RESOLVING AMBIGUITY THROUGH EXTRINSIC EVIDENCE

Flushed with optimism when a deal is struck, businessmen rarely welcome nit-picking. When goodwill is replaced by acrimony, the illusion of minds *ad idem* shatters. Even the most conscientiously drafted document can then attract debate. Matters extrinsic to the written document are often invoked in support of diametrically different interpretations. In this paper, we look at how the court treats such evidence.

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1 The devil himself knows not the mind of man. The public at large, though, expects our judges to find the truth embedded in the protagonists' minds. Since our judiciary relies on intellectual and not metaphysical powers, our system of extracting truth is built on what is discernible, *ie* words. Hence, while intention is the bedrock of contract law, the dictates of expedience embodied in the parol evidence rule[1] turns this principle on its head:

> The question … is, not what was the intention of the parties, but what is the meaning of the words they have used.[2]

Anyone with a dollar to spend should put his money, not where his mouth is, but where his pen poises.

2 Sometimes, parties intentionally leave things unsaid, hoping that good faith will prevail in resolving issues as they arise. But all too often, a dealmaker falls into a series of false assumptions. Firstly, he thinks that he has thought through every issue that can arise from the transaction.

1 Fear that parol evidence would lengthen a trial and increase costs led to the utilitarian maxim "it is better to suffer a mischief to one man than an inconvenience to many" *Waberley v Cockerel* (1542) 1 Dyer 51a at 51a; 73 ER 112 at 113.

2 *Per* Denman LCJ, in *Rickman v Carstairs* (1833) 5 B & Ad 651 at 663; 110 ER 931 at 935. Despite sophisticated embellishments introducing, for example, "the factual matrix", this is still, in a nutshell, the modern approach. More recently, in *Chia Ee Lin Eveyln v Teh Guek Ngor Engelin* [2004] 4 SLR 330 at [43], Lai Kew Chai J reiterated that "the intention which courts will attribute to a person is always that which that person's conduct and words amount to when reasonably construed by a person in the position of the offeree, and not necessarily that which was present in the offeror's mind".

Secondly, the dealmaker falsely believes that, by some remarkable telepathy, his counterpart is of the same mind on all unspoken issues. Thirdly, on issues discussed, he believes that his counterpart will honour the spoken word against all threats to life, and more importantly, career.

3 In *Full Fledge Holdings Ltd v Wisanggeni Lauw*, Kan Ting Chiu J observed that:[3]

> This case would not be necessary if the parties had put their agreements into writing or engaged lawyers to do it for them.

An encouraging phrase for hardworking draftsmen, but maybe too kind on a lawyer's power of elucidation. There are more things on heaven and earth than are thought of in the solicitor's Forms and Precedents.

4 At worst, ambiguity can result in there being no agreement at all. At best, parties, their lawyers and the courts are left scrambling to make sense out of the document.

I. Where there is no binding contract

5 There are two competing considerations when the courts are faced with an ambiguous document. On the one hand, the court will strive to uphold an agreement, to give it legal effect. Tan Lee Meng J in *Grossner Jens v Raffles Holdings Ltd* elucidates:[4]

> Depending on circumstances, negotiating parties may enter into a binding contract even though there are a few terms which have yet to be agreed upon. This was recently reiterated by the Court of Appeal in *The Rainbow Spring* [[2003] 3 SLR 362]. However, the position is very different where important terms have not been agreed upon for as Maugham LJ put it in *Foley v Classique Coaches Ltd* [1934] 2 KB 1 at 13, "unless all the material terms of the contract are agreed there is no binding obligation". In the present case, the parties did not reach agreement on crucial terms such as the remuneration for JG …

6 A stipulated mechanism for determining essential terms that have not been agreed can save what would otherwise be an invalid contract. Thus, in *Hillas and Co Limited v Arcos Limited*,[5] the House of Lords salvaged a contract to buy "100,000 Standards" by referring back to

3 [2004] SGHC 141 at [1].
4 [2004] 1 SLR 202 ("*Grossner Jens*") at [14].
5 (1932) 147 LT Rep 503.

the previous year's contract which referred to "standards softwood goods of fair specifications". By interpolating "fair specifications" into the current contract, the House of Lords found that there was an objective standard within the timber trade for assessing the kinds, qualities and sizes of the goods.

7 The common law approach is not that unusual. Article 2.1.14 of the UNIDROIT Principles of International Commercial Contracts 2004[6] provides that a contract can be valid even if parties intentionally leave a term open to be decided later, provided there is an alternative means of rendering the term definite.

8 In sale of goods contracts, s 8(2) Sale of Goods Act (Cap 393, 1999 Rev Ed) comes to the rescue by providing a "reasonable price" where the parties have not agreed on the price, nor fixed a manner for its determination or have a course of dealing in which the price can be determined.[7]

9 Similarly, Art 55 of the United Nations Convention on Contracts for the International Sale of Goods ("CISG"),[8] provides that where a contract has been validly concluded but does not expressly or implicitly fix or make provision for determining the price, the parties are considered to have impliedly made reference to "the price generally charged" at the time of contract for such goods. This provision, though, is

6 The UNIDROIT Principles 2004 are an enlargement rather than revision of the UNIDROIT Principles 1994, which the Working Group had found to be successful. These are a set of recommended principles put together by a Working Group represented by jurists from all the major legal systems and regions of the world. They are not part of Singapore law as such. But they can apply if parties agree to have their contracts governed by them or by general principles of law or the *lex mercatoria*, or more unusually, if parties have not chosen any law to govern their contract. This last possibility is highly remote in Singapore because the courts strive to find an implied choice of law when it has not been expressed. In the absence of a choice of law, the courts will apply the law of the country with which the contract is most closely connected.

7 In *May and Butcher, Limited v R* [1934] 2 KB 17, the English Court of Appeal held that parties could not agree to agree on the price, and the test of reasonable price in the Sale of Goods Act would not avail parties to save such an agreement. But the strictness of this rule is mitigated in *Foley v Classique Coaches, Limited* [1934] 2 KB 1 where the Court of Appeal applied the reasonable price test to uphold an agreement to buy petrol "at a price agreed by the parties from time to time".

8 Part of Singapore law by virtue of the Sale of Goods (United National Convention) Act (Cap 283A, 1996 Rev Ed).

a source of controversy in itself, as the price is one of the important factors for the formation of contract under Art 14.[9]

10 On the other hand, it is not the role of the court to write the contract for the parties. If crucial terms are not agreed and there is no means of determining such terms, there will be no binding contract.[10] The concept of "reasonableness" is not a panacea for sloppiness. It is open to the court to interpret the lack of certainty as lack of contractual intention. In *Baird Textiles Holdings Ltd v Marks & Spencer plc*,[11] Mance LJ reaffirmed the conditions for a contract's existence: (a) an agreement on essentials with sufficient certainty to be enforceable; and (b) an intention to create legal relations. In that case, the lack of agreement on essentials indicated that neither party could objectively be taken to have intended to make any legally binding commitment. In *Grossner Jens*,[12] the lack of agreement on the remuneration of the broker led the judge to find that there was no binding contract.

11 A particularly sensitive period lies between the initial understanding and the formalisation of the contract by a full written form. If the terms are agreed and the written document is just a formality, there is no problem finding that a contract exists. The question is whether the intended documentation is just a formality, or a condition for the existence of a contract.

