(2022) 34 SAcLJ 654
(Published on e-First 10 June 2022)

RECTIFICATION OF CONTRACTS ARISING FROM COMMON MISTAKE

Sun Electric Pte Ltd v Menrva Solutions Pte Ltd [2021] 5 SLR 648

This case note discusses the decision of the High Court in *Sun Electric Pte Ltd v Menrva Solutions Pte Ltd* [2021] 5 SLR 648 which originated from a contractual dispute between two companies that eventually claimed against each other for, *inter alia*, breach of contract. The decision illustrates the current Singapore position on rectification of contracts arising from common mistake and how the courts assess if the remedy ought to be granted. This note also discusses the ambiguity in the local application of rectification concepts, particularly in the area of common law rectification, and highlights the need to take into account the Evidence Act 1893 (2020 Rev Ed) when considering the applicability of common law concepts derived from foreign jurisdictions such as England.

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I. Introduction

1 This matter arose from a contractual dispute between the plaintiffs and the defendants. The issue on liability was first heard in *Sun Electric Pte Ltd v Menrva Solutions Pte Ltd* [2018] SGHC 264 and subsequently affirmed in *Sun Electric Pte Ltd v Menrva Solutions Pte Ltd* [2019] SGCA 51 (the "Liability Decisions"). The latest case in this dispute and upon which this case note focuses is *Sun Electric Pte Ltd v Menrva Solutions Pte Ltd* [2021] 5 SLR 648 (the "AD Decision"), which pertains to the assessment of the damages to be paid by the first plaintiff to the first defendant.

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2 Apart from providing a brief background, this case note will focus primarily on the defendants' counterclaim which led to the discussion of the remedy of rectification based on common mistake in the Singapore context. Readers should refer to the Liability Decisions for a better understanding of the plaintiffs' claims for breach of contract and the tort of negligence.

II. Background

3 The first plaintiff, Sun Electric Pte Ltd ("SE"), was the parent company of the second plaintiff, Sun Electric Power Pte Ltd ("SEP"). The chief executive officer and director of both plaintiffs was Dr Matthew Peloso ("Dr Peloso"). On or around March 2015, SEP was accepted as a participant under the Enhanced Forward Sales Contract Scheme (the "Scheme") implemented by the Energy Market Authority of Singapore ("EMA").

4 Under the Scheme, participants had to buy or sell a certain volume of electricity futures each trading day. This undoubtedly involved risk. Thus, to mitigate the risk involved, participants could enter into forward sale contracts with SP Services Limited ("SPS") where participants would either receive payments from SPS or make payments to SPS. The direction of payments and quantum were dependent on the difference between the wholesale electricity price ("WEP") and the liquefied natural gas vesting price ("LVP") at the time.[1]

5 In connection with SEP's participation in the Scheme, Dr Peloso sought to obtain professional consultancy services from the second defendant, Mr Chan, and the parties agreed to structure their collaboration as a consultancy agreement between SE and a Singapore corporate vehicle to be incorporated by Mr Chan. Consequently, Mr Chan incorporated the first defendant, Menrva Solutions Pte Ltd ("Menrva").[2]

6 Shortly after Menrva was incorporated, Menrva and SE formally executed an agreement for Menrva to provide advisory, consultancy and risk management services (the "Consultancy Agreement"), of which the pertinent terms were:

> (a) The recitals expressly identified the contractual counterparties as SE, *ie*, the first plaintiff and Menrva.[3]

1 *Sun Electric Pte Ltd v Menrva Solutions Pte Ltd* [2018] SGHC 264 at [4]–[8].
2 *Sun Electric Pte Ltd v Menrva Solutions Pte Ltd* [2018] SGHC 264 at [9]–[10].
3 *Sun Electric Pte Ltd v Menrva Solutions Pte Ltd* [2021] 5 SLR 648 at [7]–[9].

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(b) Clause 3 provided that SE was to pay Menrva fees which were to be calculated on a sliding scale as a percentage of the "Total Annual Receipt" as defined in the Consultancy Agreement.[4]

(c) Clause 4 concerned an investment which the parties envisaged that Menrva would make in one of the SE's infrastructure projects or in SE itself.[5]

(d) Clause 7 allowed either party to terminate the Consultancy Agreement on notice, without cause.[6]

7 To hedge against volatility in the electricity futures market, SEP, on the advice of Menvra, entered into seven contracts between June and December 2015 for differences on the WEP ("CFDs"). Unfortunately, SEP only made a gain of $353,280 on the first CFD. SEP suffered a loss of under $1.46m on the last six CFDs. This said $1.46m formed the bulk of the plaintiffs' claim against the defendants.[7]

8 On or around 26 January 2016, Dr Peloso sent Mr Chan an email stating that SE was terminating the Consultancy Agreement with Menrva for "non-performance" and "for cause" stemming from the first defendant's breach of clauses 1(b)(v)(a) to (e) of the same. Mr Chan rejected such allegations and reminded that payment was due to Menrva under the Consultancy Agreement.[8]

