CLARIFYING RECTIFICATION IN SINGAPORE

Rectification, which has become increasingly important, needs to be clarified in Singapore. For a start, important questions about the relationship between rectification and the Evidence Act have not been asked and, if asked, will reveal that, contrary to English developments, equitable rectification, and not common law rectification, remains significant in Singapore because common law rectification is constrained by the Evidence Act. If this is correct, the ambit and application of both forms of rectification, especially equitable rectification, need to be clarified. The purpose of this article is to provide an understanding of rectification under Singapore law.

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I. Introduction

1 "Rectification" is usually taken to refer to the equitable remedy of rectification of documents, otherwise known as "equitable rectification". This involves the reconstruction or amendment of documents where there is a "mismatch between the parties' agreement and the instrument which purports to record it".[1] Equitable rectification is often compared with "common law rectification", which is the use of contractual construction to remedy obvious drafting errors.[2] While common law rectification is not substantively rectification in so far as the document itself is not amended but interpreted,[3] the comparison has remained. An important difference between equitable and common law rectification is

* The author would like to thank David McLauchlan for his very helpful suggestions. All errors remain the author's own. The author would also like to thank the editorial team of the *Singapore Academy of Law Journal* for their painstaking editing work.

1 Gerard McMeel, *The Construction of Contracts: Interpretation, Implication and Rectification* (Oxford University Press, 2nd Ed, 2011) at p 484.

2 Gerard McMeel, *The Construction of Contracts: Interpretation, Implication and Rectification* (Oxford University Press, 2nd Ed, 2011) at p 484.

3 See, *eg*, *Holding & Barnes plc v Hill House Hammond* [2001] EWCA Civ 1334 at [47]:

> This is the classical process of construction, which owes nothing to any of the recent authorities … It enables the court to correct an obvious clerical error in a document that it may conform with the obvious intention of the parties. Although in a loose sense the document is rectified, indeed the process is sometimes referred to as common law rectification, it is not rectification in the correct sense. It remains an exercise in construction.

that exclusionary evidential rules constrain the construction process. This is all the more important in Singapore, given that the antiquated Evidence Act[4] ("EA") still preserves old exclusionary rules that have been dispensed with under English law today. Yet another significant difference is that equitable rectification has traditionally been stated to require a higher degree of probability than other civil remedies.[5] This seems to suggest that, between the two, equitable rectification will often be harder to obtain.

2 Rectification, in both senses, has seen a rapid development in the last quarter of a century. Lord Neuberger, in his foreword to David Hodge QC's acclaimed treatise on rectification,[6] suggests that the rise of lengthy legal documents, driven in turn by the growth of commercialisation and the arrival of the word processor, has contributed to the increasing use of rectification to amend errors in these documents.[7] The situation in Singapore, while of a smaller scale, also reflects the increasing importance of rectification.[8] Indeed, as the volume, size and complexity of legal documents increase, it is inevitable that the risk of errors in these documents will increase. And when such increased risk materialises, rectification will assume even greater significance.[9]

3 It is therefore important that rectification be properly understood under Singapore law. Indeed, as Lord Neuberger MR said in *Daventry District Council v Daventry & District Housing Ltd*,[10] the principles of rectification should be as clear and predictable as possible given the commercial importance of rectification. Singapore cases that have discussed rectification have generally assumed that English law on rectification applies here. However, such an assumption may not be correct because, as mentioned above, Singapore law in this area is constrained by the EA. The EA affects both the common law and equitable doctrines, and hence, unlike the position in England where rules of evidence are non-statutory, may affect rectification in both senses here. Indeed, in *Sembcorp Marine Ltd v PPL Holdings Pte Ltd*[11] ("*Sembcorp Marine*"), the Court of Appeal emphasised that the law of evidence in Singapore is governed primarily by the EA, even as it

4 Cap 97, 1997 Rev Ed.

5 Gerard McMeel, *The Construction of Contracts: Interpretation, Implication and Rectification* (Oxford University Press, 2nd Ed, 2011) at p 517.

6 David Hodge QC, *Rectification: The Modern Law and Practice Governing Claims for Rectification for Mistake* (Sweet & Maxwell, 2010).

7 David Hodge QC, *Rectification: The Modern Law and Practice Governing Claims for Rectification for Mistake* (Sweet & Maxwell, 2010) at p vii.

8 Before 1986, there were no reported Singapore cases that discussed rectification, but the 1990s and 2000s have seen no less than 30 cases dealing with the area.

9 David Hodge QC, *Rectification: The Modern Law and Practice Governing Claims for Rectification for Mistake* (Sweet & Maxwell, 2010) at p vii.

10 [2012] 1 WLR 1333 at [194].

11 [2013] 4 SLR 193.

acknowledged that the Act does not directly prescribe a substantive rule of contractual interpretation.[12] Similarly, the EA does not say anything about how rectification is to be applied. Nonetheless, given that rectification will almost certainly raise a question of evidence involving proof of the mistake that warrants its application, it is essential that the EA is consulted.

4 Apart from the relationship between rectification and the EA, questions also need to be asked about how the remedy is invoked and applied. Analysis of the few Singapore cases that have considered rectification reveals that, while Singapore law on rectification is largely similar to the English approach, it is not entirely identical. For instance, the ambit of common law rectification needs to be examined in the light of the EA. Also, the EA itself requires a slight amendment to clarify the operation of equitable rectification in Singapore.

5 The purpose of this article is thus to provide an understanding of rectification under Singapore law. It does so on the assumption that the present rules in the EA apply even if there may be a good argument for reforming parts of the EA. It will do this through considering several matters for each form of rectification. First, it will consider the relationship between rectification and the EA. Secondly, it will survey the Singapore decisions that have considered rectification and attempt to state the local law. Thirdly and finally, it will posit a few issues for future consideration as Singapore law shapes its own unique approach in applying rectification.

II. Common law rectification under Singapore law

A. Common law rectification as presently understood in Singapore

6 The leading case governing common law rectification under English law is the English Court of Appeal decision of *East v Pantiles (Plant Hire) Ltd*[13] ("*East*"). Brightman LJ laid down two conditions for correcting an obvious clerical mistake by the process of construction as follows:[14]

> Two conditions must be satisfied: first, there must be a clear mistake on the face of the instrument; secondly, it must be clear what correction ought to be made in order to cure the mistake. If those conditions are satisfied, then the correction is made as a matter of construction.

12 *Sembcorp Marine Ltd v PPL Holdings Pte Ltd* [2013] 4 SLR 193 at [38]–[40] and [65].
13 [1982] 2 EGLR 111.
14 *East v Pantiles (Plant Hire) Ltd* [1982] 2 EGLR 111 at 112.

7 These requirements must now also be read in the light of the House of Lords' decision in *Chartbrook Ltd v Persimmon Homes Ltd*[15] ("*Chartbrook*"). Lord Hoffmann held that all that is needed is that "it should be clear that something has gone wrong with the language and that it should be clear what a reasonable person would have understood the parties to have meant".[16]

8 The conditions need further consideration in the light of the parol evidence rule contained in the EA. The first condition does not require recourse to further evidence outside of the contract, the mistake being ascertained "on the face of the instrument". However, the second condition must be considered together with the EA because parol evidence could very well be needed to make clear "what correction ought to be made in order to cure the mistake" or "what a reasonable person would have understood the parties to have meant".

9 The statement of common law rectification in *East* has been accepted and applied by the Singapore courts. The first instance is the High Court case of *Ng Swee Hua v Auston International Group Ltd*[17] ("*Ng Swee Hua*"), in which the court used common law rectification to amend an investment agreement that misidentified the relevant company. In the court's words:[18]

> In the Investment Agreement, the 'Company' is identified as AIMT. Clause 3.2.5 on its face bears out a clear error of drafting which has led to a meaningless clause. A literal reading gives rise to absurdity. It is plain from the language used that a mistake was made by the draftsman. It is necessary to cure the drafting error to reflect the true intention of the draftsman. It is clear what corrections need to be made in order to cure the mistake. Reference to 'Company' in cl 3.2.5 should read as Auston.

10 In this case, it is important to note that both AIMT and Auston were existing entities, and also that the court considered that cl 3.2.5 was inconsistent with other clauses of the agreement in finding that there was a mistake.[19] We will return to these points below when we consider the effect of the EA on common law rectification in Singapore. For now, *Ng Swee Hua* is a good example of a Singapore court applying English law on common law rectification.

15 [2009] 1 AC 1101.
16 *Chartbrook Ltd v Persimmon Homes Ltd* [2009] 1 AC 1101 at [25].
17 [2008] SGHC 241.
18 *Ng Swee Hua v Auston International Group Ltd* [2008] SGHC 241 at [33].
19 *Ng Swee Hua v Auston International Group Ltd* [2008] SGHC 241 at [35].

11 Yet another example is *Soon Kok Tiang v DBS Bank Ltd*[20] ("*Soon Kok Tiang*"), in which the High Court used common law rectification to correct a clause describing a credit event redemption amount ("CERA") in an investment agreement. The court accepted the defendant's argument that there had been an obvious clerical mistake in the fourth CERA description: instead of stating that the aggregated principal amount should be multiplied by the "final price", it stated that it should be multiplied by "(1 – final price)".[21] This rendered it absurd and inconsistent with other parts of the investment agreement that the CERA should be derived by multiplying the aggregated principal amount with the final price.[22] Again it is important to note that the court applied *East* on the basis that such a correction would eliminate the contradiction caused by the clerical error[23] and did not refer to evidence outside of the agreement.[24]

12 A final example is the High Court case of *Edwards Jason Glenn v Australia and New Zealand Banking Group Ltd*.[25] In this case, the court used common law rectification to correct the misdescription of referencing of clauses within the agreement concerned. The court held that if the misdescription were not corrected, the present references would be nonsensical.[26]

13 In all of these Singapore cases, the courts cited *East* but did not break up their analysis into *East*'s two constituent conditions. It is clear that, in so far as the first condition is concerned, the mistakes have all been ascertained on the face of the document. As for the second condition, the courts appear to have rectified the documents concerned by recourse to internal consistency – the argument being that, in order to maintain consistency *within* the contract concerned, the clerical error must be rectified. What the courts do not say clearly is whether they reached their conclusion based on the document itself, or external evidence. The ascertainment of an error within a document requires a concomitant ascertainment that the other parts of the document are correct, which may require recourse to external evidence. Whether or not such evidence can be considered is a question to be answered with reference to the EA. This is thus an opportune time to consider the relationship between common law rectification and the EA.

