

Case Note

CONTRACTUAL INTERPRETATION IN SINGAPORE

Continued Refinement after *Zurich Insurance*

Sheng Siong Supermarket Pte Ltd v Carilla Pte Ltd
[2011] 4 SLR 1094

This piece discusses the following aspects of contractual interpretation in Singapore raised in the recent Singapore High Court case of *Sheng Siong Supermarket Pte Ltd v Carilla Pte Ltd* [2011] 4 SLR 1094: (a) the distinction between interpretation and implication of terms in fact; (b) the occasions in which extrinsic evidence is admissible for the interpretation of contracts in Singapore; and (c) the distinction between “admissible extrinsic evidence” and “permissible interpretation”.

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I. Introduction

1 The law relating to the interpretation of contracts in Singapore is unique. In the first place, it involves the interpretation of a statute, *viz*, particular provisions of the Evidence Act¹ which govern various aspects of contractual interpretation. One might question if the approach taken in statutory and contractual interpretation is consistent in Singapore,² but that is not the aim of this note. More relevantly, contractual interpretation in Singapore must now be discussed in the

* The author would like to thank Yip Man for her very helpful comments and suggestions. The usual caveats, which, as presently stated, clearly necessitate a contextual interpretation to determine their ambit, apply.

1 Cap 97, 1997 Rev Ed.

2 The Court of Appeal in *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR(R) 1029 at [133] noted that:

It is also intriguing to note that, while meretricious symmetry or convergence is not the holy grail of legal jurisprudence, the adoption of the contextual approach to contractual interpretation is conceptually broadly similar to the purposive approach which our courts now adopt *vis-à-vis* statutory interpretation.

For principles of statutory interpretation in Singapore, see Goh Yihan, “Statutory Interpretation in Singapore: 15 Years on from Legislative Reform” (2009) 21 SAclJ 97.

light of the important Court of Appeal decision of *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd*³ (“*Zurich Insurance*”). At the risk of gross over-simplification, the Court of Appeal held in that case that proviso (f) to s 94 of the Evidence Act is “a fundamental rule of interpretation”⁴ and, as such, governs contractual interpretation in Singapore by allowing extrinsic evidence to be admitted in the interpretation of contracts, which has to be done via the contextual approach. From that premise, the Court of Appeal proceeded to restate the fundamental rules of contractual interpretation in Singapore, culminating in a six-point summary⁵ which has since been cited many times by the local courts.

2 The recent High Court decision of *Sheng Siong Supermarket Pte Ltd v Carilla Pte Ltd*⁶ (“*Sheng Siong*”) is one of the latest cases to cite⁷ *Zurich Insurance* and is illustrative of the continued refinement of contractual interpretation in Singapore. It therefore provides us with a good opportunity to discuss and evaluate the state of contractual interpretation in Singapore some three years after *Zurich Insurance* was decided. In particular, this note offers commentary on the following aspects of contractual interpretation in Singapore: (a) the distinction between interpretation and implication of terms in fact; (b) the occasions on which extrinsic evidence is admissible for the interpretation of contracts in Singapore; and (c) the distinction between “admissible extrinsic evidence” and “permissible interpretation”.

II. Facts and decision in *Sheng Siong*

3 But first, as is the custom in pieces of this nature, a summary of the facts and decision in *Sheng Siong* is appropriate at this juncture. Put shortly, the case concerns the interpretation of a leasehold agreement, specifically whether that agreement is conditional upon the premises concerned being capable of use as a supermarket.

4 The plaintiff, Sheng Siong Supermarket Pte Ltd (“Sheng Siong”), entered into negotiations in October 2008 to set up a supermarket and a food court in the premises of a building owned by Carilla Pte Ltd (“Carilla”), the defendant. In November 2008, the parties through their representatives exchanged e-mail messages, one amongst which stipulated that Carilla was to build “two internal travellers,

3 [2008] 3 SLR(R) 1029.

4 *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR(R) 1029 at [71]–[74].

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

6 [2011] 4 SLR 1094.

7 Although not the six-point summary referred to above.

a sub-station [*sic*], central air-cons, and a cargo lift to suit the supermarket operations”.⁸ In January 2009, Carilla sent a main term sheet (“MTS”) to Sheng Siong for its approval. Sheng Siong replied that Carilla should obtain approval from the relevant authorities for Sheng Siong to set up its supermarket and food court operations on the premises concerned. Crucially, Sheng Siong stated via e-mail in the same month that “if either one of these business is being [*sic*] rejected or disapproved by authorities, we were [*sic*] not consider to rent the said premises”.⁹ The parties signed a final version of the MTS on 14 January 2009. Clause 10 of the MTS read:

40% of GFA is for retail and 60% GFA is for entertainment, offices, child care, etc. Tenant usage comprises supermarket, wet market, thematic F&B, offices and others.

5 Clause 10, along with all the other terms in the MTS, was to have been incorporated into the standard tenancy agreement to form the final tenancy agreement. Had this been the case, there would be a clear-cut failure of a condition precedent in the event that approval for the supermarket was not granted. As it turned out, however, this clause was later omitted from the final version of the standard tenancy agreement. Nevertheless, Annex 1 of the standard tenancy agreement included a plan of the premises concerned that depicted a supermarket. The Second Schedule to the standard tenancy agreement likewise contained a list that included a cargo lift, a passenger lift, travellers and escalators, all of which were consistent with use as a supermarket. But there was no express provision similar to the one in the MTS that provided that the premises concerned were to be used as a supermarket.

6 In March 2009, Sheng Siong signed the final tenancy agreement and paid Carilla \$453,210 being the agreed security deposit, and \$22,954 being the sum for stamp duties. In April 2009, Carilla proceeded to obtain approval from the Housing and Development Board (“HDB”) – the relevant authority – that the premises concerned be used as a supermarket and food court. After this application was rejected, Carilla proposed to Sheng Siong that the use of the premises be changed from “Supermarket” to “Retail”. Sheng Siong did not agree to this proposed change. Carilla then suggested in May 2009 that Sheng Siong appeal to HDB. This was done in June 2009 but rejected in the same month, with a suggestion that the premises concerned be used as a “hotel or hostel”.

7 Carilla then informed Sheng Siong that it was to “adjust [its] operation at the [premises concerned] so as to be in line with the usage as allowed by HDB”.¹⁰ After some further correspondence between the

8 *Sheng Siong Supermarket Pte Ltd v Carilla Pte Ltd* [2011] 4 SLR 1094 at [5].

9 *Sheng Siong Supermarket Pte Ltd v Carilla Pte Ltd* [2011] 4 SLR 1094 at [6].