9 Following failed negotiations, the plaintiffs commenced legal action against the defendants for breach of contract and for breach of duty of care in tort. The plaintiffs further claimed that Menrva's corporate veil ought to be lifted to hold Mr Chan liable to the plaintiffs for Menrva's defaults. The defendants also relied on clause 7 of the Consultancy Agreement and commenced a counterclaim against the plaintiffs for the outstanding fees due to Menrva under clause 3 of the Consultancy Agreement if it had not been terminated on 26 January 2016.[9]

4 *Sun Electric Pte Ltd v Menrva Solutions Pte Ltd* [2021] 5 SLR 648 at [10].
5 *Sun Electric Pte Ltd v Menrva Solutions Pte Ltd* [2021] 5 SLR 648 at [11].
6 *Sun Electric Pte Ltd v Menrva Solutions Pte Ltd* [2018] SGHC 264 at [26] and [148].
7 *Sun Electric Pte Ltd v Menrva Solutions Pte Ltd* [2021] 5 SLR 648 at [12]; *Sun Electric Pte Ltd v Menrva Solutions Pte Ltd* [2018] SGHC 264 at [20]–[22].
8 *Sun Electric Pte Ltd v Menrva Solutions Pte Ltd* [2018] SGHC 264 at [23]–[24].
9 *Sun Electric Pte Ltd v Menrva Solutions Pte Ltd* [2018] SGHC 264 at [26] and [148].

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III. The Liability Decisions

10 At the conclusion of the trial in the High Court, the trial judge held that:

(a) Menrva had only breached clause 1(b)(v)(a) of the Consultancy Agreement as it had failed to provide SE a daily indicative valuation of the forward sale contracts for risk monitoring. The court rejected Menrva's arguments that the said clause was ambiguous when considered based on the context and/or that SE had waived Menrva's obligation under the said clause. A plain reading of the said clause undoubtedly required Menrva to produce such daily indicative valuations and it was undisputed that Menrva did not do so.[10]

(b) Menrva did not breach clauses 1(b)(v)(b) to (e) of the Consultancy Agreement.[11]

(c) SE was entitled to nominal damages of $1,000 for Menrva's breach of clause 1(b)(v)(a) of the Consultancy Agreement. The court rejected the plaintiffs' claim for their losses of $1.46m on the six CFDs for two reasons. First, the losses were suffered by SEP which was not a party to the Consultancy Agreement; any contractual obligations owed by Menrva were to SE only and SEP had no legal basis to recover such sum. Second, there was no causal link between Menrva's said breach and SEP's said loss. As such, the court could only award SE nominal damages as was its right which arose from the breach of contract.[12]

(d) The plaintiffs had not sufficiently discharged their burden of proving that Menrva was not a separate entity from Mr Chan and was in fact carrying on Mr Chan's business. Therefore, there was no necessity for Menrva's corporate veil to be lifted to make Mr Chan personally liable.[13]

(e) The defendants did not owe the plaintiffs any duty of care.[14]

(f) On the counterclaim, SE had not exercised its right to terminate the Consultancy Agreement under clause 7 of the Consultancy Agreement at any point in time. SE also had no right to terminate the Consultancy Agreement at common law

10 *Sun Electric Pte Ltd v Menrva Solutions Pte Ltd* [2018] SGHC 264 at [48]–[54].
11 *Sun Electric Pte Ltd v Menrva Solutions Pte Ltd* [2018] SGHC 264 at [55]–[81].
12 *Sun Electric Pte Ltd v Menrva Solutions Pte Ltd* [2018] SGHC 264 at [82]–[92].
13 *Sun Electric Pte Ltd v Menrva Solutions Pte Ltd* [2018] SGHC 264 at [126]–[147].
14 *Sun Electric Pte Ltd v Menrva Solutions Pte Ltd* [2018] SGHC 264 at [93]–[124].

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when it attempted to do so on 26 January 2016. Such attempt to terminate without justification in itself was tantamount to a repudiatory breach of contract. Thus, Menrva was entitled to damages for SE's repudiatory breach, the quantum for which needed to account for various contingencies.[15]

11 The plaintiffs appealed against the judge's decision. After considering both written and oral submissions of the parties, the Court of Appeal ("CA") dismissed the appeal:

(a) First, the CA agreed with the judge that there was only a breach of clause 1(b)(v)(a) and there were no breaches of clauses 1(b)(v)(b) to (e). The CA also upheld the judge's finding based on the facts that there was no causal link between Menrva's said breach and SEP's losses on the CFDs.[16]

(b) However, the CA was of the view that Menrva did owe a duty of care based on the relevant principles set out in *Spandeck (S) Pte Ltd v Defence Science & Technology Agency*,[17] *ie*, both factual foreseeability and legal proximity were satisfied.[18] Despite this, an assessment of facts showed that Menrva did not breach its duty of care and that the parties had in any event intended to exclude any duty in tort owed by Mr Chan.[19]

(c) The CA further affirmed the judge's decision to reject the plaintiffs' application to pierce the corporate veil[20] as well as the decision on the counterclaim.[21]

IV. The AD Decision

12 Following the Liability Decisions, the matter was remitted back to the High Court for an assessment of damages in respect of Menrva's successful counterclaim against SE. It was the common understanding that the quantum of damages was based on the amount which Menrva would have received under clause 3(b) of the Consultancy Agreement if SE had not breached the Consultancy Agreement and that this amount was, at best, a sum just below $1.5m. However, SE submitted that Menvra