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20 [2011] 2 SLR 716.

21 *Soon Kok Tiang v DBS Bank Ltd* [2011] 2 SLR 716 at [46].

22 *Soon Kok Tiang v DBS Bank Ltd* [2011] 2 SLR 716 at [46].

23 *Soon Kok Tiang v DBS Bank Ltd* [2011] 2 SLR 716 at [47].

24 The Court of Appeal accepted the High Court's finding in this regard: see *Soon Kok Tiang v DBS Bank Ltd* [2012] 1 SLR 397 at [56].

25 [2012] SGHC 61.

26 *Edwards Jason Glenn v Australia and New Zealand Banking Group Ltd* [2012] SGHC 61 at [63].

B. Common law rectification constrained by the Evidence Act

14 Common law rectification has existed for as long as the EA, which was drafted close to 150 years ago. A leading 19th century authority is the House of Lords case of *Wilson v Wilson*,[27] in which Lord St Leonards stated:[28]

> Now it is a great mistake if it is supposed that even a Court of Law cannot correct a mistake, or error, on the face of an instrument: there is no magic in words. If you find a clear mistake, and it admits of no other construction, a Court of Law, as well as a Court of Equity, *without impugning any doctrine about correcting those things which can only be seen by parol evidence to be mistakes* – without, I say, going into those cases at all, both Courts of Law and Equity may correct an obvious mistake on the face of an instrument without the slightest difficulty. [emphasis added]

15 While Lord St Leonards' statement clearly allowed for common law rectification, he also emphasised that this cannot be done if the mistake can only be proved by the production of parol evidence in contravention of the parol evidence rule. Indeed, Lord St Leonards said at various points that the construction sought in the case could only be arrived at "without parol evidence, and upon the mere frame of the deed read in a sensible way, so as to see what the meaning of the parties is".[29] This therefore places a limit on the utility of common law rectification; indeed, it may be difficult to conclude that parties intended a different construction simply by reading the document itself. The rise of common law rectification in recent times over equitable rectification can be explained by the English courts' relaxation of the parol evidence rule almost to the point of extinction.[30] For example, Lord Hoffmann's celebrated restatement of the principles of contractual interpretation in *Investors Compensation Scheme Ltd v West Bromwich Building Society*[31] laid down a broad approach to the admissible context, the only exclusions being prior negotiations and subjective intentions. The English courts are able to do this because, unlike the case in Singapore, English evidence law is based on the common law and is therefore more malleable than a statute-based evidence law. Thus, this is to be contrasted with the much narrower approach taken in the EA, which still relies on antiquated distinctions, such as that between latent and patent ambiguity, to limit the range of admissible evidence to establish the context needed for common law rectification.

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27 (1854) 5 HL Cas 40.

28 *Wilson v Wilson* (1854) 5 HL Cas 40 at 66–67.

29 *Wilson v Wilson* (1854) 5 HL Cas 40 at 68.

30 Gerard McMeel, *The Construction of Contracts: Interpretation, Implication and Rectification* (Oxford University Press, 2nd Ed, 2011) at p 411.

31 [1998] 1 WLR 896.

16 Two potentially restrictive provisions in the EA on the operation of common law rectification are ss 95 and 96, which provide as follows:

> **Exclusion of evidence to explain or amend ambiguous document**
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> **95.** 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.
>
> **Exclusion of evidence against application of document to existing facts**
>
> **96.** 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.

17 Section 95, which provides that in the instances where patent ambiguity arises – either by the language used being obviously uncertain (though intelligible), or so defective as to be meaningless – no evidence may be given to cure the ambiguity. Although extrinsic evidence is admissible to ascertain whether the language is ambiguous or defective, when such evidence reveals that the ambiguity is patent, then pursuant to s 95, further extrinsic evidence may not be used to supply an alternative meaning or provide a solution so as to cure the defect. *Zurich Insurance (Singapore) Ltd v B-Gold Interior Design & Construction Pte Ltd*[32] ("Zurich Insurance") characterised s 95 as being "extremely narrow"[33] in its operation but it is unclear what this means. For present purposes, it suffices to note that s 95 is based on the old cases of *Clayton v Lord Nugent*[34] ("*Clayton*") and *Baylis v The Attorney General*[35] ("*Baylis*"), which each corresponds to the illustrations accompanying the provision. In *Clayton*, a card that supplied meaning to initials appearing in a will was ruled inadmissible, whereas in *Baylis*, evidence as to the testator's

32 [2008] 3 SLR(R) 1029.

33 *Zurich Insurance (Singapore) Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR(R) 1029 at [76].

34 (1844) 13 K & W 200.

35 (1741) 2 Atk 239.

intention to fill in a blank was similarly held inadmissible. These cases, along with s 95, have been explained on the basis that, in an instance of patent ambiguity, the intention of the maker of the contract becomes a matter of speculation and so the contract fails.[36]

18 Closely related to s 95 is s 96, the "plain language" section. Rather than being concerned with outward ambiguity, it is concerned with outward clarity that arises because of the "plainness" of the language when applied to existing facts. In *Zurich Insurance*, the Court of Appeal cautioned that s 96 should "not be read too restrictively",[37] which, for present purposes, means that its effect on common law rectification should be carefully considered. In cases falling within the ambit of s 96, no evidence may be admitted to explain that the contractual language was not meant to apply to such facts. This may be regarded as another way of characterising a situation "where external circumstances do not create any doubt or difficulty as to the proper application of those words to claimants under the instrument".[38] As Denman LCJ said in *Rickman v Carstairs*,[39] "[t]he question … is not what was the intention of the parties, but what is the meaning of the words they have used".[40]

19 When considered together, ss 95 and 96 restrict the application of common law rectification in Singapore. Their effect is that common law rectification of an otherwise clear contractual provision can take place only if the error appears clear from the rest of the document. It might be difficult to think of when an otherwise clear provision can be rectified through construction without recourse to evidence apart from the contractual language. This is especially in the light of the accepted view that contractual language cannot be understood in a vacuum.[41] The answer might well be that, apart from the external context, there is the internal context to consider as well. Indeed, it is through consideration of the internal context that Singapore cases have applied common law rectification in line with the EA.

20 The next three sections (ss 97 to 99) concern latent ambiguity and provide instances where such ambiguity may be present. Latent ambiguity is one that "arise[s]… extrinsically in the application of an instrument of

36 Sudipto Sarkar & V R Manohar, *Sarkar's Law of Evidence* (LexisNexis Butterworths, 16th Ed, 2007) at p 1552.

37 *Zurich Insurance (Singapore) Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR(R) 1029 at [77].

38 *Shore v Wilson* (1842) 9 Cl & F 355 at 565.

39 (1833) 5 B & Ad 651.

40 *Rickman v Carstairs* (1833) 5 B & Ad 651 at 663.

41 Although proviso (*f*) to s 94 of the Evidence Act (Cap 97, 1997 Rev Ed) allows for the consideration of context, that is subject to ss 95 and 96, which disallow such consideration in their defined circumstances.

clear and definite intrinsic meaning to doubtful subject-matter".[42] Extrinsic evidence is first admissible to ascertain the ambiguity. This is consistent with the analysis in both *Zurich Insurance* and *Sembcorp Marine*. If the ambiguity is latent, then extrinsic evidence may be given to show an alternative meaning other than that conveyed by the plain meaning of the contractual language. This is explainable on the basis that since such ambiguities arise from an extrinsic fact, extrinsic evidence is admissible to explain away the ambiguity. As for the evidence admissible thereafter, the court in *Sembcorp Marine* took the view that this could only be the drafter's subjective declaration of intention. After an analysis of the prevailing case law at the time the *Indian Evidence Act* was drafted, it held that "extrinsic evidence in the form of parol evidence of the drafter's intentions is generally inadmissible unless it can in some way be brought within the exceptions in ss 97 to 100".[43] *Zurich Insurance*, on the other hand, said that evidence apart from the drafter's subjective declarations of intention may be considered. On balance, it appears that the relevant sections do not lay down any restriction on the evidence admissible.

21 At this point, it might be asked why *Wilson v Wilson* allowed common law rectification despite the parol evidence rule under the English law of the time. The answer might well be that, unlike the EA, the parol evidence rule that had existed then in England was subject to a degree of malleability. The facts of *Wilson v Wilson* concerned a deed of separation that had been entered into between the parties. One of the deed's articles provided that if the husband performed the covenants stated within, "he, his heirs, executors, *etc*, and their estates and effects, shall be indemnified from all the present debts and liabilities of the said John [the husband]", "by the joint and several covenant of" the trustees for the wife. On an action by the wife to compel specific performance of the articles, the Vice-Chancellor made an order referring it to the Master to approve of a proper deed to carry its provisions into effect. The Master approved a deed that corrected the indemnity clause so that the trustees of the wife agreed to indemnify the husband "against the past and present debts of Mary [the wife]", instead of his own debts. The husband disagreed with this deed, and appealed all the way to the House of Lords.

22 The House of Lords allowed the rectification. Lord St Leonards, after having stated the law on common law rectification reproduced earlier, said that there was a clear error in the deed. He gave several reasons: first, there was no account of the husband's debts in the deed.[44]

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42 Thomas Starkie, *A Practical Treatise on the Law of Evidence, and Digest of Proofs in Civil and Criminal Proceedings* vol 3 (Stevens & Norton, 3rd Ed, 1842) at pp 755 and 768.

