is excluded"*. In addition, the broker[3] who concluded the Primary Policy on Figaro's behalf, Mr Almaviva, included the following gloss on the Aggregation Wording at the last minute ("**the Implementing Language**"): *"for the purposes of this Policy, the Aggregation Wording shall mean all claims to the extent they relate to one transaction, one investment decision, or one regulatory investigation"*. The Implementing Language was not included in the Secondary Policy, which only contained the Aggregation Wording. None of the parties noticed these issues before the Policies incepted[4] (on 31 December 2013, for a term of one year).

In early 2014, Scarpia became subject to investigation by UK regulators in relation to allegations of manipulation of the foreign exchange ("**Forex**") market, and has recently been fined a total of SGD$65m. During 2014 Scarpia also received several claims from customers who traded Forex with it during the period when the market was being manipulated. These claims fall into two groups, which are entirely separate from each other: (a) claims for losses directly caused by Forex manipulation, totalling around SGD$8m; and (b) claims for losses caused by the failure by Scarpia to execute Forex

[2] Aggregation clauses are essentially interpreted applying the same general principles that apply to any other contractual terms. There is, however, a specific body of law which addresses how wording such as the Aggregation Wording should be construed (in general, a broad approach is taken). Candidates are not required to address this specific body of law beyond the discussion in *Colinvaux's Law of Insurance* (10th ed., 2014), at 10-153 to 10-171 (or the equivalent section on Aggregation Clauses in chapter 10 in earlier editions).
[3] I.e. agent.
[4] In insurance contracts, "inception" is when the policy commences.

trades that would have been profit-making (which do not rely on any allegations of market rigging), totalling around SGD$12m. It is understood that all of these claims have a high chance of success.

On 28 May 2015, Scarpia wrote to Figaro and Wotan informing them that it intends to recover these losses under the Policies. It considers that the exclusion clauses do not cover losses arising out of Forex manipulation, in spite of what was discussed in the November meeting. It also argues that the regulatory fine and the two groups of civil claims all fall to be aggregated under both Policies, so that only one retention applies (the Implementing Language in the Primary Policy is said to be redundant).

Figaro and Wotan therefore seek advice on the following issues (assuming that Singapore law governs the Policies):

1. Can they rely on the exclusion clauses in the Policies to avoid liability altogether?

2. Will the regulatory fine and the two types of civil claims be aggregated? Will the answer be different under the Primary and Secondary Policies?

It is thought that there may be an argument that English law rather than Singapore law governs the Policies (advice is not sought on this point at present). Figaro and Wotan would therefore also like to know whether the answer to the above questions might be different under English law.

The CEOs of Figaro and Wotan, who will be reviewing the advice, are acutely aware of the facts in this case and the wording of the relevant provisions in the Policies, and so there is no need to repeat those matters for them. They are also very busy, and so would be very grateful if the advice were no longer than 5,000 words.[5] They both have board meetings in July and so require the advice by 10 July 2015.

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[5] Candidates are asked to assume that any issues of illegality and public policy do not apply, and to focus on the points of contractual construction only.

Author: Lim Jun Rui, Ivan

Dear Sirs,

LEGAL ADVICE TO FIGARO INSURANCE PLC ("FIGARO") & WOTAN INSURANCE CO ("WOTAN") REGARDING CIVIL LIABILITY POLICIES ("POLICIES") WITH SCARPIA BANK CORPORATION ("SCARPIA")

1. Scarpia seeks to claim insurance under the Policies in respect of the S$65m regulatory fine imposed for manipulation of the foreign exchange market (the "**Regulatory Fine**"), the S$8m civil claim in respect of losses caused by Forex manipulation (the "**Forex Manipulation Claims**"), and the S$12m civil claim in respect of losses caused by failure to execute profit-making Forex trades (the "**Forex Trading Claims**").

2. You have sought advice on the following issues:

   (1) Whether the exclusion clauses (the "**Exclusion Clauses**") in the Policies can be relied upon to exclude liability for the Regulatory Fine, the Forex Manipulation Claims and the Forex Trading Claims.

   (the "**Exclusion Clause Issue**")

   (2) Whether Scarpia can rely on the respective aggregation clauses in the Policies to aggregate the Regulatory Fine, the Forex Manipulation Claims and the Forex Trading Claims into a single "Claim" such that the retention clauses in the Policies do not preclude or limit recovery.