15 *Sun Electric Pte Ltd v Menrva Solutions Pte Ltd* [2018] SGHC 264 at [148]–[153].
16 *Sun Electric Pte Ltd v Menrva Solutions Pte Ltd* [2019] SGCA 51 at [2]–[4].
17 [2007] 1 SLR(R) 720.
18 *Sun Electric Pte Ltd v Menrva Solutions Pte Ltd* [2019] SGCA 51 at [5]–[6].
19 *Sun Electric Pte Ltd v Menrva Solutions Pte Ltd* [2019] SGCA 51 at [7]–[8].
20 *Sun Electric Pte Ltd v Menrva Solutions Pte Ltd* [2019] SGCA 51 at [9].
21 *Sun Electric Pte Ltd v Menrva Solutions Pte Ltd* [2019] SGCA 51 at [10].

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was only entitled to nominal damages or substantially less than the "best case" scenario for three reasons:[22]

> (a) Menrva's contractual entitlement was to receive fees on payments that EMA made to SE under the Scheme. Since EMA had made all payments under the Scheme to SEP and there were no payments to SE, Menrva would have received no fees under the Consultancy Agreement and was therefore entitled to nominal damages only (the "Entity Ground").
>
> (b) Menvra was obliged to deduct SEP's gains and losses on the CFDs from the "Total Annual Receipt" *before* calculating its fees as per clause 3(b) (the "CFD Ground").
>
> (c) The quantum of damages had to account for the likely current value of the investments envisaged by clause 4 of the Consultancy Agreement (the "Clause 4 Ground").

A. Entity Ground

13 SE submitted that clause 3(b) ought to be interpreted such that Menrva was entitled to receive fees only if "SE" received payments under the Scheme and that "SE" could only mean SE, the first plaintiff, and cannot be interpreted to mean or include SEP. Menvra disagreed and submitted that the clause allowed it to receive fees from SE even if SEP was the party which received payments from the EMA under the Scheme. Alternatively, Menrva asked that "SE" in clauses 3(a) and 3(c) to 3(e) (but not in clause 3(b)) be rectified to read as "Sun Electric Power Pte. Ltd. or any entity within the Sun Electric group of companies".[23]

14 In this regard, the court held that the contextual approach as set out in *Yap Son On v Ding Pei Zhen*[24] ("*Yap Son On*") was applicable in relation to contractual interpretation. Having said that, the Court considered that the Consultancy Agreement, save for clause 4, was drafted by Dr Peloso and Mr Chan who were both laypersons. Thus, it was appropriate to adopt a "common sense approach" in interpretation as opposed to a technical or legalistic approach.[25]

15 Considering the interrelated commercial and contractual concepts in clause 3 holistically and contextually, the court held that Menrva's right to receive fees was triggered only if "SE" received payments

22 *Sun Electric Pte Ltd v Menrva Solutions Pte Ltd* [2021] 5 SLR 648 at [13]–[14].
23 *Sun Electric Pte Ltd v Menrva Solutions Pte Ltd* [2021] 5 SLR 648 at [35]–[37].
24 [2017] 1 SLR 219.
25 *Sun Electric Pte Ltd v Menrva Solutions Pte Ltd* [2021] 5 SLR 648 at [40]–[41].

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under the Scheme. The issue then hinged on whether "SE" in clause 3 could be interpreted to mean or include SEP.[26]

16 On this point, the court reiterated the principles underlying the contextual approach, whilst highlighting that the courts had no power to disregard the parties' intention as ascertained from objective evidence and to rewrite the contract based on its subjective view of what was just and fair.[27]

17 Moving on to the facts, the court found that the parties were fully aware that it was SEP and not SE which would be receiving payments under the Scheme when it entered into the Consultancy Agreement. This was evident from various emails by Dr Peloso, the parties' conduct when submitting the application to participate in the Scheme and evidence given by Dr Peloso and Mr Chan upon cross-examination. Given the contextual circumstances, it would be absurd to interpret "SE" as referring to SE only; such interpretation would result in an uncommercial result and defer from the parties' intentions when they were negotiating the terms of the Consultancy Agreement.[28] However, the court noted that context could not be used to rewrite the text of the Consultancy Agreement which clearly provided no basis to read "SE" as anything else apart from SE, even if it had been drafted by laypersons such as Dr Peloso and Mr Chan.[29]

18 Menrva's argument that clause 4(a) of the Consultancy Agreement, which used three different terms, *ie*, "SE", "Sun Electric" and "Sun Electric Pte Ltd", was evidence that the parties intended "SE" to be more than a contractual synonym for SE, also failed. The clause referred to "fees received from Sun Electric" and it was common ground that only SE was obliged to pay fees to Menrva. It was evident that the three different terms in clause 4 all referred to SE only and the parties did not intend to draw any distinction between the meaning of "Sun Electric Pte Ltd" and the meaning of "Sun Electric".[30]

19 Thus, the court held that there was no scope for the context to take precedence over the meaning of "SE" in the Consultancy Agreement even if it led to such an absurd and uncommercial result. Having said that, the court acknowledged that the parties could not have intended for such result. As such, the court proceeded to consider rectification.

