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ANOTHER CLOG ON THE CONSTRUCTION OF CONTRACTS? THE PAROL EVIDENCE RULE AND THE USE OF EXTRINSIC EVIDENCE

In the recent decision of *Citicorp Investment Bank (Singapore)* v *Wee Ah Kee*, our Court of Appeal examined the parol evidence rule. In interpreting the agreement in question, the court appears to have taken a restrictive view of the use of extrinsic evidence. This article explains how courts use extrinsic evidence to interpret instruments, and analyses the parol evidence provisions on interpretation in the Evidence Act.

I. Introduction

THE lifeblood of modern commercial transactions is the written instrument. The written form is either a legal requirement, *eg,* transactions involving the sale of land, or it arises out of the agreement of parties, *eg,* contracts. The increased volume of transactions and the complexity of obligations have lead to a corresponding increase in the number and complexity of such written instruments. Yet it may come somewhat as a surprise to the lay person that the rules of law for interpreting such written instruments have been formulated almost two hundred years ago, and have remained largely unchanged, even though these rules are becoming increasingly important, and are being applied with increasing frequency.

II. *Citicorp Investment Bank (Singapore)* v *Wee Ah Kee*[1]

Our Court of Appeal in the recent case of *Citicorp Investment Bank (Singapore)* v *Wee Ah Kee* had the opportunity to examine the parol evidence rule and the law of equity in the same case. In this sense, it is a unique decision. The judgment contains statements from our court to the effect that the anachronistic doctrine of clog on the equity of redemption may not survive modern innovations in corporate financing. Equally importantly, a large part of the judgment is devoted to an academic exposition of the

[1] [1997] 2 SLR 759. All references to this judgment shall be made to the paragraph numbers of the judgment.

parol evidence rule, and on how the parol evidence rule is to be applied when interpreting written documents.

The crux of the dispute between Wee, the plaintiff borrower, and Citicorp, the defendant bank, lies in a letter of 6 December 1994 which evidenced the agreement between the parties to vary the terms of the original loan agreement.[2] Citicorp had under the original loan agreement advanced to Wee a principal sum of US$4.25m[3] for the purchase of shares in a company, CIL,[4] subsequently reconstituted as Sum Cheong,[5] in return for Wee's grant of (i) a charge over the shares in favour of Citicorp, and (ii) an option to Citicorp to purchase, during the option period, 30% of the Sum Cheong shares from Wee.[6] Wee had failed to make repayment of the principal sum plus interest on the due date. Thus the parties entered into a fresh agreement on 6 December 1994 to allow Wee an extension of time to 15 December 1995 ('the repayment date') to repay the advances. The pertinent portion of the letter reads:

> 'The Call Option … *shall be terminated subject to* (1) your payment to Citicorp [the bank] of a sum of US$800,000 on or before 15 December 1995, and (2) your fulfillment of your obligation to repay the loan under the Loan Agreement…' (emphasis added)

On 15 December 1995,[7] Wee repaid the bank the loan plus accrued interest, but not the sum of US$800,000. As a result, Citicorp delivered only part of the Sum Cheong shares to Wee.[8] It held on to the rest, totalling 2,975,000 shares, asserting that since Wee had not discharged this debt, it was entitled to retain these shares as security for the call option fee of US$800,000.[9]

1. *Clog on the Equity of Redemption*

Wee applied for summary judgment against the bank for the return of the shares. His main contention was that the call option was invalid in the first place as it was a clog on the equity of redemption. If it was invalid,

2 The whole letter is reproduced at para 45 of the judgment.
3 Para 2.
4 Para 3.
5 Para 6.
6 Para 3.
7 Para 12.
8 Para 8.
9 Paras 12, 13.

Wee's promise to pay US$800,000 would form a collateral advantage which was similarly unenforceable.[10] This contention found approval before TQ Lim JC. His Honour entered judgment for Wee,[11] declared that Citicorp was not entitled to retain possession of any part of the shares, and ruled that the call option amounted to a clog on the equity of redemption. The Court of Appeal however reversed his decision, ruling that the call option was not a clog on the equity of redemption.[12] For a searching commentary of the Court of Appeal's decision on this point, please see the casenote by my learned colleague, Mr Lee Eng Beng, in this issue of the Singapore Journal of Legal Studies.[13]

2. *The Call Option and the Agreement of 6 December 1994*

There was however a second string to Wee's bowl. If the option was valid, Wee would nonetheless contend that Citicorp was not entitled to hold on to Wee's shares. This was because the agreement of 6 December 1994 meant that the call option would be terminated only upon payment of US$800,000 and repayment of the loan. Since both conditions had to be fulfilled, and since Wee did not pay the US$800,000, the call option was not terminated.[14] Presumably, Wee's argument would then proceed as follows: Since the loan was repaid and there was no further indebtedness to Citicorp,[15] Citicorp was not entitled to retain the shares as security.

Citicorp disputes this argument. Its contention was that when the agreement was entered into on 6 December 1994, Citicorp agreed to give up the call option forthwith and Wee promised by the agreement to pay US$800,000 (in addition to discharging his existing obligations under the loan agreement). Since Wee failed to make this payment, Citicorp was entitled to retain the charged shares as security for the sum outstanding.[16]

The issue before the Court of Appeal was then a simple one: Did the words "shall be terminated subject to…" in the 6 December 1994 agreement mean that Wee had promised to pay US$800,000 for the immediate termination of the option, or was the termination of the option contingent on

[10] Para 19.
[11] [1997] 1 SLR 543.
[12] Para 41.
[13] "Not Quite Unclogged: *Citicorp Investment Bank (Singapore) Ltd* v *Wee Ah Kee*" [1997] SJLS 597.
[14] Paras 47, 53(b).
[15] The 'indebtedness' clause to the original loan argument is spelt out in cl 1(A) of the charge, at para 12 of the judgment.
[16] Paras 47, 51, 53(a).

the payment of the sum concerned? (These arguments did not appear to have been canvassed before TQ Lim JC).[17]

The Court of Appeal preferred the latter view. It concluded that the parties' subsequent agreement on 6 December 1994[18] to terminate the option was conditional. According to the court, the two preconditions to the conditional agreement were: the payment of US$800,000 to Citicorp, and the repayment of the underlying loan,[19] for which the option was part of Citicorp's security.[20] Since Wee had repaid the loan but not made payment of the US$800,000 to Citicorp,[21] the option was never terminated. It lapsed and Citicorp could not retain the shares because Wee would owe Citicorp no further debt after fully discharging his loan agreement.[22] In the result, Citicorp was ordered to return the shares which it retained as security for the sum of US$800,000.

3. *The Commercial Object of the Agreement*

This conclusion merits closer examination from a commercial standpoint. As the judgment noted, Citicorp negotiated to terminate the option by selling the option back to Wee because of the low liquidity in the consolidated shares.[23] It is not disputed that the parties had come to an agreement on this matter.[24] By the agreement to value the option at US$800,000,[25] Wee in effect conceded that this was at least part of Citicorp's consideration for the loan.

The effect of the court's ruling that the agreement is a conditional one is that the agreement was primarily for Wee's benefit.[26] It bears repeating that the call option was already part of the consideration provided by Wee to Citicorp for its loan. If Wee makes repayment of the loan plus US$800,000, the loan is discharged with the call option. But if Wee simply makes repayment of the loan on the redemption date, *ie*, 15 December 1995, minus the US$800,000, the loan is discharged *together* with the call option. The

17 Paras 21, 54.

18 The letter was erroneously misdated 6 November 1994 (para 11). Both parties agreed that the correct date of the letter was 6 December 1994 (para 45).

19 Para 47.

20 Para 44.

21 Para 12.

22 Para 47.

23 Para 44.

24 Para 15.

25 It does appear that this was Citicorp's valuation. See para 19.

26 See para 70, where the court observed that the effect of the agreement was to permit Wee to terminate the option by repaying his loan.

call option does not, and cannot, survive the loan.

