

THE CASE FOR DEPARTING FROM THE EXCLUSIONARY RULE AGAINST PRIOR NEGOTIATIONS IN THE INTERPRETATION OF CONTRACTS IN SINGAPORE

This article examines the viability of the exclusionary rule against prior negotiations in the interpretation of contracts in Singapore. It argues that the exclusionary rule should no longer be followed in Singapore through three main points. First, the Singapore courts retain entire freedom to depart from the exclusionary rule as it is not of legislative origin. Second, the Singapore courts should exercise this freedom because there is already local precedent, wherein the Singapore courts have referred to prior negotiations in the interpretation of contracts. Even if these local precedents are wrong, there remain convincing, independent reasons as to why the exclusionary rule should be rejected. Primarily, the rule is not supported as a matter of history and evolved through a misstep in a series of early-20th-century cases. Third, the rejection of the exclusionary rule does not mean that prior negotiations are always admissible in the contractual interpretative exercise: the challenge for the Singapore courts is to recognise exactly why such evidence is inadmissible, instead of following a blanket rule that is (as will be argued) unsupported by either its supposed longevity or substantive justifications.

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I. Introduction

1 The exclusion of prior negotiations in the interpretation of contracts stands as a hallmark of English contract law. Although the exclusionary rule's boundaries have been acknowledged by the House of Lords to be uncertain,¹ its legitimacy has been reaffirmed by the

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1 See, eg, *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896 at 913; *Proforce Recruit Ltd v The Rugby Group Ltd* [2006] EWCA Civ 69 (cont'd on the next page)

same court most recently in *Chartbrook Ltd v Persimmon Homes Ltd*² (“*Chartbrook*”). Due to our historical legal ties to England, the position in Singapore probably leans towards the English position of exclusion as well.³ Yet, there are signs that the viability of the exclusionary rule requires a second look in Singapore. In the important Court of Appeal decision of *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd*⁴ (“*Zurich Insurance*”), V K Rajah JA accepted academic criticisms against the exclusionary rule and held that “there should be no absolute or rigid prohibition against evidence of previous negotiation or subsequent conduct”,⁵ even if such evidence may turn out to be inadmissible for non-compliance with other requirements of the *Zurich Insurance* framework.⁶ This is a tentative statement at best, and should not be regarded as representing a departure from the exclusionary rule. Indeed, the tentative nature of this statement was confirmed by Rajah JA himself in an extrajudicial article, where his Honour wrote that “*Zurich Insurance cautiously suggested* that prior negotiations ... *may* be admissible for the purpose of interpretation” [emphasis added].⁷ Tentative they may be, these statements clearly invite a re-examination of the continued viability of the exclusionary rule in Singapore.

2 The purpose of this article is to perform that re-examination of the exclusionary rule against prior negotiations in the interpretation of contracts in the specific context of Singapore. Its primary thesis is that the exclusionary rule, in whatever form, should no longer be supported in Singapore. This thesis is organised around three major parts. The first part concerns the status and origin of the exclusionary rule in Singapore. In particular, it will be argued that the Singapore courts are theoretically free to depart from the exclusionary rule if there are sound reasons to do so. Although much of contractual interpretation,

at [57]; *Chartbrook Ltd v Persimmon Homes Ltd* [2009] 3 WLR 267 at [33] and [42]; *Luminar Lava Ignite Ltd v Mama Group plc* [2010] CSIH 1 at [39].

2 [2009] 3 WLR 267.

3 See, eg, *Sheng Siong Supermarket Pte Ltd v Carilla Pte Ltd* [2011] 4 SLR 1094 at [34].

4 [2008] 3 SLR(R) 1029.

5 See, eg, *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR(R) 1029 at [132].

6 See Goh Yihan, “Contractual Interpretation in Singapore: Continued Refinement after *Zurich Insurance* – *Sheng Siong Supermarket Pte Ltd v Carilla Pte Ltd*” (2012) 24 SAclJ 275 at 282–284.

7 V K Rajah JA, “Redrawing the Boundaries of Contractual Interpretation: From Text to Context to Pre-text and Beyond” (2010) 22 SAclJ 513 at 520. Although see now *Master Marine AS v Labroy Offshore Ltd* [2012] SGCA 27 at [34] where the Court of Appeal held that “[a]s words are sometimes penumbral, the external context of the contract (encompassing the surrounding factual matrix, prior negotiations, etc) will, more often than not, help to define the contours and limits of the penumbra”. This appears to be a slightly more definitive departure from the exclusionary rule.

particularly the admissible extrinsic evidence, is governed by the Evidence Act,⁸ the exclusionary rule does not derive its legitimacy from any legislative source. This means that it is purely a common law construct in the Singapore context. In fact, it may even be argued that since the exclusionary rule is not provided for within the Evidence Act, it ought not to be received in the common law. Even if that argument is wrong, it will be submitted that the Singapore courts retain the freedom to depart from the exclusionary rule, owing to its common law origins.

3 Assuming that the Singapore courts can, in fact, depart from the exclusionary rule, the second part of this article argues that they should. In the first place, some Singapore cases have already made use of prior negotiations in the interpretation of contracts, notwithstanding the exclusionary rule. Thus, as a matter of precedent, there is authority to support a departure from the rule. In any event, whatever the correctness of these local precedents, it will be shown that there are substantive reasons as to why the exclusionary rule should be rejected. Many of these reasons have been covered elsewhere,⁹ but this article highlights a reason based on history, which has not been extensively raised before. It will be suggested that, despite claims of a long lineage,¹⁰ the truth is that the exclusionary rule became an independent rule divorced from any historical reason through a series of cases in the 20th century. The elevation of the rule to an independent one became cemented, following the House of Lords decision of *Prenn v Simmonds*.¹¹ While *Prenn v Simmonds* is often cited in support of the rule, it in fact represents an incorrect departure from the true historical reasons as to why prior negotiations were excluded. It will be shown that, before *Prenn v Simmonds*, prior negotiations were not rejected because of their status as such, but because the criterion of ambiguity was not satisfied to allow for the admission of any extrinsic evidence to interpret contracts.

8 Cap 97, 1997 Rev Ed.

9 See, eg, Ewan McKendrick, "Interpretation of Contracts and the Admissibility of Pre-Contractual Negotiations" (2005) 17 SAclJ 248 at 264–268 and 274–275; Lord Nicholls of Birkenhead, "My Kingdom for a Horse: The Meaning of Words" (2005) 121 LQR 577; Gerard McMeel, "Prior Negotiations and Subsequent Conduct: The Next Step Forward for Contractual Interpretation" (2003) 119 LQR 272; David McLauchlan, "Contract Interpretation: What Is It About" (2009) 31 Sydney L Rev 5; and Catherine Mitchell, "Contract Interpretation: Pragmatism, Principle and the Prior Negotiations Rule" (2010) 26 JCL 134.

10 It has been said that the exclusionary rule is "well established and salutary" (*Bank of Scotland v Dunedin Property Investment Co Ltd* 1998 SC 657 ("Bank of Scotland")) at 665; although see David McLauchlan, "Chartbrook Ltd v Persimmon Homes Ltd: Commonsense Principles of Interpretation and Rectification?" (2010) 126 LQR 8 at 10 and "Interpretation and Rectification: Lord Hoffmann's Last Stand" [2009] NZLR 431 at 443–444, who astutely noted that a close analysis of *Bank of Scotland* reveals that the court merely paid lip service to the exclusionary rule) and "vouched by ... compelling authorities" (*Alexiou v Campbell* [2007] UKPC 11 at [15]). See also *Chartbrook Ltd v Persimmon Homes Ltd* [2009] 3 WLR 267 at [28].

11 [1971] 1 WLR 1381.

Apart from this historical reason, this part of the article also canvasses other substantive reasons against the exclusionary rule.

4 Following these arguments as to why the exclusionary rule should be departed from, the third part of the article argues that such a departure does not warrant the unhindered admissibility of prior negotiations in the contractual interpretative exercise. The challenge of the Singapore courts is, then, to locate the true basis for the exclusion of such evidence, instead of following the (evident) English approach that rejects such evidence simply because of their nature. It will be argued that, in the Singapore context, the true basis for the rejection of prior negotiations can be found in two sources: first, the principle of objectivity that underlies contractual interpretation and, indeed, contract law itself; and second, the criterion of ambiguity in the Evidence Act. It is only from adhering to these two sources that prior negotiations can be excluded (and included) on a proper and principled basis. There is no need to have a specific rule targeted at prior negotiations, however narrowly conceived.

II. The Singapore courts retain the freedom to depart from the exclusionary rule

5 The article begins with a consideration of whether the Singapore courts can depart from the exclusionary rule. This is not as straightforward as it might seem: the Evidence Act governs much of contractual interpretation in Singapore. That Act, being legislative in origin, trumps any judge-made law. As such, if the exclusionary rule originated from the Evidence Act, then whatever its desirability, the Singapore courts will be bound to apply it.¹²

A. The exclusionary rule stated

(1) Two versions of the exclusionary rule

6 In considering the ability of the Singapore courts to depart from the exclusionary rule, first, we need to be clear as to exactly what the rule is. In the House of Lords decision of *Investors Compensation Scheme Ltd v West Bromwich Building Society* (“*Investors Compensation*”), Lord Hoffmann explained the rule in the following terms:¹³

The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification. The law makes this distinction for reasons of practical policy and, in this respect only,

¹² Short of an (fanciful) argument that it is unconstitutional.

¹³ [1998] 1 WLR 896 at 913.

legal interpretation differs from the way we would interpret utterances in ordinary life. The boundaries of this exception are in some respects unclear. But this is not the occasion on which to explore them.

7 Stated in this way, the exclusionary rule is very broad: all prior negotiations are excluded, except for the purpose of rectification. This is so even if the prior negotiations are not declarations of subjective intention: indeed, in the quotation from *Investors Compensation* above, prior negotiations are treated as being separate from such declarations by the use of the conjunctive word “and”. In contrast to this broad view of the exclusionary rule, the cases reveal another, narrower view of the exclusionary rule. By this view, the exclusionary rule applies only when prior negotiations are used for certain purposes, such as to advance the parties’ subjective intentions. Although prior negotiations are admissible under such a version, it remains that there is a specific exclusionary rule against prior negotiations, and that admission is the exception rather than the norm. It is important to differentiate between the two versions of the exclusionary rule so that we can be certain which applies in Singapore.

(a) Broad version

8 The predominant view in England is that it is the broad version of the exclusionary rule that applies there. For example, in *Banque Sabbag SAL v Hope*,¹⁴ which concerned the coverage of an insurance slip over war risks, Mocatta J held that oral evidence of what had been said between the contracting parties could not be admitted in evidence.¹⁵ The parties’ intentions could only be derived from the contract itself or its performance.¹⁶ Similarly, in considering whether subsequent conduct may be admitted in the interpretation of a contract, Lord Wilberforce in *L Schuler AG v Wickman Machine Tools Sales Ltd*¹⁷ (“*Wickman Tools*”) held that, as a general rule, extrinsic evidence is not admissible for the interpretation of a written contract, and that the parties’ intentions must be ascertained from the words they used, even as he acknowledged the presence of exceptions.¹⁸ Likewise, in *Moschi v Lep Air Services Ltd*,¹⁹ Lord Simon of Glaisdale said that it is not permissible to construe a contract by reference to negotiations leading thereto, although he would not confine interpretation to the words used within the contract; instead, he accepted that it is permissible to look at all the circumstances.²⁰ These examples all accept a broad version of the exclusionary rule whereby

14 [1972] 1 Lloyd’s Rep 253.

