

## What if you didn't write it down? Verbal promises in business contracts\*

### I. Introduction

- 1 Business negotiations can be lengthy. In the course of negotiations, parties might make a verbal promise to do or not do something. There might also be emails recording the promise or showing that there were verbal negotiations. But if the promise does not end up in a written contract, can you hold the other party to it?
- 2 The answer is: generally, no.<sup>1</sup> This is because the law seeks to promote commercial certainty.<sup>2</sup> When parties have deliberately put their agreement into a written contract, they should be able to rely on that written contract. They should not have to worry that the other party might one day recall some remark—often long forgotten or difficult to explain—and claim that it was part of the agreement.<sup>3</sup>
- 3 There are a few exceptions. This article discusses two significant ones:
  - (a) Where the promise was mistakenly left out of your written contract; and
  - (b) Where the promise was intended to be part of your agreement but was not recorded in the written contract.
- 4 In both scenarios, the promise forms part of the agreement, allowing you to seek financial compensation if the other party breaks its promise.

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<sup>1</sup> *Shogun Finance Ltd v Hudson* [2004] 1 AC 919 at [49], quoted in *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR(R) 1029 (“**Zurich Insurance**”) at 1049, [36].

<sup>2</sup> *Ang Sin Hock v Khoo Eng Lim* [2010] 3 SLR 179 at 206, [76] (collateral contracts). See similarly *Zurich Insurance*, *id* at 1065, [70], quoting John Pitt Taylor, *A Treatise on the Law of Evidence* (A Maxwell q& Son, 1848) at [813] (parol evidence rule).

<sup>3</sup> *Zurich Insurance*, *ibid*; *Lee Chee Wei v Tan Hor Peow Victor* [2007] 3 SLR(R) 537 (“**Lee Chee Wei**”) at 547, [26], quoting *Inntrepreneur Pub Co v East Crown Ltd* [2000] 2 Lloyd’s Rep 611 at 614 (entire agreement clauses).

## II. Discussion

### A. General considerations

5      Whichever scenario applies, the promise must be certain rather than vague. For example, a promise that “I will provide free servicing for the machines you buy” is vague, while a promise that “I will provide free annual servicing for three years for the machines you buy” is certain.<sup>4</sup>

6      Further, a practical consideration in both scenarios is that the other party may remember the negotiations differently from you. It will be easier to convince the court of the promise if you have it recorded in emails or other documents.

### B. Scenario 1: Where the promise was mistakenly left out of your written contract

7      If the promise was mistakenly left out, the court can correct the written contract by inserting the promise.<sup>5</sup> This is called rectification. You will need “convincing proof” that the written contract does not accurately reflect the parties’ intention, and that inserting the promise would fix this issue.<sup>6</sup> You may be able to find such proof in your verbal negotiations or emails exchanged before the written contract was finalised.<sup>7</sup>

8      There are two situations in which the court can correct the written contract:

- (a)      Where you mistakenly thought that the written contract accurately recorded your agreement, and the other party knew that you were mistaken but did not correct you;<sup>8</sup> and
- (b)      Where both of you mistakenly thought that the written contract accurately recorded the agreement.<sup>9</sup>

9      To illustrate the first situation, suppose a supplier agrees to supply Arabica coffee beans to a buyer. However, the word “Arabica” is accidentally left out of the written contract, so it only refers to “coffee beans”. When signing the contract, the buyer does not notice

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<sup>4</sup> See similarly *Lemon Grass Pte Ltd v Peranakan Place Complex Pte Ltd* [2002] 2 SLR(R) 50 at 75, [123].

<sup>5</sup> *Halsbury’s Laws of Singapore* vol 7 (Butterworths Asia, 2016) at para 80.156.

<sup>6</sup> *Yap Son On v Ding Pei Zhen* [2017] 1 SLR 219 (“*Yap Son On*”) at 247, [65].

<sup>7</sup> Evidence Act s 94(a); *Yap Son On*, *id* at 247, [64].

<sup>8</sup> *Yap Son On*, *id* at 247, [65]; Gerard McMeel, *The Construction of Contracts: Interpretation, Implication, and Rectification* (Oxford University Press, 2007) at 355, [17.38].

<sup>9</sup> *Yap Son On*, *supra* n 6 at 247, [65].

this error. However, the supplier does and keeps quiet. Later, the supplier sends cheaper Robusta beans instead. The buyer can ask the court to correct the written contract by inserting “Arabica” and claim compensation for supplying the inferior coffee beans.<sup>10</sup>

10 For the second situation where both parties mistakenly thought that the written contract was accurate, you must prove three things:

- (a) Both of you intended the promise to be part of the contract;
- (b) You communicated this intention to one another; and
- (c) By mistake, the document did not reflect this shared intention.<sup>11</sup>

11 It will be difficult to convince the court that both of you made a mistake if you exchanged drafts of the written contract and suggested changes.<sup>12</sup> This is because the parties would have had to check every draft and should have noticed any problems in the draft.<sup>13</sup> Further, the other party may claim that the written contract is consistent with their intention if the mistake is advantageous to them. If so, you will need convincing evidence that the written contract was contrary to your shared intention.<sup>14</sup>

12 Recall the earlier coffee bean example, but with the factual twist that neither party noticed the error. The negotiations are convincing evidence that both parties intended a contract to supply Arabica beans only. This is because the buyer had asked specifically for Arabica coffee beans, and the supplier had agreed. Therefore, the buyer can have the written contract corrected.