12 In *Tan Yeow Khoon v Tan Yeow Tat (No 1)*,[13] MPH Rubin J found that all the essential terms had been settled and what remained to be finalised was the device or mechanism to set those terms in train. An agreement to execute a formal agreement did not prevent there being a valid and concluded agreement in the meantime. In *The Rainbow Spring*,[14] the Court of Appeal held that a charterparty was established by telex exchanges, even though no formal charterparty was executed and minor terms had not yet been decided. In contrast, the Court of Appeal

9 For a summary of decisions that attempt to grapple with these two apparently contradictory provisions, see UNCITRAL Digest of case law on the United Nations Convention on the International Sale of Goods, A/CN.9/SER.C/DIGEST/CISG/14, paras 14–16. Excellent resources on the CISG can also be found at http://www.cisg.law.pace.edu.

10 For a discussion on what are "essential terms", see *Pagnan SpA v Feed Products Ltd* [1987] 2 Lloyd's Rep 601 at 619, *per* Lloyd LJ.

11 [2002] 1 All ER (Comm) 737.

12 *Supra* n 4.

13 [2000] 3 SLR 341.

14 [2003] 3 SLR 362.

in *Compaq Computer Asia Pte Ltd v Computer Interface (S) Pte Ltd*[15] held that a letter awarding a tender contract "subject to final terms and conditions being agreed" showed that parties did not intend to have a binding contract at that stage. In *Compaq Computer,* the essential terms had also not been agreed yet.

13 What effect a phrase has depends on its context, but when parties say "subject to contract", that has a more unsettling effect.

14 In *Burby, Mark v Koo Khin Yong*,[16] a signed term sheet (investment agreement) was qualified "subject to contract". Judith Prakash J considered the authorities, including the Court of Appeal decision in *Compaq Computer* and summarised the position thus:[17]

> The conclusion to be drawn from the case law therefore, is that a document containing the clause "subject to contract" will, *prima facie*, not constitute a binding obligation unless there are exceptional circumstances that show that the *prima facie* implication must be displaced. The person who asserts that the *prima facie* implication is not applicable is the one who must prove it. In this case therefore, the onus of establishing the contractual status of the Term Sheet lies on the plaintiff.

15 On the facts, the learned judge held that the plaintiff had not proved the contractual status of the Term Sheet, even though it was signed. The judge found that:[18]

> [I]t set out the overall scheme of the arrangement between the parties that would fall into place when the shareholders' agreement and the subscription agreement were executed. It was intended as a guide for the detailed contents of these documents that would form the binding obligation between all parties concerned.

16 In the shipping context, English case law recognises that "*sub details*" or "subject to details" have a similar meaning to "subject to contract", especially in the sale of ships as well as the fixing of charterparties. There is usually no binding contract until the details have been agreed.[19] In Singapore, "subject to details" featured in *Pacific Orient*

15 [2004] 3 SLR 316 ("*Compaq Computer*").
16 [2004] SGHC 194.
17 *Ibid* at [42].
18 *Id* at [56].
19 *Thoresen & Co (Bangkok) Ltd v Fathom Marine Company Ltd* [2004] 1 Lloyd's Rep 622 at 626.

Sea Transport Pte Ltd v The Owners of the ship or vessel "Ever Wealthy".[20] The parties had agreed by telex on a charter of the specific ship for a voyage of 80 days between a range of specified ports at a stated daily rate, subject to further agreement on three items, *ie* charterparty details, bunkers and board approval. On the facts, Judith Prakash J found that the board approval had been obtained and the details agreed subsequently. She further held that the fact that parties had not worked out the subject of bunkers in the charterparty did not prevent the existence of a binding charterparty contract.

17 It is clear that where the existence of a contract is in issue, extrinsic facts play a large part in providing the answer. In fact, in *Mohamed Bassatne v Rifaat El Gohary*,[21] Lai Siu Chiu J looked to the subsequent conduct of the parties. In this case, however, she seems to have proceeded on an estoppel by convention, where parties cannot deny the truth of an assumption on which they have acted, if it would be unjust to allow them to go back on it.[22] The question is, can subsequent conduct short of an estoppel assist the court in determining the existence, or otherwise, of a contract?

18 The answer seems to be "yes", but only if the document being deciphered is not a complete record of the parties' intention. In *Compaq Computer*,[23] the Court of Appeal accepted that the subsequent conduct of the parties should not be taken into account in the *construction* of a document, but "this principle does not apply to determine whether a document evidenced a contract, *where such document is not the whole of the contract*".[24] In *MAE Engineering Ltd v Fire-Stop Marketing Services Pte Ltd*,[25] the Court of Appeal reaffirmed that the court may not look at the subsequent conduct of parties to interpret a written agreement except when variation or estoppel is in issue.[26] There is nothing controversial about this, but the Court of Appeal was equally emphatic in *The Epic*,[27] where the question pertained to the existence of a contract. In that case, the plaintiffs argued against the existence of a collateral contract based on

20 [2000] SGHC 101.
21 [2004] SGHC 63.
22 See also *Amalgamated Investment & Property Co Ltd v Texas Commerce International Bank Ltd* [1982] QB 84.
23 *Supra* n 15.
24 *Ibid* at [28] (emphasis added). See also *Wilson v Maynard Shipbuilding Consultants AB* [1978] QB 665*; Mears v Safecar Security Ltd* [1983] QB 54.
25 [2005] 1 SLR 379.
26 *Ibid* at [41].
27 [2000] 3 SLR 735.

an exchange of telexes, by referring to subsequent telexes between the parties that allegedly showed that the plaintiffs did not accept the defendants' terms. The Court of Appeal rejected this:[28]

> If the contract had been made, the subsequent telexes of [the plaintiff's agent] could not unmake or alter it unilaterally.

19 On the other hand, the High Court in *Seow Kim Koi v Wei Yin Chen*[29] has held that it is permissible under proviso (*a*) of s 93 Evidence Ordinance (Cap 4, 1955 Rev Ed) (now s 94 Evidence Act (Cap 97, 1997 Rev Ed)) to look at extraneous circumstances to see whether there is in fact a real contract or merely a sham document. If subsequent conduct will demonstrate the document to be a sham, will it be admissible under *Seow Kim Koi* or excluded by *The Epic*? One can rationalise that the Court of Appeal in *The Epic* did not have in mind evidence that the document was just a fictitious device. The subject of its disapproval seemed to be the *unilateral* attempt to unmake a contract.

II. Where there is a binding contract

20 The parol evidence rule is more prominent when there is a binding contract. This can be considered an amalgamation of three rules:

> (a) The first is the "best evidence rule", namely that the contents of a document should be proved by production of the document, not by secondary evidence.
>
> (b) The second rule prohibits admission of extrinsic evidence to contradict, vary, add to or subtract from the terms of a document.
>
> (c) The third rule deals with the admission of extraneous facts in aid of the interpretation of documents.

21 Another view is that the parol evidence rule is simply a circular proposition of law that "when it is proved or admitted that the parties to a contract intended that all the express terms of their agreement should be as recorded in a particular document or documents, evidence will be inadmissible (because irrelevant) if it is tendered only for the purpose of

28 *Ibid* at [38].
29 [1965–1968] SLR 797 ("*Seow Kim Koi*").

adding to, varying, subtracting from or contradicting the express terms of that contract."[30]

22 How the doctrine is described is less important than how it applies in practice. The reductionist approach, breaking it up into the three rules above, is favoured here to facilitate discussions, Our focus is on the second and third rules. In Singapore, all three rules find expression in ss 93 to 101 of the Evidence Act.