So the court had to conclude that Wee's consideration for this agreement must be in *impliedly* agreeing to an extension of the call option, which will expire on 15 December 1995.[27] Unfortunately, such an agreement as postulated leaves even more questions unanswered. Why was it that Citicorp failed to exercise its option? Was Citicorp labouring under a misapprehension? Could Wee be estopped from contending that Citicorp's understanding of the agreement was wrong? If the extension of the option was so important to both parties, why was it not clearly and expressly specified in the agreement that Citicorp had a valid and exercisable option in the agreement of 6 December 1994?

Notwithstanding these questions, if, as the argument goes, Citicorp could recover its (at least) US$800,000 consideration, on the facts, it chose not to do so. Unfortunately, this argument introduces further doubts as to the commercial wisdom of treating the 6 December 1994 agreement as a conditional agreement. The exercise of the call option would straddle Citicorp with enough uncertainties. For this reason, as was observed by the court, the parties negotiated to terminate the call option.[28] The court stated that Citicorp could buy 30% of the shares "at the specified price".[29] It is unclear from the judgment whether this was a fixed price or some floating rate which contributed to the uncertainty facing Citicorp. If it is the former, and if Wee were correct, one would naturally ask why Citicorp did not exercise its right to the call option immediately after the agreement of 6 December 1994 was executed. If it is the latter, why would Citicorp compound and contuse its own uncertainty by permitting Wee, by his unilateral conduct, to undermine Citicorp's right to exercise the option, by effecting repayment *at any time* after the 6 December 1994 agreement after Citicorp agreed to extend the repayment date?[30] Wee could, by tendering payment before the redemption date and thus terminating the loan and option, easily prevent Citicorp from exercising its option when the market conditions for the purchase (and possible resale) of the shares were most favourable.

Thus, according to the Court of Appeal, there is now a conditional agreement (the 6 December 1994 agreement) to further complicate the other conditional agreement (the call option). And this uncertain and highly unfavourable state of affairs for Citicorp will last about one year, from 6 December 1994, the date of the agreement, to 15 December 1995, the

[27] Para 71.
[28] Para 44.
[29] Para 3.
[30] See cl 1 of the agreement of 6 December 1994, as reproduced at para 45 of the judgment.

repayment date. In the absence of further evidence perhaps as to the circumstances in which the option and the 6 December 1994 agreement were granted, this ruling sits uncomfortably with some *prima facie* observations, as identified above, gleaned from the evidence as disclosed to the court. Further evidence would shed much light on the matter, and perhaps better justify the conclusion of the court.

4. *A Restatement of the Parol Evidence Rule in* Citicorp v *Wee Ah Kee*

The Court of Appeal however set its face against the admission of evidence to explain the circumstances in which 6 December 1994 agreement was made and the corresponding intention of the parties.[31] As noted earlier, Wee had applied for, and obtained, summary judgment in the High Court.[32] On appeal, to support their contention that summary judgment should not be awarded, Citicorp's counsel had argued that there were triable issues of fact as the wording of the 6 December 1994 agreement was vague and ambiguous, and extrinsic evidence of "circumstances in which the option was granted and the intentions of the parties at the relevant time"[33] would show "the true sense of the words as used by the parties" – that the agreement was not conditional, in that the call option was terminated forthwith in consideration of Wee's promise to pay the US$800,000.[34] Counsel relied on section 94(f), Evidence Act (Cap 97) for this purpose,[35] but the court dismissed this argument. "In our view, no extrinsic evidence could be adduced to ascertain the meaning of the letter agreement; it must be interpreted as it stood."[36]

The court reasoned that the words "shall be terminated subject to" did not appear uncertain or ambiguous since "they, without more, were used in a conditional sense. We therefore specifically directed our inquiry into whether there was any merit in the bank's contention of an ambiguity so as to apply section 94(f) …"[37] The court then noted that "there may be instances where extrinsic evidence of surrounding circumstances may be necessary to aid the interpretation of a document."[38] But according to the court, extrinsic evidence may be adduced only in *appropriate cases*.[39]

[31] Para 51, reproducing para 135 of Citicorp's submission.
[32] *Supra*, note 11.
[33] Para 51.
[34] Paras 47, 48.
[35] Para 48.
[36] Para 49.
[37] Para 60.
[38] Para 62.
[39] Para 63.

"Accordingly, section 94(f) must be relied upon scrupulously …"[40] The court concluded its reasoning by saying:

> We therefore took the position that where words of a written agreement have a clear and fixed meaning, not susceptible of explanation, extrinsic evidence is inadmissible to show that the parties meant something different from what they have written.… Otherwise, no contract will be worth the paper it is written on if clear and unambiguous words can be easily displaced by extrinsic evidence in an attempt to explain a contrary meaning.
>
> In our view, the language of the letter agreement was plain and unambiguous. There was no need to resort to the surrounding circumstances or extrinsic evidence to ascertain its meaning.[41]

The court concluded that the instant case was not such an appropriate case because the words in question in the 6 December 1994 agreement – "the call option … shall be terminated subject to …" were plain and unambiguous, and so must be interpreted without resorting to the surrounding circumstances or extrinsic evidence to ascertain its meaning.[42]

Thus, in summary, the Court of Appeal quite possibly took the following approach to the issue of interpretation: if a party claims a latent ambiguity in an agreement, the court will ascertain if the language of the relevant provision is plain or unambiguous without resorting to surrounding circumstances or extrinsic evidence to ascertain its meaning. If however the court *prima facie* concludes that there is some ambiguity, it may resort to section 94(f) to receive extrinsic evidence. Even then, "its application [must be] limited to situations whereby the proposed alternative meaning is one which the words of the document can properly bear."[43]

In other words, reliance on section 94(f), according to the court, is conditioned upon its prior determination, without reliance on extrinsic evidence, *whether there is an ambiguity in the language of the document*. If there is no such ambiguity, there can be no reliance on extrinsic evidence. The Court of Appeal introduced the italicized rider to section 94(f), even though section 94(f) contains no such rider.

[40] Para 66.
[41] Paras 67-68.
[42] Para 68. See also para 61.
[43] Para 66.

It is unfortunate that Stephen chose to put the parol evidence rules into the Evidence Act, when they are technically not rules of evidence but of substantive law.[44] Thayer echoes Stephen's sentiments.[45] The parol evidence rule is famous for its complexity, having been developed from a *potpourri* of exceedingly complicated caselaw, many of which are not easily reconcilable. It is also not easy to crystallise the common law wisdom of these cases into terse propositions of law in codified form, accompanied by what would often be misleading illustrations which are drawn from single cases, when cases going the other way can just as easily be found. In this regard, it is useful to consult the English common law decisions on this point, to ascertain the position of the law as it then stood when Stephen drafted the Evidence Act.

III. Species of the Parol Evidence Rule

The principle behind the parol evidence rule is, on its face, simple. When a transaction is recorded in a document, it is generally impermissible to adduce other evidence extrinsic to the document.[46] There are three species of this rule. The first rule is a rule relating to means of proof.[47] It prevents secondary evidence of a document from being given.[48] This rule, as found in section 93, does not concern us here and no further mention shall be made of it.