15 [1972] 1 Lloyd’s Rep 253 at 258.

16 *Banque Sabbag SAL v Hope* [1972] 1 Lloyd’s Rep 253 at 258.

17 [1974] UKHL 2; [1974] AC 235.

18 [1974] UKHL 2; [1974] AC 235 at 261.

19 [1972] 2 WLR 1175; [1973] AC 331.

20 [1972] 2 WLR 1175; [1973] AC 331 at 354.

prior negotiations are excluded from the admissible background to interpret the contract simply by virtue of their status as such.

9 Certain “exceptions” are said to qualify the broadness of the broad version of the exclusionary rule. Such “exceptions” primarily allow for the admissibility of prior negotiations to determine issues of formation,²¹ misrepresentation, *non est factum* and rectification.²² Other exceptions include the admission of prior negotiations where the subsequent written agreement refers to previous oral correspondence,²³ or where the negotiations are used to identify property referred to in a contract or a term of art used in the contract.²⁴ However, when properly understood, many of these supposed “exceptions” are not truly exceptions to the exclusionary rule; rather, they operate outside of the rule.²⁵ If the exclusionary rule prohibits prior negotiations for the *interpretation* of contracts, then its exceptions must allow prior negotiations for that *same* purpose. However, as has been seen, many of these supposed exceptions allow the use of prior negotiations *not* for the interpretation of contracts, but for other purposes such as allowing rectification and vitiating the contract for mistake or misrepresentation. A true exception not only involves the same subject matter (in this case, prior negotiations) but, more importantly, it also involves the same purpose. Since many of these supposed “exceptions” concern the use of prior negotiations for purposes other than interpretation, thus they are not exceptions at all. Indeed, in *Proforce Recruit Ltd v The Rugby Group Ltd*²⁶ (“*Proforce Recruit*”), Arden LJ drew a clear distinction between admitting prior negotiations for all these other purposes and for contractual interpretation. In particular, she said that courts do, “for different purposes”, admit evidence as to communications between the parties prior to the making of a written contract, and lists partly written and partly oral contracts, rectification, and where one party made a representation to another upon which that other acts as among those “different purposes”.²⁷

10 One true “exception” to the broad version of the exclusionary rule may be said to be the “genesis and aim” exception. In *Wickman Tools*, Lord Wilberforce held that prior negotiations might be admitted to explain technical expressions, to identify the subject matter of an

21 See, eg, *Rustenburgh Platinum Mines Ltd v South African Airways and Pan American World Airways Inc* [1977] 1 Lloyd’s Rep 564 at 567; *Capon v Evans* 1986 WL 407130; *Waterlow Publishers Ltd v Rose* [1995] FSR 207 at 219–220; and *Cleopatra Seafoods Ltd v Khera* [2002] EWCA Civ 1260 at [30] and [43].

22 See, eg, *Arrale v Constain Civil Engineering Ltd* [1976] 1 Lloyd’s Rep 98.

23 *Shell Tankers (UK) Ltd v Astro Comino Armadora SA* [1981] 2 Lloyd’s Rep 40.

24 *Proforce Recruit Ltd v The Rugby Group Ltd* [2006] EWCA Civ 69 at [54].

25 See, eg, *Chartbrook Ltd v Persimmon Homes Ltd* [2009] 3 WLR 267 at 284–285.

26 [2006] EWCA Civ 69.

27 *Proforce Recruit Ltd v The Rugby Group Ltd* [2006] EWCA Civ 69 at [53]–[54].

agreement or to resolve a latent ambiguity, although ambiguity in this context is not to be equated with difficulty of construction.²⁸ Where prior negotiations are admitted under this exception, the courts agree that the “genesis and aim” of a contract are not what each party now say they wanted but rather what they have obtained.²⁹ If stated in this manner, this exception clearly operates within the exclusionary rule. However, the cases are not entirely clear on the existence of this exception. In *Arrale v Constain Civil Engineering Ltd*,³⁰ Stephenson LJ said that even if the “genesis” of a contract includes prior negotiations and its “aim” includes intentions, such negotiations are admissible only to clarify ambiguity or to support rectification. This seems to suggest that prior negotiations are never admissible to interpret a contract, even if they contain information as to the background.³¹ Indeed, it may even be said that this exception is conceptually incompatible with a broad version of the exclusionary rule that excludes prior negotiations simply based on their status as such.

(b) Narrow version

11 In contrast, there have been cases that have attributed a narrower understanding to the exclusionary rule. By this view, the exclusionary rule is not absolute.³² This is best explained in *Bank of Scotland v Dunedin Property Investment Co Ltd* in the following terms:³³

Certainly Lord Wilberforce proceeds to explain how the substance of negotiations must be excluded from questions of construction. However I do not think his Lordship meant this to be applied too rigidly. As he states (p 1385): ‘It may be said that previous documents may be looked at to explain the aims of the parties. In a limited sense this is true: the commercial, or business object, of the transaction, objectively ascertained, may be a surrounding fact.’

12 Similarly, in *Scottish Widows Fund and Life Assurance Society v BGC International*, the exclusionary rule was explained thus:³⁴

But the pre-contractual negotiations of the parties must not to be used as an aid to construction, save insofar as they may assist in the objective ascertainment of the common commercial or business object of the transaction. The identification of the genesis of the transaction may assist where one reading of a document renders that commercial

28 *L Schuler AG v Wickman Machine Tools Sales Ltd* [1974] UKHL 2; [1974] AC 235 at 261.

29 See *Aldrington Garages v Fielder* (1983) 7 HLR 51 at 69; and *Sir Elton Hercules John v Price Waterhouse* 2001 WL 273028 at [124].

30 [1976] 1 Lloyd’s Rep 98.

31 *Arrale v Constain Civil Engineering Ltd* [1976] 1 Lloyd’s Rep 98 at 104.

32 *Luminar Lava Ignite Ltd v Mama Group plc* [2010] CSIH 1 at [41].

33 1998 SC 657 at 676–677.

34 [2011] EWHC 729 (Ch) at [17].

or business objective futile, but another does not. But the identification of the commercial objective from the negotiations cannot be used at a more granular level to support detailed points of interpretation.

The English Court of Appeal has recently affirmed the broad thrust of these observations on appeal,³⁵ even though it cautioned that prior negotiations may have limited use as evidence as to the general object of the transaction in question.³⁶

13 There are cases after *Chartbrook* that now insist that Lord Hoffmann's explanation of the exclusionary rule in that case had referred to the narrow version. Thus in *Stena Line Ltd v Merchant Navy Ratings Pension Fund Trustees Ltd*,³⁷ Briggs J held that the exclusionary rule operates, and excludes "evidence of the parties' negotiations, at least for the purpose of identifying, as a relevant background fact, 'a provisional consensus which may throw light on the meaning of the contract which was eventually concluded'".³⁸ Indeed, in more recent cases, the breadth of the exclusionary rule has been more carefully delimited. For example, in *Proforce Recruit*, two members of the English Court of Appeal said that prior negotiations may be admitted in certain circumstances, even when it was for the interpretation of the contract concerned. Mummery LJ cited an academic text, to the effect that "evidence of facts about which the parties were negotiating is admissible to explain what meaning was intended and evidence of what the parties said in negotiations is admissible to show that the parties negotiated on an agreed basis that the words used bore a particular meaning".³⁹ He also accepted Lord Nicholls' extrajudicial view that the exclusionary rule, as it is broadly understood, was too "rigid".⁴⁰ In accepting Lord Nicholls' analysis, Mummery LJ appeared to accept that prior negotiations will only be inadmissible should they afford direct evidence of the parties' actual intentions.⁴¹

14 Thus, the preceding discussion reveals that it is possible to see the exclusionary rule either broadly or narrowly. The broad version

35 See *Scottish Widows Fund and Life Assurance Society v BGC International* [2012] EWCA Civ 607 at [16]. See also *Owen Ernest Wood v Hudson Industrial Services Ltd* [2012] EWCA Civ 599 at [50]–[52].

36 See *Scottish Widows Fund and Life Assurance Society v BGC International* [2012] EWCA Civ 607 at [32]–[35].

37 [2010] EWHC 1805 (Ch).

38 [2010] EWHC 1805 (Ch) at [86].

39 *Proforce Recruit Ltd v The Rugby Group Ltd* [2006] EWCA Civ 69 at [31].

40 *Proforce Recruit Ltd v The Rugby Group Ltd* [2006] EWCA Civ 69 at [33].

41 *Proforce Recruit Ltd v The Rugby Group Ltd* [2006] EWCA Civ 69 at [35]. Cf *Great Hill Equity Partners II LP v Novator One LP* [2007] EWHC 1210 at [59]; *Berkeley Community Villages Ltd v Fred Daniel Pullen* [2007] EWHC 1330 (Ch) at [48]; *Chartbrook Ltd v Persimmon Homes Ltd* [2007] EWHC 409 (Ch) at [33]–[38].

appears unqualified, even though supposed “exceptions” are said to exist. The narrow version, on the other hand, does not impose a blanket prohibition of prior negotiations. Rather, the approach is calibrated to render only prior negotiations that are being used to show the parties’ subjective intentions inadmissible. The narrow version is, in turn, incompatible with any of the “exceptions” affecting the broad version since it does not deny admission of all prior negotiations from the outset. The question that arises is which of these two versions applies in Singapore.

(2) *Narrow version applies in Singapore*

15 On balance, it is submitted that the narrow version of the exclusionary rule applies, or is taken to apply, in Singapore. A preliminary objection to this submission might be the recent Court of Appeal decision of *Master Marine AS v Labroy Offshore Ltd*⁴² (“*Master Marine AS*”), wherein Rajah JA held that the external context of a contract, *including prior negotiations*, might help define the contours and limits of the preumbral nature of words,⁴³ citing a particular paragraph from *Zurich Insurance* after this statement.⁴⁴ This seems, at first glance, to suggest that the Court of Appeal has departed from the exclusionary rule, such as to render moot any discussion as to whether it is the broad or narrow version of it that applies. However, it is suggested that a better reading of the case is not quite so definitive. First, the paragraph cited from *Zurich Insurance* did not concern the admissibility of prior negotiations; rather, it was concerned with the preumbral nature of words and how courts should cautiously allow extrinsic evidence to explain such words. Therefore it is evident that Rajah JA was not seeking to conclusively cement a departure from the exclusionary rule in this case. Second, such a quick and unelaborated departure from the exclusionary rule does not appear consistent with previous tentative statements from the same court in relation to the desirability of the exclusionary rule. At best, the statement in *Master Marine AS* only supports a narrow version of the exclusionary rule, which, as will be submitted, represents the present position in Singapore.