23 By right, our statute should be the first reference point, but whether the whole baggage of the common law rule is codified is a difficult question. Indeed, the common law principles evolve. Our ss 93 to 101 have not. To apply the words that the Privy Council used in considering the criminal burden of proof in *Jayasena v The Queen*:[31]

> The common law is malleable to an extent that a code is not. … The [Evidence Ordinance] embodied the old criminal law and cannot be construed in the light of a decision that has changed the [common] law.

24 Section 2(2) Evidence Act reads as follows:

> All rules of evidence not contained in any written law, so far as such rules are inconsistent with any of the provisions of this Act, are repealed.

25 This is commonsensical. The Privy Council in *Mahomed Syedol Ariffin v Yeoh Ooi Gark* pronounced that:[32]

> [T]he acceptance of a rule or principle adopted in or derived from English law is not permissible if thereby the true and actual meaning of the statute under construction be varied, or denied effect.

In that case, the Privy Council held that the English hearsay rule could not displace a provision in the Evidence Ordinance specifically admitting certain statements.

26 On the other hand, it has been said that the Evidence Act is not complete, and may be supplemented by the common law. In *PP v*

30 The Law Commission of England and Wales Report on *The Parol Evidence Rule* (Law Com No 154), at para 2.7. In its earlier Working Paper on *The Parol Evidence Rule* (Law Com No 70), it had divided the rule into the three sub-rules mentioned.

31 [1970] AC 618 at 625 *per* Lord Devlin.

32 [1916] 2 AC 575 at 581 *per* Lord Shaw of Dunfermline.

Yuvaraj,[33] the Privy Council applied the common law distinction between criminal and civil burden of proof, even though the statute did not distinguish between the two. But if the Evidence Act neither prohibits nor allows a type of evidence, can we apply the common law to exclude it? No case law authoritatively pronounces on this issue. On the flip side of the coin, Prof Andrew Phang, in *Cheshire, Fifoot & Furmston's Law of Contract*,[34] suggests that common law exceptions to the parol evidence rule apply if not inconsistent with the Evidence Act. After his elevation to the Bench, Andrew Phang Boon Leong JC had opportunity to confirm this view.[35]

27 Another general point to note about the Evidence Act is that it does not apply to arbitrations. Section 2(1) Evidence Act provides that it applies to "all judicial proceedings in or before any court, but not to affidavits presented to any court or officer nor to proceedings before an arbitrator". This provision was not cited in *Digital Dispatch (ITL) Pte Ltd v Citycab Pte Ltd*[36] where Judith Prakash J held that an arbitrator had obviously erred in law by admitting parol evidence to interpret certain terms of a contract. As s 2(1) was not discussed, it is uncertain if the learned judge intended common law to fetter an arbitrator, who is not bound by the Evidence Act, in his approach to evidence.

28 We shall now look at the statutory provisions on parol evidence.

A. Section 93

29 The first rule, which is the "best evidence rule", is not the subject of this paper. It is contained in s 93 Evidence Act, which provides that when terms are reduced to the form of a document, no evidence is admissible of its terms except the document itself. Secondary evidence of its contents can be given only where secondary evidence is admissible under the Evidence Act.

33 [1969] 2 MLJ 89.

34 (Butterworths Asia, 2nd Singapore and Malaysian Ed, 1998), pp 244–246.

35 *China Insurance Co (Singapore) Pte Ltd v Liberty Insurance Pte Ltd* [2005] SGHC 40 ("*China Insurance*") at [41] and [53]. Andrew Phang JC in that case had in mind the common law "exception" of the factual matrix. Interestingly, while he acknowledged that proviso (*f*) to s 94 is analogous to the common law factual matrix, he limited the application of proviso (*f*) to a situation where the terms of the contract are ambiguous – see discussion at para 63 of the main text at below.

36 [2003] SGHC 6.

B. Section 94

30 The second rule prohibits admission of extraneous facts to contradict the express terms in the document.[37] Section 94 is rather lengthy, with six substantive provisos and ten illustrations. The main body of s 94 reads as follows:

> When the terms of any such contract, grant or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to section 93, no evidence of any oral agreement or statement shall be admitted as between the parties to any such instrument or their representatives in interest for the purpose of contradicting, varying, adding to, or subtracting from its terms subject to the following provisions …

31 A few points can be made on the section. We can start with semantics. "Oral" is not limited to just that which is spoken, but includes an unwritten agreement implied from the acts and conduct of the parties. It is not as wide as "parol" however, because the words "parol evidence" describe all evidence extraneous to the document itself, including all documents and correspondence other than those constituting the transaction in issue, or incorporated therein by reference.[38] So, one immediately starts off on the wrong foot if one treats s 94 as the equivalent of the common law "parol evidence" rule.

32 Section 94 only disallows oral evidence for the purpose of "contradicting, varying, adding to, or subtracting from its terms".[39] It does not rule out extrinsic evidence that can co-exist with the terms stated on the document. In *Mario-Ville Boarding House Pte Ltd v Pulau Properties Pte Ltd*,[40] a third party was allowed to prove that he was the undisclosed principal of the tenant who signed the document, so that he also obtained rights as an undisclosed principal. The court held that such evidence did not contradict the tenancy, as it was not a denial that the signatory was a tenant and had obligations as such.[41]

37 Sections 93 and 94 complement each other. In fact, s 94 has been said to be also based on the best evidence rule – see the judgment of the Malaysian High Court in *Datuk Tan Leng Teck v Sarjana Sdn Bhd* [1997] 4 MLJ 329 at 341.

38 *Sarkar on Evidence* (Wadhwa and Company, 15th Ed, 1999) vol 1 p 1327.

39 Furthermore, it seems that only terms may not be contradicted. Statement of facts can be contradicted: *Shah Lal v Indrajit* 27 IA 93; 22 A 370.

40 [1996] 1 SLR 394.

41 *Ibid* at 399, [13].

33 Judith Prakash J in *Smart Modular Technologies v Federal Express (Singapore) Pte Ltd*[42] took a broader approach where the identity of the contracting parties was in question. The learned judge held that the parol evidence rule had no application where the enquiry involved questions of agency and undisclosed principal. Sections 93 and 94 only "exclude parol evidence relating to the meaning of *terms* of documents but do not exclude evidence relating to the identification of *parties* to such documents".[43]

34 The section applies only where all terms are written into the agreement.[44] It is not always easy to know whether a document purports to contain all the terms of the agreement. One might even argue that this is a circular question: If all the terms were contained in the document, one would not be looking at additional terms anyway.[45] On a practical level, though, the enquiry really is whether the document *looks* like a complete contract, or whether it resembles a short note or memorandum that clearly contemplates additional terms to be found elsewhere. In the words of Prof Lord Wedderburn:[46]

> What the parol evidence rule has bequeathed to the modern law is a presumption – namely that a document which *looks* like a contract is to be treated as the *whole* contract. [emphasis in original]

For example, a one-liner stating the purchase of a horse from a named seller for a stated price was held to be just a memorandum that did not exclude the admission of other terms such as an oral warranty.[47] Illustration (*h*) to s 94 gives two contrasting scenarios that seem to have precisely this approach in mind:

> *A* hires lodgings of *B* and gives *B* a card on which is written: "Rooms $80 a month." *A* may prove a verbal agreement that these terms were to include partial board.