   (the "**Aggregation Issue**")

I. EXECUTIVE SUMMARY

3. In summary, our preliminary views on the above issues are as follows:

Exclusion Clause Issue

(1) Assuming Singapore law applies, Figaro / Wotan have an arguable case that a contextual interpretation of the Exclusion Clauses should apply to exclude liability in respect of claims arising out of Forex manipulation. Such contextual interpretation accords with the prior commercial negotiations between parties during the November meeting and other background evidence, which shows that parties intended to exclude liability in respect of "*claims arising out of LIBOR rigging and other forms of market manipulation*". Such evidence is arguably admissible under Singapore law.

(2) On the aforesaid basis, Figaro / Wotan would be able to exclude liability in respect of the Regulatory Fine and the Forex Manipulation Claims, since these arise out of forex and/or market manipulation. However, liability for the Forex Trading Claims would not be excluded as they do not arise out of or rely on allegations of market manipulation.

(3) Assuming English law applies, the position would be different in that evidence of prior negotiations is extrinsic evidence which is not admissible for use as a direct aid to interpretation. Hence, without the benefit of such evidence, Figaro / Wotan would have difficulty persuading the Court to adopt a contextual interpretation of the Exclusion Clauses that covers exclusion of liability arising out of "*other forms of market manipulation*" such as Forex manipulation.

(4) However, under English law, evidence of prior negotiations is admissible under the alternative remedy of rectification. In this regard, Figaro / Wotan have an arguable case that there had been a clerical error in respect of the Exclusion Clauses, and that

rectification of the Policies should be allowed for amendment to reflect parties' common intention that liability be excluded for "*claims arising out of LIBOR rigging and other forms of market manipulation*".

Aggregation Issue

(5) Assuming Singapore law applies, Figaro has an arguable case to resist Scarpia's arguments that the Implementing Language is redundant and that the Aggregation Wording applies to the Primary Policy so as to aggregate the Regulatory Fine, the Forex Manipulation Claims and the Forex Trading Claims. Although there is background evidence that may support Scarpia's arguments (e.g. private email correspondence between Figaro and Wotan), it is arguable that such evidence is extrinsic evidence which is not admissible for use as a direct aid to interpretation. In any event, the interpretation proffered by Scarpia would effectively render the Implementing Language meaningless and is not likely to be accepted.

(6) Figaro has an arguable case that the natural and ordinary meaning of the Implementing Language should be given effect to such as to preclude Scarpia from aggregating the Regulatory Fine, the Forex Manipulation Claims and the Forex Trading Claims, because these are different categories of claims which do not "*relate to one transaction, one investment decision, or one regulatory investigation*".

(7) On the aforesaid basis, Figaro would be liable to provide insurance in respect of the Regulatory Fine, for the amounts beyond the S$50m retention (i.e. S$15m), but not for the amounts in respect of the Forex Manipulation / Trading Claims (which are precluded by the retention clause).

(8) On the other end, Wotan would have difficulty persuading the Court that the Implementing Language should apply to the Secondary Policy. In this regard, although

there is background evidence that suggests Figaro and Wotan had intended to adopt the Aggregation Wording for the Policies (e.g. private email correspondence between Figaro and Wotan), it is arguable that such evidence is extrinsic evidence which is not admissible for use as a direct aid to interpretation. In any event, such interpretation proffered by Wotan is completely at odds with the natural and ordinary meaning of the written words of the Aggregation Wording and is not likely to be accepted.

(9) The Aggregation Wording therefore applies in respect of the Secondary Policy allowing Scarpia to aggregate the Forex Manipulation Claims and Forex Trading Claims together with the Regulatory Fine. These claims would likely be considered a single claim "*arising out of or in connection with the same originating cause*", which originating cause is the result of manipulation of the Forex markets.

(10) On the aforesaid basis, Wotan would be liable to provide insurance in respect of the aggregated claims, up to its aggregate limit of S$50m.

4. As seen from above, two main areas of contention lie in respect of both issues. First, there is the question of how much background evidence is admissible and as can be legitimately taken into account of in aid of interpretation. Secondly, there is the question of how such background evidence (if admissible) would affect interpretation of the Policies.