43 *Sembcorp Marine Ltd v PPL Holdings Pte Ltd* [2013] 4 SLR 193 at [65].

44 *Wilson v Wilson* (1854) 5 HL Cas 40 at 67.

Secondly, the form of the deed was unusual in that "[n]o man living, who knows anything about the construction of deeds, ever heard of a covenant entered into by a wife and her Trustees to indemnify her husband against his own debts".[45] Thirdly, the learned judge then listed several constructions along this line, all of which have made the wife liable to the very debts the husband agreed to pay, and which the judge regarded as irrational and absurd.[46] Therefore, "without doing the slightest violence to the words", Lord St Leonards found that that was a covenant to indemnify the husband against the wife's debt, and not his own debts. He therefore read the deed as though "Mary" had been inserted in place of "John" in the article providing for the indemnity. This was supposedly arrived at "without recourse to parol evidence, and upon the mere frame of the deed read in a sensible way, so as to see what the meaning of the parties is".[47]

23 While it is true that the facts of *Wilson v Wilson* showed that there was a clerical error in substituting the wife's name with the husband's name, it is not clear whether such a result could be reached under the terms of the EA. First of all, it may be artificial to say that the error can be discerned simply by reading the deed itself. Indeed, Lord St Leonards had alluded to external context, such as how such deeds are normally constituted, as well as the reasonable intention of parties, in coming to the conclusion that the uncorrected form was irrational and absurd. Contrary to Lord St Leonard's assertion, it may well be that he had actually considered evidence external to the deed in coming to an admittedly sensible conclusion. Secondly, and more pertinently, the facts of *Wilson v Wilson* might not have satisfied ss 95 and 96 of the EA, assuming that they had happened in present-day Singapore. In particular, s 96, which expressly excludes the consideration of evidence to show otherwise when language used in a document is "plain in itself" and "applies accurately to existing facts", would have prevented the court's consideration of external evidence that the deed had meant to refer to the wife rather than the husband. This is because the deed as originally formulated was "plain", in that it referred to the husband, and could also "appl[y] accurately to existing facts", in that it referred to an existing person (the husband). The fact that such an interpretation resulted in an absurdity does not matter under the terms of the EA. This is not to say that the wife in *Wilson v Wilson* should be left without a remedy if the EA were to apply, only that the correct solution is equitable rectification instead of common law rectification.

24 Thus, the effect of the EA on common law rectification needs to be considered. For a start, it is apparent that it cannot apply in cases

45 *Wilson v Wilson* (1854) 5 HL Cas 40 at 67–68.
46 *Wilson v Wilson* (1854) 5 HL Cas 40 at 68.
47 *Wilson v Wilson* (1854) 5 HL Cas 40 at 68.

involving the correction of terms used in a document that refer erroneously to otherwise existing entities. However, common law rectification still has some role to play under Singapore law; the question is to what extent, and that is what we turn to next.

C. What remains of common law rectification in Singapore?

(1) Situations in which common law rectification may not apply in Singapore

(a) Misdescription of an existing entity as another existing entity

25 We turn first to the situations in which common law rectification may not apply due to the EA. The first situation concerns a misdescription of an existing entity as another existing entity, as occurred in *Ng Swee Hua*. Bearing in mind the two conditions in *East*, it is clear, as explained above, that the first condition is not affected by the EA. Thus, the court in *Ng Swee Hua* rightly found on the face of the agreement that there was a mistake. The remaining question is whether the second condition is satisfied in the light of s 96 of the EA.

26 It is suggested that s 96 will prevent a court in Singapore from considering *parol* evidence to show how the misdescription is to be corrected once its requirements that the language used is "plain" and "applies accurately to existing facts" are satisfied. These requirements will be satisfied if the misdescription is to an *existing* entity since the entity can be identified, and the language applied *accurately*. It may not apply *correctly* in that it does not reflect the parties' intention, but that is not what s 96 is concerned about. Indeed, as was said in *Rickman v Carstairs*,[48] "[t]he question … is not what was the intention of the parties, but what is the meaning of the words they have used".[49]

27 This does not mean that *Ng Swee Hua* was wrongly decided. This is because the court had relied on the contract *itself* to ascertain how the mistake is to be cured. Had the court in *Ng Swee Hua* relied on *parol* evidence to correct the mistake, that would have been wrong being in contravention of s 96. However, this does show that the scope of common law rectification is limited in Singapore to the identification of the correction within the contract concerned, and not anywhere else.

28 An example of a misdescription situation in which s 96 would prevent the application of common law rectification is the UK Supreme

48 (1833) 5 B & Ad 651.
49 *Rickman v Carstairs* (1833) 5 B & Ad 651 at 663.

Court case of *Marley v Rawlings*.[50] In that case, Mr and Mrs Rawlings each executed a will giving each other their estate upon death. However, if the other spouse had already died, or died within a month of the other's death, the estate was to be left to Mr Marley, whom the Rawlings treated like a son. The two wills were identical except for differences to account for the identity of the testator. By an oversight, the solicitor gave Mr Rawlings his wife's will and *vice versa*, with the result that they signed each other's will. Mr Rawling's "will" therefore left his estate to himself. The mistake here concerned the misdescription of an existing entity to another entity.

29 The mistake only came to light when Mr Rawlings, the surviving parent, eventually passed away. At the time of his death, Mr Rawlings was a joint tenant of a house with Mr Marley and, in addition to that, had some £70,000. By the operation of the doctrine of survivorship, the tenancy passed to Mr Marley. The Rawlings' two sons challenged the validity of Mr Rawling's will. If the will were invalid, Mr Rawlings would have died intestate, and his two sons would inherit the £70,000. Mr Marley brought proceedings to rectify the will under s 20 of the Administration of Justice Act 1982,[51] which was opposed by the Rawlings' natural children.

30 Lord Neuberger issued the leading judgment, and ordered rectification of Mr Rawling's will under s 20 of the 1982 Act. Although the decision was based on statute, Lord Neuberger was of the view that even in common law, the court has the power to rectify the will but that power can be no wider than the statutory power under s 20.[52] Section 20 allows for rectification of a will if the court is satisfied that the will fails to carry out the testator's intentions in consequence of either "a clerical error" or "a failure to understand his instructions". In coming to this conclusion, Lord Neuberger affirmed that wholesale correction, as in the case of substituting Mr Rawling's will with Mrs Rawling's, could be rectification.

31 Such a result may not have been allowed by s 96 of the EA[53] had it applied to the facts. This is because the misdescription, being to an existing entity, is "plain in itself" and "applies accurately to existing facts". In *Marley v Rawlings*, evidence pointing to the substitution of Mr Rawling's will with Mrs Rawling's must necessarily involve parol evidence to the will in question. A court cannot decide in the abstract that Mr Rawling's will referred to another party's will without referring to that

50 [2014] 2 WLR 213, noted in Goh Yihan & Yip Man, "*Marley v Rawlings*: Reflections from Singapore" [2014] Sing JLS 218.

51 c 53.

52 *Marley v Rawlings* [2014] 2 WLR 213 at [28] and [30].

53 Subject of course to s 102 of the Evidence Act (Cap 97, 1997 Rev Ed).

other will, which would, by definition, be parol evidence relative to Mr Rawling's will.

32 Therefore, common law rectification may not fully apply in Singapore in a situation involving a misdescription of an existing entity to another existing entity, due principally to s 96 of the EA. There is still room for common law rectification to apply if parol evidence is *not* needed to point out the correction needed to cure the mistake. This will normally be the case when the mistake arises due to inconsistencies within the contract *itself*, and such inconsistencies can supply the correction to cure the mistake. However, common law rectification is unlikely to apply if parol evidence is needed, such as when the external context (arguably such as in *Wilson v Wilson*) or another document (such as in *Marley v Rawlings*) is considered.

(b) Missing words in need of supplication[54]

33 A second situation in which common law rectification may not apply fully in Singapore is when courts supply words into the document. An example of such a situation under English law is the case of *Mourmand v Le Clair*[55] ("*Mourmand*"), where a bill of sale to secure a loan of 70*l* and interest at 1*s* in the pound *per* month stipulated that the principal and interest should be repaid by monthly instalments of "seven" on a certain date each month. In considering whether the bill was rendered invalid by the omission of any unit of monetary denomination after the word "seven", Lord Alverstone CJ held that the word "pounds" may be entered after the word "seven". The learned judge declined to read the word "shillings" after "seven" because that would be unreasonable as the repayment of seven shillings *per* month for a loan of 70 pounds would not be repayment at all.[56]

34 If these facts were to arise in Singapore, it is unlikely that a court could correct the error by common law rectification. First of all, the error would likely invoke s 95, since the contractual language would be "ambiguous or defective". Indeed, this is much like illustration (b) to s 95, in which a deed contains blanks. Once invoked, s 95 would prohibit recourse to parol evidence to correct the error: on the facts of *Mourmand*, whether the missing word was intended to be "pounds" or "shillings". It is unlikely that a court can draw on the internal context because the parties could very well have agreed on a repayment rate of seven shillings *per* month, however unreasonable that might have been. Thus, when Lord Alverstone CJ held that "pounds" was the correct word to insert, he

54 Gerard McMeel, *The Construction of Contracts: Interpretation, Implication and Rectification* (Oxford University Press, 2nd Ed, 2011) at p 486.
55 [1903] 2 KB 216.
56 *Mourmand v Le Clair* [1903] 2 KB 216 at 218.

properly could only have done that by recourse to parol evidence. This would not be allowed under s 95. As in illustration (*b*) to s 95, evidence cannot be given of facts to show how the "blank" was to be filled.