10 *Sheng Siong Supermarket Pte Ltd v Carilla Pte Ltd* [2011] 4 SLR 1094 at [17].

parties, Carilla informed Sheng Siong in late June 2009 that it was to comply with HDB's direction. If Sheng Siong failed to do so, it would lose all the moneys already paid to Carilla, and would also incur additional "holding costs". After communications broke down between the parties, Sheng Siong began legal proceedings for the return of the moneys it had paid over to Carilla in March 2009. Carilla counterclaimed for a declaration that the final tenancy agreement had been repudiated by Sheng Siong's breach and that the moneys paid over by Sheng Siong be forfeited in Carilla's favour.

8 From these facts, the pertinent issue was whether Carilla could enforce the final tenancy agreement against Sheng Siong notwithstanding that the premises concerned could not be used as a supermarket. The High Court decided in favour of Sheng Siong. After considering several pieces of extrinsic evidence, it found that there was an "express provision" in the final tenancy agreement that made the agreement conditional on permission being granted for the premises concerned to be used as a supermarket. This "express provision" was in fact the plan of the premises (annexed to the standard tenancy agreement which formed part of the final tenancy agreement) that depicted a supermarket.¹¹ Because this condition had not been met, the High Court found that the final tenancy agreement had been frustrated.¹² Consequent to the Frustrated Contracts Act,¹³ Sheng Siong was entitled to recover the sums paid over to Carilla,¹⁴ subject to a suitable deduction being made for expenses incurred by Carilla in relation to the preparation of the proposal to HDB.¹⁵

9 Leaving aside the frustration issues, the focus of this piece is the High Court's use of extrinsic evidence in interpreting the final tenancy agreement.

11 In the alternative, the High Court also remarked that it would have been inclined to rule in Sheng Siong's favour on the basis of rectification, had Sheng Siong brought its case as such: see *Sheng Siong Supermarket Pte Ltd v Carilla Pte Ltd* [2011] 4 SLR 1094 at [66]–[71].

12 *Sheng Siong Supermarket Pte Ltd v Carilla Pte Ltd* [2011] 4 SLR 1094 at [77].

13 Cap 115, 1985 Rev Ed.

14 Pursuant to s 2(2) of the Frustrated Contracts Act (Cap 115, 1985 Rev Ed): see *Sheng Siong Supermarket Pte Ltd v Carilla Pte Ltd* [2011] 4 SLR 1094 at [79].

15 Pursuant to s 2(3) of the Frustrated Contracts Act (Cap 115, 1985 Rev Ed): see *Sheng Siong Supermarket Pte Ltd v Carilla Pte Ltd* [2011] 4 SLR 1094 at [79].

III. A preliminary issue of characterisation: Interpretation or something else?

A. *The distinction between interpretation and existence of an express term*

10 Before we discuss the relevant principles on the use of extrinsic evidence in contractual interpretation, there is first a preliminary issue of characterisation that should be addressed. Although the parties submitted on whether there was an express condition precedent that the final tenancy agreement was conditional on permission being granted for use as a supermarket, the High Court characterised the issue as being one of “interpretation of the [Final] Tenancy Agreement”¹⁶. In doing so, it seems to have merged the issue of whether there was an express term, and the interpretation of such a term. It should be said that the *existence* of a term – whether express or implied – is distinct from the *meaning* of the term; the interpretation of a term presupposes that the term already exists.¹⁷ Therefore, it may be more accurate to characterise the issue as the interpretation of an express term. Having said that, however, it is understandable why the High Court had characterised the issue as being one of “interpretation”: Sheng Siong had submitted that the plans reflected usage as a supermarket,¹⁸ whereas Carilla argued that the plans should not be interpreted “as reflecting an express provision that the lease was conditional on the premises concerned being capable for use as a supermarket”.¹⁹ Thus, the parties’ submissions appear to be concerned with the *interpretation* of an (assumed) express term, while (it seems) mischaracterising the issue as being concerned with the *existence* of such a term.

B. *The distinction between interpretation and implication of terms in fact*

11 More importantly, it is Sheng Siong’s alternative submission that there is an implied term to similar effect that raises a more important distinction. Although the High Court did not deal with the issue – since it had already found that there was an express condition precedent to such effect – it is interesting that the High Court had outlined both issues together,²⁰ and then dealt with the “express condition” issue as one of interpretation. This suggests that it *might* have

16 *Sheng Siong Supermarket Pte Ltd v Carilla Pte Ltd* [2011] 4 SLR 1094 at [25]–[29].

17 See, eg, Gerard McMeel, *The Construction of Contracts: Interpretation, Implication, and Rectification* (Oxford University Press, 2nd Ed, 2011) at p 408.

18 *Sheng Siong Supermarket Pte Ltd v Carilla Pte Ltd* [2011] 4 SLR 1094 at [25].

19 *Sheng Siong Supermarket Pte Ltd v Carilla Pte Ltd* [2011] 4 SLR 1094 at [26].

20 *Sheng Siong Supermarket Pte Ltd v Carilla Pte Ltd* [2011] 4 SLR 1094 at [22].

dealt with the “implied term” issue as one of “interpretation” as well.²¹ If this speculation is correct, then there is a need to address the distinction between interpretation and the implication of a term (in fact²²).

12 In the Privy Council case of *Attorney General of Belize v Belize Telecom Ltd*²³ (“*Belize*”), Lord Hoffmann explained that the implication of terms in fact is really an exercise of contractual interpretation. Thus, whenever a court sought to imply a term in fact, it must ask itself “whether such a provision would spell out in express words what the instrument, read against the relevant background, would reasonably be understood to mean”.²⁴ This is the only question to be asked, and “other tests” such as the “business efficacy” or the “officious bystander” tests are not different or additional tests.²⁵ The question is whether a Singapore court will adopt the characterisation of implication of terms in fact as a question of interpretation, as the High Court in *Sheng Siong* appeared close to doing, and the High Court in *Kim Eng Securities Pte Ltd v Goh Teng Poh Karen*²⁶ appeared to have done²⁷.

13 It is unlikely that the Singapore courts will accept Lord Hoffmann’s characterisation of interpretation if and when directly argued before them. Indeed, in the first place, there are local Court of Appeal cases that have distinguished interpretation from implication. For example, in *Panwah Steel Pte Ltd v Koh Brothers Building & Civil Engineering Contractor (Pte) Ltd*,²⁸ the appellant faced the procedural question whether it was effectively raising the same argument rejected by the court below (*ie*, the implication of a term) packaged in a different way (*ie*, a purposive interpretation of the contract). The Court of Appeal held that the two arguments were different. In particular, it drew a distinction between the *interpretation* of express terms and the *implication* of non-express terms.²⁹

14 More to the point, the Court of Appeal has in *MFM Restaurants Pte Ltd v Fish & Co Restaurants Pte Ltd*,³⁰ albeit in *obiter* comments,

21 See also *Sheng Siong Supermarket Pte Ltd v Carilla Pte Ltd* [2011] 4 SLR 1094 at [23] which suggests that the High Court saw the two issues as being concerned with the interpretation of the contract.