42 [2004] 3 SLR 473. In *Mohamed Bassatne v Rifaat El Gohary*, *supra* n 21, Lai Siu Chiu J also looked at extrinsic evidence to identify the parties to the contract, but she referred only to common law.

43 *Supra* n 42, at [22] (emphasis in original).

44 *Damu Jadhao v Paras Nath Singh* [1965] 2 MLJ 38.

45 For a more comprehensive treatment, see Treitel, *The Law of Contract* (Sweet & Maxwell 11th Ed, 2003), pp 193–194.

46 "Collateral Contracts" [1959] CLJ 58 at 62; cited with approval in the Law Commission Report on *The Parol Evidence Rule*, *supra* n 30, at para 2.13, although the Law Commission cautioned at the same time that the court does not really apply any presumption of law. Rather, it judges the intention of the parties objectively.

47 *Allen v Pink* (1838) 4 M&W 140; 150 ER 1376.

> *A* hires lodgings of *B* for a year, and a regularly stamped agreement drawn up by an attorney is made between them. It is silent on the subject of board. *A* may not prove that board was included in the terms verbally.

35 The clarity of the second illustration is diminished somewhat by *De Lassalle v Guildford*.[48] There, the English Court of Appeal admitted evidence of a verbal warranty regarding the condition of drains where the formal lease document was entirely silent about the drains. The court reasoned that the lease did not contain the whole contract between the parties. This decision is best treated as one on a collateral contract co-existing with the principal contract.[49]

36 When a document is something that is required to be in writing, the enquiry is rather straightforward. Evidence of oral evidence to vary the instrument is simply inadmissible. For example, an option to purchase land is a "contract, grant or other disposition of property" that is required to be in writing and cannot be varied by an oral agreement.[50]

37 In *Datuk Tan Leng Teck v Sarjana Sdn Bhd*,[51] the Malaysian High Court held that the operation of s 94 is limited to bilateral and dispositive documents. In other words, it does not apply to unilateral, non-dispositive documents like police reports or the depositions of witnesses. This case was cited with approval in the Singapore High Court decision of *China Insurance*.[52]

38 Common law doctrines can apparently continue to operate, where they are not in conflict with the statutory provisions. Hence, in *Chuan Hong Petrol Station Pte Ltd v Shell Singapore (Pte) Ltd*,[53] Warren L H Khoo J allowed promissory estoppel to be raised:[54]

48 [1901] 2 KB 215.

49 The court treated the verbal warranty as a collateral agreement to the lease. See discussion below under proviso (*b*), s 94 Evidence Act.

50 *Teo Siew Peng v Guok Sing Ong* [1982–1983] SLR 128.

51 [1997] 4 MLJ 329. The Malaysian High Court preferred the Federal Court's decision in *PP v Datuk Haji Harun bin Haji Idris* [1977] 1 MLJ 180 over that of another Federal Court decision in *Ah Mee v PP* [1967] 1 MLJ 220. This distinction is not always obvious, or material, in common law: see *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] AC 749 where the House of Lords grappled with a unilateral notice to quit a tenancy.

52 *Supra* n 35, at [34]. Section 93, in contrast, applies to both bilateral and unilateral and dispositive and non-dispositive documents.

53 [1992] 2 SLR 729.

54 *Ibid* at 739, [59].

> The doctrine of promissory estoppel does not seek to contradict, vary, add to or subtract from the terms of a contract. In fact, it presupposes and recognizes the existence of the terms of a contract. It only operates to prevent a party having the benefit of terms of a contract from enforcing them if the conditions for the operation of the doctrine are fulfilled.

39 Perhaps this doctrine can even be introduced under proviso (*a*) of s 94, which allows facts to be proved that would entitle any person "to any decree or order relating" to the document. That brings us to the provisos, which set out the evidence that may be adduced notwithstanding the general caveat in the main text.

(1) Proviso (a)

40 Proviso (*a*) deals with vitiating factors:

> [A]ny fact may be proved which would invalidate any document or which would entitle any person to any decree or order relating thereto; such as fraud, intimidation, illegality, want of due execution, want of capacity in any contracting party, the fact that it is wrongly dated, want or failure of consideration, or mistake in fact or law.

Illustrations (*d*) and (*e*) demonstrate how this proviso works:

> (*d*) *A* enters into a written contract with *B* to work certain mines, the property of *B*, upon certain terms. *A* was induced to do so by a misrepresentation of *B* as to their value. This fact may be proved.
>
> (*e*) *A* institutes a suit against *B* for the specific performance of a contract, and also prays that the contract may be performed as to one of its provisions on the ground that that provision was inserted in it by mistake. *A* may prove that such a mistake was made as would by law entitle him to have the contract performed.

41 In *Seow Kim Koi*,[55] the High Court held that s 93 of the Evidence Ordinance (the predecessor to our s 94) did not exclude evidence showing that the document was never intended to operate as a contract but was only a fictitious device to cloak something else.

(2) Proviso (b)

42 Proviso (*b*) allows collateral contracts to be proved:

55 *Supra* n 29. But see discussion above on inadmissibility of subsequent conduct.

> [T]he existence of any separate oral agreement, as to any matter on which a document is silent and which is not inconsistent with its terms, may be proved; in considering whether or not this proviso applies, the court shall have regard to the degree of formality of the document.

43 The principles governing collateral contract are summarised by Belinda Ang J in *Lemon Grass Pte Ltd v Peranakan Place Complex Pte Ltd*:[56]

> A collateral contract is an agreement distinct from the main contract. A court must therefore find all the usual legal requirements of a contract having been fulfilled with respect to the collateral agreement before it can be enforced.
>
> What this means is that the statement purporting to be the contractual promise in such a collateral contract must be promissory in nature or effect rather than representational: *De Lassalle v Guildford* [1901] 2 KB 215; [1900–3] All ER Rep 495; *Wells (Merstham) v Buckland Sand and Silica Co* [1965] 2 QB 170; [1964] 1 All ER 41; *Esso Petroleum Co v Mardon* [1976] QB 801 at 826. The plaintiffs must establish the agreement of the parties to its terms. Thus, to succeed in a claim founded on a collateral contract, the plaintiffs have to prove certainty of the terms.
>
> It is for the party seeking to rely upon the collateral contract who has to bear the burden of establishing that both parties intended to create a legally binding contract: Ralph Gibson LJ in *Kleinwort Benson v Malaysia Mining Corp* [1989] 1 All ER 785 at 796.
>
> They must also establish consideration, which in the case of a collateral contract is easy to prove. All that is required is the promisee [the plaintiffs] entering or promising to enter into a principal contract with the promisor [the defendants]. …
>
> Even if a different view is taken on the question of the existence of a collateral contract, the collateral agreement (again on the assumption that the alleged statements were made), could not stand consistently with the main written agreement and for that reason, could not be enforced: s 94(b) Evidence Act.