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26 *Sun Electric Pte Ltd v Menrva Solutions Pte Ltd* [2021] 5 SLR 648 at [42]–[43].
27 *Sun Electric Pte Ltd v Menrva Solutions Pte Ltd* [2021] 5 SLR 648 at [45].
28 *Sun Electric Pte Ltd v Menrva Solutions Pte Ltd* [2021] 5 SLR 648 at [46]–[48].
29 *Sun Electric Pte Ltd v Menrva Solutions Pte Ltd* [2021] 5 SLR 648 at [49].
30 *Sun Electric Pte Ltd v Menrva Solutions Pte Ltd* [2021] 5 SLR 648 at [50]–[57].

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20 The court considered the case of *Edwards Jason Glenn v Australia and New Zealand Banking Group Ltd*[31] ("*Edwards Jason Glenn*") and held that the courts have the power to correct "obvious mistakes in the written expression of the intention of the parties". As set out in *East v Pantiles (Plant Hire) Ltd*[32] ("*East v Pantiles*") which was applied locally in the case of *Ng Swee Hua v Auston International Group Ltd*[33] ("*Ng Swee Hua*"), the remedy of common law rectification is applicable if there is a clear mistake on the face of the instrument and if it is clear as to the correction that ought to be made to cure the mistake.[34]

21 Considering the facts, the court was of the view that the first element in *East v Pantiles* was not made out as there was no clear mistake on the face of the Agreement. The first recital had expressly defined "SE" to mean "Sun Electric Pte Ltd", which was a party to the Consultancy Agreement, and it was entirely possible for SE to receive payments and pay Menrva fees under clause 3. This was a stark difference from the facts in *Edwards Jason Glenn* and *Ng Swee Hua* where there was a plain mistake in the drafting.[35]

22 Menrva purported to rely on the English case of *Chartbrook Ltd v Persimmon Homes Ltd*[36] ("*Chartbrook*") and argued that common law rectification was no longer restricted to a clear mistake on the face of the instrument, *ie*, the first element in *East v Pantiles*. Applying the extension in *Chartbrook*, the court could consider the instrument's background and context in ascertaining if the said element in *East v Pantiles* was satisfied.[37] However, *Chartbrook* was not considered in the Singapore cases which applied *East v Pantiles*. In any event, the court preferred to proceed on the basis that the extension in *Chartbrook* was not part of Singapore law since the parties had not addressed this issue despite binding authorities and the constraints of the Evidence Act 1893[38] (the "EA"), and that this extension appeared to blur important distinctions between contractual interpretation and rectification concepts.[39] Nonetheless, the court made several observations on common law rectification and the EA:[40]

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31 [2012] SGHC 61.
32 [1982] 2 EGLR 111.
33 [2008] SGHC 241.
34 *Sun Electric Pte Ltd v Menrva Solutions Pte Ltd* [2021] 5 SLR 648 at [59]–[60].
35 *Sun Electric Pte Ltd v Menrva Solutions Pte Ltd* [2021] 5 SLR 648 at [63]–[65].
36 [2009] 1 AC 1101.
37 *Sun Electric Pte Ltd v Menrva Solutions Pte Ltd* [2021] 5 SLR 648 at [66].
38 2020 Rev Ed.
39 *Sun Electric Pte Ltd v Menrva Solutions Pte Ltd* [2021] 5 SLR 648 at [67]–[68]. For the common law position on rectification *versus* interpretation, see Paul S Davies, "Rectification *versus* Interpretation: The Nature and Scope of the Equitable Jurisdiction" (2016) 75(1) *Cambridge Law Journal* 62.
40 *Sun Electric Pte Ltd v Menrva Solutions Pte Ltd* [2021] 5 SLR 648 at [69]–[78].

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(a) The contextual approach in English law is a pure common law doctrine. Thus, it was open for the judge in *Chartbrook* to have extended the first *East v Pantiles* element, as he had done, in the incremental manner by which the common law usually develops.

(b) However, the contextual approach in Singapore, especially in the area of common law rectification, must operate within the constraints of the EA. This was similarly noted in *Yap Son On* where the Court of Appeal cited Goh Yihan[41] and held that the scope of common law rectification was "greatly circumscribed" by the EA.

(c) As such, the extension in *Chartbook* was too broad to be accepted into Singapore law. Any such application required close examination as there was a real possibility of conflict with the EA.

(d) Of the various sections in the EA, s 95 was a significant constraint on common law rectification in Singapore. The said provision prohibits the court from receiving extrinsic evidence to ascertain what correction should be made to the language of the document in question if the language is "on its face ambiguous or defective". Essentially, the court can only consider the document itself to determine the necessary corrections.

(e) The EA allows some room for extending the *East v Pantiles* elements only in limited situations. This is provided for in ss 97 and 99 where the language in a document is plain on its face but is meaningless by reference to existing facts and the evidence to be adduced is meant to show to which of two sets of existing facts the language in a document was intended to refer. These sections can apply to permit admission of extrinsic evidence even if the mistake is not clear on the face of the instrument so long as the mistake becomes clear upon admission of the same.