5. We first expand on our views by setting out an outline of the principles and framework in relation to the interpretation of contracts and admissibility of background evidence. We then elaborate on our views in respect of each issue in turn. Finally, we conclude by setting out our recommendations for Figaro / Wotan moving forward.

II. THE APPLICABLE PRINCIPLES AND FRAMEWORK

6. Both Singapore and English law adopt a contextual approach towards contractual interpretation. This means that while the starting point for interpretation is the natural and ordinary meaning of the written words chosen by parties to express their rights and obligations, the courts can, in appropriate circumstances, have regard to the background evidence or surrounding circumstances as a whole in order to ascertain objectively the intentions of the parties.

7. However, given the potential uncertainty of outcome in disputes over interpretation and added complexity that may follow from possible admission of a broad range of background evidence, both Singapore and English law impose restrictions and/or safeguards on the admissibility of such evidence. In this regard, there are differences in the approaches adopted under Singapore and English law.

8. English law imposes a blanket prohibition against the use of certain types of background evidence, namely evidence of prior negotiations and parties' subjective intentions.[1] The concern is that such evidence is inherently susceptible to being shaped towards self-serving ends with hindsight, is highly likely to be highly contentious, and also liable to add to complexity and costs of dispute resolution.

9. In contrast, under Singapore law, there is no blanket prohibition against the admissibility of specific types of background evidence.[2] In principles, all types of background evidence are potentially admissible, but subject to the requirements that the evidence (i) be relevant, (ii) be reasonably available to all contracting parties, and (iii) relate to a clear and obvious context.

10. Under Singapore law, a party seeking to introduce background evidence will also need to establish that it is admissible (and not excluded) under the provisions of the *Evidence Act* (including sections 94 to 100). These provisions contain certain restrictions which exclude

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[1] *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 W.L.R 896; *Chartbrook Ltd v Persimmon Homes Ltd* [2009] 1 AC 1101 ("***Chartbrook***").
[2] *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR(R) 1029 ("***Zurich***").

admissibility of extrinsic evidence that can be brought before the courts, which we will elaborate on further below.

11. Hence, subject to the foregoing requirements, background evidence such as the surrounding circumstances of the contract, the overall commercial purpose of the contract, and parties' pre-contractual negotiations are all potentially admissible under Singapore law for use in aid of interpretation.

12. The overall approach taken by the Singapore courts in recent years suggests reduced emphasis on exclusionary rules and a greater inclination to examine background evidence in aid of contextual interpretation. However, it ought to be highlighted that the local Court of Appeal recently expressed some reservations with such an approach, stating that the question of whether evidence of prior negotiations should be excluded as irrelevant or unhelpful for policy reasons (such as those stated in paragraph 8 above) remains open for further consideration in future.[3]

13. Lastly, it is pertinent to note that the position under both Singapore and English law is that background evidence ultimately cannot be used to "*contradict, vary, add to or subtract*' from the express terms of the contract[4], although it may be noted that the distinction between legitimate use of background evidence to construe the real objective intentions of parties and one that results in a "rewriting" of the contract can be a fine one in particular circumstances.[5] The courts have also yet to provide definitive guidance on the limits as to how background evidence may be used to affect the contextual interpretation of contracts.[6] However, broadly speaking, cases where the limits may conceivably have been crossed could include the following:

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[3] *Sembcorp Marine Ltd v PPL Holdings Pte Ltd* [2013] 4 SLR 193 at [75].
[4] *Ibid.* at [122].
[5] *Yamashita Tetsuo v See Huo Seng Ltd* [2009] 2 SLR(R) 265.
[6] *Xia Zhengyan v Geng Changqing* [2015] 3 SLR 732 at [69].

(1) Where the contextual interpretation proffered renders the agreement unoperable;

(2) Where the contextual interpretation proffered would have the effect of ignoring and/or contradicting other provisions in the agreement altogether; and/or

(3) Where the extrinsic evidence sought to be introduced in aid of contextual interpretation renders the meaning of the term concerned at odds with either the plain meaning of an express provision and/or the plain meaning that the contractual words are capable of bearing.[7]

14. Having set out the applicable principles and framework, we move on to address the Exclusion Clause Issue and Aggregation Issue. We will set out the position under Singapore law first, before considering the position under English law.