The second rule makes inadmissible evidence of things which vary from those recorded in the document.[49] This rule is generally found in section 94 which states that "when the terms of any [written document] have been proved according to section 93, no [extrinsic evidence] shall be admitted … for the purpose of contradicting, varying, adding to, or subtracting from its terms." This rule preserves the conclusiveness of terms recorded in a document. "It would be inconvenient that matters in writing, made by advice and on consideration, and which finally import the certain truth of the agreement of the parties, should be controlled by averment of the parties, to be proved by the uncertain testimony of slippery memory."[50] But the conclusiveness of a written document can be overridden where there is fraud,

44 Stephen, *A Digest of the Laws of Evidence* (12th ed, 1936), at 209.
45 Thayer, *A Preliminary Treatise on Evidence at the Common Law* (1969 reprint), at 411.
46 Nokes, *An Introduction to Evidence* (4th ed, 1967), at 239.
47 S 93 is found in Part II of the Evidence Act (Cap 97, 1990 ed), which contains the provisions regulating the means of proof of relevant facts. All references to sections shall be to sections in the Evidence Act.
48 Nokes, *supra*, note 46, at 239.
49 *Ibid*, at 245.
50 *Countess of Rutland's case* (1604) 5 Co Rep 25, 26a.

illegality or want of consideration,[51] a separate oral agreement on any matter on which a document is silent,[52] a separate oral agreement as a condition precedent to the written document,[53] or a distinct subsequent oral agreement which rescinds or modifies the prior written document.[54] Otherwise, "to reject parol or other extrinsic proof in such cases would be to apply the rule in question to a purpose for which it was never intended, and to render it a protection to practices which the object of the law is to suppress."[55]

The third species of the parol evidence rule deals with the admissibility of facts in aid of the interpretation of written documents.[56] "The construction or interpretation of written contracts consists in ascertaining the meaning of the parties as expressed in the terms of the writing, according to the rules of grammar, and subject to the rules of law."[57] Here, the objections to the use of extrinsic evidence are arguably less strong. It is of necessity that a document has to be interpreted before one can ascertain if other extrinsic agreements will detract from the document itself. So extrinsic evidence has a bigger role to play in relation to this species of the parol evidence rule than the previous rule. This rule is quite different from, and is not to be confused with, the previous rules.[58]

IV. The Role of Extrinsic Evidence in Interpretation

1. *Interpretation vs Construction*

Strictly speaking, there is a difference between the expressions "interpretation of a document" and "construction of a document". The interpretation of a document is the ascertainment of the meaning of written expressions – the sense in which words have been used. Construction is a matter of law in which the courts apply rules of law to the instrument *after that sense has been ascertained*.[59] The parol evidence rule is concerned only with interpretation, not with construction. Having drawn this distinction however, it must be noted that the expressions "interpretation" and "construction" are in practice often used interchangeably.[60]

51 S 94(a).
52 S 94(b).
53 S 94(c).
54 S 94(d).
55 Phipson, *Best on Evidence* (11th ed, 1911), at 221.
56 Nokes, *supra*, note 46, at 256.
57 Leake, *Dig Cont* 217.
58 Stephen, *supra*, note 44, at 207.
59 See Nokes, *supra*, note 46, at 256-257; Howard, Crane and Hochberg, *Phipson on Evidence* (14th ed, 1990), at 1046.
60 *Phipson*, *ibid*. Quotations from the various judgments in this article abound with such illustrations.

2. *Extrinsic Evidence as a Material Circumstance*

What is the role played by extrinsic evidence in the interpretation of written documents? The underlying philosophy is incontrovertible: in interpreting a written document, the court should not be deprived of the assistance of extrinsic evidence of the material circumstances surrounding the writers of the documents.[61] As Lord Blackburn explained, in the context of the interpretation of a will:

> The general rule is that, in construing a will, the Court is entitled to put itself in the position of the testator, and to consider all material facts and circumstances known to the testator with reference to which he is to be taken to have used words in the will, and then to declare what is the intention evidenced by the words used with reference to those facts and circumstances which were (or ought to have been) in the mind of the testator when he used those words.[62]

The often-quoted statement from Blackburn J in *Grant* v *Grant* makes the same point:

> The general rule seems to be that *all facts are admissible* which tend to shew the sense the words bear with reference to the surrounding circumstances of and concerning which the words were used, but that such facts as only tend to shew that the writer intended to use words bearing a particular sense are to be rejected.[63] (my emphasis)

In modern language, Lord Dunedin puts it more simply as follows:

> Now, in order to construe a contract the Court is *always entitled* to be so far instructed by evidence as to be able to place itself in thought in the same position as the parties to the contract were placed, in fact, when they made it – or, as it is sometimes phrased, to be informed as to the surrounding circumstances.[64] (my emphasis)

[61] Hawkins, *A Concise Treatise on the Construction of Wills* (3rd ed, 1925), at 14.
[62] *Allgood* v *Blake* (1873) LR 8 Ex 160, 162.
[63] (1870) LR 5 CP 727, 728.
[64] *Charrington & Co Ltd* v *Wooder* [1914] AC 71, at 82.

3. *The Rule in Great Western Railway* v *Bristol*

As late as 1900, this view still held sway. In *Bank of New Zealand* v *Simpson*,[65] the Privy Council quoted, with approval, the following statement of the rule from *Taylor on Evidence*:

> It may be laid down as a broad and distinct rule of law that *extrinsic evidence* of every *material fact* which will enable the Court to *ascertain the nature and qualities* of the subject-matter of the instrument, or, in other words *to identify the persons and things* to which the instrument refers must of necessity be received. [66] (my emphasis)

In the next two decades, the House of Lords had the opportunity to address the parole evidence rule on no fewer than five occasions. In the same year, in *North Eastern Railway* v *Hastings*,[67] the House of Lords held that the conduct of the parties which evidenced their interpretation of the agreement would not debar the court from another interpretation of the agreement.[68] Two years later, in *Higgins* v *Dawson*,[69] the House of Lords refused to admit extrinsic evidence of the testator's personal estate, which would ostensibly have assisted the House in the interpretation of the testator's will. This was followed by *Charrington & Co Ltd* v *Wooder*,[70] where extrinsic evidence was actually admitted to assist the court in its interpretation of an agreement between a brewing company and a publican. It was in that case that Lord Atkinson first germinated the view that where the words as used in an agreement are susceptible of two or more meanings,

> the relations of the parties and all the surrounding circumstances may be taken into consideration … to shew the nature and quality of the subject-matter, or, in other words, to shew the meaning the parties themselves attached to the language they have used.[71]

65 [1900] AC 182.
66 (8th ed), vol II, s 1194.
67 [1900] AC 260.
68 In *Van Diemen's Land Company* v *Table Cape Marine Board* [1906] AC 98, in a speech delivered on behalf of the Privy Council on appeal from Tasmania, Earl Halsbury LC cited *North Eastern Railway Co* v *Hastings* for the proposition that if the language of the instrument itself were absolutely plain and unambiguous, no amount of user would prevail against the plain meaning of the words. But in that case, the Privy Council went on nonetheless to admit extrinsic evidence to ascertain the actual circumstances in which the instrument in question was made.
69 [1902] AC 1.
70 [1914] AC 71.
71 *Ibid*, at 93.

Lord Atkinson's views culminated in *Great Western Railway and Midland Railway* v *Bristol Corporation*,[72] where his Lordship repudiated the validity of Lord Blackburn's views, judicial and extra-judicial.[73] His Lordship unequivocally held, after consulting the speech of Tindal CJ in the *locus classicus* of *Shore* v *Wilson*,[74] that:

> Before, therefore, extrinsic evidence of the surrounding circumstances can be admitted the Court must find in the written instrument words which have not a fixed meaning, but are in the connection in which they are used ambiguous, susceptible of more than one meaning. If there are no such words in the agreement … then the evidence as to the circumstances surrounding its making was inadmissible.[75]

This proposition is now taken to be the unreserved and unquestioned position of the law as repeated in the modern textbooks of today.[76]

4. *A Critique of Great Western Railway* v *Bristol*

It does then seem that the Court of Appeal in *Citicorp Investment Bank (Singapore)* v *Wee Ah Kee* has identified itself[77] with the approach taken in *Great Western Railway and Midland Railway* v *Bristol Corporation*. Is this approach a valid one?

It is the respectful submission of this author that *Great Western Railway and Midland Railway* v *Bristol Corporation* does not stand for the proposition that the words in the agreement must be ambiguous before evidence of the surrounding circumstances are admissible.[78]

72 (1918) LJ 87 Ch 414.

73 As set out above.

74 (1842) 9 Cl & F 355, 565.

75 *Supra*, note 72, at 419.