16 The Singapore courts have had the opportunity since *Zurich Insurance* to consider the proper ambit of the exclusionary rule. In *Sheng Siong Supermarket Pte Ltd v Carilla Pte Ltd*,⁴⁵ the High Court held that the Court of Appeal had in *Zurich Insurance* “removed the near-absolute

42 [2012]3 SLR 125.

43 [2012] 3 SLR 125 at [34].

44 *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR(R) 1029 at [122].

45 [2011] 4 SLR 1094.

bar against evidence of previous negotiations”⁴⁶. The court highlighted that such evidence is merely “likely to be inadmissible” for failing to provide the objective intentions of the parties.⁴⁷ Similarly, the same court in *Fico Sports Inc Pte Ltd v Thong Hup Gardens Pte Ltd*⁴⁸ held that the extrinsic evidence admissible “includes prior negotiations and subsequent conduct”.⁴⁹ Indeed, in *Goh Guan Chong v AspenTech Inc*⁵⁰ (“*Goh Guan Chong*”), the High Court agreed with the judgment of Thomas J in the New Zealand Court of Appeal decision of *Yoshimoto v Canterbury Golf International Ltd*,⁵¹ in which the judge advocated a relaxation of the absolute and rigid nature of the exclusionary rule.⁵² In addition, the Court of Appeal itself has, after *Zurich Insurance*, provided confirmation that a narrow version of the exclusionary rule applies in Singapore. For example, in *Yamashita Tetsuo v See Hup Seng Ltd*,⁵³ Rajah JA, in delivering the majority judgment, stated that there should be no absolute or rigid prohibition against extrinsic evidence in the form of prior negotiations, even if such evidence would likely be inadmissible for non-compliance with other requirements of the *Zurich Insurance* framework.⁵⁴ In fact, the Court of Appeal in *Chiang Hong Pte Ltd v Lim Poh Neo*,⁵⁵ a case decided close to 30 years ago, arguably adopted a narrow reading of the exclusionary rule.⁵⁶ The common point across all these statements is that the exclusionary rule in Singapore is not absolute; in other words, prior negotiations are not inadmissible on the basis of their status as such. Instead, they will only be inadmissible if they do not provide the objective intentions of the parties or (and this may be a distinct point) if they do not satisfy the three facets of relevancy in the *Zurich Insurance* framework. However, there still

46 [2011] 4 SLR 1094 at [34].

47 *Sheng Siong Supermarket Pte Ltd v Carilla Pte Ltd* [2011] 4 SLR 1094 at [34].

48 [2011] 1 SLR 40.

49 [2011] 1 SLR 40 at [60]. However, the court’s allusion to the admissibility of subsequent conduct is probably not accurate, given the Court of Appeal’s expressly tentative position with regard to such evidence: see *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR(R) 1029 at [132]: “We should add that the relevance of subsequent conduct remains a controversial and evolving topic that will require more extensive scrutiny by this court at a more appropriate juncture.” See also *Shanghai Tunnel Engineering Co Ltd v Econ-NCC Joint Venture* [2011] 1 SLR 217 at [45]; *Tiger Airways Pte Ltd v Swissport Singapore Pte Ltd* [2009] 4 SLR(R) 992 at [13]; and *Ascend Foodstuff Solution Pte Ltd v Lim Tian Sye* [2009] SGDC 31 at [31] (although *cf* at [32]–[33] where the court appears to have, with respect, conflated contextual interpretation of a contract with its variation through the admission of extrinsic evidence).

50 [2009] 3 SLR(R) 590.

51 [2001] 1 NZLR 523.

52 [2001] 1 NZLR 523 at [78].

53 [2009] 2 SLR(R) 265.

54 [2009] 2 SLR(R) 265 at [65].

55 [1983–1984] SLR(R) 346.

56 [1983–1984] SLR(R) 346 at [18]–[19].

remains an exclusionary rule against prior negotiations as a starting point, albeit in a narrow form.

17 This may be contrasted with the broader version that applied in Singapore before *Zurich Insurance*. For example, it was not so long ago that the Court of Appeal declared in *MAE Engineering Ltd v Fire-Stop Marketing Services Pte Ltd*⁵⁷ that “evidence of prior negotiations is inadmissible as it does not represent any consensus between the parties”.⁵⁸ Indeed, the High Court in *Standard Chartered Bank v Neocorp International Ltd*⁵⁹ described the rule that eschewed reliance on prior negotiations and subjective expressions of intent, as one of the “established rules of interpretation”.⁶⁰ These statements would prohibit the admissibility of prior negotiations on the basis of their status as such. More specifically, perhaps, these cases assume irrebuttably that prior negotiations *always* represent parties’ subjective intentions, and hence are *never* admissible. Although never expressly overruled, it is clear that the broader version of the exclusionary rule envisaged in these older cases has now been surpassed by the narrow version in Singapore, as laid down in *Zurich Insurance* and affirmed by subsequent decisions.

B. The non-legislative origin of the exclusionary rule in Singapore

18 So far, it has been concluded that a narrow version of the exclusionary rule applies in Singapore. However, what is the origin of the rule as such? As mentioned, this is important in considering whether the Singapore courts can even depart from the rule in the first place.

19 It is submitted that the exclusionary rule is not legislative in origin. More specifically, it does not emanate from the Evidence Act. The relevance of the Evidence Act to contractual interpretation in Singapore is its preservation of various aspects⁶¹ of the parol evidence rule. At

57 [2005] 1 SLR(R) 379.

58 [2005] 1 SLR(R) 379 at [24]. See also *China Construction (South Pacific) Development Co Pte Ltd v Spandek Engineering (S) Pte Ltd* [2005] SGHC 86 at [27]; *Jurong Engineering Ltd v Black & Veatch Singapore Pte Ltd* [2004] 1 SLR(R) 333 at [51]; *United Lifestyle Holdings Pte Ltd v Oakwell Engineering Ltd* [2002] 1 SLR(R) 726 at [7]; *Management Corp Strata Title Plan No 1933 v Liang Huat Aluminium Ltd* [2001] 2 SLR(R) 91 at [10]–[11]; *Ling Chee Ewe v Serial System Pte Ltd* [1997] SGHC 265 at [23]; *Citicorp Investment Bank (Singapore) Ltd v Wee Ah Kee* [1997] 2 SLR(R) 1 at [66]; *Chi Man Kwong Peter v Asia Commercial Bank* [1988] 1 SLR(R) 220 at [40]–[41]; and *Chai Chung Ching Chester v Diversey (Far East) Pte Ltd* [1991] 1 SLR(R) 757 at [15].

59 [2005] 2 SLR(R) 345.

60 [2005] 2 SLR(R) 345 at [36].

61 The Law Commission identified three distinct rules that exclude extrinsic evidence, which collectively form the “parol evidence rule”: see Law Commission, *Law of Contract: The Parol Evidence Rule* (Law Com No 154, 1986) at para 1.2.

common law, the parol evidence rule is a manifestation of the objective theory of contract.⁶² The Evidence Act⁶³ preserves the parol evidence rule by way of ten provisions, *viz*, ss 93 to 102. These provisions mirror three distinct rules of the common law parol evidence rule.⁶⁴ The first rule is that the contents of certain documents must be proved by production of the document, except where secondary evidence is permitted.⁶⁵ The second rule is that extrinsic evidence is not admissible to “contradict, vary, add to or subtract from” the terms of a written document, subject to certain provisos.⁶⁶ Finally, the third rule is that evidence of specific facts may be admitted in aid of the interpretation or construction of certain documents.⁶⁷ It is the third rule, embodied primarily in s 94(f) and ss 95 to 100 of the Evidence Act,⁶⁸ which is most relevant for present purposes.

20 It is clear that none of these sections specifically excludes prior negotiations from consideration. Instead, the Evidence Act provides for a limited admissibility of *all* extrinsic evidence in the interpretative exercise,⁶⁹ based on the criterion of ambiguity. It restricts the range of admissible evidence primarily by recourse to the distinction between latent and patent ambiguities. The basic point is that, in general, the Evidence Act allows for the admissibility of extrinsic evidence where there is latent ambiguity, and does not allow for admissibility where there is patent ambiguity.

62 See generally Law Commission, *Law of Contract: The Parol Evidence Rule* (Law Com No 154, 1986) and D W McLauchlan, *The Parol Evidence Rule* (Professional Publications Ltd, 1976).

63 Cap 97, 1997 Rev Ed.

64 Law Reform Committee, *Report of the Law Reform Committee on the Review of the Parol Evidence Rule* (Singapore Academy of Law, 2006) at para 13.

65 Law Reform Committee, *Report of the Law Reform Committee on the Review of the Parol Evidence Rule* (Singapore Academy of Law, 2006) at para 13. According to Stephen, primary documentary evidence is the document itself, and secondary documentary evidence includes a copy of the document or an oral account of its contents: see James Fitzjames Stephen, *A Digest of the Law of Evidence* (MacMillan & Co, 1876) at pp 67–68.

66 Law Reform Committee, *Report of the Law Reform Committee on the Review of the Parol Evidence Rule* (Singapore Academy of Law, 2006) at para 13.

67 Law Reform Committee, *Report of the Law Reform Committee on the Review of the Parol Evidence Rule* (Singapore Academy of Law, 2006) at para 13.

68 Cap 97, 1997 Rev Ed. See *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR(R) 1029 at [67]–[80]. The reference includes s 94(f) of the Evidence Act because that section (or more specifically, proviso to s 94) also contains what Stephen regarded as a substantive rule of interpretation: see James Fitzjames Stephen, *A Digest of the Law of Evidence* (MacMillan & Co, 1876) at pp 160–61.

69 See Evidence Act (Cap 97, 1997 Rev Ed) s 94(f).

21 The distinction between these two types of ambiguities originated from Lord Bacon's maxims.⁷⁰ Although those maxims were originally formulated for pleadings, they have attained substantive effects of their own, on the basis that "a transaction of one 'nature' cannot be overturned by anything of an inferior 'nature'".⁷¹ While once also a restriction of the admissible evidence under the common law, that distinction has largely been done away with at the present time.⁷² The result is that the ambiguities restrict the range of admissible evidence under the Evidence Act,⁷³ although only for the specific purpose of explaining words. This is very clear on the face of the relevant provisions in the Evidence Act:⁷⁴ for example, s 96 refers to extrinsic evidence being used to show that the words were "not meant to apply to such [existing] facts". Likewise, s 97 allows for extrinsic evidence to be "given to show that it was used in a peculiar sense". The common purpose contemplated is the use of extrinsic evidence to *explain* the words concerned.

22 The concept of ambiguity does not restrict the range of extrinsic evidence for purposes otherwise. For example, nowhere in the Evidence Act is there a prohibition against the admissibility of extrinsic evidence to establish whether there is an ambiguity in the first place. This is also consistent with the prevailing law – that extrinsic evidence is always admissible to raise a latent ambiguity – at the time when the Evidence Act was enacted.⁷⁵

23 Though more relevantly, and as has been pointed out,⁷⁶ the Evidence Act does not differentiate between prior negotiations, subsequent conduct and other forms of extrinsic evidence, in so far as the admissibility of extrinsic evidence for interpretation is concerned. As alluded to above and which will be elaborated below, this is mainly historical: the criterion governing admissibility was the presence of

70 Francis Bacon, *A Collection of Some Principal Rules and Maxims of the Common Laws of England* (Printed by the assignes of I More Esq, 1630) at p 91.