15. In this regard, our views herein are based solely on the instructions received, and further subject to the assumptions set out below.

III. THE EXCLUSION CLAUSE ISSUE

16. The Exclusion Clauses state that "*all liability arising out of LIBOR rigging, etc is excluded*".

17. Based on the aforesaid wording alone, Figaro / Wotan will have difficulty arguing that the Exclusion Clauses should be interpreted as excluding liability for other forms of market manipulation other than "*LIBOR rigging*", such as Forex manipulation. This difficulty is due to the ambiguity posed by the usage of the term "*etc*".

[7] *Sheng Siong Supermarket Pte Ltd v Carilla Pte Ltd* [2011] 4 SLR 1094; see also Goh Yihan, Contractual Interpretation in Singapore (2012) 24 SAcLJ 275 at [23] to [31].

18. Although the term "*etc*" suggests an intention to exclude liability in respect of similar categories / classes of liabilities as that of "*LIBOR rigging*", it is difficult to say with certainty what such categories / classes of liabilities are being referred to.

A. Extrinsic Evidence in Aid of Interpretation

19. Figaro / Wotan should therefore seek to adduce background evidence to show that the term "*etc*" was meant to refer to other forms of market manipulation, including Forex manipulation. Such background evidence would comprise of the (i) background facts illustrating parties' knowledge and awareness that there were recent allegations of market rigging by investment banks; and (ii) the prior negotiations between parties during the November meeting.

20. Such background evidence arguably satisfies the requirements stated at paragraph 9 above. The evidence is clearly relevant and relates to a clear and obvious context. It shows that parties were aware of Figaro's / Wotan's concerns in respect of market rigging, and a consensus appeared to have been reached for Figaro / Wotan to exclude liability in respect of claims "*arising out of LIBOR rigging and other forms of market manipulation*", in return for Scarpia paying a reduced premium. There is no question that the evidence was available and known to all parties.

21. Having said that, Scarpia may contend that the background evidence is not admissible by reason of section 95 of the *Evidence Act*, which provides that "*When the language used in a document is on its face ambiguous or defective, evidence may not be given of facts which would show its meaning or supply its defects*".

22. Nevertheless, in our view, Scarpia's argument is not likely to succeed for the following reasons.

    (1) A purposive interpretation of section 95 of the *Evidence Act* should be adopted. Given that written words invariably give rise to more than one meaning (and hence be

considered ambiguous), it is arguable that the provision ought to be restricted to cases where the uncertainty arising from the ambiguity or defect of the language is incurable. This is arguably not the case here with the wording of the Exclusion Clauses.

(2) Restricting the ambit of section 95 of the *Evidence Act* as stated above would also provide for a coherent reading of other provisions in the *Evidence Act*, including sections 94(f) and 97, the wording of which is broad enough to admit background evidence to clarify the interpretation of ambiguous (but not incurable) language.

(3) In particular, section 94(f) of the Evidence Act allows for the extrinsic evidence to be admissible insofar as they relate to facts which "*shows in what manner the language of a document is related to existing facts*". Similarly, the extrinsic evidence is arguably admissible under section 97 of the Evidence Act, which provides that "*When language used in a document is plain in itself, but is meaningless in reference to existing facts, evidence may be given to show that it was used in a peculiar sense*".

(4) It is also pertinent to note that the Policies were in no way a standard form contract, but were specially negotiated in light of the concerns of market rigging.[8] That being the case, the courts ought to be more inclined to examine all relevant background evidence for the purpose of objectively ascertaining parties' intentions.

23. For the foregoing reasons, our view is that the background evidence mentioned at paragraph 19 above would be admissible in aid of interpretation of the Exclusion Clauses. It is further arguable that such background evidence is cogent evidence that helps explain and illuminate the Exclusion Clause, rather than to contradict or vary it.

24. Consequently, our view is that the Court, having regard to the background evidence, is likely to adopt a contextual interpretation of the Exclusion Clauses to exclude Figaro / Wotan from

[8] cf *Master Marine AS v. Labroy Offshore Ltd* [2012] 3 SLR 125.

liability in respect of "*claims arising out of LIBOR rigging and other forms of market manipulation*".