(f) Nonetheless, it is pertinent that the conditions in ss 97 or 99 must be satisfied; the approach does not apply to every case of common law rectification. Hence, *Chartbrook* is not authority on the scope of the first *East v Pantiles* element in Singapore.

23 The court then proceeded to consider equitable rectification which is permitted where there is a "mismatch between the parties' agreement and the instrument which purports to record it".[42] Menrva

41 Goh Yihan, "Clarifying Rectification in Singapore" (2015) 27 SAcLJ 403.
42 *Sun Electric Pte Ltd v Menrva Solutions Pte Ltd* [2021] 5 SLR 648 at [80].

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sought to rectify clauses 3(a) and 3(c) to (e) in equity on the ground of common mistake or unilateral mistake by striking out "SE" and replacing it with "Sun Electric Power Pte. Ltd. or any entity within the Sun Electric group of companies".[43]

24 The court first considered the ground of common mistake. Applying *Yap Son On*, equitable rectification based on common mistake could be granted if Menrva could prove that the parties had, *inter alia*: (a) a continuing common intention in respect of the interpretation of "SE" in the Consultancy Agreement; (b) there was an outward expression of accord; (c) such common intention continued until the point of execution of the Consultancy Agreement; and (d) the Consultancy Agreement did not reflect that said continuing common intention by mistake.[44]

25 In this regard, a question arose as to whether the continuing common intention was supposed to be subjectively or objectively ascertained. The court considered various local and English authorities and noted the suggestion for such subjective tests to be applied in the Singapore context. Nonetheless, as the parties took a common position that the intention ought to be objectively ascertained, the court did not consider the question further.[45]

26 Moving on, the court accepted Menrva's submission that the parties had an agreement or common intention that, upon any entity in the Sun Electric group entering into a Definitive Agreement with the MM Partner and thereafter receiving a net positive payment under the Scheme, Menrva would be entitled to a percentage of that said payment. This was based on the parties' common knowledge that it was SEP that would enter into the Definitive Agreement and receive payments under the Scheme as well as Dr Peloso's and Mr Chan's evidence on cross-examination. The continuing common intention was that Menrva would be paid a percentage of the net positive payments received by SEP, even though it was sometimes referred to as "SE". As such, the court was satisfied that clause 3 was drafted in this manner due to an oversight by the parties.[46]

27 Notably, the Consultancy Agreement had provided for an entire agreement clause which SE purported to rely on as its defence to the counterclaim. However, SE failed to make submissions on the effect of

43 *Sun Electric Pte Ltd v Menrva Solutions Pte Ltd* [2021] 5 SLR 648 at [81].
44 *Sun Electric Pte Ltd v Menrva Solutions Pte Ltd* [2021] 5 SLR 648 at [82]–[83].
45 *Sun Electric Pte Ltd v Menrva Solutions Pte Ltd* [2021] 5 SLR 648 at [84]–[86].
46 *Sun Electric Pte Ltd v Menrva Solutions Pte Ltd* [2021] 5 SLR 648 at [87]–[92].

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the clause on Menrva's equitable rectification claim. Regardless, the court was of the view that the said clause did not preclude rectification.[47]

28 In conclusion, the court held that Menrva had successfully proved its entitlement to equitable rectification on grounds of common mistake and clauses 3(a) and 3(c) to (e) of the Consultancy Agreement as prayed for.[48] There was therefore no need to consider the alternative ground of unilateral mistake.

B. CFD Ground

29 SE's main argument was that clause 3 had to be interpreted consistently such that the phrase "net positive payment" therein was to be the net sum of SEP's gains and losses on the CFDs. However, the court reviewed the entire Consultancy Agreement and found that there was no mention of the CFDs whatsoever. Even if the clause had been drafted by laymen such as Dr Peloso and Mr Chan, the complete phrase in clause 3 could not be interpreted so broadly as to encompass gains and losses on the CFDs. The parties were fully aware that SEP could enter into CFDs with counterparties apart from the MM Partner which would assist SEP in laying off some risk associated with its participation in the Scheme.[49]

30 Further, as seen from clauses 3(b) to 3(d), the net positive payment under clause 3(a) was to consist of annual and quarterly payments. Nonetheless, it was open to SEP to enter into CFDs involving payments at any interval. Given this possibility of having payments at other intervals, the gains and losses on each CFD did not form part of the annual and quarterly net positive payments from the MM Partner within the meaning of clause 3.[50]

31 Even if the payment of $52,992 to Menrva in August 2015 arising from SEP's gain on the first CFD had been admitted as evidence of subsequent conduct, it would not have aided SE's case. The court considered the circumstances and the parties' intention at the time when they entered into the agreement and found that there were alternative explanations for the said payment. As such, the court declined the CFD Ground.[51]

47 *Sun Electric Pte Ltd v Menrva Solutions Pte Ltd* [2021] 5 SLR 648 at [93]–[94].
48 *Sun Electric Pte Ltd v Menrva Solutions Pte Ltd* [2021] 5 SLR 648 at [95].
49 *Sun Electric Pte Ltd v Menrva Solutions Pte Ltd* [2021] 5 SLR 648 at [100].
50 *Sun Electric Pte Ltd v Menrva Solutions Pte Ltd* [2021] 5 SLR 648 at [101].
51 *Sun Electric Pte Ltd v Menrva Solutions Pte Ltd* [2021] 5 SLR 648 at [102]–[107].