44 On the last point, it is important to bear in mind that proviso (*b*) of s 94 Evidence Act requires consistency between the separate oral agreement and the terms of the document. Yong Pung How CJ, delivering

56 [2002] 4 SLR 439 at [116]–[119] and [126].

the judgment of the Court of Appeal in *Latham v Credit Suisse First Boston* said:[57]

> In our judgment, [s 94(b)] could not operate to admit evidence of the verbal agreement either as a collateral contract or as forming part of the terms of a part oral, part written contract. Section 94(b) only allows the admission of evidence of a collateral contract on matters which are not inconsistent with the written agreement. Where the alleged terms of the oral agreement are in addition to and therefore inconsistent with the written contract, that evidence is inadmissible: *Ng Lay Choo Marion v Lok Lai Oi* [1995] 3 SLR 221.

45 This was overlooked in the Malaysian case of *Tan Swee Hoe Co Ltd v Ali Hussain Bros*[58] but that case is suspect and was not followed by the Singapore Court of Appeal in *Latham v Credit Suisse First Boston*. Illustration (*b*) to the section makes it quite clear:

> *A* agrees absolutely in writing to pay *B* $1,000 on 1st March 1893. The fact that at the same time an oral agreement was made that the money should not be paid till 31st March cannot be proved.

46 The ride does not end here, because we still have s 101 Evidence Act. This provision allows a third party to give evidence of any fact tending to show a contemporaneous agreement varying the terms of the document. The illustration to the section refers to an oral agreement that contradicts a written contract. Evidence of this oral agreement cannot be shown between the parties but can be shown by the third party if it affects his interests. Section 101 and its illustration read as follows:

> Persons who are not parties to a document or their representatives in interest may give evidence of any fact tending to show a contemporaneous agreement varying the terms of the document.
>
> *Illustration*
>
> *A* and *B* make a contract in writing that *B* shall sell *A* certain tin to be paid for on delivery. At the same time they make an oral agreement that 3 months' credit shall be given to *A*. This could not be shown as between *A* and *B*, but it might be shown by *C* if it affected his interests.

57 [2000] 2 SLR 693 at [21]. Phang JC, in *China Insurance*, *supra* n 35, at [43]–[44], pointed out that common law admits collateral contracts that are inconsistent with the main contract, but this is not allowed under s 94(*b*).

58 [1980] 2 MLJ 16.

47 The door seems open to a third party to rely on a collateral contract which varies the terms of written agreement between the two contracting parties. On a more general note, in *China Insurance*,[59] Phang JC held that s 94 and the prohibitions therein applied only "as between the parties" to the instruments, and did not preclude strangers to the particular instruments from adducing extrinsic evidence.

(3) Proviso (c)

48 Proviso (*c*) deals with condition precedents:

> [T]he existence of any separate oral agreement constituting a condition precedent to the attaching of any obligation under any such contract, grant or disposition of property, may be proved.

49 Illustration (*j*) to s 94 gives an example of a condition precedent:

> *A* and *B* make a contract in writing to take effect upon the happening of a certain contingency. The writing is left with *B*, who sues *A* upon it. *A* may show the circumstances under which it was delivered.

50 The Court of Appeal in *Latham v Credit Suisse First Boston* took the opportunity to clear up some confusion between a collateral contract and a condition precedent:[60]

> Condition precedents and collateral contracts are different legal creatures. Collateral contracts constitute an independent contract from the written agreement. In contrast, the condition precedent to an agreement is one where the parties have agreed that the written contract does not take effect until the fulfilment of a certain condition. It has been pointed out by the editor of *Cheshire, Fifoot and Furmston's Law of Contract*, Second Singapore and Malaysian edition, that the applicable exception in s 94 in relation to collateral contracts is s 94(b). A proper interpretation of s 94(c) of the Evidence Act indicates that it is only applicable to condition precedents.

51 Another interesting distinction between the two concepts is that, unlike proviso (*b*) on collateral contracts, proviso (*c*) on condition precedents does not impose a requirement that the condition precedent must not be inconsistent with the terms of the main agreement.

59 *Supra* n 35, at [31].
60 *Supra* n 57, at [19].

52 In *Somerset Investments Pte Ltd v Far East Technology International Ltd*,[61] the defendant failed to prove a collateral agreement on the facts. The defendant also failed on an alleged condition precedent of its liability to the plaintiff because the judge found that this alleged condition was inconsistent with the terms of the subject guarantee. Proviso (*b*) of s 94 was not cited. It is not clear if the allegation failed because the judge did not believe that there could be such a condition precedent in the light of the unambiguous wording of the principal document, or because evidence of such a condition was inadmissible. The only clear lesson from this case is that one should not let sleeping words lie in the main document if there is a contrary intention.[62]

(4) Proviso (d)

53 The subsequent conduct of parties, short of estoppel or a new agreement, is generally of no help in the construction of a contract.[63] Proviso (*d*) admits oral agreements *subsequent* to the instrument to be proved, unless the instrument is required by law to be in writing:

> [T]he existence of any distinct subsequent oral agreement, to rescind or modify any such contract, grant or disposition of property, may be proved except in cases in which such contract, grant or disposition of property is by law required to be in writing, or has been registered according to the law in force for the time being as to the registration of documents.

54 An option to purchase property, for instance, is an instrument required in law to be in writing.[64]

(5) Proviso (e)

55 Proviso (*e*) admits custom:

> [A]ny usage or custom by which incidents not expressly mentioned in any contract are usually annexed to contracts of that description may be

61 [2004] 3 SLR 46.

62 For other cases on collateral contracts, see *Sigma Cable Co Ltd v Nam Huat Electric & Sanitary Co* [1969–1971] SLR 574; *Exklusiv Auto Services Pte Ltd v Chan Yong Chua Eric* [1996] 1 SLR 433 *cf. Lee Heng & Co v C Melchers & Co* [1963] MLJ 47; *Tan Chong & Sons Motor Company (Sdn) Berhad v Alan McKnight* [1983] 1 MLJ 220; *Gek Lau Choon Theatrical Company v Hu Kiang Yan* [1937] MLJ 25.

63 *Standard Chartered Bank v Neocorp International Ltd* [2005] SGHC 43 at [44]; citing with approval *James Miller & Partners Ltd v Whitworth Street Estates (Manchester) Ltd* [1970] AC 583, at 603, *per* Lord Reid.

64 *Teo Siew Peng v Guok Sing Ong*.

> proved; except that the annexing of such incident would not be repugnant to or inconsistent with the express terms of the contract.

56 The oft-cited English case where "1,000 rabbits" actually meant "1,200 rabbits" might not find favour here.[65] There, custom or usage was admitted to show a particular meaning to the words used, but proviso (*e*) allows admission of any usage or custom only where it would not be "repugnant to or inconsistent with the express terms of the contract".

57 Illustration (*c*) highlights this:

> An estate called "the Kranji Estate" is sold by a deed which contains a map of the property sold. The fact that land not included in the map had always been regarded as part of the estate and was meant to pass by the deed cannot be proved.

58 In *Cheng Keng Hong v Government of the Federation of Malaya*, the Malaysian High Court observed the requirement of the proviso that the usage or custom must be consistent with the contract.[66] Note, however, that the proviso specifically refers to the *express* terms of the contract. Raja Azlan Shah J in *Cheng Keng Hong*, on the other hand, merely adopted wholesale the common law position in *London Export Corporation Ltd v Jubilee Coffee Roasting Co Ltd*.[67] The common law principle applied by Jenkins LJ in that case[68] was that the custom could only be incorporated if "there is nothing in the express or necessarily *implied* terms of the contract to prevent such inclusion" and the custom must be consistent "with the tenor of the document as a whole".