76 See, *eg*, *Phipson*, *supra*, note 59, at 1058, Nokes, *supra*, note 46, at 258. This rule is expressed in a more equivocal way in Tapper, *Cross & Tapper on Evidence* (8th ed, 1995), at 777. *Contra* the statement of the rule in Norton, *A Treatise on Deeds* (2nd ed, 1928), at 63, which is: "When the words used in a deed are in their literal meaning unambiguous, and when such meaning is not excluded by the context, and is sensible with respect to the circumstances of the parties at the time of executing the deed, such literal meaning must be taken to be that in which the parties used the words." Note the qualification – that the words in the deed must be unambiguous in the context and circumstances.

77 See main text at *supra*, note 41.

78 Following from *Great Western Railway and Midland Railway* v *Bristol Corporation*, Lord Atkinson repeated his propositions as law in *Watcham* v *East Africa Protectorate* [1919] AC 533, at 538. Lord Aktinson was however prepared to make the concession that extrinsic evidence may be given to identify the subject-matter to which the words of an instrument refer, even if the language is not ambiguous.

It is worth noting that Lord Atkinson's abhorrence for the use of extrinsic evidence of surrounding circumstances was not shared by the other members of the House. Though Lord Shaw intimated that it was not competent to introduce a reference to surrounding circumstances if there was no ambiguity in the expression of the agreement,[79] his Lordship was more concerned with the use of extrinsic evidence of intention to displace the intention of the parties as evidenced in the document. Furthermore, Lord Shaw did cite Lord Blackburn's unreserved proposition about the use of extrinsic evidence with approval, and noted that this proposition was judicially approved of by the House of Lords in *Bank of New Zealand* v *Simpson* and by Lord Atkinson himself in *Charrington & Co* v *Wooder*.

Lord Wrenbury, who delivered the last judgment, put, it is submitted, the use of extrinsic evidence in its proper context. One can do no better than to quote what his Lordship said:

> With these observations I apprehend that, as in *every case of construction*, your Lordships are here entitled, *before reading the document, to be informed of the surrounding circumstances*, and *if you find any ambiguity* upon which evidence is admissible upon those principles, you are entitled to admit it and act upon it.[80] (my emphasis)

If Lord Wrenbury is right, Lord Atkinson's proposition suffers from the following fallacy: if the court is not informed of the surrounding circumstances, it cannot *a priori* say that the language of the document is otherwise clear and unambiguous. Lord Blackburn's judgments in *River Wear Commissioners* v *Adamson*, *Inglis* v *Buttery & Co*,[81] and the similar pronouncements of the House of Lords in *Bank of New Zealand* v *Simpson* and *Charrington & Co* v *Wooder* which affirm this point, were never really distinguished by Lord Atkinson. For his proposition, Lord Atkinson relied heavily on *Shore* v *Wilson*.[82] It is worth quoting what Tindal CJ *actually* said in this case *in extenso*:

[79] *Blackburn on Contract of Sale* (3rd ed), at 51, where his Lordship said, "The general rule seems to be, that all facts are admissible which tend to show the sense the words bear with reference to the surrounding circumstances concerning which the words were used, but that such facts as only tend to show that the writer intended to use words bearing a particular sense are to be rejected."

[80] *Great Western Railway and Midland Railway* v *Bristol Corporation, supra,* note 72, at 429.

[81] (1878) 3 App Cas 552, 577.

[82] *Supra*, note 74.

> The general rule I take to be, that where the words of any written instrument are free from ambiguity in themselves, *and where external circumstances do not create any doubt or difficulty as to the proper application of those words to claimants under the instrument, or the subject-matter to which the instrument relates*, such instrument is always to be construed according to the strict, plain, common meaning of the words themselves; and that in such case evidence *dehors* the instrument, for the purpose of explaining it according to the surmised or alleged intention of the parties to the instrument, is utterly inadmissible … The true interpretation, however, of every instrument being manifestly that which will make the instrument speak the intention of the party at the time it was made, it has always been considered an exception from, as a corollary to, the general rule above stated, that where any doubt arises upon the true sense and meaning of the words themselves, or any difficulty as to their application under the surrounding circumstances, the sense and meaning of the language may be investigated and ascertained by evidence *dehors* the instrument itself; for both reason and common sense agree that by no other means can the language of the instrument be made to speak the mind of the party.[83] (my emphasis)

On closer examination, Tindal CJ's speech is positively inconsistent with Lord Atkinson's proposition. Tindal CJ referred to the unqualified use of "external circumstances" to determine if there is any "doubt or difficulty as to the proper application of those words … or the subject-matter". Tindal CJ did not say that where the words of any written instrument are free from ambiguity, no reference can be made to "external circumstances". In this quotation, it can be seen that Tindal CJ implicitly acknowledged that even if the words are "free from ambiguity *in themselves*", external circumstances may still create doubt or difficulty, and he noted that where any doubt arises upon the true sense and meaning of the words, the court may investigate this by way of evidence *dehors* the instrument itself.

It is quite ironic also that despite ruling that extrinsic evidence is inadmissible, Lord Atkinson in the rest of his judgment made extensive references to the extrinsic evidence of the surrounding circumstances to eventually conclude in the same way as Lord Wrenbury and Lord Shaw.[84]

Nor do the cases of *North Eastern Railway* v *Hastings* and *Higgins* v

[83] *Ibid*, at 565.

[84] The other two speeches of Lord Finlay and Lord Paker contain minimal amounts of legal reasoning, and do not add anything more to this analysis.

[85] *Supra*, note 67.

Dawson advance Lord Atkinson's proposition. In *North Eastern Railway*,[85] the extrinsic evidence took the form of the conduct of the parties subsequent to the making of the agreement, which was insufficiently relevant to the circumstances surrounding the making of the agreement.[86] This is also a case about estoppel by convention, in which the parties acted under a misapprehension as to the scope and extent of their rights and liabilities under the agreement.[87] The railway company could have sought redress *via* estoppel by convention,[88] but this point was never raised. In *Higgins* v *Dawson*,[89] evidence of the testator's possession of personal property was held inadmissible for the purpose of construing his will. This is really not strictly a case in which extrinsic evidence of surrounding circumstances was inadmissible because the language of the will was clear and unambiguous. The underlying reasoning was that evidence as to the testator's property at the date of the will could not affect its interpretation, because a will speaks as at the date of death,[90] and because counter evidence could be led as to the testator's possible expectations as at the date of making the will.[91] So such evidence was held immaterial and irrelevant.

5. *The Modern Approach to Extrinsic Evidence*

Set against this backdrop, perhaps then it is no longer remarkable to observe that the modern approach of the House of Lords exemplified by the speeches of Lord Wilberforce in the trio of cases – *Prenn* v *Simmonds*,[92] *Wickman Machine Tool Sales* v *Schuler AG*[93] and *Reardon Smith Line Ltd* v *Hansen-Tangen*[94] – does not suffer from this problem. In *Prenn* v *Simmonds*, the House of Lords held that in order for the agreement in question to be understood, it must be placed in its context. Lord Wilberforce declared that

[86] *Ibid*, *per* Earl of Halsbury LC, at 266. *Whitworth Street Estates (Manchester) Ltd* v *James Miller & Partners Ltd* [1970] AC 583 confirms this position. *Cf* the decision of *Watcham* v *Attorney-General of East Africa Protectorate* [1919] AC 533, criticised in *Gaisberg* v *Storr* [1950] 1 KB 107, *per* Cohen LJ at 114, and in *Sussex Caravan Parks Ltd* v *Richardson* [1961] 1 WLR 561, *per* Harman LJ at 568.

[87] *Amalgamated Investment & Property Co Ltd* v *Texas Commerce International Bank Ltd* [1982] QB 84; *The Vistafjord* [1988] 2 Lloyd's Rep 343; *Singapore Island Country Club* v *Hilborne* [1997] 1 SLR 248.

[88] Witness the reservations of Lord Davey at 268.

[89] *Supra*, note 69.

[90] *Ibid*, *per* Lord Shand at 9, *per* Lord Davey at 11; s 18, Wills Act (Cap 352).