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C. Clause 4 Ground

32 The court reviewed clause 4 of the Consultancy Agreement and accepted SE's submission that Menrva was obligated to invest part of its fees in SE or one of its infrastructure projects. Nevertheless, SE did not discharge its burden of proof and failed to provide evidence of its infrastructure projects or the value of such projects or of its equity over time. As such, the court was not in a position to make any assessments and the Clause 4 Ground was rejected.[52]

33 At the conclusion of the assessment hearing, the court ordered as follows:[53]

> (a) Clauses 3(a) and 3(c) to (e) of the Consultancy Agreement were rectified such that any mention of "SE" therein was read as "Sun Electric Power Pte. Ltd. or any entity within the Sun Electric group of companies".[54]
>
> (b) SE was to pay Menrva damages for breach of the Consultancy Agreement assessed at $1,495,452.53 with interest calculated from the date of the writ to the date of judgment at the rate of 5.33% p.a. on the said sum, amounting to $413,169.36.

V. Commentary

34 The decision of the High Court in the AD Decision left the application of the extension in *Chartbrook*[55] under common law rectification open for discussion. Rectification is an increasingly common remedy that is highly sought after by contracting parties in litigation[56] and understandably so, as successful parties would be able to amend errors in contracts and proceed accordingly. Thus, it is imperative to have clarity on the application of rectification in the Singapore context.

35 Before proceeding further, it is noted that the 2020 revised edition of the EA in force (or previous editions of the EA) does not expressly provide for the application of rectification.[57] The slightest hint or mention of the application of rectification appears to feature only in

52 *Sun Electric Pte Ltd v Menrva Solutions Pte Ltd* [2021] 5 SLR 648 at [109]–[117].
53 *Sun Electric Pte Ltd v Menrva Solutions Pte Ltd* [2021] 5 SLR 648 at [118]–[119].
54 *Sun Electric Pte Ltd v Menrva Solutions Pte Ltd* [2021] 5 SLR 648 at [95].
55 *Chartbrook Ltd v Persimmon Homes Ltd* [2009] 1 AC 1101.
56 Goh Yihan, "Clarifying Rectification in Singapore" (2015) 27 SAcLJ 403 at 404, para 2.
57 Goh Yihan, "Clarifying Rectification in Singapore" (2015) 27 SAcLJ 403 at 405, para 3.

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s 94(*a*) of the EA which excludes equitable rectification from the parol evidence rule.[58] In the absence of such exclusion provision, common law rectification must operate *per* the evidentiary rules in the EA.

36 Common law rectification has been described as a process which entails the use of "contractual construction to remedy obvious drafting errors".[59] As discussed in Part IV above, common law rectification may be granted subject to the two conditions in the English case of *East v Pantiles*,[60] *ie*, there must be clear mistake on the face of the instruction and it is clear what correction should be made to cure the mistake. The position in *East v Pantiles* is recognised and accepted in the local context. In particular, there is no conflict between the first element and the EA as it simply calls for review of the document in question as it is.[61] This is undoubtedly in line with the parol evidence rule codified in ss 93 and 94 of the EA.

37 However, the English position has since changed slightly with Lord Hoffman's decision in *Chartbrook* introducing an extension to the first *East v Pantiles* element. The extension permits further evidence beyond the face of the document and the court may consider the instrument's background and context to determine if the said element is fulfilled.[62] What this means is that "a contract could be rectified for common mistake even where one party was not actually mistaken: it was sufficient that a reasonable observer would conclude, objectively, that both parties had made a common mistake".[63] As Davies has noted, "this left the law in a troublesome position as this appeared to have been in conflict with the orthodox test, i.e. that required both parties actually (or 'subjectively') to have made a mistake".[64] In this regard, the court had in the AD Decision declined to consider the extension as part of Singapore law due to the real possibility of conflicts with the EA,[65] despite not hearing submissions on the same.

38 It is argued that the High Court had rightfully decided so. If the extension in *Chartbrook* was accepted, the parties would certainly

58 *Sun Electric Pte Ltd v Menrva Solutions Pte Ltd* [2021] 5 SLR 648 at [71].
59 *Sun Electric Pte Ltd v Menrva Solutions Pte Ltd* [2021] 5 SLR 648 at [59], citing Goh Yihan, *The Interpretation of Contracts in Singapore* (Sweet & Maxwell Singapore, 2018).
60 *East v Pantiles (Plant Hire) Ltd* [1982] 2 EGLR 111.
61 Goh Yihan, "Clarifying Rectification in Singapore" (2015) 27 SAcLJ 403 at 406, para 8.
62 *Sun Electric Pte Ltd v Menrva Solutions Pte Ltd* [2021] 5 SLR 648 at [66].
63 Paul S Davies, "Rectification Rectified" (2020) 79(1) *Cambridge Law Journal* 8 at 8.
64 Paul S Davies, "Rectification Rectified" (2020) 79(1) *Cambridge Law Journal* 8 at 8.
65 *Sun Electric Pte Ltd v Menrva Solutions Pte Ltd* [2021] 5 SLR 648 at [72].