B. Position under English Law

25. As explained above, English law imposes a blanket prohibition against evidence of prior negotiations, by treating it as extrinsic evidence which is not admissible for use as a direct aid to interpretation.

26. As such, Figaro / Wotan would have difficulties adducing evidence of the prior negotiations between parties during the November meeting in aid of interpretation of the Exclusion Clauses. In such event, without the evidence, Figaro / Wotan would have difficulties persuading the Court that the scope of the Exclusion Clause should be interpreted as covering "*other forms of market manipulation*" such as Forex manipulation.

27. Nonetheless, we note that there are English authorities[9] which, while confirming that there is an exclusionary rule prohibiting the use of prior negotiations as a direct aid to construction, also acknowledge that prior negotiations may nevertheless be a legitimate source of context generally, where reliance can placed on them to glean other objective factual material (save for the meaning of the terms).[10]

28. Further, we note that under English law, evidence of prior negotiations is admissible under the alternative remedy of rectification. Hence, should English law apply, Figaro / Wotan should advance their case both ways by (i) arguing that a contextual interpretation should be applied to the Exclusion Clauses, and adducing contextual evidence such as parties' concerns on market rigging by banks (as brought up during the prior negotiations), and (ii) arguing in the alternative on rectification, bolstered by reference to evidence of the consensus reached by

[9] See *Chartbrook*.
[10] *Oceanbulk Shipping and Trading SA v TMT Asia Ltd* [2011] 1 AC 662.

parties on excluding liability for other forms of market rigging (pursuant to the prior negotiations), as a direct aid to interpretation. For completeness, we would add that a similar approach could be adopted where Singapore law applies.

29. Insofar as the alternative remedy of rectification is concerned, Figaro / Wotan could argue that the Exclusion Clauses should be amended to expressly exclude liability in respect of "*claims arising out of LIBOR rigging and other forms of market manipulation*", on the basis that this reflects the actual agreement that parties reached, and which would have been reflected, if not for the clerical error.

30. In this connection, rectification could be allowed on the basis of a common mistake amongst parties, provided that Figaro / Wotan establish the following[11]:

(1) That there was an outward expression of accord (such as oral evidence of a meeting of minds).

(2) That there must have been a continuing common intention right up to the time at which the agreement was executed.

(3) That, by mistake, the document as executed did not represent the common intention of parties.

(4) That the rectified document would accurately reflect the true agreement.

31. On the facts, these requirements have arguably been met. Consequently, our view is that the Court is likely to allow the alternative remedy of rectification of the Exclusion Clauses.

[11] *Swainland Builders Ltd v Freehold Properties Ltd* [2002] 2 EGLR 71; see also *Lim Koon Hai v Alex Yeo Siak Chuan* [2013] SGHC 90.

IV. THE AGGREGATION ISSUE

32. The Aggregation Wording in the Policies states that "*any claim or series of claims arising out of or in connection with the same originating cause shall be considered a single claim*".

33. Authorities have established that the term "*originating cause*" is to be construed broadly.[12] In particular, it was held that the word "*cause*" refers to a "*continuing state of affairs*" or "*the absence of something happening*". It was also held that the word "*originating*" suggests an intention to "*open up the widest possible search for a unifying factor*" for purposes of aggregation.

34. In light of the foregoing, the Aggregation Wording, without more, would likely be interpreted as being broad enough to aggregate the Regulatory Fine, the Forex Manipulation Claims and the Forex Trading Claims. This is because these claims would arguably be considered a single "Claim" arising out of or in connection with the manipulation of Forex in the markets. This would arguably be so even for the Forex Trading Claims, as a linkage could be drawn to the fact that such claims would not have arisen but for the manipulation of Forex (and notwithstanding that they do not actually rely on allegations of market rigging).

35. However, it is necessary to consider the impact of the following matters, namely, that (i) Figaro had added the Implementing Language to the Primary Policy, providing that "*for the purposes of this Policy, the Aggregation Wording shall mean all claims to the extent they relate to one transaction, one investment decision, or one regulatory investigation*"; and (ii) Figaro and Wotan had agreed in private email correspondence (not shared with Scarpia) that it would make commercial sense for the aggregation clauses in both Policies to be the same, although the Implementing Language was not eventually added in Wotan's Secondary Policy.