22 The assumption here is that the court would have implied a term “in fact”, rather than “in law”.

23 [2009] 1 WLR 1988, noted in K F K Low & K C F Loi, “The Many ‘Tests’ for Terms Implied in Fact: Welcome Clarity” (2009) 125 LQR 561.

24 *Attorney General of Belize v Belize Telecom Ltd* [2009] 1 WLR 1988 at [21].

25 *Attorney General of Belize v Belize Telecom Ltd* [2009] 1 WLR 1988 at [21].

26 [2011] SGHC 201.

27 See *Kim Eng Securities Pte Ltd v Goh Teng Poh Karen* [2011] SGHC 201 at [66]–[67].

28 [2006] 4 SLR(R) 571.

29 *Panwah Steel Pte Ltd v Koh Brothers Building & Civil Engineering Contractor (Pte) Ltd* [2006] 4 SLR(R) 571 at [13].

30 [2011] 1 SLR 150.

responded to Lord Hoffmann's characterisation of interpretation in *Belize*. The Court of Appeal was critical of the unnecessarily high level of abstraction which the characterisation of interpretation engendered.³¹ In its view, this would result in a lack of concrete rules (and consequent normative guidance) as well as uncertainty.³² However, since the court's views were *obiter*, it would be helpful to independently evaluate Lord Hoffmann's test of interpretation as well.³³

15 It is suggested that Lord Hoffmann's characterisation of the implication of terms in fact as being an issue of "interpretation" is open to two main criticisms. First, and as has been pointed out,³⁴ the test of "interpretation" broadens the traditional requirement of "necessity" in relation to the implication of terms in fact to one of "reasonableness". While Lord Hoffmann said that "necessity" in the "business efficacy" test meant that it is insufficient for a court to consider that the implied term expresses what would have been "reasonable" for the parties to agree to,³⁵ the truth is that the test of "interpretation" brings with it the broader requirement of "reasonableness". According to *Investors Compensation Scheme Ltd v West Bromwich Building Society*³⁶ ("*Investors Compensation*"), interpretation is the "ascertainment of the meaning which the document would convey to a *reasonable* person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract"³⁷ [emphasis added]. Thus, the restriction which Lord Hoffmann placed on the word "necessity" in the context of the "business efficacy" test is no longer whether the implication is *necessary* to give effect to business efficacy, but whether the implication is necessary to convey the meaning as understood by a *reasonable* person. Therefore, the criterion of "reasonableness" has become the governing test over that of "necessity". While "reasonableness" itself is not an objectionable criterion, it is the potential uncertainty which it engenders that is open to criticism.

16 The second criticism of Lord Hoffmann's test of "interpretation" is its vagueness. English law has until now distinguished the process of implication from interpretation. For example, in *Equitable Life*

31 *MFM Restaurants Pte Ltd v Fish & Co Restaurants Pte Ltd* [2011] 1 SLR 150 at [98].

32 *MFM Restaurants Pte Ltd v Fish & Co Restaurants Pte Ltd* [2011] 1 SLR 150 at [98].

33 The High Court in *Premium Automobiles Pte Ltd v Song Gin Puay Ronnie* [2009] SGHC 254 at [10], referred to Lord Hoffmann's statement of his test but without comment as to its correctness.

34 E MacDonald, "Casting Aside 'Officious Bystanders' and 'Business Efficacy?'" (2009) 26 JCL 97 at 99.

35 *Attorney General of Belize v Belize Telecom Ltd* [2009] 1 WLR 1988 at [22].

36 [1998] 1 WLR 896.

37 *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896 at 912.

Assurance v Hyman,³⁸ Lord Steyn said that “[t]he purpose of interpretation is to assign to the language of the text the most appropriate meaning which the words can legitimately bear”.³⁹ Thus, while specific tests underpinned by the requirement of “necessity” govern the process of implication, a broader test of “reasonableness” informs the (contextual) interpretation of contracts. Collapsing both these hitherto disparate tests could give rise to confusion. How is the court to decide what a reasonable person would have interpreted the non-express words of a contract to mean? Unlike interpreting express terms, which naturally bind the court to a discernible spectrum of meanings, the “interpretation” of non-express terms is perhaps not as clear.⁴⁰

17 For all of the above reasons, it is suggested that the Singapore courts are unlikely to follow Lord Hoffmann’s characterisation of the implication of terms in fact as interpretation. It must be reiterated that the High Court in *Sheng Siong* had not done this, and the issue is only being canvassed here for the sake of completeness. Thus, contractual interpretation in Singapore remains a distinct concept from implication of terms.

IV. When is extrinsic evidence admissible for the interpretation of contracts in Singapore?

18 The more significant issue raised by *Sheng Siong* concerns the admissibility of extrinsic evidence for the interpretation of contracts in Singapore. In order to discuss this aspect of the decision more closely, we need to first consider the currently established legal framework that governs contractual interpretation in Singapore.

A. Contractual interpretation in Singapore following Zurich Insurance

19 As already mentioned, the law relating to the interpretation of contracts in Singapore must now be discussed in the light of *Zurich Insurance*. Contractual interpretation, as outlined in *Zurich Insurance*, inevitably involves a discussion of the parol evidence rule and the so-called contextual approach. Whilst related, it is important to realise they are not the same. Whereas the parol evidence rule – in its current strand⁴¹ – governs the admissibility of extrinsic evidence to aid in the

38 [2002] 1 AC 408.

39 *Equitable Life Assurance v Hyman* [2002] 1 AC 408 at 458.

40 Cf A Kramer, “Implication in Fact” [2004] CLJ 384.

41 See *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR(R) 1029 at [33] and [71], in which the so-called “thin” strand
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interpretation of contracts, it does not directly tell us *how* to interpret.⁴² That is informed by the contextual approach. This distinction is recognised by the prescribed two-step framework in the interpretation of contracts in *Zurich Insurance*.⁴³

20 The *first step* is to consider whether the extrinsic evidence sought to be adduced can in fact be admitted. The Court of Appeal in *Zurich Insurance*, after an extensive study of the relevant case law, concluded that although the parol evidence rule (as embodied in s 94 of the Evidence Act) still operates as a restriction on the use of extrinsic material to affect a contract, extrinsic material is admissible for the purpose of interpreting the language of the contract.⁴⁴ Assuming that the contract is one to which the parol evidence rule applies, no extrinsic evidence is admissible to contradict, vary, add to or subtract from its terms. However, extrinsic evidence is admissible to interpret the contract even if there is no ambiguity in the contract concerned.⁴⁵ Whether the extrinsic evidence is admissible depends on whether it is (a) relevant (*ie*, it would affect the way in which the language of the document would have been understood by a reasonable man); (b) reasonably available to all the contracting parties;⁴⁶ and (c) relates to a clear and obvious context.⁴⁷ According to the Court of Appeal, the

of the parol evidence rule was found applicable in Singapore; this is that version of the rule which states that evidence cannot be admitted (or, even if admitted, cannot be used) to add to, vary or contradict a written instrument.