[91] *Ibid*, *per* Lord Shand at 9.

[92] [1971] 1 WLR 1381.

[93] [1974] AC 235.

[94] [1976] 1 WLR 989.

> [t]he time has long passed when agreements, even those under seal, were isolated from the matrix of facts in which they were set and interpreted purely on internal linguistic considerations. There is no need to appeal here to any modern, anti-literal, tendencies, for Lord Blackburn's well-known judgment in *River Wear Commissioners* v *Adamson* … provides ample warrant for a liberal approach. We must, as he said, inquire beyond the language and see what the circumstances were with reference to which the words were used, and the object, appearing from those circumstances, which the person using them had in view.[95]

It is noteworthy that in *Prenn* v *Simmonds*, the House of Lords appraised itself of the factual background known to the parties at or before the date of the agreement, including the genesis and aim of the agreement, and held that the reference to "profits" in the agreement meant the profits of the group of companies as a whole. This was because it was the avowed aim of the parties to the agreement that the plaintiff employed the defendant to ensure that enough profits were earned by the group as a whole and not just the holding company, and because the objective of the plaintiff in this arrangement was to use the group's profits to redeem the preference shares. The House of Lords did not use as their starting point a fine linguistic analysis of the language of the agreement. Lord Wilberforce simply noted that the plaintiff's contrary contention, that "profits" referred to the profits of the holding company, did not fit the aim of the agreement, or correspond with commercial good sense.[96] Thus it may be said that when Lord Wilberforce confidently pronounced that the plaintiff's contention was linguistically unacceptable,[97] he did so with the benefit of an informed consideration of the extrinsic evidence of the surrounding circumstances.

In *Reardon Smith Line* v *Hansen-Tangen*, Lord Wilberforce again took the trouble to explain that the surrounding circumstances or factual matrix of the agreement is always relevant:

> But it does not follow that … one must be confined within the four corners of the document. No contracts are made in a vacuum: there is always a setting in which they have to be placed. The nature of what is legitimate to have regard to is usually described as "the surrounding

[95] *Supra*, note 92, at 1383-1384.
[96] *Ibid*, at 1389.
[97] *Ibid*.

> circumstances" but this phrase is imprecise: it can be illustrated but hardly defined. In a commercial contract it is certainly right that the court should know the commercial purpose of the contract and this in turn presupposes knowledge of the genesis of the transaction, the background, the context, the market in which the parties are operating.[98]

After being informed of the factual matrix of the ship building agreement, the House of Lords held that the reference to the vessel as "Osaka 354" was a mere substitute for a name, serving no purpose but to provide a means whereby the charterers could identify the ship. The reference was held not to be a contractual description which would bind the ship builders as to who built the ship and the number of the hull. The members of the House did not preface their analysis with the observation that the reference "Osaka 354" was unclear or ambiguous.

Prenn v *Simmonds* and *Reardon Smith Line* v *Hansen-Tangen* were followed and applied by our Court of Appeal in *Diversity (Far East) Pte Ltd* v *Chai Chung Ching Chester*[99] and *Mt Elizabeth Hospital Ltd* v *Allan Ng Clinic for Women*[100] respectively. In the former case, the court noted that "[o]ne must enquire beyond the language and see what the circumstances were with reference to which the words were used."[101] In the latter case, there is no real dispute that in order for the court to interpret the terms of the agreement in dispute, the court was entitled to examine the subject-matter of the dispute preceding the making of the agreement in question as part of the factual matrix of the agreement. The court did not preface its reference to the factual matrix with any pronouncement that the terms in question were unclear or ambiguous.[102] In this respect, such an interpretation of *Citicorp Investment Bank (Singapore)* v *Wee Ah Kee* that no reference may be had to any extrinsic evidence in the form of the factual matrix of the agreement unless the court first decides that the language is unclear or ambiguous is not easily reconcilable with *Diversity* and *Mt Elizabeth Hospital Ltd.*

V. The Limitations of Extrinsic Evidence

It is however fallacious to conclude from the observations above that simply because extrinsic evidence is relevant, it will always be useful and material

[98] *Supra*, note 94, at 995.
[99] [1993] 1 SLR 535, 538-540.
[100] [1994] 3 SLR 639.
[101] *Supra*, note 99, *per* Rajendran J at 539.
[102] *Ibid*, at 652-653.

in the interpretation of documents, and that it can always be used to displace the contents of the documents. To understand why this is so, it is necessary to know that there are two competing theories of interpretation.

1. *The Two Theories of Interpretation*

The first theory asserts that the object of interpretation is to ascertain the linguistic meaning of the words used. It concentrates on the grammatical and lexicographical meaning of the words in the abstract. As observed above, this theory cannot be correct because words in a document cannot be construed in the abstract but have to be contextualised. Reference to extrinsic evidence is a permissible and necessary step of the interpretation process.

The second theory asserts that the object of interpretation is to ascertain, not the meaning of the words, but the meaning of the writer of those words. This theory embraces the help of extrinsic evidence, because its objective is to ascertain, and give effect to, the writer's intention, from the evidence extrinsic to the document.

This theory has superficial attraction, but it is not correct either. With unilateral documents, the court has to give effect, not to the writer's intention, but to the writer's intent *as he then had, as expressed in writing*. With bilateral documents, the court has to give effect to the parties' *ad idem intent which they had then reached, as expressed in written form*. It is clear that the court cannot give effect to the meaning of the words alone, in the abstract. Nor can the court give effect to the intention of the writer or writers *dehors* the document.

2. *Reconciling the Two Theories*

Thus the overriding goal of interpretation is not to ascertain the actual intent of the writer, but to give effect to the written intention by ascertaining this objectively, from both the document as well as extrinsic evidence. It cannot be from the document alone. One of the subgoals of the interpretation exercise is to determine the material facts and circumstances known to the writer of the document with reference to which he is to be taken to have used the words.[103] It is only after the court has placed itself in the same

[103] See also *Doe d Simon Hiscocks* v *Hiscocks* (1839) 5 M&W 363, *per* Lord Abinger CB, at 367-368; *Towns* v *Wentworth* (1858) 11 Moo P CC 526 *per* Lord Kingsdown, at 543. The proposition is equally applicable to the construction of contracts and was repeated extra-judicially by Blackburn himself in *Blackburn on Contract of Sale*, *supra*, note 79, at 51.

[104] *Boyes* v *Cook* (1880) 14 Ch D 53, *per* James LJ at 56; *Charrington & Co* v *Wooder*, *supra*, note 64, *per* Lord Dunedin at 82; *Cannon* v *Villas* (1878) 8 Ch D 415, *per* Jessel MR at 419; *Van Diemen's Land*, *supra*, note 104, *per* Earl Halsbury at 98; *Hart* v *Hart* (1881) 18 Ch D 670, *per* Kay J at 692.

position as the writers,[104] that it can declare what is the intention evidenced by those words so used with reference to those facts and circumstances.[105] There can be no immediate reliance on the words of a document, even where the words are clear and unambiguous,[106] because the same words used in two documents may express one intention when used with reference to one state of affairs, and quite a different one when used with reference to another state of affairs.[107] While it is a general rule that courts would give effect to the natural and ordinary meaning of words, it may however appear from the context that to do so would actually be defeating the intention of the writers.[108] Language and communication are not perfect.[109] As Hawkins pointed out in a seminal paper, the court approaching this question of interpretation has no right to expect written expression to contain language used by infallible creatures who are not subjected to the vicissitudes of time and accident.[110]

Nor should the court place exclusive reliance on extrinsic evidence alone without reference to the document. This is because the court rightly assumes that "the object of [the parties in] reducing transactions to a written form is to take security against bad faith or bad memory."[111] In other words, by reducing the transaction into writing, the writer or parties agree that the writing is the best evidence of his or their intentions. As Thayer noted:

> [I]t means that direct statements of intention may really be used as mere aids to interpretation, absolutely as subordinate and auxiliary to the text; not, in any way, as being given an independent operation, but only as contributing to illuminate the writing and give to that its

[105] *Allgood* v *Blake*, *supra*, note 62, at 162; *Hampshire* v *Pierce* (1839) 2 Ves sen 216, unless a rule of law has affixed a certain determinate meaning to technical expressions: *Towns* v *Wentworth*, *supra*, note 103, whereupon this will be because of the principles of construction, not of interpretation.