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have adduced extrinsic evidence in a bid to persuade the courts of the background and context leading up to the formation of the instrument. Allowing the parties to do so would contravene the EA, particularly ss 95 to 96.

39 For instance, in this case, the recitals in the Consultancy Agreement had expressly defined "SE" as the first plaintiff, SE. There could not have been any room for an alternative interpretation based on a plain reading of the recitals. Allowing the parties to submit further extrinsic evidence to show such alleged background or context even where the recitals were so clear and corresponded to the existing facts would have contravened s 96 of the EA. Even if the interpretation of "SE" was as ambiguous as Menrva had purported, s 95 of the EA clearly prohibited admission of extrinsic evidence to explain the meaning.

40 Having said that, the court observed that the extension in *Chartbrook* did not appear to be prohibited by ss 97 and 99 of the EA as the illustrations provided under the sections essentially amounted to the use of common law rectification to replace and strike out phrases in an instrument respectively.[66] Thus, this is likely limited only to situations of latent ambiguity and where parol evidence is needed to correct the error.[67] Nonetheless, this has not yet been affirmed by the Singapore courts and it remains to be seen if ss 97 and 99 would serve to permit extrinsic evidence in cases involving common law rectification.

41 As demonstrated and briefly discussed in this case, the exceptions in different sections of the EA would have had different effects on the application of common law rectification. Given that the constraints imposed by the EA are unavoidable until such reform,[68] it would be helpful for the courts to clarify the application of the *Chartbrook* extension in the local context.

66 *Sun Electric Pte Ltd v Menrva Solutions Pte Ltd* [2021] 5 SLR 648 at [74]–[78].

67 Goh Yihan, "Clarifying Rectification in Singapore" (2015) 27 SAcLJ 403 at 419, paras 45–46.

68 Goh Yihan, "Clarifying Rectification in Singapore" (2015) 27 SAcLJ 403 at 420, para 48.

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VI. The English Court of Appeal's decision in *FSHC Group Holdings Ltd v GLAS Trust Corp Ltd* on parties' intention for rectification

42 In Paul Davies' brilliant article on rectification,[69] he highlighted the overlaps between interpretation and rectification for correcting mistakes. For instance, the broad approach to interpretation would allow for a greater range of mistakes to be corrected by interpretation at common law.[70] However, rectification might be preferred to interpretation because the equitable jurisdiction is better equipped to protect third party rights. This is because equitable relief might be refused if it would prejudice third parties. An example would be where third parties rely on the plain meaning of a contract without being aware of the particular facts which indicate that the contractual language was used by mistake in the formal written document.[71]

43 Davies has argued that other jurisdictions should not follow the lead of the House of Lords in *Chartbrook* and should only rectify agreements where the parties have actually made a mistake in the written document. The traditional approach was that the subjective intentions of the parties were of paramount importance for rectification, but this principle had been disturbed by *Chartbrook*.[72] Davies had criticised the *Chartbrook* decision because the objective approach to rectification would have circumvented the parties' subjective beliefs and imposed upon Chartbrook Ltd a contract to which it did not actually agree, thereby allowing Persimmon Ltd to escape from a bad bargain.[73]

44 As Davies has noted, there are existential questions where rectification is concerned, *ie*: (a) to adopt an objective approach to the parties' intentions such that it is consistent with the common law approach to interpretation; or (b) to favour a subjective approach that is in line with its traditional equitable roots. Davis favours the second approach because written contracts should only be rectified where they

69 Paul S Davies, "Rectification *versus* Interpretation: The Nature and Scope of the Equitable Jurisdiction" (2016) 75(1) *Cambridge Law Journal* 62.

70 Paul S Davies, "Rectification *versus* Interpretation: The Nature and Scope of the Equitable Jurisdiction" (2016) 75(1) *Cambridge Law Journal* 62 at 68.

71 Paul S Davies, "Rectification *versus* Interpretation: The Nature and Scope of the Equitable Jurisdiction" (2016) 75(1) *Cambridge Law Journal* 62 at 69.

72 *Chartbrook Ltd v Persimmon Homes Ltd* [2009] 1 AC 1101 at [48]–[66].

73 Paul S Davies, "Rectification *versus* Interpretation: The Nature and Scope of the Equitable Jurisdiction" (2016) 75(1) *Cambridge Law Journal* 62 at 75.

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fail to accord with the parties' intentions in the case of common mistake rectification.[74]

45 There are two situations in which a written contract may be rectified on the basis of common mistake: (a) the document fails to give effect to a prior concluded contract, *eg*, where a binding contract is agreed orally but then "reduced to writing" in a formal document that does not accurately reflect the terms of the oral agreement ("Common Agreement Mistake"); or (b) the parties had a common intention, continuing at the time of execution, in respect of a particular matter which, by mistake, the document did not accurately record ("Common Intention Mistake").[75]

46 The applicable test for rectification in cases of Common Intention Mistake had been contentious ever since the *obiter* comments made by Lord Hoffmann in *Chartbrook*. In that case, he stated that the test for common mistake was objective and involved asking what the reasonable observer would have understood the intentions of the parties to have been.