42 Although one could argue that the consideration of extrinsic evidence in the interpretation of contracts *necessarily* means that a contextual approach is applied; otherwise, why even consider the admissibility of extrinsic evidence? It may also be argued that the contextual approach is somehow embedded within the statutory provision providing for the parol evidence rule, making them (almost) one and the same: *cf Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR(R) 1029 at [121]: “Thus, it is our view that the contextual approach to contractual interpretation, as accepted by our courts ... is statutorily embedded in proviso (f) to s 94.”

43 *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR(R) 1029 at [124].

44 *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR(R) 1029 at [108].

45 *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR(R) 1029 at [115]. See also *Sheng Siong Supermarket Pte Ltd v Carilla Pte Ltd* [2011] 4 SLR 1094 at [32].

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

47 *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR(R) 1029 at [132]. Although see also [2008] 3 SLR(R) 1029 at [129]:

In our view, the benefits of adopting, via proviso (f) to s 94, the contextual approach to contractual interpretation (*viz*, flexibility and accord with commercial common sense) will be maximised and its costs (*viz*, increased uncertainty and added litigation costs) minimised if, as a threshold requirement for the court’s adoption of a different interpretation from that suggested by

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extent of the admissible evidence is very broad and is not confined to empirical facts. This involves, in appropriate cases, a consideration of the commercial purpose of the contract in question.⁴⁸ However, it bears repeating that the Court of Appeal in *Zurich Insurance* cautioned that the contextual approach did not allow a court to contradict or vary the terms of a contract on the pretext of “interpreting” it.⁴⁹

21 The *second step* concerns the task of interpretation. This involves the application of the contextual approach under the terms of proviso (f) of s 94. The Court of Appeal in *Zurich Insurance* noted that neither ambiguity nor the existence of an alternative technical meaning is a prerequisite for the court’s consideration of extrinsic material. Instead, the court will first take into account the plain language of the contract together with relevant extrinsic material that is evidence of its context. Then, if, in the light of this context, the plain language of the contract becomes ambiguous (*ie*, it takes on another plausible meaning) or absurd, the court will be entitled to put on the contractual term in question an interpretation which is different from that demanded by its plain language.⁵⁰ The existing canons of interpretation continue to be relevant as well, although they are only a guide and not exhaustive.⁵¹

22 From this broad framework, it is now possible to discuss how *Sheng Siong* has applied various stages of the framework, and offer possible suggestions for refinements.

the plain language of the contract, the context of the contract should be clear and obvious.

For a more general acceptance of the three requirements, see the High Court decision of *Goh Guan Chong v AspenTech, Inc* [2009] 3 SLR(R) 590 at [57] and [79] and *Sheng Siong Supermarket Pte Ltd v Carilla Pte Ltd* [2011] 4 SLR 1094 at [31].

48 *Yamashita Tetsuo v See Hup Seng Ltd* [2009] 2 SLR(R) 265 at [64].

49 *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR(R) 1029 at [122]. See also *Yamashita Tetsuo v See Hup Seng Ltd* [2009] 2 SLR(R) 265 at [21]:

While I recognise that the line between construing a contract to determine the real objective intention of the parties and rewriting a contract can, in particular circumstances, be a fine one, the court should be astute not to impose, under the guise of construing a document, its own sense of fairness or reasonableness on a transaction entered into between two commercial parties who are well capable of taking care of their respective interests and who have obviously engaged in much bargaining before concluding the arrangement finally arrived at (as was the case in this appeal).

50 *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR(R) 1029 at [130]. See also *Sheng Siong Supermarket Pte Ltd v Carilla Pte Ltd* [2011] 4 SLR 1094 at [60].

51 *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR(R) 1029 at [131].

B. Refining the application of the parol evidence rule: An overarching “purpose” test

23 The two-step framework is necessitated by the statutory enshrinement of the parol evidence rule in the Evidence Act. Unlike in England, where the parol evidence rule is largely regarded as a relic of the past in all of its various manifestations,⁵² the parol evidence rule still appears in the statutory law of Singapore and cannot be judicially overwritten or ignored.⁵³ One possible concern with the framework is that, apart from stating that extrinsic evidence should not be admitted to “contradict, vary, add to or subtract” from the terms of the contract, it does not provide any further guidance on when this might be the case, which would in turn be an infringement of the parol evidence rule. The three requirements of admissibility, *viz*, relevance, reasonable availability, and clear and obvious context, do not actually tell us when the parol evidence rule is infringed. Indeed, these requirements concern the *inclusion* of extrinsic evidence, not the *exclusion* of it, which is what the parol evidence rule is about. Thus, the three requirements may be under-inclusive in limited situations because it is conceivable that a piece of extrinsic evidence may satisfy the three requirements (justifying its admission) but still offend the parol evidence rule because it is being used to contradict, vary, add to or subtract from the terms of the contract.

24 The High Court’s innovation in *Sheng Siong* in this regard is the addition of an overarching “purpose” test. Before the High Court applied the three requirements of admissibility, it stated that the “ultimate lynchpin” in the admission of extrinsic evidence is “what [the] court seeks to do with the extrinsic evidence”. As the High Court proceeded to elaborate:⁵⁴

Relying on such evidence to interpret the contract in its proper context is permissible; relying on the same to “contradict or vary or add to or subtract from” the contract is impermissible.

25 While this may seem to be a mere restatement of the Court of Appeal’s statement of the law in *Zurich Insurance*, it is suggested that the positive placement of such an overarching “purpose” test at the start of the inquiry gives proper effect to the parol evidence rule, which is exclusionary in nature. Furthermore, the High Court in *Sheng Siong* examined the situations where the “purpose” test is offended: it appears that this hinges on the “scope of the meanings that [the contractual]

52 See, *eg*, Gerard McMeel, *The Construction of Contracts: Interpretation, Implication, and Rectification* (Oxford University Press, 2nd Ed, 2011) at pp 166–167 and 422–424.

53 *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR(R) 1029 at [108] and [111]–[112].

54 *Sheng Siong Supermarket Pte Ltd v Carilla Pte Ltd* [2011] 4 SLR 1094 at [37].

words can bear”⁵⁵ Where the extrinsic evidence is to render the meaning of the term concerned “completely at odds” with either an express clause in the contract or with the meaning that the contractual words are capable of bearing, then the purpose of their admission would be to contradict, vary, add to or subtract from the terms of the contract, thereby infringing the parol evidence rule.⁵⁶

26 One possible critique against such an overarching “purpose” test is that it is circular: in order to know whether the extrinsic evidence is being admitted to attribute a meaning which the contractual words are incapable of bearing, one needs to first *interpret* the words to ascertain just what meaning they can in fact bear. This critique is based on the premise that there is no distinction between the plain and non-plain meanings of words pursuant to a contextual interpretative approach; the words only have a contextual meaning.⁵⁷ If this view is accepted, then there would certainly be a circularity if the “purpose” test is adopted.