71 J H Wigmore, *A Treatise on the Anglo-American System of Evidence in Trials at Common Law* vol IX (Little Brown and Company, 3rd Ed, 1940) at p 88.

72 May be even earlier: see, eg, *Colpoys v Colpoys* (1822) Jacob 451 at 463; 37 ER 921 at 925. See also *L Schuler AG v Wickman Machine Tool Sales Ltd* [1974] UKHL 2; [1974] AC 235 at 268.

73 See, eg, F M Morgan, "Extrinsic Evidence in the Evidence of Wills" (1860) 2 Jurid Soc Pap 35 at 378, in which the author noted that Lord Bacon's maxim had not been intended to be a complete dissertation upon the use of extrinsic evidence in the juridical interpretation of legal instruments, and it was a maxim relating to pleadings, not to evidence.

74 Cap 97, 1997 Rev Ed.

75 The Evidence Ordinance 1893 (SS Ord No 3 of 1893) was enacted on 1 July 1893. See, eg, *Thomas v Thomas* (1796) 6 TR 671; 101 ER 764.

76 V K Rajah JA, "Redrawing the Boundaries of Contractual Interpretation: From Text to Context to Pre-text and Beyond" (2010) 22 SAclJ 513 at 537.

latent ambiguity, and prior negotiations were only excluded if there was no latent ambiguity. This is the criterion that guides the admissibility of extrinsic evidence, including prior negotiations, in the Evidence Act.⁷⁷ Accordingly, in so far as the exclusionary rule uses the status of the evidence (that is, whether it is a prior negotiation) to govern admissibility, it is submitted that the rule is non-legislative in origin, and was instead adopted by the local courts, by way of an adoption of common law developments in England.⁷⁸

24 However, there may be at least one local authority that links the exclusionary rule to the Evidence Act. In *Chai Chung Ching Chester v Diversey (Far East) Pte Ltd*⁷⁹ (“*Chester Chai*”), the High Court considered that s 94(f) of the Evidence Act⁸⁰ “does not allow any party to the written contract to refer to the prior negotiations and earlier drafts of the document”.⁸¹ The court reasoned that s 94(f) allows the admission of extrinsic evidence on a more limited scale:⁸²

[Section 94(f)] could be applied in the following manner as was suggested by Mr Yeoh. If A contracts with B for sale of Blackacre to B, evidence may be used to show where Blackacre is situated. That’s the purpose for which the proviso is inserted. It does not allow parties to go behind the sale and refer to prior negotiations.

25 With respect, the court’s reading of s 94(f) is probably no longer correct. First, in light of *Zurich Insurance*, it is quite clear that “context” is not limited to the identity of the subject matter, and may extend to other aspects of the transaction as well. Second, s 94(f) does not expressly prohibit recourse to prior negotiations. It is noteworthy that the court in *Chester Chai* did not refer to any authority in reaching this conclusion. The better reading of *Chester Chai* is, therefore, that it does not support the proposition that the exclusionary rule is legislative in origin. Thus the courts are free to depart from it, should they wish to do so.

77 See *Tan Hock Keng v L & M Group Investments Ltd* [2001] 3 SLR(R) 47 at [13]–[14].

78 See, eg, *Chiang Hong Pte Ltd v Lim Poh Neo* [1983–1984] SLR(R) 346 where the exclusionary rule was first stated.

79 [1991] 1 SLR(R) 757.

80 Cap 97, 1985 Rev Ed.

81 [1991] 1 SLR(R) 757 at [15].

82 *Chai Chung Ching Chester v Diversey (Far East) Pte Ltd* [1991] 1 SLR(R) 757 (HC) at [15]. See also *Diversey (Far East) Pte Ltd v Chai Chung Ching Chester* [1992] 3 SLR(R) 412 (CA) at [16].

C. *Can the Singapore courts recognise a rule excluding the admissibility of evidence not recognised in the Evidence Act?*

(1) *The criterion of “inconsistency” in the Evidence Act*

26 If the exclusionary rule does not originate from the Evidence Act, is the continued recognition of it – in whatever form – permissible since the Evidence Act is meant to codify all rules of evidence, including admissibility? The starting point towards resolving this question is s 2(2) of the Evidence Act,⁸³ which reads:

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

Two important points emerge from this provision. The first point is that any court ruling inconsistent with the Evidence Act as at 1 July 1893 – which was when the Evidence Act was enacted – is repealed.⁸⁴ It has also been applied to exclude *subsequent* inconsistent common law authorities.⁸⁵ Thus, it is irrelevant when the exclusionary rule was established at common law. If it was before 1 July 1893, it would have been repealed via s 2(2). Likewise, if it was after 1 July 1893, it too would have been repealed under s 2(2). As will be argued below,⁸⁶ the exclusionary rule could be regarded as being established in England by the 1878 case of *A & J Inglis v John Buttery & Co*⁸⁷ (“*Inglis*”). If the rule were inconsistent, s 2(2) would operate and repeal that case at the time the Evidence Act was enacted in India. If the exclusionary rule were established only by the 20th-century case of *Prenn v Simmonds*,⁸⁸ s 2(2) would still be relevant if the exclusionary rule were inconsistent, because s 2(2) also applies to *subsequent* common law developments that are inconsistent with the Evidence Act.⁸⁹ The only relevant question,

⁸³ Cap 97, 1997 Rev Ed.

⁸⁴ Jeffrey Pinsler, “Approaches to the Evidence Act: The Judicial Development of a Code” (2002) 14 SAclJ 365 at 366. See also *Bank of England v Vagliano* [1891] AC 107 at 144–145.

⁸⁵ Jeffrey Pinsler, “Approaches to the Evidence Act: The Judicial Development of a Code” (2002) 14 SAclJ 365 at 366. See also *Rajapakse Pathurange Don Jayasena v The Queen* [1970] 2 WLR 448; [1970] AC 618.

⁸⁶ See para 33 below.

⁸⁷ (1878) 3 App Cas 552. This case was recently given new attention in David McLauchlan, “*Chartbrook Ltd v Persimmon Homes Ltd*: Commonsense Principles of Interpretation and Rectification?” (2010) 126 LQR 8 at 10; and David McLauchlan, “Common Intention and Contract Interpretation” [2011] LMCLQ 30 at 31. See also the very valuable analysis in David McLauchlan, “Deleted Words, Prior Negotiations and Contract Interpretation” (2010) 24 NZULR 278 at 282–288, which scope this article cannot replicate, given its different aims.

⁸⁸ [1971] 1 WLR 1381.

⁸⁹ Admittedly, it is somewhat artificial to speak of the “repeal” of a future development in the context of s 2(2), which seems to apply more naturally to the
(cont'd on the next page)

therefore, is whether the exclusionary rule, whenever established, is inconsistent with the Evidence Act.

27 This brings the second point from s 2(2): it repeals all existing or future common law development *inconsistent* with the Evidence Act. This raises the difficult question of the meaning of “inconsistency”: just when is a common law development “inconsistent” with the Evidence Act so as to render it inapplicable? In a thorough analysis, Jeffrey Pinsler isolated a few instances where a common law development could be said to be inconsistent with the Evidence Act:

- (a) apparently vague provision should not be interpreted in light of a more precise common law principle when that vagueness was intended to provide for flexibility;⁹⁰
- (b) complete absence of a common law principle should not be supplemented by recourse to prevailing common law principle where this would interfere with the structure or scheme of the Evidence Act;⁹¹
- (c) limited application of a common law principle to certain proceedings should not be extended where this would offend the purpose of the Evidence Act;⁹² and
- (d) conflict between common law principle and provisions of the Evidence Act⁹³ (which can arise due to direct conflict,⁹⁴ conflict in operation of principle or⁹⁵ different conceptual bases, whether specifically⁹⁶ or generally in relation to the code itself).⁹⁷

“repeal” of an *existing* common law rule. However, it seems that the purpose of s 2(2) is to preserve the core of the Evidence Act, even in the face of future common law developments. Thus, while the semantic unease is acknowledged, it is submitted that the word “repeal” applies equally to future common law developments after 1 July 1893.

- 90 Jeffrey Pinsler, “Approaches to the Evidence Act: The Judicial Development of a Code” (2002) 14 SAclJ 365 at 367–370.
- 91 Jeffrey Pinsler, “Approaches to the Evidence Act: The Judicial Development of a Code” (2002) 14 SAclJ 365 at 370.
- 92 Jeffrey Pinsler, “Approaches to the Evidence Act: The Judicial Development of a Code” (2002) 14 SAclJ 365 at 372–375.
- 93 Jeffrey Pinsler, “Approaches to the Evidence Act: The Judicial Development of a Code” (2002) 14 SAclJ 365 at 375.
- 94 Jeffrey Pinsler, “Approaches to the Evidence Act: The Judicial Development of a Code” (2002) 14 SAclJ 365 at 375–376.
- 95 Jeffrey Pinsler, “Approaches to the Evidence Act: The Judicial Development of a Code” (2002) 14 SAclJ 365 at 378–381.
- 96 Jeffrey Pinsler, “Approaches to the Evidence Act: The Judicial Development of a Code” (2002) 14 SAclJ 365 at 381–382.
- 97 Jeffrey Pinsler, “Approaches to the Evidence Act: The Judicial Development of a Code” (2002) 14 SAclJ 365 at 382–384.

28 In addition to Pinsler's analysis, the High Court dealt with this issue at length in *Law Society of Singapore v Tan Guat Neo Phyllis*⁹⁸ ("*Phyllis Tan*"). The court made several important points in relation to the operation of s 2(2). It held that the Evidence Act is a codifying Act and accepted the proposition in *Mahomed Syedol Ariffin v Yeoh Ooi Gark*⁹⁹ ("*Mahomed Syedol Ariffin*") that "the acceptance of a rule or principle adopted in or derived from English law is not permissible if thereby the true and actual meaning of the statute under construction be varied, or denied effect".¹⁰⁰ Indeed, the court in *Phyllis Tan* later stated unequivocally that "new rules of evidence can be given effect to only if they are not inconsistent with the provisions of the [Evidence Act] or their underlying rationale" [emphasis in original].¹⁰¹ The emphasis is on whether the underlying *rationale* of the Evidence Act is offended. This is an important point because it illustrates the broader holding of *Phyllis Tan*: while subsequent passages¹⁰² in *Phyllis Tan* seem to suggest a more specific instance where common law developments would be inconsistent with the Evidence Act, it is important to bear in mind that that specific instance is derived from this more general notion adopted from *Mahomed Syedol Ariffin*. One such specific instance appears to arise when the court said that an overarching principle in the Evidence Act is that "all relevant evidence is admissible unless specifically expressed to be inadmissible".¹⁰³ Thus, because the Evidence Act is meant to be a non-exhaustive code, the pertinent question is whether any future common law development is inconsistent with its terms so as to be inapplicable.¹⁰⁴ Most importantly, the court cautioned that s 2(2) "is not an unrestricted licence to import 21st-century notions of the common law into a 19th-century code".¹⁰⁵

(2) *Is the exclusionary rule inconsistent with the Evidence Act?*

29 These general considerations shall now be applied to the present context, and whether the exclusionary rule is inconsistent with the Evidence Act shall be considered. The confinement of the relevant provisions in the Evidence Act shall first be laid out. It is submitted that these ought to be ss 93 to 100 of the Evidence Act, instead of the general admissibility provisions found in Part I of the Act.¹⁰⁶ The reason for this is historical: James Fitzjames Stephen, the drafter of the Indian Evidence

98 [2008] 2 SLR(R) 239.