[12] *Axa Reinsurance (UK) Ltd v Field* [1996] 1 WLR 1026.

36. We note that it is not clear to us the reason for which Figaro's brokers had subsequently added the Implementing Language to the Primary Policy, and whether this was expressly discussed between the parties. It is also not clear to us why Figaro / Wotan did not eventually keep to the initial intention that the aggregation clauses in both Policies be worded similarly. Further instructions may therefore be required to come to a more definitive view. Subject to the aforesaid, we set out the issues likely to arise and our views below.

A. Extrinsic Evidence in Aid of Interpretation of Figaro's Primary Policy

37. Given that the Aggregation Wording is more favourable to Scarpia, Scarpia is likely to argue that it is the Aggregation Wording that applies under the Primary Policy. In this regard, Scarpia is likely to seek to adduce background evidence in support of such an interpretation, including (i) the private email correspondence between Figaro and Wotan, where they had agreed that the Aggregation Wording should be used in both Policies; and (ii) the parties' intentions that the Primary and Secondary Policies were meant to be complementary in nature, which suggests again that similar aggregation wording ought to have been employed.

38. Scarpia may contend that the said background evidence is admissible under Singapore law by reason of sections 94(f) (as stated above) and sections 98 and 99 of the *Evidence Act*. In particular:

(1) Section 98 of the *Evidence Act* provides that "*When the facts are such that the language used might have been meant to apply to any one, and could not have been meant to apply to more than one of several persons or things, evidence may be given of facts which show to which of those persons or things it was intended to apply*".

(2) Section 99 of the *Evidence Act* provides that "*When the language used applies partly to one set of existing facts and partly to another set of existing facts, but the whole of it*

does not apply correctly to either, evidence may be given to show to which of the 2 it was meant to apply".

39. However, in our view, such background evidence is unlikely to be admissible for the following reasons:

(1) First and foremost, the background evidence would arguably not satisfy the requirements stated at paragraph 9 above. The private email correspondence between Figaro and Wotan was not shared with Scarpia, and thus would not have been available to all parties at the material time. This being the case, such material cannot be properly used to ascertain parties' objective intentions.

(2) Further, Figaro's addition of the Implementing Language to the Primary Policy at the end indicates that the earlier intentions to adopt the same aggregation clause wording had been superseded. Accordingly, there is arguably no clear and obvious context that can be discerned from the background evidence. Put in any way, parties' earlier intentions can only be said, at best, to have represented the subjective aspirations of parties, as opposed to any real consensus reached.

(3) Moreover, it is arguable that any attempt by Scarpia to adduce such background evidence is, in fact, for the sole purpose of introducing Scarpia's own subjective intentions as to what ought to be the proper interpretation of the aggregation clauses. In this regard, the courts would arguably be less inclined to admit such evidence of subjective intentions, as this goes against the contextual approach of ascertaining the parties' intentions objectively. For that matter, such evidence is also arguably not admissible under the *Evidence Act* for the following reasons:

(a) Evidence of Scarpia's subjective intent is not admissible under section 94(f) since such intent is not "*existing facts*" within the meaning of the provision.[13]

(b) Sections 98 and 99 of the *Evidence Act* arguably applies only where there is latent ambiguity. This is arguably not the case here. On the contrary, Figaro may instead rely on section 96 of the *Evidence Act* to argue that the evidence is not admissible, because "*When language used in a document is plain in itself and when it applies accurately to existing facts, evidence may not be given to show that it was not meant to apply to such facts*".

(4) In any event, it is arguable that Scarpia's proffered interpretation that the Aggregation Wording applies to the Primary Policy not only contradicts, but completely renders the Implementing Language meaningless. Such interpretation therefore falls under the prohibition against using background evidence to "*contradict, vary, add to or subtract*"[14] from the express terms of the contract, as mentioned above at paragraph 13 (and the sub-paragraphs therein).

40. Further, Figaro may plausibly argue that the Implementing Language adopted in the Primary Policy is not in any way inconsistent with parties' intention that the Secondary Policy play a complementary role to the Primary Policy (by providing cover for losses that do not fall within the retention in the Primary Policy). Such role has not changed. The only difference made by the Implementing Language is to apply a narrower test for the purposes of aggregation of claims under the Primary Policy, which Scarpia did not object to.