35 Therefore, common law rectification may not fully apply in Singapore in a situation requiring the supply of words to correct an error because s 95 of the EA would prevent a court from considering parol evidence to correct the error. However, if parol evidence is not needed, and the court is able to correct the error simply by examining the internal context of the agreement, then that would be permissible in spite of the EA. An example of such a situation is the old case of *Wright v Dicksons*,[57] where a question arose as to whether "great chows and panwood" in a lease meant "great *coal*; chows [small pieces of coal] and panwood [the refuse or smallest coal]". Lord Eldon held that the word "coal" could be supplied as otherwise "other words in the lease could not have their proper effect without it".[58] In this case, the court considered the internal context to supply the missing word. This would be permissible despite s 95 of the EA since parol evidence is not being considered.

(c) Extra words that need to be disregarded[59]

36 A third situation in which common law rectification may not apply fully in Singapore is when courts disregard clauses or words. The concern, as with the situation before, is whether parol evidence needs to (and can) be used to identify the correction to cure the mistake. If parol evidence is needed, then it is unlikely to be admissible pursuant to s 95 of the EA. This is aptly shown by illustration (*a*) to s 95: "*A* agrees in writing to sell a horse to *B* for $500 or $600." Here, the mistake is easily identifiable. However, parol evidence is not admissible to show which price was to be given, as stated in the illustration itself: a court cannot use parol evidence to disregard either $500 or $600.

37 However, if the court does not need to make use of parol evidence, then it may disregard clauses or words and correct the mistake by common law rectification. Although not expressly characterised as such by the High Court, this was the case in *Soon Kok Tiang*, where the court disregarded the words "(1 –)" without recourse to parol evidence. In this case, s 95 of the EA arguably applies because the presence of the additional words "(1 –)" gave rise to an ambiguity when considered with the rest of the agreement. Thus, parol evidence would not be admissible to correct this error. However, the court did not rely on parol evidence; instead, it relied on the *internal* context of the document to conclude that

57 [1813] 1 Dow 141.

58 *Wright v Dicksons* [1813] 1 Dow 141 at 147.

59 Gerard McMeel, *The Construction of Contracts: Interpretation, Implication and Rectification* (Oxford University Press, 2nd Ed, 2011) at p 487.

the mistake could be corrected by disregarding those additional words so as to reach internal consistency.

38 A similar case is the English Court of Appeal decision of *Stewart & Co v Merchants Marine Insurance Co, Ltd*.[60] The court had to deal with a time policy upon ship and freight that was carelessly drafted. It was in the ordinary form of a policy on goods to which stipulations had been added so as to apply to the ship only, but much was left that did not apply to a ship, such as provisions with regard to corn, fish, salt, fruit and so forth. The court held that it could "strike out all the immaterial stipulations which cannot possibly apply to an assurance of the ship".[61] If the EA were to apply to these facts, it is arguable that s 95 would apply because the contractual language is "on its face ambiguous or defective". However, given that the *internal* context would likely show that the time policy was intended to be for a ship, a court bound by s 95 would unlikely have to consider parol evidence to correct the error. In this case, common law rectification can apply because parol evidence is not needed to correct the error.

(d) Words that need to be rearranged[62]

39 A final situation in which common law rectification may not apply fully in Singapore is when courts rearrange words or make other grammatical corrections in order to realise the intention of the parties. The breadth of this situation can be seen in the House of Lords' decision in *Chartbrook*, where Lord Hoffmann stated that there was not "a limit to the amount of red ink or verbal rearrangement or correction which the court is allowed".[63]

40 The relevant considerations in this situation are ss 95 and 96 of the EA. Particularly since the rearrangement of words is largely dependent on parol evidence to show what the parties intended, the constraining effect of ss 95 and 96 must be kept in mind. If they apply to prohibit recourse to parol evidence, and such evidence is needed to correct the error, then common law rectification would not apply.

60 (1885) 16 QBD 619.
61 *Stewart & Co v Merchants Marine Insurance Co, Ltd* (1885) 16 QBD 619 at 622.
62 Gerard McMeel, *The Construction of Contracts: Interpretation, Implication and Rectification* (Oxford University Press, 2nd Ed, 2011) at p 487.
63 *Chartbrook Ltd v Persimmon Homes Ltd* [2009] 1 AC 1101 at [25].

(2) Situation in which common law rectification can apply in Singapore

(a) Misdescription of an existing entity as a non-existing entity

41 We turn to the first situation in which common law rectification can apply in Singapore. This concerns a misdescription of an existing entity as a non-existing entity. Relevant factual situations can be derived from the English cases of *In re Howgate and Osborn's Contract*[64] and *Lombard Finance Ltd v Brookplain Trading Ltd*[65] ("*Lombard Finance*"). The facts of both cases show how common law rectification can apply fully in Singapore in this particular situation, notwithstanding the EA.

42 In *In re Howgate and Osborn's Contract*, the abstract of title to a property delivered to the purchaser stated a mortgage to three persons, of whom the third was described as "William" Gray. It appeared from the original deed that "William" was erased and the names "Edward Thomas" substituted. The question was whether the alteration was permissible, to which the court found that it was. Kekewich J found that "there is no reason why you should not prove by parol evidence that the person described as William Gray was really Edward Thomas Gray".[66] If these facts had occurred in Singapore, s 96 of the EA would not prohibit recourse to parol evidence. This is because the misdescription to a *non*-existing entity means that it does *not* apply "accurately to existing facts". Accordingly, proviso (*f*) to s 94, which allows the proof of any fact that "shows in what manner the language of a document is related to existing facts", would apply to allow the consideration of parol evidence (in this case, the statutory declarations) exceptionally.[67]

43 The analysis would be similar on the facts of *Lombard Finance*, in which the name of the company concerned in a guarantee agreement was wrongly described as "Brookplain Trading Company Ltd", rather than "Brookplain Trading Ltd". Dillion LJ held that this misdescription could be cured by evidence.[68] Once again, s 96 of the EA would not apply because "Brookplain Trading Company Ltd" referred to a non-existing entity, with the result that the contractual language does *not* apply "accurately to existing facts". Parol evidence, if needed, can therefore be used to cure the mistake.

64 [1902] 1 Ch 451.
65 [1991] 1 WLR 271.
66 *In re Howgate and Osborn's Contract* [1902] 1 Ch 451 at 456.
67 Proviso (*f*), and not proviso (*e*), is the applicable proviso because common law rectification, although so called, remains a process of construction.
68 *Lombard Finance Ltd v Brookplain Trading Ltd* [1991] 1 WLR 271 at 274.

44 Therefore, common law rectification may fully apply in Singapore in a situation involving a misdescription of an existing entity to a non-existing entity, because s 96 of the EA will not apply. Instead, proviso (*f*) to s 94 will apply to allow the consideration of parol evidence to cure the mistake. Indeed, if parol evidence is not needed, then the EA is not even relevant since the mistake can be cured with reference to the terms of the contract itself.

(b) Latent ambiguity that needs to be corrected

45 Where a latent ambiguity is present, the EA allows the consideration of parol evidence. Common law rectification can therefore apply fully, especially if parol evidence is needed to correct the error. Sections 97 to 99 of the EA govern situations where there is latent ambiguity, which "arise[s] … extrinsically in the application of an instrument of clear and definite intrinsic meaning to doubtful subject-matter".[69]

46 Section 97 refers to the situation where otherwise plain contractual language is rendered meaningless in reference to existing facts. The illustration to s 97 shows when common law rectification may be applied: if *A* conveys to *B* by deed "my plantation in Penang", then parole evidence might be admitted to show that *A* had a plantation in Province Wellesley and in fact owns no plantation in Penang. In this case, it is not hard to see that common law rectification can apply to correct "Penang" to "Province Wellesley".

47 Section 98 relates to an "equivocation", or where the contractual language used might have been meant to apply to only one of several things that are each susceptible to the same description used. In this case, parol evidence might be admitted to correct an error that might have led to the equivocation. The same can be said about s 99, which concerns the situation where the contractual language could apply partially to two sets of existing facts but the whole does not apply correctly to either.

D. Summary: Common law rectification in Singapore

48 In summary, common law rectification can apply in Singapore, as has rightly been recognised by the courts. However, its application requires careful consideration of the EA. In particular, bearing in mind the two conditions for invoking common law rectification as laid down in *East* (and read with *Chartbrook*), a significant distinction between the Singapore and English approaches is that the EA restricts the range of

69 Thomas Starkie, *A Practical Treatise on the Law of Evidence, and Digest of Proofs in Civil and Criminal Proceedings* vol 3 (Stevens & Norton, 3rd Ed, 1842) at pp 755 and 768.

admissible evidence to correct any error. Such restriction is absent under English law, except for the very narrow exclusions of prior negotiations and subjective declaration of intention. When parol evidence is not needed to correct the error, such as when recourse to the internal context is sufficient, the EA will not affect common law rectification in Singapore. However, when parol evidence is needed, the EA has to be consulted: in particular, ss 95–99 lay down important (and mandatory) statutory restrictions on when such parol evidence can be considered. The restrictions will inevitably affect how far common law rectification can apply in Singapore in affected situations. While this may not be welcome, given that English law has now moved to expand the reach of common law rectification, the solution is not to ignore the EA, but to press for its reform. Until such reform materialises, the EA has to be applied.

III. Equitable rectification under Singapore law

A. Equitable rectification and common law rectification

49 We turn now to equitable rectification, which is decidedly different from common law rectification. Professor Gerard McMeel helpfully lists at least four differences between them: first, common law rectification is concerned with contracts and other transactions, whereas equitable rectification is concerned with documents beyond contracts; secondly, common law rectification is concerned with situations apart from proof of a qualifying mistake (such as ambiguity), whereas equitable rectification is concerned only with mistake; thirdly, common law rectification is subject to exclusionary evidential rules whereas equitable rectification is not (this is all the more relevant in Singapore given the EA); fourthly, it has been said that equitable rectification is subject to a higher standard of proof compared with common law rectification.[70]

50 In the context of Singapore, and based on what has been discussed, it is clear that the ambit of common law rectification is more restrictive compared to English law due to the exclusionary evidential rules imposed by the EA.[71] In contrast, as will be shown below, equitable rectification is not subject to the same rules. As such, and as distinct from the English situation,[72] equitable rectification will continue to play an important role under Singapore law, together with common law

70 Gerard McMeel, *The Construction of Contracts: Interpretation, Implication and Rectification* (Oxford University Press, 2nd Ed, 2011) at pp 493–494.