99 [1916] 2 AC 575.

100 *Law Society of Singapore v Tan Guat Neo Phyllis* [2008] 2 SLR(R) 239 at [117].

101 *Law Society of Singapore v Tan Guat Neo Phyllis* [2008] 2 SLR(R) 239 at [117].

102 See, eg, *Law Society of Singapore v Tan Guat Neo Phyllis* [2008] 2 SLR(R) 239 at [126].

103 *Law Society of Singapore v Tan Guat Neo Phyllis* [2008] 2 SLR(R) 239 at [126].

104 *Law Society of Singapore v Tan Guat Neo Phyllis* [2008] 2 SLR(R) 239 at [117].

105 *Law Society of Singapore v Tan Guat Neo Phyllis* [2008] 2 SLR(R) 239 at [117].

106 Evidence Act (Cap 97, 1997 Rev Ed).

Act 1872,¹⁰⁷ was heavily influenced by James Wigram's work on the admissibility of extrinsic evidence in the interpretation of wills.¹⁰⁸ Wigram had set out several propositions relating to when extrinsic evidence could be admitted in the interpretation of wills. These propositions find expression in ss 93–100 of the Evidence Act; indeed, Stephen himself acknowledged the influence that Wigram's work had on the substance and arrangement of the provisions in the Evidence Act to do with the admissibility of extrinsic evidence.¹⁰⁹

30 Having set out the parameters with the relevant provisions, the specific rule laid down in *Phyllis Tan* – that “all relevant evidence is admissible unless specifically expressed to be inadmissible”¹¹⁰ – shall be examined presently. By way of context, *Phyllis Tan* was concerned with whether a court had the power to exclude evidence that was more prejudicial than probative. This issue had arisen because a line of past cases¹¹¹ had accepted that, notwithstanding s 2(2) of the Evidence Act, the Singapore courts had the power to disallow the admissibility of certain evidence because they were prejudicial. In *Phyllis Tan*, the court rejected the existence of such a power because it was inconsistent with the general scheme of admissibility of evidence, based on relevancy provided for in the Evidence Act; thus “all relevant evidence is admissible unless specifically expressed to be inadmissible”. It is submitted that this actually supports the proposition contended for, that the exclusionary rule is inconsistent with the Evidence Act. By the same token, if the Evidence Act does not preclude the admissibility of prior negotiations, then such evidence should be excluded on the basis of a common law development that excludes such evidence. Again, in the words of the court in *Phyllis Tan*, “all relevant evidence is admissible unless specifically expressed to be inadmissible”.¹¹² From a very broad perspective, the rule of inadmissibility encompassed in the exclusionary rule is therefore inconsistent with the Evidence Act. However, this rule should not be regarded as determinative. As argued above, this rule is only a specific manifestation of the broader rationale that only common

107 Act 1 of 1872.

108 James Wigram, *Admission of Extrinsic Evidence in Aid of the Interpretation of Wills* (Charles Hunter, 2nd Ed, 1835).

109 James Fitzjames Stephen, *A Digest of the Law of Evidence* (MacMillan & Co, 1876) at pp 160–161. It has also been noted elsewhere that the provisions in the Indian Evidence Act 1872 (Act 1 of 1872) concerning the interpretation of contracts correspond to various propositions in Wigram's work: see Sudipto Sarkar & V R Manohar, *Sarkar's Law of Evidence* (LexisNexis Butterworths, 16th Ed, 2007) at p 1573.

110 *Law Society of Singapore v Tan Guat Neo Phyllis* [2008] 2 SLR(R) 239 at [126].

111 See *Cheng Swee Tiang v Public Prosecutor* [1964] MLJ 291; *Ajmer Singh v Public Prosecutor* [1985–1986] SLR(R) 1030; *How Poh Sun v Public Prosecutor* [1991] 2 SLR(R) 270; and *SM Summit Holdings Ltd v Public Prosecutor* [1997] 3 SLR(R) 138.

112 *Law Society of Singapore v Tan Guat Neo Phyllis* [2008] 2 SLR(R) 239 at [126].

law developments that offend the *rationale* of the Evidence Act will be “inconsistent” and hence invalid.

31 On this front, it might then be argued that prior negotiations are *already* excluded under certain provisions¹¹³ of the Evidence Act (albeit under a different rationale, and not because the evidence is prior negotiation as such). Thus, because the Evidence Act already excludes such evidence, a common law exclusionary rule would not be inconsistent with the Evidence Act, since all that the common law rule does is to graft a similar rule over an existing one. It does not matter that the *basis* for exclusion is not the same, so long as the *effect* of exclusion is the same. This raises the question of just how “rationale” is to be construed. In this context, is the rationale of the Evidence Act simply to disallow prior negotiations, or is it to disallow prior negotiations on a particular basis such that non-admissibility on a different basis would be inconsistent?

32 It is submitted the second meaning of “rationale” should be adopted in light of the broader holding in *Phyllis Tan*. It is important to bear in mind the court’s holding that a common law development can be given effect to, if it is “*not inconsistent with the provisions of the [Evidence Act] or their underlying rationale*” [emphasis in original].¹¹⁴ This relates to a broader rationale than simply the end result of a rule. Inconsistency can occur at several levels. As Pinsler’s analysis (which was cited approvingly in *Phyllis Tan*¹¹⁵) shows, sometimes this arises where there is a direct conflict between the common law principle and the Evidence Act provisions. However, it would be wrong to suggest that inconsistency can only occur at such a superficial level. As Pinsler’s analysis further shows, inconsistency can also occur where the rationale for a common law principle is different from that within the Evidence Act. A good example is provided by the Court of Appeal decision of *Lee Chez Kee v Public Prosecutor*¹¹⁶ (“*Lee Chez Kee*”). In that case, Rajah JA rejected the view in the earlier Court of Appeal decision of *Soon Peck Wah v Woon Che Chye*,¹¹⁷ to the effect that common law exceptions to the hearsay rule were incorporated into the Evidence Act by virtue of s 2(2). This could not have been because there was a superficial conflict between the two: the *effect* of the two rules is the same, that is, the court will not admit hearsay evidence.¹¹⁸ Yet, the *bases* of the two rules are different: whereas the common law view is premised on an exclusionary scheme, the Evidence Act, at least in its general part, is based on an

113 Evidence Act (Cap 97, 1997 Rev Ed) ss 93–96.

114 *Law Society of Singapore v Tan Guat Neo Phyllis* [2008] 2 SLR(R) 239 at [117].

115 *Law Society of Singapore v Tan Guat Neo Phyllis* [2008] 2 SLR(R) 239 at [117].

116 [2008] 3 SLR(R) 447.

117 [1997] 3 SLR(R) 430.

118 *Lee Chez Kee v Public Prosecutor* [2008] 3 SLR(R) 447 at [75].

inclusionary scheme. It was for this difference in rationale that Rajah JA held that the common law exceptions to hearsay are inconsistent with the Evidence Act, and hence invalid pursuant to s 2(2) of the Evidence Act.¹¹⁹

33 Applied to the present context, the mere fact that the exclusionary rule achieves the same effect as existing provisions in the Evidence Act is not indicative of its consistency. In the end, as with the interpretation of all statutes, one is concerned with the legislative intention behind the statute. A literal reading of the statute might yield that intention (and hence reveal any inconsistency), but it cannot be the only one. Where the conceptual basis or rationale behind the common law principle is incompatible with the Evidence Act provisions, it is submitted that such a principle would be inconsistent with the Act,¹²⁰ as was the case in *Lee Chez Kee*. Indeed, as the court in *Phyllis Tan* said, “new rules of evidence can be given effect to only if they are not inconsistent with the provisions of the [Evidence Act] or their underlying rationale” [emphasis in original].¹²¹

34 In this regard, it is important that the Evidence Act has provided for the instances where extrinsic evidence (which can include prior negotiations) may (or may not) be admitted for the interpretation of a contract in ss 94 to 100 on a particular basis. A common law development that justifies exclusion of prior negotiations on a different basis would be inconsistent. This argument is strengthened when one considers that prior negotiations were not treated apart from other types of evidence at the time when the Evidence Act was enacted. Indeed, to elaborate on the point made above,¹²² prior negotiations were, in fact, admissible to ascertain the aim and object of the contract as early as 1835. In *Reay v Richardson*,¹²³ a previous conversation was held admissible to explain the motive that induced the plaintiff to enter into a compromise agreement with the defendant. Parke B held that the evidence of the conversation was not to add to, or qualify the terms of, the agreement, but to show with what view the agreement had been written.¹²⁴ Prior negotiations were only excluded on the principle that “it is not permitted to interpret what has no need of interpretation”.¹²⁵ This rested upon the belief that words have fixed meanings, such that a party who has used clear and unambiguous language will be held to all

119 *Lee Chez Kee v Public Prosecutor* [2008] 3 SLR(R) 447 at [75].

120 Jeffrey Pinsler, “Approaches to the Evidence Act: The Judicial Development of a Code” (2002) 14 SAclJ 365 at 381–382.

121 *Law Society of Singapore v Tan Guat Neo Phyllis* [2008] 2 SLR(R) 239 at [117].

122 See para 20 above.

123 (1835) 150 ER 182.

124 *Reay v Richardson* (1835) 150 ER 182 at 184.

125 H T Colebrooke, *Treatise on Obligations and Contracts* (Black, Kingsbury, Parbury, and Allen, 1818) at p 66.

that naturally follows from a direct and plain understanding of such language.¹²⁶ It was only when a term was susceptible to several meanings¹²⁷ that recourse could be had to the relevant context, in order to discover the parties' true intentions.¹²⁸ The criterion, it bears repeating,¹²⁹ used to be that of "ambiguity" to determine whether extrinsic evidence of any kind can be admitted to interpret contracts. Since the Evidence Act¹³⁰ was intended to codify the English evidence law at that time,¹³¹ it is likely that Stephen, the draftsman, had intended to import these common law principles into the Act. If so, the recognition of the exclusionary rule, based as it is on a different rationale for excluding prior negotiations, would be inconsistent with the Evidence Act and must be rejected pursuant to s 2(2) of the same Act.