41. For the foregoing reasons, our view is that the background evidence mentioned at paragraph 37 above falls under extrinsic evidence which is not admissible for use as a direct aid to interpretation. Further, our view is that the Implementing Language applies to the Primary

[13] *HSBC Trustee (Singapore) Ltd v Lucky Realty Co Pte Ltd* [2015] 3 SLR 885.
[14] See also section 94 of the *Evidence Act*.

Policy. In this connection, having regard to the natural and ordinary meaning of the Implementing Language, the Court is likely to hold that Scarpia is not entitled to aggregate the Regulatory Fine, the Forex Manipulation Claims and the Forex Trading Claims, because these are different categories of claims which do not "*relate to one transaction, one investment decision, or one regulatory investigation*".

42. Based on the aforesaid, Figaro would be liable to pay insurance in respect of the Regulatory Fine, for the amounts beyond the S$50m retention (i.e. S$15m).

B. Extrinsic Evidence in Aid of Interpretation of Wotan's Secondary Policy

43. At the other end, given that the Implementing Language is more favourable to Wotan, Wotan may seek to argue that it is the Implementing Language that applies under the Secondary Policy. In this regard, Wotan should seek to adduce background evidence in support of such an interpretation, including the earlier mentioned private email correspondence between Figaro and Wotan.

44. As in Scarpia's case, Wotan may argue that such extrinsic evidence is admissible by reason of sections 94(f), 98 and 99 of the *Evidence Act*.

45. However, the same analysis as set out above at paragraphs 39 to 40 applies. For the reasons stated therein, our view is that the background evidence mentioned at paragraph 43 above falls under extrinsic evidence which is not admissible for use as a direct aid to interpretation. Further, our view is that the Aggregation Wording applies to the Secondary Policy. In this connection, having regard to the natural and ordinary meaning of the Aggregation Wording, the Court is likely to hold that Scarpia is entitled to aggregate the Regulatory Fine, the Forex Manipulation Claims and the Forex Trading Claims, because these claims would likely be considered a single claim "*arising out of or in connection with the same originating cause*", namely, the originating cause of manipulation of the Forex markets.

46. Based on the aforesaid, Wotan would be liable to provide insurance in respect of Scarpia's insurance claims, up to its aggregate limit of S$50m.

C. Position under English Law

47. The position under English law would not be different in respect of the Aggregation Issue. This is because background evidence such as private email correspondence between Figaro and Wotan is likely to be regarded as inadmissible on account of being extrinsic evidence of prior negotiations and/or subjective intent.

V. CONCLUSION AND RECOMMENDATIONS

48. To conclude, our views on Figaro / Wotan's liability in respect of the insurance claims are as follows:

(1) Should Figaro / Wotan succeed in the Exclusion Clause Issue and manage to exclude liability in respect of "*claims arising out of LIBOR rigging and other forms of market manipulation*", Figaro would not have to pay any insurance claim (due to the retention clause), while Wotan would be liable to pay an amount of S$2m in respect of the Forex Trading Claims (i.e. S$12m less S$10m retention sum).

(2) In the event that Figaro does not succeed in the Exclusion Clause Issue, but succeeds in the Aggregation Issue (i.e. resisting Scarpia's argument for the Aggregation Wording to apply to the Primary Policy), Figaro would be liable to pay an amount of S$15m in respect of the Regulatory Fine (i.e. S$65m less S$50m retention sum), but not any other amounts in respect of the Forex Manipulation / Trading Claims.

(3) In the event that Wotan does not succeed in the Exclusion Clause Issue, and on the basis that the Aggregation Wording applies to the Secondary Policy, Wotan would be liable to pay insurance in respect of the aggregated claims of the Regulatory Fine, Forex Manipulation Claims and Forex Trading Claims, up to the aggregate limit of S$50m.

49. Moving forward, we would recommend that Figaro / Wotan proceed to take steps to formally prepare for potential litigation, including:

(1) Responding to Scarpia's letter to deny liability;

(2) Identifying the relevant personnel with personal knowledge of and who were involved in the negotiations in relation to the Policies; and

(3) Scheduling interviews with such personnel for the purposes of preparing statements to be provided by them in respect of the matter.