59 The difference between proviso (*e*) and the test promulgated by Jenkins LJ is not merely semantical. It is conceivable that a custom that is consistent with an express term is nonetheless inconsistent with an implied term.

(6) Proviso (f)

60 Proviso (*f*) is different from the other provisos in that it does not deal with facts that add to the terms or otherwise vary the contract:

65 *Smith v Wilson* (1832) 3 B & Ad 728; 110 ER 266.
66 [1966] 2 MLJ 33 ("*Cheng Keng Hong*").
67 [1958] 1 WLR 661.
68 *Ibid* at 675 (emphasis added).

> [A]ny fact may be proved which shows in what manner the language of a document is related to existing facts.

61 Proviso (*f*) permits extrinsic evidence to be led on the factual context of the words used.[69] Some cases have added a condition that the extrinsic evidence may be led only where the terms of the document are ambiguous.[70] This condition is neither stipulated in proviso (*f*) of s 94, nor is it required now in common law. Even in pre-modern times, Erskine J in *Shore v Wilson* pronounced that:[71]

> [I]n all cases, even where the words are in themselves plain and intelligible, and even where they have a strict legal meaning, it is always allowable, in order to enable the Court to apply the instrument to its proper object, to receive evidence of the circumstances … not for the purpose of giving effect to any intention of the writer not expressed in the deed, but for the purpose of ascertaining what was the intention evidenced by the expressions used …

62 Lord Wilberforce's words in *Prenn v Simmonds*[72] are often cited:

> The time has long passed when agreements, even those under seal, were isolated from the matrix of facts in which they were set and interpreted purely on internal linguistic considerations. … We must … inquire beyond the language and see what the circumstances were with reference to which the words were used, and the object, appearing from those circumstances, which the person using them had in view.

63 It is submitted that ambiguity should not be a pre-condition to looking at the factual context. After all, the court will look at extrinsic materials to assist the interpretation of statutory provisions even in the absence of ambiguity.[73] There is no compelling policy reason to treat the

69 For examples of this proviso in operation, see *Diversey (Far East) Pte Ltd v Chai Chung Ching Chester* [1993] 1 SLR 535, *Wong Kai Chung v Automobile Association of Singapore* [1993] 2 SLR 577.

70 *Citicorp Investment Bank (Singapore) Ltd v Wee Ah Kee* [1997] 2 SLR 759 ("*Citicorp Investment*"); *Tan Hock Keng v L & M Group Investments Ltd* [2002] 2 SLR 213.

71 (1842) 9 Cl & Fin 355 at 512–513; 8 ER 450 at 513.

72 [1971] 1 WLR 1381 at 1383–1384.

73 *The Seaway* [2005] 1 SLR 435.

interpretation of contracts differently.[74] In *MAE Engineering Ltd v Fire-Stop Marketing Services Pte Ltd*,[75] the Court of Appeal referred to the factual matrix without any mention that the words were ambiguous, citing *Prenn v Simmonds, infra,* amongst other authorities in support.[76] But the position remains uncertain. In *China Insurance Co v Liberty Insurance*, Andrew Phang Boon Leong JC drew a distinction between the common law factual matrix and s 94(*f*). While he preferred the view that ambiguity in the contracts is not a pre-requisite to looking at the factual matrix, he considered it clear that s 94(*f*) only comes into play when there is some latent ambiguity in the document.[77] In any case, the factual context can only be used as an aid to construction, not to vary or contradict the document.[78]

64 The licence to refer to "factual background" does not admit evidence of negotiations.[79] In *Keng Huat Film Co Sdn Bhd v Makhanlall (Properties) Pte Ltd*, the Malaysian Federal Court distinguished between evidence of negotiations, which is inadmissible, and evidence of a previous lease, which is admissible as part of the factual background of the subsequent lease that was being construed.[80] The Singapore Court of Appeal took a similar approach in *MAE Engineering Ltd v Fire-Stop Marketing Services Pte Ltd*, distinguishing between negotiations and an antecedent agreement.[81] In *MCST Plan No 1933 v Liang Huat Aluminium Ltd*,[82] the majority of the Court of Appeal also outrightly rejected the admissibility of discussions and negotiations in construing a deed of assignment.[83] The dissenting judge, Chao Hick Tin JA, held that it was permissible to look at objective facts which indicated the "aim" of the

74 *Chitty on Contracts* (Sweet & Maxwell, 28th Ed, 1999) at para 12-116 explained that the older, restrictive view has been replaced by a modern view, which does not require that the words be ambiguous before extrinsic evidence will be admitted. For an exhaustive critique of *Citicorp Investment*, *supra* n 70, see Daniel Seng, "Another Clog on the Construction of Contracts? The Parol Evidence Rule and the Use of Extrinsic Evidence" (1997) SJLS 457. For a more recent affirmation that a clear meaning on the face of the document does not prevent the court from looking at the background, see *Static Control Components (Europe) Ltd v Egan* [2004] 2 Lloyd's Rep 429 at 435.

75 *Supra* n 25.

76 *Ibid* at [23].

77 *Supra* n 35, at [51] and [53].

78 *Id* at [51]–[52]; see also *Standard Chartered Bank v Neocorp International Ltd*, *supra* n 63, at [35].

79 *Prenn v Simmonds*, *supra* n 72.

80 [1984] 1 MLJ 243.

81 *Supra* n 25, at [24].

82 [2001] 3 SLR 253.

83 *Ibid* at [10].

transaction, but he also accepted that evidence on pre-contract negotiations and subjective intention did not constitute the factual matrix and should be disregarded.[84]

65 While relatively straightforward, the exclusion of negotiations can still make for interesting discourse. Prof McKendrick discusses this topic in more detail in the same issue of this journal,[85] touching on *MCST Plan No 1933 v Liang Huat Aluminium Ltd* as well as the House of Lords decision in *Investors Compensation Scheme Ltd v West Bromwich Building Society.*[86] Here, we will focus on the statutory provisions.

66 In *Wong Wai Cheng v AG*,[87] F A Chua J upheld an arbitrator's decision to exclude evidence of pre-contract negotiations contained in letters exchanged before the signing of the formal contract. Chua J cited s 94 of the Evidence Act (then s 92). But the provision cited excludes "oral" agreements or statements to contradict, vary, add to or subtract from the terms of the contract. Section 94 itself does not exclude *written* statements that purport to do so. On the other hand, English common law does not draw such a distinction between written and oral negotiations: see the rationale for excluding negotiations in *Prenn v Simmonds*, *per* Lord Wilberforce:[88]

> The reason for not admitting evidence of these exchanges is not a technical one or even mainly one of convenience … It is simply that such evidence is unhelpful. By the nature of things, where negotiations are difficult, the parties' positions, with each passing letter, are changing and until the final agreement, though converging, still divergent. It is only the final document which records a consensus.