27 However, the Evidence Act itself recognises the distinction between the plain and non-plain meaning of words. This is why, at the second step of the *Zurich Insurance* framework, the Court of Appeal in that case stated that a departure from the words’ plain meaning is permissible if ambiguity or absurdity ensued after consideration of the context. Indeed, the premise that there is a distinction between the “plain” and “non-plain” meaning of words is also recognised in statutory interpretation, where the court is bound by the text as enacted. As Andrew Phang J (as his Honour then was) stated in *Nation Fittings (M) Sdn Bhd v Oystertec plc*,⁵⁸ the court’s purposive (or contextual) interpretation should be “consistent with, and should not either add to or take away from, or stretch unreasonably, the literal language of the statutory provision concerned”.⁵⁹ Thus, if this distinction is recognised (along with the broader view that words can admit of different possible meanings), then the High Court’s “purpose” test in *Sheng Siong* will escape the circularity trap.

28 Another possible critique against the “purpose” test is that the courts are permitted in limited situations to depart from the plain meaning of the contractual words and yet still remain within the realm

55 *Sheng Siong Supermarket Pte Ltd v Carilla Pte Ltd* [2011] 4 SLR 1094 at [38], referring to *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR(R) 1029 at [108] and [122]–[123].

56 *Sheng Siong Supermarket Pte Ltd v Carilla Pte Ltd* [2011] 4 SLR 1094 at [38].

57 See, eg, *Static Control Components Ltd v Egan* [2004] 2 Lloyd’s Rep 429 at 435.

58 [2006] 1 SLR(R) 712.

59 *Nation Fittings (M) Sdn Bhd v Oystertec plc* [2006] 1 SLR(R) 712 at [27]. See also *Tan Kiam Peng v PP* [2008] 1 SLR(R) 1 at [59] and Goh Yihan, “Two Contrasting Approaches in the Interpretation of Outdated Statutory Provisions” [2010] Sing JLS 530.

of interpretation. For example, in *Investors Compensation*, Lord Hoffmann said that if the context leads a court to conclude that something must have gone wrong with the language used by the parties, the law does not require the courts to attribute to the parties an intention which they plainly could not have had.⁶⁰ Similarly, in the Singapore context, the Court of Appeal in *Zurich Insurance* stated that:⁶¹

Then, if, in the light of this context, the plain language of the contract becomes ambiguous (ie, it takes on another plausible meaning) or absurd, the court will be entitled to put on the contractual term in question an interpretation which is different from that demanded by its plain language. [emphasis in original]

These passages refer to what has become known as “common law rectification” (as distinguished from the equitable doctrine of rectification), which is the “deployment of construction as a tool for remedying obvious drafting errors”.⁶² Such a technique does not exist for statutory interpretation, perhaps because courts are more reluctant to “correct” Parliament’s express words as compared to the contractual words reached between two private⁶³ entities. Thus, the objection is that, if the courts are always able to depart from the plain meaning of the words via “common law rectification”, can there ever be a situation where the words cannot bear an imputed meaning? If not, then the “purpose” test would in fact “short-circuit” this quite legitimate technique by ruling as inadmissible many pieces of extrinsic evidence on the basis that they would contradict, vary, add to or subtract from the terms of the contract, when that is in fact a residual power which the court can exercise later on in the analytical framework.⁶⁴

29 The answer to this critique is that the English cases must be read in their proper context. The parol evidence rule in English law, it bears repeating, is a common law construct and not statutorily enshrined. As such, it could – and was – largely ignored by the English courts, in all of its various manifestations.⁶⁵ The situation is different in Singapore. The presence of the parol evidence rule in the Evidence Act – interpreted by

60 *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896 at 913.

61 *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR(R) 1029 at [130].

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

63 Though sometimes “public” as well, of course.

64 Interestingly, the High Court in *Sheng Siong Supermarket Pte Ltd v Carilla Pte Ltd* [2011] 4 SLR 1094 at [58]–[60] referred to the practice of common law rectification but without explaining how it interacts with the “purpose” test it laid down earlier.

65 See the valuable analysis in Gerard McMeel, *The Construction of Contracts: Interpretation, Implication, and Rectification* (Oxford University Press, 2nd Ed, 2011) at pp 411–414.

the Court of Appeal in *Zurich Insurance* as encompassing the “thin” version – means that the scope for “common law rectification” in Singapore may be narrower than in England. Whereas the English courts may not be bound by the “plain” meaning of the contractual words, the presupposition of such a concept in the parol evidence rule as embodied in the Evidence Act may mean that the Singapore courts are so bound, at least to some extent. This may be why the Court of Appeal in *Zurich Insurance* cautioned that:⁶⁶

However, where the court concludes that the parties must, for whatever reason, have used the wrong words or syntax and seeks to reject the actual words used by the parties altogether (see Lord Hoffmann’s fourth proposition in the *Investors Compensation Scheme* restatement (reproduced at [56] above)), *the alternative of rectification exists and may be the more appropriate remedy*. [emphasis added]

30 The Court of Appeal’s reference to rectification (and by this, it more than likely meant the equitable doctrine) as being the “more appropriate remedy” strongly suggests that “common law rectification” must not be taken too far in Singapore law. This is especially so since the Court of Appeal draws a contrast with Lord Hoffmann’s views on “common law rectification” in *Investors Compensation*. Thus, with respect, the High Court in *Sheng Siong* may have over-emphasised the importance of Lord Hoffmann’s allusion to common law rectification in *Investors Compensation*. But, returning to the present point, the narrower scope of common law rectification in Singapore means that the “purpose” test does not, in fact, “short-circuit” the courts’ power to rectify by way of construction. This is simply because their power to do so must be subject to the meaning which the contractual words can bear, an inquiry well addressed by the “purpose” test and which necessarily requires a consideration of the plain meaning of the words.

31 Therefore, to summarise this part of the discussion, it is submitted that the High Court’s innovation in *Sheng Siong*, in the form of a “purpose” test before one considers the admissibility of extrinsic evidence according to the three requirements, is a useful one. It gives effect to the exclusionary effect of the parol evidence rule, and arguably fills a gap which the Court of Appeal in *Zurich Insurance* did not directly address. As argued above, the “purpose” test is consistent with other aspects of the contractual interpretative framework in Singapore. It asks if the purpose of the extrinsic evidence concerned is to “contradict, vary, add to or subtract” from the contractual terms; pertinently, this involves a consideration of the meaning which the contractual words can reasonably bear, an inquiry which requires consideration of the words’

66 *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR(R) 1029 at [123].

plain meaning. The courts are bound by the ordinary meaning of those words and any *extended* departure⁶⁷ would fail the “purpose” test, thereby infringing the parol evidence rule.