47 The English Court of Appeal in *FSHC Group Holdings Ltd v GLAS Trust Corp Ltd*[76] ("*FSHC*") disagreed with Lord Hoffmann and held that different tests are applicable to Common Agreement Mistake and Common Intention Mistake because of the different underlying principles justifying rectification. In another recent article, Davies praised *FSHC* for restoring "traditional orthodoxy" to the law on rectification of common mistake.[77]

48 An objective test applies to Common Agreement Mistake because the rectification is based on the principle that agreements should be kept and the terms of the prior agreement should therefore be objectively determined.[78] However, for Common Intention Mistake, the test is subjective because the rectification is based on the equitable principle of good faith and it therefore has to be proved that the parties are mistaken as a matter of fact.[79]

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74 Paul S Davies, "Rectification *versus* Interpretation: The Nature and Scope of the Equitable Jurisdiction" (2016) 75(1) *Cambridge Law Journal* 62 at 85.

75 *FSHC Group Holdings Ltd v GLAS Trust Corp Ltd* [2019] EWCA Civ 1361 at [176].

76 [2019] EWCA Civ 1361.

77 Paul S Davies, "Rectification Rectified" (2020) 79(1) *Cambridge Law Journal* 8 at 8–11.

78 *FSHC Group Holdings Ltd v GLAS Trust Corp Ltd* [2019] EWCA Civ 1361 at [140]–[141].

79 *FSHC Group Holdings Ltd v GLAS Trust Corp Ltd* [2019] EWCA Civ 1361 at [142].

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49 The objective test is clearly appropriate in the case of Common Agreement Mistake, because all the court is being asked to do is to ascertain what the parties agreed on and whether the written contract reflected that prior agreement. This is similar to the "contractual interpretation" approach in Singapore as discussed in the case of *Sembcorp Marine Ltd v PPL Holdings Pte Ltd*.[80] By contrast, in the case of Common Intention Mistake, the court is tasked with looking beyond the contract itself and correcting an unfairness that should not be allowed to stand notwithstanding what the parties have objectively agreed in writing.[81] Therefore, the more demanding subjective test is appropriate for cases of Common Intention Mistake. This approach is supported by *FSHC*.[82]

50 In the AD Decision, the High Court did not have to deal with the issue as the parties had agreed that this common intention was to be objectively ascertained.[83] However, it appeared that the High Court left open the possibility of using a subjective approach to determine the parties' common intention. Although it agreed that a person's subjective intention is ascertained by "drawing inferences from that person's outward manifestations of his intent", the High Court recognised that it could make a difference in the "most unusual of cases".[84] On the present facts, the High Court acknowledged that it did not make any difference to the AD Decision whether a subjective or objective approach (as to what the parties intended for the purposes of rectification) was adopted.[85]

51 In terms of the legal test for rectification, the possibility that courts could look to the subjective intentions of the parties would lead to greater flexibility and avoid injustice if the situation so required. However, this flexibility does not necessarily mean that successful rectification claims will become more common. In *FSHC*, the court emphasised that "as a matter of policy, rectification should be difficult to prove", with the parties being required to show "convincing proof" to dislodge the normal rule that a written contract is an accurate record of what the parties agreed.[86]

52 Unlike cases involving contractual construction, evidence of prior negotiations and post-execution conduct could be admissible in rectification and may be decisive in establishing the common intention

80 *Sembcorp Marine Ltd v PPL Holdings Pte Ltd* [2013] 4 SLR 193.
81 *FSHC Group Holdings Ltd v GLAS Trust Corp Ltd* [2019] EWCA Civ 1361 at [175].
82 *FSHC Group Holdings Ltd v GLAS Trust Corp Ltd* [2019] EWCA Civ 1361 at [141]–[142] and [176].
83 *Sun Electric Pte Ltd v Menrva Solutions Pte Ltd* [2021] 5 SLR 648 at [84]–[86].
84 *Sun Electric Pte Ltd v Menrva Solutions Pte Ltd* [2021] 5 SLR 648 at [86].
85 *Sun Electric Pte Ltd v Menrva Solutions Pte Ltd* [2021] 5 SLR 648 at [86].
86 *FSHC Group Holdings Ltd v GLAS Trust Corp Ltd* [2019] EWCA Civ 1361 at [46] and [176].

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and the outward expression of accord.[87] Hence, it appears that the best way to protect against mistake is to maintain both good internal records and *inter partes* correspondence demonstrating a common understanding of the transaction so that if push comes to shove, a claim for rectification can be fully evidenced.

VII. Conclusion

53 The High Court's AD Decision has reiterated the court's contextual approach to contractual interpretation and demonstrated that that any rectification granted would have to be considered with the law of evidence embodied in the EA. The decision, which allowed for equitable rectification, would be a huge relief to contractual parties especially where the application of common law rectification in Singapore is much more restrictive.

54 Nevertheless, the decision has highlighted issues on the application of rectification concepts. It remains undecided as to whether the extension in *Chartbrook* for common law rectification applies or if a subjective or objective approach on the parties' "common continuing intention" under equitable rectification is preferred. While these were not obstacles in the present matter, it is anticipated that these questions will be answered in future, so that we may gain clarity on the same.

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87 *FSHC Group Holdings Ltd v GLAS Trust Corp Ltd* [2019] EWCA Civ 1361 at [145].

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