[106] Hawkins, *supra*, note 61, Proposition IV, at 6.

[107] *River Wear Commissioners* v *Adamson*, *supra*, note 81, at 764. See also *Thayer*, *supra*, note , at 411-412. This proposition was repeated by Lord Morris in *Wickman Machine Tools* v *Schuler AG*, *supra*, note 93, at 256C.

[108] *Grey* v *Pearson* (1857) 6 HLC 61, *per* Lord Chancellor at 78, *per* Lord Wensleydale at 106, *per* Lord St Leonards at 91.

[109] Hawkins, "Of the Principles of Legal Interpretation, with Reference Especially to the Interpretation of Wills", Juridical Society Papers, ii, 298; reproduced in *Thayer*, *supra*, note 45, at 584- 585.

[110] *Ibid*, at 577-605. This proposition was approved of by *Thayer*, *supra*, note 45, at 412.

[111] Stephen, *supra*, note 44, at 208.

[112] *Thayer*, *supra*, note 45, at 441.

own true meaning and operation.[112]

It follows then that a *per se* unilateral statement of intention by the writer is in most circumstances unhelpful.[113] It will only be evidence of what the writer *wished*, not what he actually *said*. The court must objectively seek the meaning of the writer which the words can bear.[114] Hence the truism that the correct view lies between the extremes of the two theories.[115] Extrinsic evidence has to be made to work within the parameters of the language of the document.[116]

There is thus a tension between the extrinsic evidence and the language of the document. It may be that the court may decide that even though the extrinsic evidence discloses an intention contrary to that expressed in the document, the clear and distinct meaning appearing in the document must evidence the binding intention of the parties and prevail over the extrinsic evidence.[117] A good illustration of this is the notorious case of *Millers* v *Travers*.[118] In this case, the testator had intended to devise all his estates in the country of Clare pursuant to certain trusts. The original draft read, "all my estates whatsoever situate in the counties of Clare, Limerick and in the city of Limerick". But his conveyancer, by mistake, struck out the reference to "counties of Clare" and substituted them with the words "county of". So the will which the testator executed read "county of Limerick and in the city of Limerick." The testator had no property in the county of Limerick, and an insignificant amount of estate in the city of Limerick. There can be no clearer illustration of pertinent extrinsic evidence than that in the instant case showing the testator's intention and the drafting circumstances to prove that a mistake had been made. But the court refused to admit such evidence. Although that case was proceeded upon, not as one on the interpretation of the will,[119] but on its rectification by way of oral evidence, the court obviously arrived at the right conclusion. The oral evidence, if admitted for the purpose sought, will in effect give

[113] *Ibid*, at 414. Even in *Hampshire* v *Pierce*, *supra*, note 105, the court, after taking in direct evidence of the testator's intention, rested its conclusion on the word of the will itself which the court claimed is now clear after receiving evidence of the testator's intention.

[114] *Phipson*, *supra*, note 59, at 1050.

[115] Nokes, *supra*, note 46, at 258; *Phipson on Evidence*, *supra*, note 59, at 1047.

[116] *Gibson* v *Minet* (1791) 1 H Bl 615; *Re Lewis's Will Trusts* [1985] 1 WLR 102.

[117] *Great Western Railway and Midland Railway* v *Bristol Corporation*, *supra*, note 72, *per* Lord Wrenbury, at 430.

[118] (1832) 8 Bing 244. Stephen cited this case as an illustration of Art 98(6) in his *Digest*.

[119] Lord Chancellor Brougham and the Chief Justice acknowledged that as the case stood, no question was made as to "whether the whole instrument taken together, and without going out of it, was sufficient to pass the estates in Clare." *Ibid*, at 400.

[120] *Thayer*, *supra*, note 45, at 476.

rise to an oral devise of property which fails to comply with the Wills Act.[120] The effective intention was that expressed in writing, not the oral evidence. The gap between what the writer intended and what was expressed was too wide to be bridged by extrinsic evidence. The extrinsic evidence was made to do too much, too late.

On the other hand, the court may decide, upon the basis of the extrinsic evidence, that the written document is to be construed in a way which would make it consistent with its surrounding circumstances.[121] Admitting extrinsic evidence gives no assurance of its utility. Even if such extrinsic evidence is admitted, the court may rule that for one class of extrinsic evidence adduced, there may be another class of extrinsic evidence which may act as a counterpoise to the first,[122] or it may be that the writer used words which express a contrary intention because he overlooked certain material facts and circumstances.[123] The court may even rule that the extrinsic evidence may be quite speculative or insufficiently material to be of much use.[124] Or it may consult rigid rules in substantive law as to the meaning of certain terms,[125] though here, the court is applying rules of construction, not interpretation. But in any case, it would be a fully-informed court which arrived at its conclusion. Thayer noted that a lawyer who makes no reference to such extrinsic evidence, but assumes that all words have a fixed, precisely ascertained meaning, will have retired itself into the illusion of lawyer's Paradise.[126] One might also echo his sentiments by adding that a lawyer who only makes reference to extrinsic evidence, and ignores the words of a document, will similarly find himself out of a job very soon.

3. *The Extent of Admissibility of Intention*

The common law generally places no restrictions on the type of extrinsic evidence which may be consulted. The only real rule (for which there is

[121] There are numerous modern cases illustrating this approach. These are cited in the main text that follows.

[122] *Higgins* v *Dawson*, *supra*, note 69, *per* Lord Shand at 9.

[123] *Allgood* v *Blake*, *supra*, note 62, *supra* at 163.

[124] *Higgins* v *Dawson*, *supra*, note 69, *per* Lord Shand at 9.

[125] For instance, a gift to "children" means a gift to legitimate children. See *Dorin* v *Dorin* (1875) LR 7 HL 568. But where the gift is a "nephew", a less technical term, the court may permit references to extrinsic circumstances to explain this term: *Grant* v *Grant* (1870) LR 5 CP 727.

[126] *Thayer*, *supra*, note 45, at 428-429.

[127] The only instance where the intention of the writer is admitted by the parol evidence rule is where there is an equivocation in the language of the document. See the main text under "s 98: Evidence as to application of language which can apply to one only of several persons" for a more detailed discussion.

only one exception)[127] to emerge from this third species of the parol evidence rule is the prohibition of the use of direct statements of the writer's intention for the purposes of interpretation.[128] As Parke B authoritatively stated in *Shore* v *Wilson*:

> [N]o extrinsic evidence of the intention of the party to the deed, from his declarations, whether at the time of his executing the instrument, or before or after that time, is admissible; the duty of the court being to declare the meaning of what is written in the instrument, not of what was intended to have been written.[129]

One cannot easily justify this rule on the basis that such direct statements of intention are irrelevant or lack evidential value in the interpretation of written documents[130] without discriminating between two types of documents: unilateral and bilateral instruments. Bilateral instruments would include most agreements such as contracts, executed between two or more people. Unilateral instruments are typically wills, trusts and other such dispositive instruments.

The reluctance to consult extrinsic evidence for bilateral instruments possibly stems from the fact that it is often abused by one or both of the parties to adduce outside evidence of some unilateral intention. In such instances, the interpretation process is hardly advanced by the presentation of evidence of diametrically different and highly subjective intentions by the parties. So the courts have sought to elicit the intention of the parties, not *via* direct evidence, but by the more objective indirect evidence. The proper course is:

> *to show that from the circumstances proved* it was manifest that the language of the document could have meant, not for one of the parties but for both, and did mean for both nothing else than *a word used in the sense and with the limits or application contended for*. The attempt in short must be to prove that this sense was that which *both of the*

[128] *Thayer*, *supra*, note 45, at 414, 483, Wigram, *Extrinsic Evidence in Aid of the Interpretation of Wills* (3rd ed), at 10, *Phipson on Evidence*, *supra*, note 59, at 1053.