C. Refining the three requirements governing admissibility of extrinsic evidence

32 If the proposed “purpose” test is not infringed, then the contractual interpretative framework proceeds to examine the admissibility of the extrinsic evidence concerned. This involves a consideration of three requirements, framed by the overarching requirement of the principle of objectivity. It will be suggested that the three specific requirements in fact represent different facets of the *same* fundamental inquiry; it may thus be better to collapse the requirements into this single inquiry focusing on the relevance of the extrinsic evidence concerned.

(1) *Objectivity and subjectivity*

33 But first, as the Court of Appeal in *Zurich Insurance* reminds us, it must always be borne in mind that the objective theory of interpretation underpins the contextual approach to contractual interpretation such that the exercise must not descend into an idle search for the parties’ subjective intentions.⁶⁸ The simplicity of this stated proposition masks, however, an underlying difficulty: just when is reference to a piece of evidence objective or subjective?

34 The distinction between objective and subjective intentions came under scrutiny in *Sheng Siong*.⁶⁹ One important piece of extrinsic evidence which Sheng Siong sought to admit was an e-mail sent by its representative to Carilla’s representatives in January 2009. In that e-mail, Sheng Siong specified that in the event that permission for a supermarket, air-conditioned wet market or food court was rejected, it would not consider renting the premises concerned.⁷⁰ The question for the High Court was whether this piece of evidence violated the objectivity principle since it emanated from Sheng Siong and could be seen as merely declaratory of its intention, not Carilla’s as well.

67 The courts can of course depart from the plain meaning, but any alternate meaning must still be within that which the word can reasonably bear.

68 *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR(R) 1029 at [125] and [127]. See also *The Vasily Golovnin* [2008] 4 SLR(R) 994 at [57]; *Ground & Sharp Precision Engineering Pte Ltd v Midview Realty Pte Ltd* [2008] SGHC 160 at [22]; and *Yamashita Tetsuo v See Hup Seng Ltd* [2009] 2 SLR(R) 265 at [62].

69 *Sheng Siong Supermarket Pte Ltd v Carilla Pte Ltd* [2011] 4 SLR 1094 at [44].

70 *Sheng Siong Supermarket Pte Ltd v Carilla Pte Ltd* [2011] 4 SLR 1094 at [43].

35 The High Court thought that *Zurich Insurance* did not prohibit the admissibility of subjective intentions if it went towards the proof of what the parties objectively intended. This may simply be another way of casting the relevant test. The true hallmark of objectivity, as Lord Hoffmann stated in *Investors Compensation*, is whether the evidence concerned “affected the way in which the language of the document would have been understood by a reasonable man”.⁷¹ The “objectivity” of the interpretative process depends not so much on the origin of the evidence concerned (*viz*, from either contracting party) but rather on the understanding of the reasonable man. That reasonable man can either be one in the position of promisee, or be wholly detached from either party,⁷² but it is this “third party’s” understanding of the contract that makes the interpretative process “objective”. Thus, in *Amalgamated Investment & Property Co Ltd v Texas Commerce International Bank Ltd*,⁷³ the English Court of Appeal admitted correspondence between the parties (which must, by definition, have originated from either side) in interpreting a guarantee. Accordingly, and with respect, the High Court in *Sheng Siong* was right in saying that just because the e-mail in January 2009 emanated from Sheng Siong did not mean, without more, that it was inadmissible as a subjective declaration of intent.

(2) *Relevance*

36 With the broad notion of objectivity in mind, we move now to examine the three requirements imposed by *Zurich Insurance* before extrinsic evidence can be admitted to interpret a contract. 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 man”.⁷⁴ Similarly, in *Tiger Airways Pte Ltd v Swissport Singapore Pte Ltd*⁷⁵ (“*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. This requirement of relevance is seemingly simple to satisfy: in *Sheng Siong*, the High Court had no difficulty finding that the extrinsic evidence sought to be admitted was “relevant”. It in fact said that the relevancy of the

71 *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896 at 912–913.

72 Gerard McMeel, *The Construction of Contracts: Interpretation, Implication, and Rectification* (Oxford University Press, 2nd Ed, 2011) at p 135.

73 [1982] 1 QB 84.

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

75 [2009] 4 SLR(R) 992.

January 2009 e-mail was “self-evident”.⁷⁶ The ease with which this requirement is satisfied is explainable by Lord Hoffmann’s restatement in *Investors Compensation*, where he said that the admissible background evidence includes “absolutely anything” which would have affected the reasonable man’s understanding of the contractual terms.⁷⁷

37 Notwithstanding the supposed ease with which the “relevance” requirement is satisfied, it is important to locate its genesis within the Evidence Act, since that is the local basis for the admission of extrinsic evidence in this area. The usage of “relevance” is apparently not the technical sense prescribed by Pt I of the Evidence Act. In particular, s 3(2) of the Evidence Act enacts that “[o]ne fact is said to be relevant to another when the one is connected with the other in any of the ways referred to in the provisions of this Act relating to the relevancy of facts”. Sections 5 to 17 of the same Act lay down the situations in which facts are “relevant”, and no more.⁷⁸ Section 94 itself does not once use the word “relevant”. Thus, the requirement of “relevance” was judicially read into s 94. This by itself is not objectionable, and indeed can be justified by examining the words of proviso (f) to s 94 itself which refer to facts that “[show] in what manner the language of a document is related to existing facts”. This itself refers implicitly to relevance, albeit not in the technical sense prescribed by s 3(2).

38 Understood this way, the requirement of “relevance” is also linked to the concept of “helpfulness”. In *Goh Guan Chong v AspenTech, Inc*⁷⁹ (“*Goh Guan Chong*”), the High Court refused to admit certain extrinsic evidence because it did not think it was “helpful”.⁸⁰ In that case, the draft of a contract was sought to be admitted as evidence. However, since the draft was drawn up by only one of the parties, the court thought that it was not helpful, as it could not show the objective intention of *both* parties. The criterion of “helpfulness” (in the sense of helpfulness to the reasonable man in understanding the contractual terms) may simply be another way of expressing the test expounded in *Tiger Airways* referred to above.

(3) Reasonable availability

39 This is often a straightforward requirement, although it should be noted that actual knowledge of availability is irrelevant as the inquiry

76 *Sheng Siong Supermarket Pte Ltd v Carilla Pte Ltd* [2011] 4 SLR 1094 at [44].

77 *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896 at 912–913, although he seemingly cut back on the broadness of this statement in *Bank of Credit and Commerce International SA v Ali* [2002] 1 AC 251 at [39].