67 Is it then permissible to ignore the distinction for the purpose of applying s 94 Evidence Act? Can it be said that the common law exclusion of written negotiations is not inconsistent with s 94, when s 94 only excludes oral statements? Part of the problem is that the "factual matrix" proviso is found under s 94. Proviso (*f*) does not sit very well in s 94. The section provides that oral evidence cannot *contradict* a written agreement and every proviso save proviso (*f*) is an exception to this rule. Proviso (*f*), and the whole baggage of common law refinements pertaining to "factual

84 *Id* at [14].
85 "Interpretation of Contracts and the Admissibility of Pre-Contractual Negotiations" (2005) 17 SAcLJ 248.
86 [1998] 1 WLR 896.
87 [1978–1979] SLR 384.
88 *Supra* n 72, at 1384.

matrices" and negotiations, are more about *interpreting* the language of the written agreement.[89] Chua J's exclusion of negotiations in *Wong Wai Cheng v AG*,[90] regardless whether they are oral or written, might be justified on an unorthodox approach to statutory interpretation, if one reads proviso (*f*) divorced from the main text of s 94.

68 Section 96 Evidence Act is wide enough to exclude even written negotiations, if these purport to contradict the plain meaning of a contractual document. This provision, though, does not make up totally for the lacuna. Negotiations *in aid of interpreting* (as opposed to contradicting or varying) the contract are not the subject of any statutory provision, other than the general proviso (*f*) to s 94.[91]

69 It does not help that the vibrant common law continues to sprout exceptions and refinements. *The Karen Oltmann*[92] held that evidence of pre-contract communications is admissible to show an agreed meaning attached to ambiguous expressions in the contract. The Court of Appeal in *The Pacific Colocotronis*[93] was not content with this fine distinction, and enthusiastically declared that the pre-contract communication in that case, even if treated as negotiation, would still be admissible to explain a word used in the contract. Ironically, Eveleigh LJ drew comfort from that part in *Prenn v Simmonds* where Lord Wilberforce propounded the factual background approach to interpretation.[94] He inexplicably ignored the next page of the judgment where Lord Wilberforce ruled out the admissibility of negotiations.[95] *The Pacific Colocotronis* should therefore be read with caution, especially in Singapore where the negotiations exclusion has been consistently acknowledged.[96]

89 Chao Hick Tin JC (as he then was) in *Haji Aminah bte Bakri v Manisah bte Haji Bakri* [1988] SLR 898, recognised that background facts admitted under proviso (*f*) serve to clarify the meaning of a clause, and are not introduced to contradict, vary, add to or subtract from the contractual document.

90 *Supra* n 87.

91 It should also be noted that, for international sale of goods contracts, negotiations are admissible to determine the parties' intention: Sale of Goods (United Nations Convention) Act, *supra* n 8, Art 8(3).

92 [1976] 2 Lloyd's Rep 708.

93 [1981] 2 Lloyd's Rep 40.

94 *Supra* n 72, at 1383.

95 *Supra* n 93, at 44; see also *Static Control Components (Europe) Ltd v Egan*, *supra* n 74, at 433, where the Court of Appeal repeated that "[t]he law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent".

96 Most recently in *MAE Engineering Ltd v Fire-Stop Marketing Services Pte Ltd*, *supra* n 25.

70 Controversy also looms where parts of a standard form are struck out or amended in the course of negotiations. The House of Lords in *A & J Inglis v John Buttery & Co*[97] had held that the court could not look to words that had been deleted to assist in the construction of the contract, and it made no difference whether the words were entirely omitted in a contract that was re-typed, or were simply deleted by having a line drawn against them in the standard printed form. But the House of Lords in *Mottram Consultants Ltd v Bernard Sunley & Sons Ltd*,[98] *per* Lord Cross of Chelsea, held that:

> When the parties use a printed form and delete parts of it one can, in my opinion, pay regard to what has been deleted as part of the surrounding circumstances in the light of which one must construe what they have chosen to leave in.

C. Section 95

71 The third aspect of parol evidence relates to how evidence of matters extrinsic to the document might aid the interpretation of its terms. Statutory codification of this rule is found in ss 95 to 100 of the Evidence Act.

72 Section 95 excludes attempts to cure a patent ambiguity in a document by reference to extrinsic matters:

> 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.
>
> *Illustrations*
>
> (*a*) *A* agrees in writing to sell a horse to *B* for $500 or $600. Evidence cannot be given to show which price was to be given.
>
> (*b*) A deed contains blanks. Evidence cannot be given of facts which would show how they were meant to be filled.

97 (1878) 3 App Cas 552.

98 [1975] 2 Lloyd's Rep 197 at 209. In another House of Lords decision, Lord Reid thought that striking out words from a printed form merited different considerations from a normal pre-contract deletion: *Timber Shipping Co SA v London & Overseas Freighters Ltd (The London Explorer)* [1972] AC 1 at 15. A more detailed account of the conflicting authorities on deletion of words in printed forms is found in Kim Lewison, *The Interpretation of Contracts* (Sweet & Maxwell, 2nd Ed, 1997) pp 29–34.

73 An example of this is found in *Gladioli Investments Pte Ltd v Montien International Limited*,[99] where there were contradictory provisions on default interest rate in a share sale and purchase agreement. Choo Han Teck J rejected an attempt by the vendor's counsel to admit a memorandum of understanding signed between the vendor and purchaser for the purposes of understanding the apparently contradictory terms:[100]

> The Agreement appears to be a complete and conclusive agreement and was drawn up by solicitors. No extraneous document, be it a memorandum of understanding or a draft contract, should therefore be used for interpreting the manifest text of the Agreement because the parties must, unless expressly agreed otherwise, have intended that the written contract that they had signed to be the authoritative version. This is a principle endorsed in the law of evidence. Neither favour nor reassurance may be received from sources outside the text. Thus, in the circumstances, where the provision relating to the rate of interest payable (after judgment had been obtained) is ambiguous, the deputy registrar correctly ruled in favour of the judgment debtor. The ambiguity arose from the draftsmanship of the text prepared by the vendor's previous solicitors.

74 On the other hand, if the ambiguity is latent, extrinsic evidence might be led to clarify the terms of the document. Sections 97, 98 and 99 can be treated as examples of latent ambiguity. Section 96 is the prelude to these provisions.

D. Section 96

75 Section 96 provides that:

> 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.
>
> *Illustration*
>
> *A* conveys to *B* by deed "my estate at Kranji containing 100 hectares". *A* has an estate at Kranji containing 100 hectares. Evidence may not be given of the fact that the estate meant was one situated at a different place and of a different size.

99 [2003] SGHC 148.
100 *Ibid* at [7].

76 While it follows the trend in s 94 against contradiction of written terms, s 96 is also the converse of ss 97 to 99, which allow extrinsic evidence where the language is not plain or do not apply accurately to existing facts.

E. Section 97

77 Section 97 admits extrinsic evidence to resolve a latent ambiguity:

> 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.
>
> *Illustration*
>
> *A* conveys to *B* by deed "my plantation in Penang".
>
> *A* had no plantation in Penang, but it appears that he had a plantation in Province Wellesley, of which *B* had been in possession since the execution of the deed.
>
> These facts may be proved to show that the deed related to the plantation in Province Wellesley.

78 *Poh Sin Mining Co v Welfare Insurance Co Ltd*[101] is probably an example of s 97 in action, even though Chang Min Tat J cited proviso (*f*) of s 94 (then s 92) instead. The learned judge admitted extrinsic evidence to identify the actual insured under a workmen's liability insurance policy because "there is a latent ambiguity in the policy, an ambiguity shown when the language is not *prima facie* consistent with the existing facts and there is a conflict between the plain meaning of the language used and the facts existing".[102] But when he sat as a Federal Judge in *Tan Suan Sim v Chang Fook Shen*,[103] he did not overlook s 97 (then s 95), citing it as well as proviso (*f*) of s 94 (then s 92) in admitting extrinsic evidence to interpret "a later date" in an agreement for the sale of a house.