[129] *Supra*, note 74, at 556; *Richardson* v *Watson* (1833) 4 B & Ad 787 *per* Parke J at 800; *Cole* v *Rawlinson* (1705) 1 Salk 234. The same conclusion was arrived at by our Court of Appeal in *Wong Kai Chung* v *Automobile Association of Singapore* [1993] 2 SLR 577, *per* Karthigesu JA at 581.

[130] In *Phipson*, *supra*, note 59, at 1050, the editors proffered the lame observation that the reasons were "partly historical and partly precautionary".

> *parties intended the words to bear*, otherwise a proof that it was the intention of one and not of the other would only establish that the parties were not *ad idem*.[131] (my emphasis)

With bilateral instruments, as the focus is on the common intent of the parties, the courts examine undisputed objective evidence for indirect evidence of the parties' intention. As Lord Wilberforce also said in *Reardon Smith Line* v *Hansen-Tangen*:

> It is often said that, in order to be admissible in aid of construction, these extrinsic facts must be within the knowledge of both parties to the contract, but this requirement should not be stated in too narrow a sense. When one speaks of the intention of the parties to the contract, one is speaking objectively – the parties cannot themselves give direct evidence of what their intention was – and what must be ascertained is what is to be taken as the intention which reasonable people would have had if placed in the situation of the parties. Similarly when one is speaking of the aim, or object, or commercial purpose, one is speaking objectively of what reasonable persons would have in mind in the situation of the parties.[132]

Hence the permissible references to the background or genesis of the transaction,[133] the context, aim or commercial purpose of the transaction,[134] and the market in which the parties are operating.[135] All these are necessarily objective evidence and common reference points for both parties.

But the common law has developed additional rules which restrict the application of other kinds of indirect extrinsic evidence. So the divergence attendant in pre-contractual negotiations and the dubitable and fluctuating positions taken by the parties prior to reaching consensus mean that such

[131] *Great Western Railway and Midland Railway* v *Bristol Corporation*, *supra*, note 72, *per* Lord Shaw at 425.

[132] *Supra*, note 94, at 996.

[133] *Prenn* v *Simmonds*, *supra*, note 92, at 1385, *Reardon Smith Line* v *Hansen-Tangen*, *supra*, note 94, at 995.

[134] *Prenn* v *Simmonds*, *supra*, note 92, at 1385, *Reardon Smith Line* v *Hansen-Tangen*, *supra*, note 94, at 995. This could be a modern equivalent for the references to "the acts of the parties" or "the conduct they have pursued" in *Doe* v *Ries* (1832) 8 Bing 178, *per* Tindal CJ at 181, and *Chapman* v *Bluck* (1838) 4 Bing NC 187, *per* Park J at 195, to enable the court to collect the common intention of the parties.

[135] *Reardon Smith Line* v *Hansen-Tangen*, *supra*, note 94, at 996; *Wickman Machine Tool Sales* v *Schuler AG*, *supra*, note 93, *per* Lord Reid at 251, *per* Lord Morris at 255.

[136] *Prenn* v *Simmonds*, *supra*, note 92. *Cf The Karen Oltman* [1976] 2 Lloyd's Rep 708.

evidence is unhelpful as an aid to interpretation.[136] Similarly, the conduct of the parties subsequent to the agreement at best reflects their understanding of the agreement, not their expressed intent.[137] Such evidence is presumably deemed unhelpful because of the circumstances in which it arises – it is several steps removed from the embodied instrument. However, it is possible for such evidence to be sufficiently material to assist in the interpretation process. Hence exceptions to these rules can be found,[138] and the unequivocal nature of these rules has come under some attack.[139]

The common law rule that evidence of intention is inadmissible applies to unilateral instruments as well.[140] However, many of these cases involve the attempted admission of extrinsic evidence that the testator knew that the legatee was dead when he drew up the will. These cases which rule such evidence inadmissible are perhaps more explicable on the basis of the substantive rule that a testamentary legacy lapses if the legatee dies in the deviser's lifetime, so the extrinsic evidence would not have made any difference.[141] In practice, the law makes a generous concession for such instruments, especially those which attempt to deal with the whole of the writer's affairs posthumously, *eg,* testamentary instruments. Here, the individual intent of the writer is certainly more material than with bilateral instruments. Hence, the habits of speech and treatment of and dealings with the beneficiaries are necessarily admissible for the purpose of interpreting a will.[142]

[137] *Whitworth Street Estates* v *James Miller & Partners*, *supra*, note 86; *Sadlier* v *Biggs* (1853) 4 HLC 435; *North Eastern Railway* v *Hastings*, *supra*, note 67; *Boyes* v *Cook*, *supra*, note 104.

[138] *Watcham* v *Attorney-General of East Africa Protectorate*, *supra*, note 86; *Beli Ram* v *Devi Chand* AIR 129 Lah 875(2); *Godhra Electricity Co* v *State of Gujarat* AIR 1975 SC 32, as an exception to *Whitworth Street Estates* v *James Miller & Partners*.

[139] *Port Sudan Cotton Co* v *Chettiar* [1977] 2 Lloyd's Rep 5, *per* Lord Denning MR at 11.

[140] *Clayton* v *Lord Nugent* (1844) 13 M & W 200, 207-208; *Re Hetley* [1902] 2 Ch 866. It is worth noting that in the past, the courts have more readily admitted evidence of the testator's actual intent. However, these cases can be explained on the basis that they admit evidence of the testator's habits and speech. *Cf* where court admitted evidence of the testator's intention to bequeath his legatees with shares, when he had sold off and converted his shares into annuities: *Selwood* v *Mildmay* (1797) 3 Ves jun 306. Though this decision was subsequently doubted in *Millers* v *Travers, supra*, note 118, it may be explained on the basis that the court in that case exercised its jurisdiction to rectify the mistake in the testator's will, since the mistake was established by extrinsic evidence.

[141] *Maybank* v *Brooks* (1780) 1 Bro CC 84; *Doe* v *Kett* (1792) 4 TR 601; *Re Whorwood* (1886) 34 Ch D 446.

[142] *Phipson on Evidence*, *supra*, note 59, at 1051, *Doe d Simon Hiscocks* v *Hiscocks*, *supra*, note 103, *Hampshire* v *Pierce*, *supra*, note 105 (evidence that testatrix declared that she had provided for one B's four children arising from a later marriage, when B had six children, two by a former husband and four by a latter one).

Even though the court professes not to rely on the expressed intent of the testator, it cannot be gainsaid that such evidence very closely approximates the testator's intent.[143]

VI. The Evidence Act and Extrinsic Evidence

How does the analysis above concerning the use of extrinsic evidence square with the parol evidence rule as found in the Evidence Act?

1. *Section 94(f): Any fact may be proved which shows in what manner the language of a document is related to existing facts*

It is submitted that the parol evidence provisions in the Evidence Act have never barred the admission of extrinsic evidence as part of the "factual matrix" of the case, nor confined its use to only instances where the language of a written document is unclear or ambiguous. The principal section confirming this, section 94(f), permits the proof of "any fact … which shows in what manner the language of a document is related to existing facts." It is conspicuously free of qualifications, unlike the other exceptions in section 94. Its equivalent provision in the *Digest* is also surprisingly modern in its language. Article 98(4) reads:

> *In order to ascertain the relation of the words of a document to facts*, every fact may be proved to which it refers, or may probably have been intended to refer, or which identifies any person or thing mentioned in it. Such facts are hereinafter called *the circumstances of the case*. (my emphasis)

It is unfortunate that section 94(f) is classified as an exception to section 94 when it should actually stand as a section in its own right.[144] Even the Court of Appeal itself in *Citicorp* v *Wee Ah Kee* noted that out of the six exceptions to the parol evidence rule in section 94, exception (f) is of an exceptional nature.[145] Unlike the other exceptions which are of limited

[143] For instance, in *Beaumont* v *Fell* (1749) 2 P Williams 141, the court admitted the intention on part of testator to name beneficiary to hold a chattel, when the name was misspelt and the bequest would otherwise be void.