78 See *Lee Chez Kee v PP* [2008] 3 SLR(R) 447 at [69].

79 [2009] 3 SLR(R) 590 at [79].

80 *Goh Guan Chong v AspenTech Inc* [2009] 3 SLR(R) 590 at [81].

is an objective one.⁸¹ This requirement was easily satisfied in *Sheng Siong* as there was actual availability to both parties. And, as already discussed, in *Goh Guan Chong*,⁸² extrinsic evidence that was only available to one of the contracting parties was held inadmissible as evidence of the parties' objective intention. However, the High Court held that this did not mean extrinsic evidence that was only available to one party is necessarily valueless. While such extrinsic evidence rightly cannot be used to conclusively reveal what the contracting parties' objective intention was, it might be used against the maker of statements therein to show the subjective intention of such party. In so doing, such evidence may reveal what the objective intention of the parties could *not* be. This will occur where the extrinsic evidence available to one party contradicts what that same party asserts was the objective intention of both parties.⁸³ However, this may simply be a roundabout way of utilising the parties' subjective intention, which is certainly impermissible.

40 More broadly, it will be noted that unavailability to both parties was used in *Goh Guan Chong* in both the "relevance" and "reasonable availability" requirements. Although the "reasonable availability" requirement was phrased as a distinct requirement by Lord Hoffmann in *Investors Compensation*,⁸⁴ its underlying rationale is still tied to that of "relevance". Thus, in *Codelfa Construction Prop Ltd v State Rail Authority of New South Wales*,⁸⁵ Brennan J said that "an extrinsic fact known only to one of the contracting parties can shed no light upon the meaning with which that word or phrase was used by the other or others".⁸⁶ There is thus a presumption – a seemingly irrebuttable one – that extrinsic evidence which is not available to both contracting parties would not assist in the reasonable man's understanding of the contractual term and, hence, not be "relevant". The inquiry revolves around the fundamental question of whether the reasonable man would derive assistance or help from the extrinsic evidence concerned, and the requirement of "reasonable unavailability" is simply a specific facet of this broader inquiry.

(4) *Clear and obvious context*

41 The next requirement of a "clear and obvious context" may also be cast in the same light. On the basis of promoting certainty, the Court

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

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

83 *Goh Guan Chong v AspenTech Inc* [2009] 3 SLR(R) 590 at [72].

84 *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896 at 912–913.

85 (1982) 149 CLR 337.

86 *Codelfa Construction Prop Ltd v State Rail Authority of New South Wales* (1982) 149 CLR 337 at 401.

of Appeal in *Zurich Insurance* imposed a threshold requirement of a “clear and obvious” context before extrinsic evidence can be admitted.⁸⁷ While this requirement found no problem of application in *Sheng Siong*, 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.⁸⁸ On this reading, this requirement of a “clear and obvious” context is simply an elaboration of the relevance test discussed earlier. Where extrinsic evidence is unclear, then it will generally be unhelpful to the reasonable man’s understanding of the contractual terms, thereby failing the requirement of “relevance”.

(5) *Relevance, reasonable availability, and clear and obvious context: Three sides of the same question?*

42 It is submitted that the three requirements of relevance, reasonable availability, and clear and obvious context are really three sides of the same question. More technically, the requirements of “reasonable availability” and “clear and obvious context” are specific elaborations of the broader “relevance” requirement. Thus, where extrinsic evidence is not reasonably available to both parties, then it would not be helpful in an objective interpretation of the contract (from the perspective of a reasonable man). Likewise, where extrinsic evidence does not relate to a clear and obvious context, it will not be helpful in objectively interpreting the contract.

43 In the light of this suggestion, it is further submitted that the three requirements laid down in *Zurich Insurance* should be collapsed into a single inquiry of “relevance”. The two other requirements should be regarded as non-exhaustive examples of the situations where extrinsic evidence may or may not be relevant. Such a scheme would better focus the courts on the true inquiry: whether the extrinsic evidence is helpful to the reasonable man’s understanding of the contract, which in turn is the fundamental basis of the objective theory interpretation in English (and Singaporean) contract law.

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

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

D. Specific example: The admissibility of prior negotiations and subsequent conduct

44 Having discussed the broad requirements of admissibility, we now discuss a specific example of extrinsic evidence. In a move which is as refreshing as it is bold, the Court of Appeal in *Zurich Insurance* departed from the present English position (embodied in *Investors Compensation* and, more recently, *Chartbrook Ltd v Persimmon Homes Ltd*⁸⁹) by accepting the possibility of admitting extrinsic evidence in the form of prior negotiations and subsequent conduct.⁹⁰ Although the Court of Appeal was non-committal on the admissibility of prior negotiations and subsequent conduct, the High Court in *Goh Guan Chong* allowed the admission of prior negotiations,⁹¹ and stated that earlier drafts of the contract concerned *could* be admitted⁹² (although this was not allowed on the facts⁹³). Similarly, in *Sports Connection Pte Ltd v Deuter Sports GmbH*,⁹⁴ the Court of Appeal, while distancing itself from laying down any general principle relating to the admissibility of subsequent conduct, did in fact rely on an e-mail sent after the contract concerned was signed to ascertain the context surrounding the intention of the parties when they entered into the contract concerned.⁹⁵

45 It is submitted that the Singapore courts should restate, once and for all, the permissibility of the admission of prior negotiations and

89 See, eg, *Chartbrook Ltd v Persimmon Homes Ltd* [2009] 1 AC 1101.

90 *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR(R) 1029 at [132]. Although it has to be noted that, even under English law, prior negotiations may be admitted if they form part of the admissible background. However, the contours of this exception are not clear.

91 *Goh Guan Chong v AspenTech Inc* [2009] 3 SLR(R) 590 at [79]. See also *Precise Development Pte Ltd v Holcim (Singapore) Pte Ltd* [2010] 1 SLR 1083 at [32], “Although this is primarily an objective exercise, the court can also consider extrinsic evidence that may shed light on what the parties intended at the time they entered into the contract.” Although the High Court in that case alluded to the possibility of admitting prior negotiations, it is perhaps incorrect in implying that recourse to prior negotiations weakens the objectivity of the interpretative exercise; see also *Sheng Siong Supermarket Pte Ltd v Carilla Pte Ltd* [2011] 4 SLR 1094 at [34].

92 *Goh Guan Chong v AspenTech Inc* [2009] 3 SLR(R) 590 at [58].

93 *Goh Guan Chong v AspenTech Inc* [2009] 3 SLR(R) 590 at [81].

94 [2009] 3 SLR(R) 883.