71 Gerard McMeel, *The Construction of Contracts: Interpretation, Implication and Rectification* (Oxford University Press, 2nd Ed, 2011) at pp 166 –168.

72 Gerard McMeel, *The Construction of Contracts: Interpretation, Implication and Rectification* (Oxford University Press, 2nd Ed, 2011) at pp 507–508. *Cf* David Hodge QC, *Rectification: The Modern Law and Practice Governing Claims for Rectification for Mistake* (Sweet & Maxwell, 2010) at pp 136–141.

rectification. Indeed, the Court of Appeal expressed the same sentiment in *Sembcorp Marine*.[73] The distinction between common law and equitable rectification will likely remain in Singapore as English law now resurrects those distinctions.[74] This is why it is all the more important to understand the application of equitable rectification under Singapore law.

B. Equitable rectification and the Evidence Act

(1) Are facts proving mistake requiring equitable rectification subject to ss 95–99 of the Evidence Act?

51 We start with a fundamental question in understanding equitable rectification: is it subject to the same exclusionary evidential rules under ss 95–99 of the EA? The relevance of this question is that the EA, being statutory law, can affect both common law and equity. Thus, it has the ability to affect the application of equitable rectification. Indeed, if equitable rectification is so affected, then its utility will be very much diminished, perhaps lower than that of common law rectification due to its supposedly higher standard of proof.

52 It is suggested that it is not so subjected. This is because ss 95–99 of the EA lay down exclusions in relation to the use of parol evidence to *explain* the document concerned. They rightly apply to common law rectification because, despite its name, it really is a process of understanding or explaining the contract. However, because equitable rectification is not a process of construction, it is not subject to these sections.

53 In order to understand this argument, we must have regard to the structure of the EA. While provisos (*a*)–(*f*) to s 94 largely replicate existing common law exceptions to the parol evidence rule, proviso (*f*) is different: although it appears as an exception to s 94, it is usually regarded as constituting a substantive rule concerning the proof of facts as aids to the interpretation of the contract.[75] Support for such a view can be found in Stephen's *Digest*, where Sir James Stephen, the drafter of the Indian Evidence Act (which is *in pari materia* with the EA), viewed ss 93 and 94

73 *Sembcorp Marine Ltd v PPL Holdings Pte Ltd* [2013] 4 SLR 193 at [97].

74 See the High Court decision of *Lek Gwee Noi v Humming Flowers & Gifts Pte Ltd* [2014] 3 SLR 27 at [179].

75 See, *eg*, Sudipto Sarkar & V R Manohar, *Sarkar's Law of Evidence* (LexisNexis Butterworths Wadhawa Nagpur, 16th Ed, 2009 Reprint) at p 1538; V Kesava Rao, *Sir John Woodroffe & Syed Amir Ali's Law of Evidence* (LexisNexis Butterworths, 18th Ed, 2009) at pp 3711–3712; and Ratanlal Ranchhoddas & Dhirajlal Keshavlal Thakore, *Ratanlal and Dhirajlal's The Law of Evidence* (LexisNexis Butterworths, 23rd Ed, 2010) at pp 1148–1149.

collectively, under what he termed as "Article 90".[76] Article 90, while including provisos (*a*)–(*e*),[77] did not contain proviso (*f*). Instead, proviso (*f*) was conceived as a sub-point under a separate "Article 91", which dealt with "what evidence may be given for the interpretation of documents".[78] Stephen further noted that Articles 90 and 91 dealt with different matters: Article 91 dealt with the interpretation of documents by oral evidence whereas Article 90 defined the cases in which documents were exclusive evidence.[79] The accepted view in jurisdictions subject to various manifestations of the EA is that proviso (*f*) to s 94 is a substantive rule of its own.[80] Thus, proviso (*f*) is more related to ss 95–99, which together deal with the evidence that may be adduced to *explain* the terms proved under ss 93 and 94.

54 Understood this way, it is suggested that equitable rectification, not being concerned with "what evidence may be given for the interpretation of documents", is not subject to ss 95–99 of the EA. Instead, it operates by way of a broad exception to the parol evidence rule as set out in the EA.

(2) Equitable rectification as an exception under the Evidence Act

55 As is well known, the parol evidence rule excludes from the courts' consideration facts outside of those recorded in the written contract. Thus, facts that prove a mistake leading to the equitable rectification of the document will be prohibited by the parol evidence rule unless it is exempted from its operation. Stephen clearly recognised this. Illustration (c) to Article 90 of his *Digest*[81] refers to relevant passages in

76 James Fitzjames Stephen, *A Digest of the Law of Evidence* (MacMillan & Co, 1st Ed, 1876) at pp 88–89.

77 James Fitzjames Stephen, *A Digest of the Law of Evidence* (MacMillan & Co, 1st Ed, 1876) at pp 88–89.

78 James Fitzjames Stephen, *A Digest of the Law of Evidence* (MacMillan & Co, 1st Ed, 1876) at pp 91–92.

79 James Fitzjames Stephen, *A Digest of the Law of Evidence* (MacMillan & Co, 1st Ed, 1876) at p 158. Indeed, the Law Commission of India, in their 69th and 185th Reports, which discussed various aspects of the Indian Evidence Act, discussed "the first five provisos" and "the sixth proviso [*ie*, proviso (*f*)]" differently: see, *eg*, Law Commission of India, *Review of the Indian Evidence Act, 1872* (185th Report, 2003) at p 441.

80 See, *eg*, *Belapur Co v State Farming Corp* AIR (1969) Bom 231 (Bom HC) at [24]–[25]. It is also important to note that Stephen himself noted that Article 91 differed from the six similar propositions in James Wigram, *Admission of Extrinsic Evidence in Aid of the Interpretation of Wills* (Charles Hunter, 2nd Ed, 1835) only in its arrangement and form of expression: see James Fitzjames Stephen, *A Digest of the Law of Evidence* (MacMillan & Co, 1st Ed, 1876) at pp 160–161.

81 James Fitzjames Stephen, *A Digest of the Law of Evidence* (MacMillan & Co, 1st Ed, 1876) at p 90.

Joseph Story's celebrated work on equity,[82] which, in turn, explain that the equitable jurisdiction to grant rectification upon proof of a mistake, that mistake being made out by parol evidence, is an exception to the parol evidence rule.

56 In this regard, the governing provision in the EA is s 94, along with the relevant illustration:

> **Exclusion of evidence of oral agreement**
>
> **94.** 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:
>
> (*a*) any 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*
>
> (*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.
>
> [emphasis added]

57 Section 94, read together with s 93, sets out the parol evidence rule. This rule provides that parol evidence is generally inadmissible to contradict, vary, add to or subtract from the contractual terms. The starting point is to consider s 93, the "proof by documentary evidence" section, which relates to the exclusiveness of documentary evidence and is an aspect of the "best evidence" rule. It provides that where a contract has been reduced to a document, that document must be produced as proof, being the best evidence of the agreement reached between the parties. Oral evidence is admissible to prove the agreement only by way of exception, and the relevant exceptions are provided by s 94, the "exclusion of oral evidence" section.

82 Joseph Story, *Commentaries on Equity Jurisprudence as Administered in England and America* (A Maxwell & Son, 4th Ed, 1846) at pp 173–178.

58 Section 94 operates in tandem with s 93. Section 94 operates only where the contract (among other documents) has been proved under s 93. It is therefore based on the same principle that documentary evidence is superior to oral evidence and no oral evidence is generally admissible to contradict, add to or subtract from the terms of the contract proved by way of documentary evidence.[83] It supplements s 93 by excluding extrinsic evidence that may be used to control the terms of the contract.[84] The purpose of ss 93 and 94 is to collectively preserve the integrity and conclusiveness of the written document as to its contents and terms.

59 Section 94 is, however, subject to six provisos, which largely replicate the exceptions to the parol evidence rule at common law. The relevant proviso in so far as rectification is concerned is proviso (*a*), which provides that parol evidence is admissible exceptionally to prove, among others, mistake in fact or law that would "entitle any person to any decree or order relating thereto". This, as already mentioned, reflects the state of the common law in the 19th century. Story, writing in 1846, about when Stephen began work on the Indian Evidence Act, states that the rationale for allowing the exceptional admission of parol evidence to prove mistake leading to rectification is to avoid a surprise or fraud upon both parties.[85] Indeed, to allow the mistake to prevail, even if innocently made, would cause as much injustice as would a positive fraud.[86] Therefore, parol evidence proving mistake leading to rectification must, like cases of fraud, be exceptionally admitted despite the parol evidence rule.[87] Understood this way, it is unsurprising that Stephen grouped "mistake in fact or law" together with "fraud, intimidation, illegality" in the same exception to the parol evidence rule: the rationale underlying the exceptional admission of facts proving these events is the same. That exception is, of course, proviso (*a*) to s 94 of the EA today.[88] And unlike common law rectification, proof establishing mistake necessary for equitable rectification is not subject to the exclusionary rules found under ss 95–99 of the EA.

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83 See M Monir, *Principles and Digest of the Law of Evidence: Being a Commentary on the Indian Evidence Act*, I of 1872 vol 1 (The University Book Agency, 7th Ed, 1989) at p 969.

84 See Sudipto Sarkar & V R Manohar, *Sarkar's Law of Evidence* (LexisNexis Butterworths Wadhawa Nagpur, 16th Ed, 2009 Reprint) at p 1461.