35 Another possible counterargument might be that the common law contextual approach, which is not provided for in the Evidence Act, was nonetheless accepted as being consistent with the Act by the Court of Appeal in *Sandar Aung v Parkway Hospitals Singapore Pte Ltd*¹³² ("*Sandar Aung*"). By analogy, therefore, the fact that the Evidence Act does not recognise the exclusionary rule should not bar its recognition in Singapore. It is submitted that the key to resolving this apparent conflict is to recognise that the contextual approach is not inconsistent with the Evidence Act. In *Sandar Aung*, the Court of Appeal considered that the common law recourse to extrinsic evidence in the interpretation of contracts (that is, the contextual approach) is not inconsistent with the terms of the Evidence Act, because such evidence did not "add to, vary or contradict" the terms of the contract, which is not allowed under the Act.¹³³ While that is one (with respect, correct) view, another is that the contextual approach was actually applied at the time when the Evidence Act was enacted. The courts have always maintained the legitimacy and importance of interpreting contracts in their proper contexts and have been doing so since the 19th century or even earlier. At that time, contractual interpretation was largely regarded as

126 H T Colebrooke, *Treatise on Obligations and Contracts* (Black, Kingsbury, Parbury, and Allen, 1818) at p 66; Joseph Chitty, *A Practical Treatise on the Law of Contracts Not Under Seal and upon the Usual Defences of Actions Thereon* (Sweet Chancery Lane, 1826) at p 20.

127 *Smith v Jeffryes* (1846) 153 ER 972 at 972–973.

128 H T Colebrooke, *Treatise on Obligations and Contracts* (Black, Kingsbury, Parbury, and Allen, 1818) at p 67.

129 See para 20 above.

130 More specifically, the Indian Evidence Act 1872 (Act 1 of 1872): see J D Heydon, "The Origins of the Indian Evidence Act" (2010) 9 OUCJLJ 1 at 1–2.

131 See James Fitzjames Stephen, *A Digest of the Law of Evidence* (MacMillan & Co, 1876) at p 2.

132 [2007] 2 SLR(R) 891.

133 *Sandar Aung v Parkway Hospitals Singapore Pte Ltd* [2007] 2 SLR(R) 891 at [33]–[37].

“liberal”.¹³⁴ It was liberal in the sense that the search was for the parties’ true intentions, ascertained by consideration of the surrounding facts and circumstances,¹³⁵ as opposed to adhering to the strict literal sense of contractual terms.¹³⁶ Thus, the Evidence Act was probably not intended to supersede the contextual interpretative approach. While it is true that various aspects of the parol evidence rule as embodied in the Evidence Act restricted the background information available to the interpreting party, these restrictions did not render the contextual approach inapplicable since *some* context was still made available. What resulted was a weaker version of the contextual approach: one that denies the full range of background information normally available and adheres to “ambiguity” as the criterion for admissibility. However, that does not militate against the adoption of some form of contextual approach. The contextual approach is therefore consistent with the Evidence Act and does not fall foul of s 2(2).

36 In contrast, as already argued, the exclusionary rule is inconsistent with the rationale of the Evidence Act, which provides for when extrinsic evidence may be admissible, based on the criterion of “ambiguity”. While the Act may be non-exhaustive, the very idea of separating prior negotiations as a species of evidence to be treated differently is inconsistent with the central criterion of “ambiguity”, which governs admissibility for all extrinsic evidence. This is not a situation involving the common law filling in a lacuna in the Evidence Act; rather, the Evidence Act has provided an approach with which the exclusionary rule is inconsistent. Therefore, it is submitted that, on this basis alone and pursuant to s 2(2) of the Evidence Act, the exclusionary rule should not be adopted in Singapore. However, assuming that the argument above based on s 2(2) is wrong, it shall be considered presently whether there is any independent and substantive reason as to why the Singapore courts should depart from the exclusionary rule.

III. Why the Singapore courts should exercise freedom to depart from exclusionary rule

A. *Some Singapore decisions substantively using prior negotiations in contractual interpretation*

37 The first reason in support of a departure from the exclusionary rule is that Singapore courts are already using prior negotiations in

134 Samuel Comyn, *A Treatise of the Law Relative to Contracts and Agreements Not Under Seal* (A Strahan, 1807) at p 532.

135 *Shore v Wilson* (1842) 8 ER 450 at 521.

136 H T Colebrooke, *Treatise on Obligations and Contracts* (Black, Kingsbury, Parbury, and Allen, 1818) at p 65.

contractual interpretation. For example, in *Goh Guan Chong*, the High Court consciously considered prior negotiations in the course of interpreting the contract concerned. Although the court stated that prior negotiations should not be subject to an absolute or rigid prohibition¹³⁷ – thereby still acknowledging the existence of an exclusionary rule – the court subsequently treated prior negotiations not as a particular class of evidence subject to an independent exclusionary rule, but a general type of evidence that must, like all other evidence, pass the standard requirements of the *Zurich Insurance* framework.¹³⁸ This is therefore local precedent for treating prior negotiations identically with all other types of evidence and not subject to an independent exclusionary rule.

B. Substantive reasons against exclusionary rule

38 In addition to the argument of precedent, there are other independent, substantive reasons against the exclusionary rule. Much of these have already been covered elsewhere,¹³⁹ and this article concentrates on an argument based on history.

(1) Exclusionary rule as a result of misstep in history

39 It is clear that the exclusion of prior negotiations was premised on two aspects of the parol evidence rule in the 19th century, and not on the basis of an independent rule. Textbooks up to the mid-1870s continued to maintain that contracts could be interpreted by reference to materials extrinsic to it, provided that the contract was ambiguous.¹⁴⁰ In fact, it was stated as a proposition that the court might look at alterations in a contract in ascertaining the parties' intentions.¹⁴¹ It was also stated that previous conversations between the contracting parties

137 *Goh Guan Chong v AspenTech Inc* [2009] 3 SLR(R) 590 at [57].

138 *Goh Guan Chong v AspenTech Inc* [2009] 3 SLR(R) 590 at [79].

139 See, eg, Ewan McKendrick, "Interpretation of Contracts and the Admissibility of Pre-Contractual Negotiations" (2005) 17 SAclJ 248 at 264–268 and 274–275; Lord Nicholls of Birkenhead, "My Kingdom for a Horse: The Meaning of Words" (2005) 121 LQR 577; Gerard McMeel, "Prior Negotiations and Subsequent Conduct: The Next Step Forward for Contractual Interpretation" (2003) 119 LQR 272; David McLauchlan, "Contract Interpretation: What Is It About" (2009) 31 Sydney L Rev 5; and Catherine Mitchell, "Contract Interpretation: Pragmatism, Principle and the Prior Negotiations Rule" (2010) 26 JCL 134.

140 See John A Russell, *A Treatise on the Law of Contracts and Upon the Defences to Actions Thereon by Joseph Chitty* (Sweet & Chancery Lane, 10th Ed, 1876) at p 88; this is the last edition to do this.

141 See John A Russell, *A Treatise on the Law of Contracts and Upon the Defences to Actions Thereon by Joseph Chitty* (Sweet & Chancery Lane, 10th Ed, 1876) at p 88.

could be admitted to ascertain the subject matter of the contract.¹⁴² These examples show that there was no independent exclusionary rule against prior negotiations in the interpretation of contracts. It was only where the extrinsic materials had the effect of adding, subtracting or varying the contract that they may not be referred to at all. The error in subsequent cases is to apply the complete exclusion without appreciating its underlying justification.

40 The first wrong turn came with the 19th-century case of *Inglis*.¹⁴³ The case concerned the interpretation of a contract to lengthen and repair a ship so that she would meet certain classifications. The issue was whether the contract obliged the shipbuilders to pay for extra new plating, which was not contemplated for specifically in the contract but otherwise required to enable the ship to meet the classification concerned. The lower courts had considered the effect of a deleted sentence in the contract in their interpretation of the contract. All the members of the House of Lords were of the view that the deletions ought not to have been looked at, thereby establishing the exclusionary rule in its independent form. Specifically, it was Lord Blackburn's speech that became the most referred to subsequently. He said that recourse to deleted sentences – which he regarded as an example of prior negotiations – was not correct because the formal contract superseded all previous communications between the parties. He regarded the purpose of a formal contract as being to put an end to the disputes that might arise if the matter were left open to prior negotiations between the parties. As such, the contract to be interpreted in the present case consisted of its constituent parts and nothing else. The lower courts were, according to Lord Blackburn, in error when they considered the effect of deleted sentences.¹⁴⁴

41 The significance of *Inglis* was regarded differently by the treatises of the time. Some treatises promulgated the error of an independent exclusionary rule, illustrated most prominently by Chitty's treatise, which regarded *Inglis* as setting an absolute rule that, in construing a contract, "the Court [is not] entitled to look at what the parties thereto said or did whilst the matter was in negotiation".¹⁴⁵ The case of *Cumberland v Bowes*¹⁴⁶ was cited as supporting this reading of *Inglis*, and an example given to illustrate this rule is the prohibition against reference to alterations in the contract to interpret the

142 See John A Russell, *A Treatise on the Law of Contracts and Upon the Defences to Actions Thereon by Joseph Chitty* (Sweet & Chancery Lane, 10th Ed, 1876) at pp 103–104.

143 See n 87 above.

144 *A & J Inglis v John Buttery & Co* (1878) 3 App Cas 552 at 577–578.

145 John A Russell, *A Treatise on the Law of Contracts and Upon the Defences to Actions Thereon by Joseph Chitty* (Sweet & Chancery Lane, 11th Ed, 1881) at p 90.

146 (1854) 139 ER 458.

contract.¹⁴⁷ Leaving aside the correctness of this reading of *Inglis* for the moment, this reading is inconsistent with other parts of the treatise on two grounds. First, *Cumberland v Bowes* did not support this reading of *Inglis*; rather, all that Jervis CJ said in that case was that he had “considerable doubt” as to whether it was correct to refer to alterations in the draft contract to interpret the contract concerned.¹⁴⁸ However, the court did not see it necessary to consider this question,¹⁴⁹ and even if it had to, it appeared that Jervis CJ’s doubt was premised on the extrinsic evidence being “contradictory”.¹⁵⁰ Therefore, if it were necessary to explain Jervis CJ’s reasoning, it would have been perfectly reconcilable with the prevailing rule that extrinsic evidence, including prior negotiations, could not be admitted if they contradicted, rather than explained, the contract. The second reason why a broad reading of *Inglis* is inconsistent with other parts of Chitty’s treatise is that the same treatise maintained that extrinsic evidence might be admissible to explain a contract where there was ambiguity, provided that the evidence was not being used to vary or contradict the contract.¹⁵¹ The treatise also cited *Macdonald v Longbottom*¹⁵² as an example where evidence of a previous conversation may be considered in the interpretation of a contract,¹⁵³ which would not have been possible had *Inglis* introduced an absolute bar against recourse to prior negotiations. These two inconsistencies continued to remain in later editions of Chitty’s treatise.¹⁵⁴

42 In contrast, other treatises attempted to reconcile *Inglis* with the prevailing rule. For example, Addison’s treatise cited *Inglis* as standing for the proposition:¹⁵⁵

147 John A Russell, *A Treatise on the Law of Contracts and Upon the Defences to Actions Thereon by Joseph Chitty* (Sweet & Chancery Lane, 11th Ed, 1881) at p 90.

148 *Cumberland v Bowes* (1854) 139 ER 458 at 461.