95 *Sports Connection Pte Ltd v Deuter Sports GmbH* [2009] 3 SLR(R) 883 at [70]–[71]. However, under English law, such evidence would probably be admissible as part of the relevant background. The Singapore cases which have admitted prior negotiations do not appear to draw the distinction between admissible prior negotiations going towards the background, and those that do not. See also *Abundance Development Pte Ltd v Absolut Events & Marketing Pte Ltd* [2009] SGHC 198 at [6], where subsequent conduct was also used to interpret the ambit of a contract; *Sundercan Ltd v Salzman Anthony David* [2010] SGHC 92 at [28], where the court “assumed” that subsequent conduct could be admitted; and *EC Investment Holding Pte Ltd v Ridout Residence Pte Ltd* [2011] 2 SLR 232 at [79].

subsequent conduct (even though it should be noted that even under English law, such evidence may be admitted if, generally speaking, they form part of the admissible background). This will avoid the occasional “mental gymnastics” to get out of the prior negotiations exclusion, as evident in *Sheng Siong*. The High Court in that case had to consider whether the MTS – which, it will be recalled, was not the final contract, but an “inchoate”⁹⁶ version if it – was admissible because it appears to constitute evidence of “prior negotiations”. The court got around this problem by characterising the MTS as a *product* of prior negotiations and hence was a “post negotiation” document. However, this reasoning, with respect, offends the rule in English law that earlier drafts of the final contract are not admissible,⁹⁷ which rule is in fact a specific example of the rule against “prior negotiations”. The exclusionary rule is not in fact narrowly against “prior negotiations” only but, rather, against “pre-contractual evidence”. The rationale is that these documents, concluded before the final contract, are not helpful towards the interpretation of contracts, probably because they show the subjective intentions of the parties. Thus, the High Court’s reasoning in *Sheng Siong*, while overcoming the exclusionary rule on a technical basis, does not answer the fundamental objection against the admission of such evidence. It is suggested that such technical characterisations are not needed.

46 If the Singapore courts are willing to consider the admissibility of prior negotiations (and, indeed, pre-contractual evidence) and subsequent conduct on a wider scale than that presently obtains in English law,⁹⁸ then perhaps the time has come for them to declare this to be the case. The traditional objection to the inclusion of such evidence is again premised on wastage of judicial time and, fundamentally, uncertainty.⁹⁹ In this regard, an analogy might be drawn with the admissibility of legislative debates in statutory interpretation. The admissibility of legislative debates is well accepted in English and Singapore law.¹⁰⁰ Yet, before the seminal case of *Pepper v Hart*,¹⁰¹ such evidence was also precluded out of concerns of wastage of judicial time and uncertainty. These reasons, it will be remembered, are the exact reasons for the current English exclusion of pre-contractual negotiations in the interpretation of contracts. Just as those reasons

96 *Sheng Siong Supermarket Pte Ltd v Carilla Pte Ltd* [2011] 4 SLR 1094 at [50].

97 See, eg, *Chartbrook Ltd v Persimmon Homes Ltd* [2009] 1 AC 1101.

98 See also the valuable analysis by Justice V K Rajah, “Redrawing the Boundaries of Contractual Interpretation: From Text to Context to Pre-text and Beyond” (2010) 22 SAclJ 513.

99 See, eg, *Full Metal Jacket Ltd v Gowlain Building Group* [2005] EWCA Civ 1809 at [17].

100 See, eg, *Pepper v Hart* [1993] AC 593 and s 9A of the Interpretation Act (Cap 1, 2002 Rev Ed).

101 [1993] AC 593.

were swept aside in *Pepper v Hart*, there is no reason why the same cannot be done in the realm of contractual interpretation. The question is surely not one of whether pre-contractual negotiations *can* be entertained at all, but *the extent* that they can be, in the interpretation of contracts. Thus, there ought not to be a blanket ban against such evidence,¹⁰² and they should be subject to the same requirements for admissibility of all extrinsic evidence, which is premised on the broad notion of “relevance”.

V. The distinction between “admissible extrinsic evidence” and “permissible interpretation”

47 The *second step* in which the contextual approach is to be applied under the *Zurich Insurance* framework concerns the way in which the task of interpretation is to be carried out. The relevant principles laid down in *Zurich Insurance* have been reproduced above.¹⁰³

48 One issue raised by *Sheng Siong* in relation to this second step concerns the distinction between permissible interpretation and admissibility of extrinsic evidence. While the two are related, they are not the same. The High Court in *Sheng Siong* appeared to have discussed issues of permissible interpretation (taking into account the whole of the contract) together with issues of admissibility.¹⁰⁴ While it is important to have recourse to the “internal context” of the contract in its interpretation,¹⁰⁵ that is quite a different matter from the admissibility of *extrinsic* evidence (which, by definition, is *external* to the contract).

VI. Conclusion

49 To conclude, *Sheng Siong* has provided us with a good opportunity to evaluate the state of contractual interpretation in Singapore after the important case of *Zurich Insurance*. The first point is that there remains in Singapore a distinction between interpretation and implication. On contractual interpretation proper, while *Sheng Siong* shows the *Zurich Insurance* principles have been continually refined and applied by the local courts, it has been suggested that a broader refinement may be attempted. First, an overarching (and threshold) “purpose” test should be imposed before the two-step analytical framework in *Zurich Insurance*. This test would filter out extrinsic

102 Or the ambit of the rule should be better defined.

103 See para 21 of this note. See also *Ang Tin Yong v Ang Boon Chye* [2011] SGCA 60 at [10]–[12].

104 *Sheng Siong Supermarket Pte Ltd v Carilla Pte Ltd* [2011] 4 SLR 1094 at [39].

105 Gerard McMeel, *The Construction of Contracts: Interpretation, Implication, and Rectification* (Oxford University Press, 2nd Ed, 2011) at p 149.

evidence that is clearly being used to “contradict, vary, add to or subtract” from the terms of the contract, a clear infringement of the parol evidence rule. In deciding whether the “purpose” test is satisfied, the court should consider the plain meaning of the contractual words – a concept recognised in the Evidence Act – and decide if the purpose of the extrinsic evidence is to attribute a meaning which those words cannot reasonably bear (but which can be different from the plain meaning of the words). If so, the test is not satisfied, and the extrinsic evidence is not admissible.

50 Assuming that the “purpose” test is satisfied, the *Zurich Insurance* two-step framework would apply. The first concerns whether the extrinsic evidence is “relevant”, *ie*, whether it would assist the reasonable man in his understanding of the contract. This gives effect to the objective theory of interpretation which permeates English (and Singaporean) contract law. The separate requirements of “reasonable availability” and “clear and obvious context” should not be treated as independent requirements, but rather as specific instances for the courts’ consideration of the relevance of the extrinsic evidence concerned. The second step in the framework involves the contextual interpretation of the contract in the light of the admitted extrinsic evidence. Crucially, Singaporean contract law recognises the distinction between the “plain” and “non-plain” meanings of words, and so a departure from the “plain” meaning is only warranted if a consideration of the extrinsic evidence reveals either ambiguity or absurdity (*ie*, that the contractual words have another meaning which they reasonably can bear).