85 Joseph Story, *Commentaries on Equity Jurisprudence as Administered in England and America* (A Maxwell & Son, 4th Ed, 1846) at p 175.

86 Joseph Story, *Commentaries on Equity Jurisprudence as Administered in England and America* (A Maxwell & Son, 4th Ed, 1846) at pp 174–175.

87 Joseph Story, *Commentaries on Equity Jurisprudence as Administered in England and America* (A Maxwell & Son, 4th Ed, 1846) at p 176.

88 That proviso (*a*) is the correct provision was peripherally alluded to by the High Court in *Exklusiv Auto Services Ltd v Chan Yong Chuan Eric* [1995] 3 SLR(R) 728 at [20], although *cf* the Court of Appeal's view in *Tay Joo Sing v Ku Yu Sang* [1994] 1 SLR 765 at [17] that it ought to be proviso (*b*). Based on the analysis above, it is respectfully submitted that proviso (*a*) is the correct provision.

(3) Amending the Evidence Act

60 The conclusion thus far is that while the EA does not provide a substantial rule of rectification, it does not exclude evidence proving facts necessary to invoke it. Indeed, the EA contemplates the admission of such evidence. There is, however, a slight curiosity in illustration (*e*) to s 94, which is supposed to show how rectification is to be understood in the context of the EA. This illustration appears in Stephen's *Digest* in the following form:[89]

> (*c*) *A* institutes a suit against *B* for the specific performance of a contract, and also prays that the contract may be *reformed* as to one of its provisions, as that provision was inserted in it by mistake.
>
> *A* may prove that such a mistake was made as would entitle him to have the contract *reformed*.
>
> [emphasis added]

61 It will be noticed that Stephen's illustration uses the word "reform" (as is currently used in the US) to describe the remedy of rectification. While the word "reformed" is no longer used to describe rectification, it was used in the 19th century as such. For example, Story also writes of the courts "reforming the preliminary contract".[90] Thus, illustration (*c*) in Stephen's *Digest* is meant to refer to rectification as we refer to it today. However, somewhat curiously, illustration (*e*), the equivalent illustration in the EA, substitutes the word "reform" with "perform":

> (*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*. [emphasis added]

This is not only different from Stephen's original version, but is also different from both the present Indian[91] and Malaysian[92] Evidence Act, both of which use the word "reform" rather than "perform" in their equivalent illustrations.

62 This in all probability means that the word "perform" was wrongly inserted into the EA in place of the original word "reform". Indeed, in its present form, illustration (*e*) in the EA makes little sense. It

89 James Fitzjames Stephen, *A Digest of the Law of Evidence* (MacMillan & Co, 1st Ed, 1876) at p 90.

90 Joseph Story, *Commentaries on Equity Jurisprudence as Administered in England and America* (A Maxwell & Son, 4th Ed, 1846) at p 179.

91 Indian Evidence Act 1872 s 92, illustration (e).

92 Malaysian Evidence Act 1950 (Act 56) s 92, illustration (e).

posits a situation where *A* sues *B* for specific performance of the contract and also for the "performance" of one of its provisions on the ground that it was inserted by mistake. If *A* is already suing *B* for specific performance of the whole contract, then there is little need for the illustration to also state that *A* is suing for the performance of a specific provision. Moreover, mistake is not a ground for specific performance. Certainly, if the provision were inserted by mistake, then there is little reason to enforce it by way of specific performance. All things considered, it must be that the word "perform" was wrongly inserted in place of "reform" in illustration (*e*) of the EA. While this does not affect the application of rectification in any substantive manner, it would be best to amend the EA to clarify that this illustration is meant to show how facts proving mistake leading to rectification can be admitted under the EA.[93]

C. Equitable rectification under Singapore law

63 Although the EA does not exclude the operation of equitable rectification, and in fact contemplates it, it does not lay down any substantive rule of operation. This is unsurprising, given that equitable rectification is an equitable remedy, which is outside of the EA's concern. This means that it is possible for the Singapore courts to apply the English approach to equitable rectification. However, it is suggested that the Singapore courts should also be mindful that common law rectification is more constrained here than in England, and hence adapt the application of equitable rectification accordingly. This section will now attempt to consolidate the Singapore cases on equitable rectification, together with consideration of the English approach.

(1) The analytical framework for equitable rectification

64 Equitable rectification under English law is available in two broad situations,[94] as recounted by Mustill J in *The Olympic Pride*.[95] First, "where there is a mistake common to both parties, the mistake being the belief that the document accurately records the transaction", and secondly, "where one party is mistaken as to the compliance of the document with the transaction and the other party knows of this mistaken belief but does nothing to correct it".[96] The Singapore courts

93 Ironically, the illustration on rectification can itself be statutorily rectified without recourse to a legislative amendment: see the very limited power to read words into a statute described in *Kok Chong Weng v Wiener Robert Lorenz* [2009] 2 SLR(R) 709 at [57], in effect "rectifying" it when it is clear that Parliament had made a mistake.

94 Gerard McMeel, *The Construction of Contracts: Interpretation, Implication and Rectification* (Oxford University Press, 2nd Ed, 2011) at p 495.

95 [1980] 2 Lloyd's Rep 67.

96 *The Olympic Pride* [1980] 2 Lloyd's Rep 67 at 72–73.

have recognised that equitable rectification is available in these two broad situations.[97]

65 Also, as a preliminary point, the Singapore courts have accepted that equitable rectification may be granted even if the parties had not pleaded it. In *Ku Yu Sang v Tay Joo Sing*[98] ("*Ku Yu Sang*"), the parties entered into a sale and purchase agreement for a property. However, the agreement failed to record the mode of exercising the option in contravention of s 4 of the Statute of Frauds 1677.[99] Although the plaintiff did not plead rectification, the High Court followed *Butler v Mountview Estates Ltd*[100] and allowed rectification of the agreement to include just such a term as reflecting the true accord reached between the parties. This was done on the ground that "the parties have not been over-meticulous in their approach to pleadings",[101] in that the defendants failed to plead specifically the ground on which the Statute of Frauds was infringed. The Court of Appeal accepted the High Court's approach on appeal by the defendants.[102]

(2) Common mistake rectification[103]

66 More specifically, the Singapore courts have discussed common mistake rectification, which is the first broad situation in Mustill J's framework, in several cases. In this regard, the leading English case of *Swainland Builders Ltd v Freehold Properties Ltd*[104] ("*Swainland Builders*") lays down four requirements before equitable rectification will be granted for a common mistake:[105]

> The party seeking rectification must show that: (1) the parties had a common continuing intention, whether or not amounting to an agreement, in respect of a particular matter in the instrument to be rectified; (2) there was an outward expression of accord; (3) the intention continued at the time of the execution of the instrument sought to be rectified; (4) by mistake, the instrument did not reflect that common intention.

97 See, *eg*, *Industrial & Commercial Bank Ltd v PD International Pte Ltd* [2003] 1 SLR(R) 382 at [24].
98 [1993] 3 SLR(R) 226.
99 c 3.
100 [1951] 2 KB 563; [1951] 1 All ER 693.
101 *Ku Yu Sang v Tay Joo Sing* [1993] 3 SLR(R) 226 at [39].
102 See *Tay Joo Sing v Ku Yu Sang* [1994] 1 SLR(R) 765 at [22]–[23].
103 See the masterly summary of the various issues in David McLauchlan, "Refining Rectification" (2014) 130 LQR 83.
104 [2002] 2 EGLR 71.
105 *Swainland Builders Ltd v Freehold Properties Ltd* [2002] 2 EGLR 71 at [33].

The House of Lords expressly accepted these four requirements in *Chartbrook*.[106]

67 The Singapore courts appear to have largely accepted these four requirements as well, although no case has actually reproduced them in the form as stated in *Swainland Builders*. Rather, the Singapore courts have either cited the older case of *Frederick E Rose (London) Ltd v William H Pim Jnr & Co Ld*[107] ("*Rose v Pim*"), or concentrated on particular elements. For example, in the High Court decision of *Max Universal Development Group Pte Ltd v Shen Yixuan*[108] ("*Max Universal*"), Lee Seiu Kin J laid down the following general principles regarding rectification:[109]

> (a) There must be an 'outward expression of accord' in relation to the particular provision. It is not necessary to show that there was a binding agreement prior to the execution of the written document, but it must be shown that parties had a continuing intention with regard to that provision down to the execution of the written contract – see *Joscelyne v Nissen* [1970] 2 QB 86.
>
> (b) The burden of proof is on the party seeking rectification and there must be very clear distinct evidence that there was a different intention from the contract document at the time the contract was entered into – see *Tucker v Bennett* (1887) 38 Ch D 1, *Joscelyne v Nissen* [1970] 2 QB 86.
>
> (c) The denial of one of the parties that the deed as it stands is contrary to his intention will have considerable weight, and unless the other party can convince the court that the document does not represent both parties' intentions at the time of execution, rectification will only be ordered exceptionally. It is not sufficient to show that the written contract does not represent the true intention of the parties, it must be shown that the written contract was actually contrary to the intention of the parties – see *Lloyd v Stanbury* [1971] 1 WLR 535.
>
> (d) There must be a literal disparity between the terms of the prior agreement and those of the document which it is sought to rectify. In *Frederick E Rose (London) Ltd v William H Pim Junior & Co Ltd* [1953] 2 QB 450, the parties entered into an oral agreement for the purchase of horsebeans, in the belief that they were 'feveroles', and a subsequent written agreement embodied the same terms. The Court of Appeal

106 *Chartbrook Ltd v Persimmon Homes Ltd* [2009] 1 AC 1101 at [48].

