



## *CIFG Special Assets Capital I Ltd (formerly known as Diamond Kendall Ltd) v Ong Puay Koon and others and another appeal [2017] SGCA 70*

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### Introduction

In *CIFG Special Assets Capital I Ltd (formerly known as Diamond Kendall Ltd) v Ong Puay Koon and others and another appeal [2017] SGCA 70* (“*CIFG Special Assets*”), a group of investors (collectively referred to as the “*Initial Shareholders*”), had sought one Kendall Court Capital Partners Limited (“*KC*”), a fund management company that wholly owned CIFG, to finance the acquisition of company known as “*Philips*”. It was agreed that Polimet would be incorporated as a holding company of the Initial Shareholders’ other companies, including Philips. KC would then provide a US\$5 million loan by subscribing for convertible bonds issued by Polimet. This culminated in CIFG entering into a set of Convertible Bond Subscription Agreements (“*CBSAs*”) with Polimet and the Initial Shareholders whereby, *inter alia*, KC would be indemnified for all losses arising out of or relating to the investment. Additionally, two of the Initial Shareholders provided Personal Guarantees (“*PGs*”) based on their initial 50% shareholding in Polimet.

Polimet subsequently defaulted on the repayment of the loan. CIFG sought to recover their investment by enforcing the PGs against the two shareholders, and the indemnity clause against the Initial Shareholders. The central issue in the appeal was whether, on the proper construction of the indemnity clause, *i.e.* Clause 12, CIFG could claim the entirety of its losses against each of the Initial Shareholders jointly and severally.

The relevant portion of Clause 12 reads:

**“General Indemnity.** *The Initial Shareholders and the Issuer hereby jointly and severally agree and undertake to fully indemnify and*

*hold the Bondholder and its shareholders and their respective fund managers, directors, officers and employees (the “Indemnified Parties”) harmless from and against any claims, damages, deficiencies, losses, costs, liabilities and expenses (including legal fees and disbursements on a full indemnity basis) directly or indirectly caused to the Indemnified Parties and in particular, but without prejudice to the generality of the foregoing, for any short-fall, depletion or diminution in value of the assets of the Issuer, the Group or any Group Company resulting directly or indirectly from or arising out of any breach or alleged breach of any of the representations, warranties, undertakings and covenants given by the Initial Shareholders and/or the Issuer under this Agreement or for any breach or alleged breach of any term or condition of this Agreement.”*

### Decision of the Court of Appeal

In an *ex tempore* judgment, the Court of Appeal held that the interpretation put forth by CIFG was over-inclusive despite its broad wording and could not be enforced against the Initial Shareholders. In reaching its decision, the Court of Appeal reaffirmed the following principles of contractual interpretation:

1. As a starting point, one must look to the text of the agreement.
2. At the same time, one may have regard to the relevant context of the agreement as long as the relevant contextual points are clear, obvious and known to both parties.
3. By having regard to the relevant context, the court is placed in “the best possible position to ascertain the parties’ objective intentions by interpreting the expressions used by [them] in their proper context”.

4. In general, the meaning ascribed to the terms of the contract must be one which the expressions used by the parties can reasonably bear.

Applying the principles, the Court found the text of Clause 12 to be so broad as to be absurd. The wording of Clause 12 conferred protection to beneficiaries who were not even party to the CBSAs. It also appeared that an unlimited number of matters could conceivably be covered by Clause 12.

Looking to the other provisions in the CBSAs, the Court of Appeal noted that these provisions specifically allocated the risks variously to Polimet, to the Initial Shareholders, or to a combination of some or all of them. It was therefore unlikely that Clause 12 had the effect of overriding the entire allocation of the risks under the contract such that Polimet and each of the Initial Shareholders would also be liable for the entirety of the loan. Furthermore, if the broad interpretation of Clause 12 were adopted, the PGs would be entirely pointless as Clause 12 would already make each and all the parties answerable for each and the entirety of the obligations under the CBSAs.

Lastly, the Court of Appeal noted that Clause 12 was introduced as a "boiler-plate" provision to complete the document. As such, it was unlikely that Clause 12 had the effect of overriding the commercial structure of the deal and the calibrated allocation of risk that is reflected elsewhere in the CBSAs.

Based on the above contextual considerations, the Court held that on the true construction of Clause 12, the Initial Shareholders could not be held liable for Polimet's default.

## Analysis

The decision in *CIFG Special Assets* affirms the Singapore courts' approval of the contextual approach towards contractual interpretation. It is notable that the courts are no longer

satisfied with simply interpreting a contractual clause at face value. As was clear in the reasoning of *CIFG Special Assets*, while the Court of Appeal had expressly stated that the text of the agreement was the starting point of contractual interpretation, it was the context in which the agreement was entered which had the most significant bearing on the interpretation of Clause 12. Thus, it is no longer sufficient for a contractual clause to be merely worded clearly and concisely – clauses that are construed to be incoherent and inconsistent with the other contractual clauses and context may prove to be fatal to a party's interests.

## Conclusion

While the decision in *CIFG Special Assets* pertained to the application of well-established principles of contractual interpretation, the manner in which the Court of Appeal utilised the contextual approach in interpreting the agreement is illuminating and provides valuable insight on how the courts will look beyond the strict textual reading of a contractual clause to reach an outcome which is commercially sensible.

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