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<sup>10</sup> See similarly McMeel, *supra* n 8, at 349-350, [17.22]; David Hodge QC, *Rectification: the Modern Law and Practice Governing Claims for Rectification for Mistake* (Sweet & Maxwell, 2nd Ed, 2016) at 540-541, [5-105]; *Frederick E Rose (London) Ltd v William H Pim Junior & Co Ltd* [1953] 2 QB 450 (“*Rose v Pim*”).

<sup>11</sup> *Yap Son On*, *id* at 248, [67]; *Rose v Pim*, *supra* n 10 at 461.

<sup>12</sup> *Industrial & Commercial Bank Ltd v PD International Pte Ltd* [2003] 1 SLR(R) 382 at 393, [36].

<sup>13</sup> *Ibid.*

<sup>14</sup> *Maxz Universal Development Group Pte Ltd v Shen Yixuan* [2009] SGHC 164 at [22(c)].

**C. Scenario 2: Where the promise was part of your agreement but was not recorded in the written contract**

13 If you cannot show that the promise was mistakenly left out of the document, you can still hold the other party to the promise if part of the contract was written and the rest of it was verbally agreed. There are two things to watch out for.

14 First, the written part must not have a clause stating that all terms of the agreement are in that document.<sup>15</sup> For example:

This Contract sets forth the entire agreement and understanding between the Parties in connection with the matters dealt with and described herein.<sup>16</sup>

If your document has such a clause, any verbal promise cannot be part of the contract.

15 Second, the verbal promise can be part of the contract only if both parties did not intend the document to contain all the terms of the agreement.<sup>17</sup> This depends on whether the document appears complete. For example:

(a) Where the document is titled “heads of contract”, the title shows that the document outlines only the most important terms of the agreement. Therefore, the verbal promise can be part of the contract.<sup>18</sup>

(b) Where the document merely states that one party is buying a product for a certain price and does not specify the product’s quality, the verbal promise that the product is of a certain quality can be part of the contract.<sup>19</sup>

16 If the document does not appear complete, the court will presume that it does not contain all the terms.<sup>20</sup> Therefore, you can use the negotiations, whether oral or email, to prove that a verbal promise is part of the contract. Specifically, you can use them to modify any existing clauses that do not reflect the negotiations, or add the promise as another term of the contract.<sup>21</sup>

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<sup>15</sup> *Lee Chee Wei*, *supra* n 3, at 548, [28].

<sup>16</sup> *Id* at 546, [21].

<sup>17</sup> *Zurich Insurance*, *supra* n 1, at 1087, [112]. See Evidence Act (Cap 97, 1997 Rev Ed) ss 93-94.

<sup>18</sup> *McMeel*, *supra* n 8 at 115, [5.37].

<sup>19</sup> *Allen v Pink* (1838) 4 M & W 140, cited in Robert Stevens, “Objectivity, Mistake and the Parol Evidence Rule” in Andrew Burrows & Edwin Peel, *Contract Terms* (Oxford University Press, 2007) at 108.

<sup>20</sup> *Zurich Insurance*, *supra* n 1, at 1087, [112].

<sup>21</sup> See *Zurich Insurance*, *supra* n 1, at 1087, [112]. See Evidence Act (Cap 97, 1997 Rev Ed) ss 93-94.

- 17 If the document appears complete, you can still try to prove that that both of you did not intend the document to contain all the terms.<sup>22</sup> For example, you might have proof that both parties verbally agreed that the Arabica coffee beans would be sent by air, even though the document allows the supplier to choose the mode of transportation.<sup>23</sup>

### III. Conclusion

- 18 If you can show that the written contract should be corrected to include the promise or that the promise is the verbal part of the contract, you can sue for compensation if the other party has broken the promise and caused you loss. Whether a lawsuit is worthwhile depends on whether the loss is large enough to justify the time, cost, and hassle involved. If you are on good terms with the other party, you should first check whether they are willing to fulfil their promise or compensate you. If that fails, you may be able to lodge a case with the Small Claims Tribunals if your loss is \$10,000 or less. If your loss is larger, you may wish to seek legal advice.

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<sup>22</sup> *Zurich Insurance, id* at 1096, [132(b)].

<sup>23</sup> See similarly *Evans (J) & Son (Portsmouth) Ltd v Andrea Merzario Ltd* [1976] 2 All ER 930.