107 [1953] 2 QB 450 at 461. See, *eg*, *Kok Lee Kuen v Choon Fook Realty Pte Ltd* [1996] 3 SLR(R) 182 at [44]; *The An Ji Jiang* [2003] 4 SLR(R) 348 at [41]; *Walsh Terence William v Peregrine Systems Pte Ltd* [2003] SGHC 117 at [22]; and *Xia Zhengyan v Geng Changqing* [2014] SGHC 152 at [57]. See also the alternative formulation by the High Court in *Hub Warrior Sdn Bhd v QBE Insurance (Malaysia) Bhd* [2004] SGHC 279 at [54]–[55]; *Pender Development Pte Ltd v Chesney Real Estate Group LLP* [2009] 3 SLR(R) 1063 at [20]; and *Columbia Asia Healthcare Sdn Bhd v Hong Hin Kit Edward* [2014] 3 SLR 87 at [179]–[180].

108 [2009] SGHC 164.

109 *Max Universal Development Group Pte Ltd v Shen Yixuan* [2009] SGHC 164 at [22].

> refused rectification as both the oral and written agreements were for horse-beans; there was no literal disparity between them.

As can be seen, the learned judge did not formulate the requirements of common mistake rectification, instead laying down the applicable broad principles guiding its application. It is respectfully suggested that while this is not wrong, and indeed helpful, it might be even more helpful had an analytical framework been adopted in terms of the precise elements required for the remedy to be invoked. With that in mind, this section adopts the four elements as set out in *Swainland Builders* and considers the precise application of each element in turn.

(a) Prior agreement or continuing common intention[110]

68 It is clear, following the statement of principles in *Max Universal*, that either a prior concluded agreement *or* continuing common intention is needed.[111] This concluded agreement or continuing common intention is of course that which the rectified document is supposed to reflect. This is in line with the English position[112] as stated in *Chartbrook*[113] and *Joscelyne v Nissen*.[114] It has also been said by the Court of Appeal in *Kok Lee Kuen v Choon Fook Realty Pte Ltd*[115] ("*Kok Lee Kuen*") that the degree of probability required to show such prior concluded agreement is that of "convincing proof", although this probably does not mean a higher standard than on a balance of probabilities.

69 The Singapore courts have dealt with the test to be applied to establish either a prior concluded agreement or continuing common intention. Perhaps somewhat coincidentally, the Singapore approach mirrors the present English position after *Chartbrook*, which is that the test is an objective one.[116] Thus, whether or not the first element is to be found in a prior concluded agreement or continuing common intention, it has to be ascertained objectively.

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110 Gerard McMeel, *The Construction of Contracts: Interpretation, Implication and Rectification* (Oxford University Press, 2nd Ed, 2011) at p 499. See also the analysis in D McLauchlan, "Commonsense Principles of Interpretation and Rectification?" (2010) 126 LQR 8.

111 See also the High Court's discussion in *Cold Storage Holdings plc v Overseas Assurance Corp Ltd* [1988] 1 SLR(R) 255 at [31]–[37].

112 Gerard McMeel, *The Construction of Contracts: Interpretation, Implication and Rectification* (Oxford University Press, 2nd Ed, 2011) at p 499.

113 *Chartbrook Ltd v Persimmon Homes Ltd* [2009] 1 AC 1101 at [59]–[60].

114 [1953] 2 QB 450.

115 [1996] 3 SLR(R) 182 at [46]–[48].

116 Gerard McMeel, *The Construction of Contracts: Interpretation, Implication and Rectification* (Oxford University Press, 2nd Ed, 2011) at p 500.

70 It is clear that the Singapore courts adopt an objective approach to ascertain whether there was a prior concluded agreement, as well as its contents. In *Cold Storage Holdings plc v Overseas Assurance Corp Ltd*,[117] the plaintiffs sued the first defendant for the rectification of insurance policy documents to reflect a coverage period of four years plus one year when the first defendant relied on a clause to cancel the policies prematurely. In a meticulous judgment, Lai Kew Chai J observed that the court's task was to ascertain *objectively* what the parties intended, and that their subjective understandings and intentions were not relevant.[118] On the facts, the court found from the objective documentation that there was a prior oral contract that recorded the agreed period of insurance cover as four years plus one year. Moreover, the court also found that the parties intended a form of insurance cover that did not include the cancellation clause to give effect to their objective intentions ascertained from the prior oral contract: given that the first defendant had two forms of insurance policies, one that contained a cancellation clause and one that did not, the parties were taken to have agreed on the one that did not contain such a clause.[119]

71 Similarly, in *Ku Yu Sang*, the High Court found that there was ample evidence that the parties had reached a clear and firm agreement on how the option was to be exercised. In doing so, the court considered evidence from both the plaintiff and defendants, showing the objectivity of the approach.[120] Finally, in *Kok Lee Kuen*, the Court of Appeal cited from *Rose v Pim* a passage that required the court to ascertain proof of a concluded antecedent contract objectively.[121] *Kok Lee Kuen* concerned the sale and purchase of a property. The plaintiffs were given a site plan showing that the property had an area of 23,090sq ft, but they did not know that this land included an additional thin strip of land. The additional lot only had a public drain and was of no commercial value. The defendants disputed that this additional lot was part of the agreement. The plaintiffs, in response, sought rectification of the agreement to include the additional lot. The Court of Appeal granted rectification. It did so on the basis that the objective evidence, such as the site plans shown to the plaintiffs and the fact that the additional lot was commercially worthless to the defendants, showed that the parties agreed for the sale of the additional lot as well.

117 [1988] 1 SLR(R) 255.
118 *Cold Storage Holdings plc v Overseas Assurance Corp Ltd* [1988] 1 SLR(R) 255 at [42].
119 *Cold Storage Holdings plc v Overseas Assurance Corp Ltd* [1988] 1 SLR(R) 255 at [43].
120 *Ku Yu Sang v Tay Joo Sing* [1993] 3 SLR(R) 226 at [22].
121 *Kok Lee Kuen v Choon Fook Realty Pte Ltd* [1996] 3 SLR(R) 182 at [44].

72 Although the Singapore courts have not expressly said so, there are also indications that they have accepted an objective approach to ascertain a continuing common intention that is not found in a prior concluded agreement. For example, the High Court in *Hub Warrior Sdn Bhd v QBE Insurance (Malaysia) Bhd*[122] looked to the objective evidence in deciding that there was no "common intention or antecedent agreement".[123] This is no doubt ambiguous at best as to whether the court decided to impose an objective standard on ascertaining common intention given that the court was concerned with an alleged oral agreement, but it may show that the courts treat both prior concluded agreement and continuing common intention similarly, such that they should be governed by the same standard as well.

73 As a matter of principle, this is to be welcomed. There is no logical reason why different tests should be used depending on whether a prior concluded agreement or continuing common intention is found. However, given that in Singapore common law rectification is of limited reach, it might be considered whether a subjective test should be preserved for at least ascertaining a continuing common intention.

(b) Outward expression of accord[124]

74 It has been said that after the insistence in *Chartbrook* that a continuing common intention is to be assessed objectively, the need for an *outward* expression of accord is now confirmed, despite its apparent weakening in several earlier cases.[125] The Singapore courts, having largely considered the existence of prior agreement for the first element, would automatically have also found an outward expression of accord in the form of that agreement.

(c) Continuing intention[126]

75 The common intention must have continued up to and at the time of the execution of the document sought to be rectified.[127] This is self-evident and the Singapore courts have assumed this to be the case.

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122 [2004] SGHC 279.

123 *Hub Warrior Sdn Bhd v QBE Insurance (Malaysia) Bhd* [2004] SGHC 279 at [56].

124 Gerard McMeel, *The Construction of Contracts: Interpretation, Implication and Rectification* (Oxford University Press, 2nd Ed, 2011) at p 503. See also David McLauchlan, "Refining Rectification" (2014) 130 LQR at 87.

125 Gerard McMeel, *The Construction of Contracts: Interpretation, Implication and Rectification* (Oxford University Press, 2nd Ed, 2011) at p 503.

126 Gerard McMeel, *The Construction of Contracts: Interpretation, Implication and Rectification* (Oxford University Press, 2nd Ed, 2011) at p 504.

127 Gerard McMeel, *The Construction of Contracts: Interpretation, Implication and Rectification* (Oxford University Press, 2nd Ed, 2011) at p 504.

(d) Disparity between agreement or consensus and document[128]

76 There must be a disparity between the prior agreement or consensus and the document sought to be rectified, a requirement that is again self-evident.

77 In addition, there must also be a mistake, in the absence of which equitable rectification cannot be granted.[129] It is clear after *Chartbrook* that both parties need not be labouring under identical mistakes.[130] *Chartbrook* concerned a price formula for payments for residential units in a building licence agreement. The developer argued that the owners would be paid either a fixed percentage of sales revenue for the flats, or the minimum guaranteed amount for each flat, whichever was greater. In contrast, the owners argued that they were entitled to both these sums. While the contract recording the price formula could be read to support the owners' interpretation, all of the documentation that shed light on the commercial purpose of the arrangement supported the developers' case. The finding of a mistake on these facts has diluted the need for identical mistakes on both parties. Indeed, the owners did not share the developers' mistaken belief that the contract matched the prior accord between the parties. To the owners, there was absolutely no mistake on their subjective belief of the prior accord. The common mistake only came about because now the prior accord was interpreted objectively.[131] Thus, Professor McMeel argues that the common mistake required has now been "reduced to the requirement that both parties were mistaken in thinking that the document represented the prior accord (which is judged objectively)".[132]

78 The Singapore courts have not considered whether this aspect of *Chartbrook* should apply. Understandably, the cases pre-*Chartbrook* appear to insist that the parties share the mistake, subjectively ascertained. For example, in *Chai Chung Ching Chester v Diversey (Far East) Pte Ltd*,[133] there was a disagreement on the terms of a settlement agreement between the parties, for which rectification was sought. In declining rectification, the High Court held that the mistaken party's mistaken assumption was not communicated to the other party. The

128 Gerard McMeel, *The Construction of Contracts: Interpretation, Implication and Rectification* (Oxford University Press, 2nd Ed, 2011) at p 504.
129 *Lim Chin San Contractors Pte Ltd v Shiok Kim Seng* [2011] 1 SLR 433 at [26].
130 Gerard McMeel, *The Construction of Contracts: Interpretation, Implication and Rectification* (Oxford University Press, 2nd Ed, 2011) at p 506.
131 Gerard McMeel, *The Construction of Contracts: Interpretation, Implication and Rectification* (Oxford University Press, 2nd Ed, 2011) at pp 506–507.
132 Gerard McMeel, *The Construction of Contracts: Interpretation, Implication and Rectification* (Oxford University Press, 2nd Ed, 2011) at p 506.
133 [1991] 1 SLR(R) 757, appeal dismissed by the Court of Appeal in *Diversey (Far East) Pte Ltd v Chai Chung Ching Chester* [1992] 3 SLR(R) 412.

court accordingly found that that other party did not share this mistake.[134] The court's insistence that the mistake was actually communicated shows that the pre-*Chartbrook* requirement of an identical mistake stands.