F. Section 98

79 Section 98 reads as follows:

101 [1971] 1 MLJ 65.
102 *Ibid* at 66.
103 [1980] 2 MLJ 66.

> 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.
>
> *Illustrations*
>
> (*a*) *A* agrees to sell to *B* for $500 "my white horse". *A* has 2 white horses. Evidence may be given of facts which show which of them was meant.
>
> (*b*) *A* agrees to accompany *B* to Halifax. Evidence may be given of facts showing whether Halifax in Yorkshire or Halifax in Nova Scotia was meant.

80 A common example of such evidence can be found in the shipping context, where bills of lading trying to incorporate charterparty terms do not clearly identify the charterparty so that there is doubt as to which charterparty applies.[104]

81 The next two sections on latent ambiguities are relatively straightforward, and the illustrations provided therein amply demonstrate how they work.

G. Section 99

82 Section 99 reads as follows:

> 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.
>
> *Illustration*
>
> *A* agrees to sell to *B* "my land at *X* in the occupation of *Y*". *A* has land at *X*, but not in the occupation of *Y*, and he has land in the occupation of *Y*, but it is not at *X*. Evidence may be given of facts showing which he meant to sell.

H. Section 100

83 Section 100 reads as follows:

104 *The Epic*, *supra* n 27; *The SLS Everest* [1981] 2 Lloyd's Rep 389; *The San Nicholas* [1976] 1 Lloyd's Rep 8.

> Evidence may be given to show the meaning of illegible or not commonly intelligible characters, of foreign, obsolete, technical, local and provincial expressions, of abbreviations and of words used in a peculiar sense.
>
> *Illustration*
>
> *A*, a sculptor, agrees to sell to *B* "all my mods". *A* has both models and modelling tools. Evidence may be given to show which he meant to sell.

III. Closing remarks

84 Nearly 30 years ago, the Law Commission of England and Wales provisionally recommended abolition of the parol evidence rule because it did not serve any useful purpose and was uncertain in ambit.[105] A decade later, when the final report was issued, another group of Commissioners concluded that the parol evidence rule had been reduced in scope and effect so much that they even doubted that it was a rule of law, and in any event it no longer had the effect of excluding evidence which ought to have been admitted if justice was to be done between the parties.[106] With respect, the report of the demise of the rule was slightly exaggerated. The parol evidence *rule* continues to be an essential topic in any leading contract textbook. The Commissioners' remark about justice is not susceptible to empirical verification either. Who can say whether a decision would have turned out to be more "just" or "unjust" if some excluded evidence had been admitted? Justice as administered by the courts takes into account the expediencies and limitations of the judicial process. In a way, the parol evidence rule is a compromise between unlimited enquiry and the need for closure.[107]

85 Whether or not common law has made the rule more digestible in modern times, Singapore has statutory provisions that have not moved with the times, which exist uneasily alongside common law. For example, s 94 and its six provisos are not perfect formulations of common law principles. Moreover, they are rigid in a way that the common law is not. To what extent should we apply English rules, exceptions and policies in the Singapore context? For arbitrations, which are excluded from the

105 The Law Commission Working Paper on *The Parol Evidence Rule*, *supra* n 30, para 43.

106 The Law Commission Report on *The Parol Evidence Rule*, *supra* n 30, para 2.45.

107 The relationship between procedural rules and substantive justice, especially in the context of the parol evidence rule, is put across more eloquently by Andrew Phang JC in *China Insurance Co v Liberty Insurance*, *supra* n 35, at [58]–[59].

technicalities of the Evidence Act, should we still apply the common law restraints, as was done in *Digital Dispatch (ITL) Pte Ltd v Citycab Pte Ltd*?[108]

86 By continuing to seek comfort in common law, we are not doing justice to the rules of statutory interpretation. As Singapore gains confidence in developing its own jurisprudence, it should consider what it wants to do with this archaic concept, which has seen better days and now resembles a beloved but haphazardly-patched security blanket. The Law Commissioners decided in 1986 not to recommend legislation on the parol evidence rule because "legislation in this field would be likely to be more confusing than clarifying".[109] Singapore's experience with its statutory provisions has not proven the Commissioners wrong. Unlike the English, who have the option of not legislating on the subject, Singapore may have no choice but to legislate further.[110]

87 Inroads have already been made in isolated instances. In giving the CISG the force of law, for example, Singapore has opened the door to experimentation. Article 8 CISG reads as follows:

> 1. For the purposes of this Convention statements made by and other conduct of a party are to be interpreted according to his intent where the other party knew or could not have been unaware what that intent was.
>
> 2. If the preceding paragraph is not applicable, statements made by and other conduct of a party are to be interpreted according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances.
>
> 3. In determining the intent of a party or the understanding a reasonable person would have had, due consideration is to be given to all relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties.

88 No decision has yet been made in Singapore on Art 8. While Art 8(2) is arguably another expression of the objective intention test, Art 8(1) is alien to common law in so far as it permits an inquiry into

108 *Supra* n 36.
109 The Law Commission Report on *The Parol Evidence Rule*, *supra* n 30, para 3.4
110 A call to reform is also made by Phang JC in *China Insurance*, *supra* n 35, at [62]–[63].

subjective intent.[111] One must possess commendable imagination to knead Art 8(1) into common law notions of estoppel or misrepresentation, or for that matter the remedy of rectification.[112] As for Art 8(3), the preponderant opinion is that it is a rejection of the parol evidence rule.[113]

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111 Contrast the decisions summarised in the UNCITRAL Digest of case law on the United Nations Convention on the International Sale of Goods, A/CN.9/SER.C/DIGEST/CISG/8 with the common law decision of *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 211 ALR 342 in November 2004, where the Australian High Court affirmed that it is only in very limited circumstances that a party will not be bound by the terms of a contract he has signed. His subjective state of mind does not let him off, nor is the other party obliged to tell him about the terms of his written commitment. In the same month, the Australian High Court upheld a signed contract against an inconsistent prior oral agreement (*Equuscorp Pty Ltd v Glengallan Investments Pty Ltd*). More recently, subjective intention received short shrift from V K Rajah J in *Standard Chartered Bank v Neocorp International Ltd*, *supra* n 63, at [44].

112 For a recent judicial commentary on rectification, see *Hub Warrior Sdn Bhd v QBE Insurance (Malaysia) Bhd* [2004] SGHC 279.

113 *MCC-Marble Ceramic Center, Inc v Ceramica Nuova D'Agostino SPA* 144 F 3d 1384 (11th Cir 1998); *cf Beijing Metals & Minerals Import/Export Corp v American Business Center, Inc* 993 F2d 1178 (5th Cir 1993); David A Levy, "*Contract Formation under the UNIDROIT Principles of International Commercial Contracts, UCC, Restatement and CISG*" (1998) 30 UCC LJ 249; Honnold, *Uniform Law for International Sales under the 1980 United Nations Convention* (Kluwer, 3rd Ed, 1999), at pp 115–123.