149 *Cumberland v Bowes* (1854) 139 ER 458 at 461.

150 *Cumberland v Bowes* (1854) 139 ER 458 at 461.

151 John A Russell, *A Treatise on the Law of Contracts and Upon the Defences to Actions Thereon by Joseph Chitty* (Sweet & Chancery Lane, 11th Ed, 1881) at p 103.

152 (1859) 120 ER 1177.

153 John A Russell, *A Treatise on the Law of Contracts and Upon the Defences to Actions Thereon by Joseph Chitty* (Sweet & Chancery Lane, 11th Ed, 1881) at p 106.

154 J M Lely & Nevill Geary, *A Treatise on the Law of Contracts and Upon the Defences to Actions Thereon by Joseph Chitty* (Sweet & Maxwell, 12th Ed, 1890) at pp 143, 155–156 and 160; J M Lely, *A Treatise on the Law of Contracts by Joseph Chitty* (Sweet & Maxwell, 13th Ed, 1896) at pp 123, 135–136 and 140; J M Lely, *A Treatise on the Law of Contracts by Joseph Chitty* (Sweet & Maxwell, 14th Ed, 1904) at pp 96, 102–103, 108–112, 115–116 and 120; Wyatt Paine, *Chitty’s Treatise on the Law of Contracts* (Sweet & Maxwell, 16th Ed, 1912) at pp 106, 119–121 and 124.

155 Horace Smith, *Addison on Contracts: A Treatise on the Law of Contracts* (Stevens & Sons, 8th Ed, 1883) at p 182. This also appeared in subsequent editions: see Horace Smith, *A Treatise on the Law of Contracts by C G Addison* (Stevens & Sons, 9th Ed, 1892) at p 44; A P Perceval Keep & William E Gordon, *A Treatise on the Law of Contracts by C G Addison* (Stevens & Sons, 10th Ed, 1903) at p 43.

But where there is a written contract, the meaning of which as it stands is clear and unambiguous, former correspondence between the parties cannot be considered for the purpose of arriving at the intention of the parties, nor can words deleted from the document and initialled by the parties as deleted, be used for such purpose.

This statement of *Inglis* did not introduce an independent exclusionary rule. Rather, the exclusion of prior negotiations is still premised on the underlying parol evidence rule that looks to ambiguity. Indeed, on its narrower reading of *Inglis*, Addison's treatise continued to include *Macdonald v Longbottom* as illustrating the admissibility of prior correspondence to ascertain the subject matter of the contract.¹⁵⁶ Anson's treatise similarly adopted a narrower reading of *Inglis*, although it did not refer to the case. Rather, it regarded cases like *Macdonald v Longbottom* as examples involving latent ambiguity, in which "explanatory evidence" is admissible.¹⁵⁷ It is submitted that this is the correct view based on the prevailing law, and it is regrettable that it did not take root in the time after *Inglis* was decided. Notwithstanding these arguments for a narrower reading of *Inglis*, the case encouraged the rise of an independent exclusionary rule. This was, however, to be found mainly in the treatises rather than the case law that followed, up to the time *Prenn v Simmonds* was decided.

43 Thus, the state of the law at the time *Prenn v Simmonds* was decided did not, on balance, support an independent exclusionary rule. The exclusion of prior negotiations, if at all, could still be explained on the basis of various aspects of the parol evidence rule. There was undoubtedly a prohibition of prior negotiations, but on the basis that they added, subtracted or varied the contract, just like all other types of evidence. Where contractual interpretation is concerned, there was merely a qualified prohibition linked to the criterion of ambiguity. However, *Prenn v Simmonds* was to herald a judicial preference for an

156 Horace Smith, *Addison on Contracts: A Treatise on the Law of Contracts* (Stevens & Sons, 8th Ed, 1883) at p 203. This also appeared in subsequent editions: see Horace Smith, *A Treatise on the Law of Contracts by C G Addison* (Stevens & Sons, 9th Ed, 1892) at p 65; A P Perceval Keep & William E Gordon, *A Treatise on the Law of Contracts by C G Addison* (Stevens & Sons, 10th Ed, 1903) at p 64; William E Gordon & John Ritchie, *A Treatise on the Law of Contracts by C G Addison* (Stevens & Sons, 11th Ed, 1911) at p 46.

157 Sir William R Anson, *Principles of the English Law of Contract and of Agency in its Relation to Contract* (Clarendon Press, 2nd Ed, 1882) at pp 242, 244. This was also the treatment in subsequent editions, all published by Clarendon Press: see, by the same author, 3rd Ed (1884) at pp 238–239, 240–241; 6th Ed (1891) at pp 256–257; 7th Ed (1893) at pp 263–264; 9th Ed (1899) at pp 271–272; 11th Ed (1906) at pp 287–289; 12th Ed (1910) at pp 201–203. See also Maurice L Gwyer, *Principles of the English Law of Contract and of Agency in its Relation to Contract by Sir William R Anson* (Clarendon Press, 13th Ed, 1912) at pp 309–311, and by the same author, 14th Ed (1917) at pp 319–320; 15th Ed (1920) at pp 322–323.

absolute prohibition of prior negotiations in contractual interpretation, which, it is submitted, is unsupported by history based on the discussion above. This therefore contradicts the modern assertions that the exclusionary rule is well supported by its longevity.¹⁵⁸

(2) *Exclusionary rule not supported by principled reasons*

44 However, it might be argued that even if the exclusionary rule is unsupported by history, it may be independently supported by other good justifications. It is submitted that there are few such justifications. Lord Nicholls writing extra-judicially has identified, without accepting, several of these justifications. First, it is said that the admission of prior negotiations would promote uncertainty and unpredictability in dispute resolution.¹⁵⁹ The same sentiments have been echoed by Lord Hoffmann, who said that “[a] written contract is a document which binds the parties according to the interpretation it would be given by a reasonable person possessed of the legally admissible background knowledge. That is the substantive nature of a contract, a legal institution designed to create enforceable promises with the necessary degree of reliability and precision”.¹⁶⁰ Second, the admission of prior negotiations may be detrimental to third parties.¹⁶¹ This is a justification supported by Lord Steyn, who has written that the popularity of England as a legal forum means that the objectivity approach in contractual interpretation should be maintained, so as to afford some commercial certainty to third parties.¹⁶² Third, the admission of prior negotiations may increase the time and expense of trial. This is, again, a view shared by Lord Steyn¹⁶³ and Lord Bingham,¹⁶⁴ both writing extra-judicially. Fourth, and as an umbrella factor stated by Lord Wilberforce in *Prenn v Simmonds*, prior negotiations are simply “unhelpful”.¹⁶⁵ The supremacy that policy-oriented reasons have over principle-based reasons in the modern justification of the exclusionary rule received its strongest confirmation yet in *Chartbrook*, where Lord Hoffmann maintained that

158 See, eg, *Bank of Scotland v Dunedin Property Investment Co Ltd* 1998 SC 657 at 665; *Alexiou v Campbell* [2007] UKPC 11 at [15]; and *Chartbrook Ltd v Persimmon Homes Ltd* [2009] 3 WLR 267 at [28].

159 Lord Nicholls, “My Kingdom for a Horse: the Meaning of Words” (2005) 121 LQR 577 at 587.

160 Lord Hoffmann, “The Intolerable Wrestle with Words and Meanings” (1997) 114 SAclJ 656 at 664.

161 Lord Nicholls, “My Kingdom for a Horse: the Meaning of Words” (2005) 121 LQR 577 at 587.

162 Sir Johan Steyn, “Written Contracts: To What Extent May Evidence Control Language?” [1988] CLP 23 at 30.

163 Sir Johan Steyn, “Written Contracts: To What Extent May Evidence Control Language?” [1988] CLP 23 at 30.

164 Lord Bingham of Cornhill, “A New Thing under the Sun? The Interpretation of Contract and the ICS Decision” (2008) 12 Edin LR 374 at 389.

165 *Prenn v Simmonds* [1971] 1 WLR 1381 at 1384.

it is reasons of policy that justify the rule and even helpful evidence will be excluded under it.¹⁶⁶

45 It is submitted that all of these justifications are not required by modern developments and should not be accepted. These justifications never featured, at least not expressly and obviously implied, in older decisions leading up to *Prenn v Simmonds*. There was never a concern that the admission of extrinsic evidence, including prior negotiations, would result in greater uncertainty in contractual interpretation cases, or that it would affect the rights of third parties. Neither was there an overt concern that the cost and time spent on litigation would increase. The former two reasons are not time-sensitive; either they exist or they do not, independent of the consideration of time. Thus, it is not likely that any change in modern circumstances would account for their sudden emergence. Given that prior negotiations were previously admitted together with extrinsic evidence to explain away latent ambiguities without any complaint of uncertainty, it appears somewhat difficult to argue that the abolition of the present-day exclusionary rule would result in widespread uncertainty. So long as the rules that inform contractual interpretation are open-textured – as they surely must be – there will be some unavoidable uncertainty in the entire enterprise of interpretation. Of course, one might argue that the need for commercial certainty could preclude recourse to prior negotiations, which may overburden the courts with too much evidence.¹⁶⁷ While commercial certainty is, of course, important, that should not be pursued at the cost of principle. It is true that prior negotiations may sometimes be unhelpful or cause uncertainty. However, that does not justify a blanket ban against prior negotiations just because of their status as such. What is required is a calibrated approach that is based on principle.

46 Likewise, if the admissibility of prior negotiations before did not give rise to concerns about third parties' rights, then it ought not to be of concern now. As David McLauchlan rightly pointed out, it is difficult to conceive of a specific situation where the admission of prior negotiations would adversely impact on third parties' rights in a way that could not be avoided by the application of some other legal doctrine.¹⁶⁸ The reason of increased cost and time should also not be taken too seriously. Even though the admissibility of prior negotiations was allowed without complaint in older times, it is undeniable that, measured in absolute terms, the scale of litigation has increased since

166 *Chartbrook Ltd v Persimmon Homes Ltd* [2009] 3 WLR 267 at [41]; see also Catherine Mitchell, "Contract Interpretation: Pragmatism, Principle and the Prior Negotiations Rule" (2010) 26 JCL 144.

167 See, eg, Alan Berg, "Thrashing through the Undergrowth" (2006) 122 LQR 354.

168 See, eg, David McLauchlan, "Contract Interpretation: What Is It About?" (2009) 31 Sydney L Rev 5 at 38.

then. However, the argument is a relative one: just as the scale of litigation has increased, so too have the resources available in response to that increase.¹⁶⁹

47 For all these reasons centring on the availability of local precedent, lack of historical support for the exclusionary rule, and existence of substantive reasons against the exclusionary rule, it is submitted that the Singapore courts should no longer follow it. In particular, there is no need to have a specialised exclusionary rule that caters solely for prior negotiations.