(3) Unilateral mistake rectification[135]

79 We turn now to equitable rectification for a unilateral mistake, which is the second broad situation in which the remedy may be granted. The High Court in *Sheng Siong Supermarket Pte Ltd v Carilla Pte Ltd*[136] ("*Sheng Siong Supermarket*") set out the requirements for unilateral mistake rectification as follows:[137]

> First, the non-mistaken party must have actual knowledge of the mistaken party's intentions and of the mistake, and this includes wilfully shutting one's eyes to the obvious. Second, the non-mistaken party must have failed to draw the mistaken party's attention to the mistake. Third, the mistake must be such that the non-mistaken party would derive a benefit, or the mistaken party would suffer a detriment, if the inaccuracy in the document were to remain uncorrected. It is not necessary that the conduct of the non-mistaken party amounts to fraud. All that is necessary is that the knowledge or conduct of the non-mistaken party must be such as to make it inequitable for that party to object to rectification.

80 It is submitted that this framework provides a useful reference for future cases and will be adopted in the next sections.

(a) Non-mistaken party must have actual knowledge

81 The requirement that the non-mistaken must have actual knowledge of the mistaken party's intention and of the mistake is illustrated by the High Court decision of *Chong Sze Pak v Har Meng Wo*[138] ("*Chong Sze Pak*"). In that case, the plaintiff exercised an option granted by the defendant to purchase a property. Clause 11 of the option provided that the final price would be based on the actual built-in area shown in the title documents or determined by a registered surveyor. The plaintiff later sought a reduction in price on the basis that the built-in area was lower than that represented by the defendant. The discrepancy had arisen because the property consisted of a leasehold interest in a flat and a one-third undivided share in the freehold reversion in the land. The plaintiff's price was derived from the area of the flat, whereas the defendant's price was based on the land area as contained in documents

134 *Chai Chung Ching Chester v Diversey (Far East) Pte Ltd* [1991] 1 SLR(R) 757 at [44].
135 See David McLauchlan, "The 'Drastic' Remedy of Rectification for Unilateral Mistake" (2008) 124 LQR 608.
136 [2011] 4 SLR 1094.
137 *Sheng Siong Supermarket Pte Ltd v Carilla Pte Ltd* [2011] 4 SLR 1094 at [67].
138 [1997] 2 SLR(R) 1009.

given to the plaintiff. In resisting the plaintiff's claim for specific performance, the defendant argued that the plaintiff knew of the defendant's mistake and took advantage of it.

82 On the facts, the court found that the plaintiff knew or must have known of the defendant's mistake. This is because while the agreement referred to the built-in area as being only the area of the flat, the price stipulated clearly contemplated the area being that of the land. Since the plaintiff allowed the defendant to remain under this delusion, it would have been unconscientious to allow the purchaser to obtain the property at a lower price.

83 Likewise, in *Sheng Siong Supermarket*, the plaintiff sought to rent a three-storey leasehold property from the defendant. The Housing and Development Board ("HDB") was the reversionary owner of the premises. The parties signed a main term sheet, cl 10 of which provided that "40% of the GTA [General Floor Area] is for retail and 60% GFA is for entertainment, offices, child care, *etc*". Importantly for the plaintiff, tenant usage was stated to comprise "supermarket, wet market, thematic F&B, offices and others". However, the final tenancy agreement did not include cl 10, even though it included a plan of the premises that depicted a supermarket. When the HDB rejected proposals for the premises to be used as a supermarket, the plaintiff sued to recover its security deposit and other fees, on the premise that the lease was conditional on the premises being approved for use as a supermarket. The defendant resisted this claim on the basis that cl 10 was not inserted in the final tenancy agreement.

84 Although unilateral mistake rectification was not pleaded, the High Court indicated that it would have been inclined to allow such a claim. The court found the requirement of actual knowledge to be satisfied since the plaintiff had communicated the importance of usage as a supermarket to the defendant. Despite this, the defendant failed to spell out this condition unambiguously in the final tenancy agreement that it unilaterally drew up.

(b) Failed to draw mistake to mistaken party's attention

85 The second requirement that the non-mistaken party failed to draw the mistaken party's attention to the mistake is also illustrated by *Sheng Siong Supermarket*. On the facts, the court found no evidence that the defendant drew the plaintiff's attention to the omission of such a fundamental point of understanding between the parties. This is a largely self-evident requirement that is highly fact-dependent.

(c) Inequitable conduct on part of non-mistaken party

86 The third requirement is that the knowledge or conduct of the non-mistaken party would make it inequitable for that party to object to rectification. One issue that has concerned the courts in unilateral mistake rectification is the degree of "inequitability" needed. The Singapore courts have not dealt with this directly but there are some useful statements of principle in the cases.

87 For example, in *Chong Sze Pak*, the High Court considered when equity would intervene to grant relief where a party is mistaken as to the terms of an offer and concludes a contract nonetheless. The court summarised the applicable principles as being:[139]

> (a) if a party knows that the other is so mistaken and lets him remain under his delusion and concludes a contract on the mistaken terms instead of pointing out the mistake: *Solle v Butcher* … See also *A Roberts & Co Ltd v Leicestershire County Council* [1961] Ch 555 *per* Pennycuick J at 570;
>
> (b) Where the mistake of a party is induced by the other even if innocently: *Faraday v Tamworth Union* (1916) 86 LJ Ch 436.
>
> (c) Where hardship amounting to injustice would be inflicted on the mistaken party by holding him to his bargain and it is unreasonable to hold him to it: *Tamplin v James* (1880) 15 Ch D 215 at 221 *per* James LJ. See also *Slee v Warke* (1949) 86 CLR 271.
>
> (d) Where one party is aware that the other party is under some serious mistake or misapprehension about the content or subject matter of a fundamental term and deliberately sets out to ensure that he does not become aware of the mistake or misapprehension: *Taylor v Johnson* …

88 The contract was set aside, not rectified. Thus, although the court was not directly concerned with unilateral mistake rectification, this summary is useful in ascertaining the type of conduct needed on the part of the non-mistaken party. It appears from the situations postulated by the court that conduct short of sharp practice is sufficient.

89 This is further supported by other cases. For example, in *Kok Lee Kuen*, the Court of Appeal had to consider the defendants' argument that they intended to keep the additional lot and hence did not make a mistake required for rectification. The court held that rectification could also be made out on the basis that the defendants failed to communicate their change of intention to the plaintiffs, given that they knew that the plaintiffs thought they were purchasing the additional lot as well.[140]

139 *Chong Sze Pak v Har Meng Wo* [1997] 2 SLR(R) 1009 at [26].
140 *Kok Lee Kuen v Choon Fook Realty Pte Ltd* [1996] 3 SLR(R) 182 at [54].

Although the court found that this omission could have been made innocently, this was nonetheless treated as sufficient. Likewise, in *Sheng Siong Supermarket*, the court did not make an express finding of sharp practice, focusing instead on the fact that there was a benefit to the non-mistaken party due to its actual knowledge. That, the court held to be sufficient to constitute inequitability.

D. Summary: Equitable rectification in Singapore

90 Equitable rectification, unlike common law rectification, is not subject to the exclusionary evidential rules found in ss 95–99 of the EA. It is thus unsurprising that the English principles are largely taken to apply in Singapore in both rectification for common mistake and unilateral mistake. Moving forward, the Singapore courts will have to consider the effect of *Chartbrook*, particularly the holding that has required an objective approach to ascertain a continuing common intention. The Singapore courts may also wish to consider the exact inequitability that must exist before unilateral mistake rectification can be invoked. In the light of the more constrained application of common law rectification in the EA, it may well be legitimate for the Singapore courts to adopt a more expansive application of equitable rectification here.

IV. Conclusion

91 This article has attempted to state the law on rectification in Singapore.[141] Given the constraints of space, this statement will be incomplete. However, it is hoped that it at least points readers towards some important issues about rectification. The primary issue must be that the EA cannot be ignored when considering rectification, which must itself be considered in terms of either common law or equitable rectification. Once that starting point is clarified, the secondary question of whether the English approach, or indeed any other jurisdiction's approach, on rectification should be followed in Singapore can then be answered.

92 As mentioned at the start of this article, rectification will only increase in importance given the growing complexity of legal documents. In Singapore, where the antiquated EA prevents a full application of modern-day contractual interpretation or common law rectification,

141 What this article has not tried to do is to suggest that the parol evidence rule within the Evidence Act (Cap 97, 1997 Rev Ed) be reformed. While there may be a good case for such reform, this article has assumed the application of the parol evidence rule as statutorily enshrined in the Evidence Act and attempted to state what the law of rectification is in Singapore.

equitable rectification will continue to have a significant role to play. It is all the more important that we clarify its understanding in the context of Singapore law.