IV. Departing from exclusionary rule does not result in unhindered admission of prior negotiations – Principled basis for restricting admissibility of prior negotiations

48 However, departing from the exclusionary rule does not mean that prior negotiations can be admitted without restriction. This would go against some fundamental principles of English (and Singapore) contract law. Even so, it is necessary to recognise that these same reasons apply equally to other types of extrinsic evidence that are potentially admissible to interpret the contract. Thus, what is being advocated here is not the narrow version of the exclusionary rule, which remains a specialised rule against prior negotiations; instead, it is suggested that these restrictive factors apply equally to both prior negotiations and other types of extrinsic evidence.

A. Principled reasons for restricting admissibility of prior negotiations

(1) Objectivity principle

49 The most important principled reason advanced against the admission of prior negotiations (and other types of evidence) is that admission would subvert the objective approach in contractual interpretation.¹⁷⁰ Thus, as Mason J said in *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales*,¹⁷¹ the investigation of the actual intentions, aspirations or expectations of the parties before or at the time of contract would tend to give too much weight to these factors at the expense of the language of the written contract.¹⁷² Lord Bingham has

169 See further David McLauchlan, “Contract Interpretation: What Is It About?” (2009) 31 Sydney L Rev 5 at 36–38.

170 Cf David McLauchlan, “Contract Interpretation: What Is It About?” (2009) 31 Sydney L Rev 5 at 35, who saw this as a “policy reason”.

171 (1982) 149 CLR 337.

172 (1982) 149 CLR 337 at 352.

also written that any detailed consideration of such prior negotiations will lead to “excessive emphasis on what the parties wanted to agree and too little on what they actually did agree”.¹⁷³ And in *Chartbrook*, Lord Hoffmann explained the concern as follows:¹⁷⁴

[P]re-contractual negotiations seem to me capable of raising practical questions different from those created by other forms of background. Whereas the surrounding circumstances are, by definition, objective facts, which will usually be uncontroversial, statements in the course of pre-contractual negotiations will be drenched in subjectivity and may, if oral, be very much in dispute. It is often not easy to distinguish between those statements which (if they were made at all) merely reflect the aspirations or one or other of the parties and those which embody at least a provisional consensus which may throw light on the meaning of the contract which was eventually concluded.

50 This is an important restriction that applies not only to prior negotiations but to any type of extrinsic evidence. Indeed, even before *Zurich Insurance*, the High Court in *Jurong Engineering Ltd v Black & Veatch Singapore Pte Ltd*¹⁷⁵ acknowledged that evidence that shows the parties’ subjective intentions would not be admissible.¹⁷⁶ More recently, the need to avoid subjectivity has been restated by both the Court of Appeal¹⁷⁷ and the High Court.¹⁷⁸ Therefore, the need to avoid subjectivity would remain as one of the criterion to determine whether extrinsic evidence, which includes prior negotiations, can be admitted in the contractual interpretative exercise.

(2) “Ambiguity” in the Evidence Act

51 Another criterion is that of “ambiguity” in the Evidence Act. As mentioned, the Evidence Act specifically restricts the range of admissible evidence primarily by recourse to the distinction between latent and patent ambiguities. Even though English law has done away with such distinctions, they remain in the Singapore statute books and have to be followed by the courts. However, it is necessary to be clear on how “ambiguity” controls the admissibility of extrinsic evidence. In this regard, the contractual interpretative exercise is a composite one, in which extrinsic evidence may be used for different purposes. More specifically, extrinsic evidence may be admitted to establish whether

173 Lord Bingham of Cornhill, “A New Thing under the Sun? The Interpretation of Contract and the ICS Decision” (2008) 12 Edin LR 374 at 389.

174 *Chartbrook Ltd v Persimmon Homes Ltd* [2009] 3 WLR 267 at [38].

175 [2004] 1 SLR(R) 333.

176 [2004] 1 SLR(R) 333 at [50].

177 See, eg, *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR(R) 1029 at [132].

178 See, eg, *Goh Guan Chong v AspenTech Inc* [2009] 3 SLR(R) 590 at [55]–[56] (although cf [71]–[74]).

there is an ambiguity – a pre-interpretative exercise that establishes negatively what the word cannot mean, but does not yet establish positively the meaning of the word. This is a subtle but important distinction that is necessarily implied in the various provisions of the Evidence Act that contemplate either patent or latent ambiguity. Indeed, without recourse to such evidence, it is not possible to ascertain whether there is ambiguity in the first place. However, the type of ambiguity determined then restricts the use of extrinsic evidence to supply a different meaning than the plain meaning. Thus, the Indian courts' lack of distinction between these specific uses of extrinsic evidence, coupled with their insistence of latent ambiguity before extrinsic evidence is admissible to interpret the contract, may require reconsideration.¹⁷⁹ The truth is that when the Indian courts rule that there is ambiguity (or not), they have already implicitly considered extrinsic evidence, although not (yet) for the purpose of explaining the contractual words (in a positive sense). This distinction is, in contrast, acknowledged by the approach taken in *Zurich Insurance*. That approach is to recognise that ambiguity plays no role in limiting the extrinsic evidence in establishing whether there is an ambiguity in the first place. However, ambiguity plays a role in restricting the use of extrinsic evidence in departing from the plain meaning of the words: in the absence of ambiguity after considering the extrinsic evidence, the evidence cannot be used to positively ascribe a meaning to the word that is different from its plain meaning.

(3) *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd requirements*

52 Finally, it must not be forgotten that *Zurich Insurance* lays down the requirement of relevancy, reasonable availability and clear and obvious context, before extrinsic evidence may be admitted to interpret a contract.¹⁸⁰ In elaboration, the first requirement is that the extrinsic evidence concerned must be “relevant”. In *Zurich Insurance*, the Court of Appeal endorsed Lord Hoffmann’s restatement in *Investors Compensation* that extrinsic evidence is relevant if “it would affect the way in which the language of the document would have been understood by a reasonable

179 *The Chairman, Serajgunj Municipality v Chittagong Co Ltd* (1922) 72 Ind Cas 969 at [5]; *Basanti v Official Receiver* AIR (1936) Lah 508 at [3]; *Ram Narain v Manki* AIR (1954) Pat 562 at [15]–[16]; *Chandra Sekhar v Mural Gope* AIR (1957) Pat 673 at [3]; *Firm Bolumal v Venkatachelapathi Rao* AIR (1959) AP 612 at [8]; *Darshan Dass v Ganga Bux* AIR (1962) Pat 53 at [6]; *Ramprashad Sahu v Basantia* AIR (1925) Pat 729 at [11]; *Baleshwar v Lal Bahadur* AIR (1972) Pat 87 at [10]; *Pradeep Kumar v Mahaveer Pershad* AIR (2003) AP 107 at [18].

180 See, eg, *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR(R) 1029 at [132].

man”¹⁸¹ Similarly, in *Tiger Airways Pte Ltd v Swissport Singapore Pte Ltd*¹⁸² (“*Tiger Airways*”), the High Court held that the test of relevancy is an objective one that asks whether a reasonable man would have regarded the extrinsic evidence as relevant to determining the context of the contract. The second requirement of “reasonable availability” is often a straightforward requirement, although it should be noted that actual knowledge of availability is irrelevant as the inquiry is an objective one.¹⁸³ The final requirement of a “clear and obvious context” is similar to the former two requirements. On the basis of promoting certainty, the Court of Appeal in *Zurich Insurance* imposed a threshold requirement of a “clear and obvious” context before extrinsic evidence can be admitted.¹⁸⁴ The High Court in *Tiger Airways* explained that this means that the extrinsic evidence that is tendered before the court must point to a clear or obvious context before the court can say with any certainty that such evidence is of assistance to the court. According to the court, this makes logical sense because if the extrinsic evidence points to a context that is far from clear or obvious, then the court would be acting within the realm of speculation.¹⁸⁵

53 It has previously been argued that all three *Zurich Insurance* requirements are really three sides to the same question and so should be combined into a single requirement,¹⁸⁶ but this is not the time or place to repeat those arguments. As the law presently stands, the three are distinct requirements that must each be satisfied in order that extrinsic evidence should, as prior negotiations, be admissible for the interpretation of contracts.

B. Consequences of departing from exclusionary rule in Singapore – Controlled (and not impossible) admissibility of prior negotiations

54 The argued-for departure from the exclusionary rule is therefore not a simultaneous call for the unrestricted admission of prior negotiations to interpret contracts. It is instead centred on two points. The first is to treat all types of extrinsic evidence the same: the Evidence Act makes no distinction between prior negotiations and other types of extrinsic evidence, and so an independent exclusionary rule that does

181 *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR(R) 1029 at [125].

182 [2009] 4 SLR(R) 992.

183 *Tiger Airways Pte Ltd v Swissport Singapore Pte Ltd* [2009] 4 SLR(R) 992 at [21].

184 For an application of this requirement, see *Soon Kok Tiang v DBS Bank Ltd* [2011] 2 SLR 716.

185 *Tiger Airways Pte Ltd v Swissport Singapore Pte Ltd* [2009] 4 SLR(R) 992 at [22].

186 See generally Goh Yihan, “Contractual Interpretation in Singapore: Continued Refinement after *Zurich Insurance – Sheng Siong Supermarket Pte Ltd v Carilla Pte Ltd*” (2012) 24 SAcLJ 275.

this may not be consistent with the Act. The second point is that certain key tenets of our contract law apply consistently to govern the admissibility of all extrinsic evidence in interpreting a contract. This article has identified three of them: objectivity, ambiguity and the *Zurich Insurance* requirements. Thus, prior negotiations will continue to be inadmissible, but not on the basis of any specially directed exclusionary rule, however broad or narrow. Rather, such evidence may be inadmissible for being either a subjective declaration of intention or that the contractual word is not ambiguous to warrant a departure from its plain meaning or that it fails to satisfy the *Zurich Insurance* requirements.

V. Conclusion

55 In conclusion, this article has argued for a departure from the exclusionary rule. First, it has argued that the Singapore courts retain entire freedom to depart from the exclusionary rule as it is not of legislative origin. Second, the Singapore courts should exercise this freedom because there is already local precedent wherein the Singapore courts have referred to prior negotiations in the interpretation of contracts. Even if the local precedent is wrong, there remain convincing, independent reasons as to why the exclusionary rule should be rejected. Indeed, it can be argued that the rule, being premised on a different basis for exclusion as compared with the relevant provisions of the Evidence Act, is inconsistent with the Evidence Act and should be “repealed”. Alternatively, the rule is not supported as a matter of history and it is evolved through a misstep in a series of early 20th-century cases. Third, the rejection of the exclusionary rule does not mean that prior negotiations are always admissible in the contractual interpretative exercise: the challenge for the Singapore courts is to recognise exactly why such evidence is inadmissible, instead of following a blanket rule that is unsupported by either its supposed longevity or substantive justifications. These reasons are adherence to the objectivity principle in contractual interpretation, the need for ambiguity before extrinsic evidence can be used to cause a departure from the plain language of contractual words, as well as the need to satisfy the *Zurich Insurance* requirements.

56 In the end, it must be recognised that prior negotiations do not stand apart as a special class of evidence to be treated specially under our legal system. For that reason alone, adherence to an independent exclusionary rule directed against such evidence, in whatever form, would be wrong. It is time for the Singapore courts to rule definitely in favour of a departure from the exclusionary rule against prior negotiations in the interpretation of contracts in Singapore.