[144] Woodroffe and Amir Ali, *Law of Evidence* (15th ed, 1991), Vol 3, at 168; *The Belapur Co Ltd* v *Mcharashtra State Farming Corpn* AIR 1969 Bom 231, 251-252.

[145] Para 56; *Sarkar on Evidence* (14th ed, 1993), at 1282-1283.

[146] These other exceptions only apply where it is sought to invalidate the document (s 94(a)), where there is a separate oral agreement (s 94(b)), where there is a condition precedent (s 94(c)), where the existing agreement has been rescinded or modified (s 94(d)), and where there is an existing usage or custom (s 94(e)).

import,[146] section 94(f) is of generic application. It is on its face not a provision which permits parol evidence to be adduced to "contradict, vary, add to or subtract from" the terms of a written document. This explains why the Court of Appeal in *Mt Elizabeth Hospital* v *Allan Ng Clinic for Women* could consult the factual matrix of the agreement in dispute, ostensibly by referring to section 94(f).[147] In his *Digest*, Stephen classified the rule in section 94(f) with the other rules in sections 95-102, as provisions of Article 98,[148] whereas the rules in section 94(a) to (e) are classified as provisions of Article 97.[149] Stephen described the latter rules as "cases in which documents are exclusive evidence of the transactions which they embody",[150] but the former as rules which explain "what evidence may be given for the interpretation of documents".[151] In other words, Article 98[152] (the equivalent of our section 94(f) and sections 95-102) embodies the rules of *interpretation* of a written document.

The language of section 94(f) is very broad: it permits the proof of "any fact … which shows in what manner the language of a document is related to existing facts." This has been compendiously summarised as referring principally to the object, the subject and the meaning of the terms of the instrument. Although the items of admissible extrinsic evidence will vary from transaction to transaction, a non-exhaustive list of types of extrinsic evidence which can be consulted include: the parties to the instrument and their legal relations to each other, the nature, identity and extent of the subject-matter, the circumstances surrounding the instrument such as its genesis, as well as the knowledge, treatment and habits of speech of the writer or writers.

Despite the unqualified language of section 94(f), our Court of Appeal in *Wong Kai Chung* v *Automobile Association of Singapore* has read in the qualifier that section 94(f) does not permit the admission of "subjective

147 *Supra*, note 100.
148 *Digest*, *supra,* note 44, 115-121.
149 *Ibid*, at 111-115.
150 *Ibid*, at 207.
151 *Ibid*, at 207.
152 Art 98(1), which is headed "What evidence may be given for the interpretation of documents", reads: "Putting a construction upon a document means ascertaining the meaning of the signs or words made upon it, and their relation to facts."
153 *Supra*, note 129, *per* Karthigesu JA in at 581, where his Honour held that s 94(f) did not permit the admission of "subjective evidence" of the intention of one of the parties to interpret the written word.

evidence of intention".[153] This interpretation is in line with the position at common law, although Stephen was quite critical of this.[154] Perhaps another view, tentatively advanced, is that section 94(f) does permit evidence of intention to be admitted, since it does not discriminate between the types of instruments applicable. But it makes no pronouncements as to the utility of such evidence. As observed above, for bilateral instruments, direct evidence of intention is for the most part irrelevant, because what is sought to be ascertained in the interpretation process is the intention of the parties as reasonable people placed in the situation of the parties, as is manifested in the language of the instrument.[155] For unilateral instruments, extrinsic statements of intention will largely be irrelevant because what really takes effect is the written statement of intention. It has to be in writing to have, *eg,* testamentary effect. The language of section 94(f) is unqualified, perhaps to acknowledge that it is difficult to generalise from all the circumstances, and also because there are instances where indirect evidence such as surrounding circumstances cannot be easily separated from direct evidence of unilateral intention. After all, the existence of intention as a state of mind has to be proved indirectly.[156] An ancillary merit to this view is that it is consistent with the view that evidence of intention may be admitted in sections 97 to 99.

The rule in section 94(e) is also technically a species of the parol evidence rule which permits extrinsic evidence to be admitted. "It is upon the principle before adverted to, namely that all writings tacitly refer to the existing circumstances under which they are made, that Courts of Law admit evidence of particular customs and usages in aid of the interpretation of written instruments – whether ancient or modern – whenever, from the nature of the case, a knowledge of such customs and usages is necessary to a right understanding of the instrument. The law is not so unreasonable as to deny to the reader of any instrument the same light which the writer enjoyed."[157] Here the extrinsic evidence takes the form of usages[158] or customs by which the contracts are concluded. The contract must have been drawn up in circumstances where the parties must be taken to have assumed that the usage or custom was applicable. The usage or custom formed part of the

[154] *Digest*, *supra*, note 44, at 210-213.
[155] *Reardon Smith Line* v *Hansen-Tangen*, *supra*, note 94 and the main text above.
[156] S 14.
[157] *Wigram*, (4th ed), *supra*, note 128, at 86; *Baker* v *Paine* (1750) 1 Ves sen 457, *per* Lord Hardwicke at 459; *Ekins* v *Maclish* (1733) Ambler 184; *Brown* v *Byrne* (1854) 3 El & Bl 703.
[158] *Dashwood* v *Magniac* [1891] 3 Ch 306.

substratum in which the contract was drawn up. Although different authors would classify this rule differently,[159] the existence of this rule is itself a concession to the fallibility of documentary language and the significance of the factual matrix in which contracts are drawn up.[160] It is noteworthy that section 94(e) does not state that reference to usage or custom shall only be permitted if the language of the document is unclear or ambiguous.

The other parol evidence provisions in the Evidence Act appear to be specialised variants of the rule in section 94(f). Although some of these provisions operate to shut out some kinds of extrinsic evidence, it is submitted that their operation is premised on a partial reliance on extrinsic evidence. These provisions illustrate the tension between a reference to the extrinsic evidence, and a reliance on the linguistic interpretation of the instrument, albeit to different degrees and extents.

2. *Section 95: Exclusion of evidence to explain or amend ambiguous document*

> When the language used in a document is on its face ambiguous or defective, evidence may not be given of facts which would show its meaning or supply its defects.

Section 95 states that "When the language used in a document is *on its face* ambiguous or defective, evidence may not be given of facts which would show its meaning or supply its defects." In *Citicorp* v *Wee Ah Kee*, the court held, *obiter*, that section 95 bars the use of extrinsic evidence as a aid to interpretation in the face of patent ambiguity.[161] According to the court, "a patent ambiguity is 'that which appears to be ambiguous upon deed or instrument.'[162] It is to be contrasted with a latent ambiguity, which is 'that which seemeth certain and without ambiguity for anything that

[159] Stephen classified this as a rule which falls within the second species of the parol evidence rule, while Nokes, *supra*, note 46, at 259, classified this as a rule of interpretation, falling within the third species of the parol evidence rule. Both Stephen and Nokes referred to the leading case of *Wigglesworth* v *Dallison* (1779) 1 Doug KB 201, by Stephen, *Digest*, *supra*, note 44, at 112, and by Nokes, *supra*, note 46, at 259.

[160] For an illustration of the way in which extrinsic evidence of usage is admitted to alter the *prima facie* meaning of the language of a document, see *Smith* v *Wilson* (1832) 3 B & Ad 728. This case cannot be explained by s 94(e), but it can be explained by s 94(f). It is actually not as far-fetched as it may seem. For instance, in the information technology industry, 1000 is often abbreviated with the expression 1K, where "K" stands for the metric suffix "kilo". However 1K in some other contexts such as memory units often refers to 1024, or 2^{10}.

[161] Paras 58-59.

[162] Para 58, citing from *Phipson*, *supra*, note 59, at 1053.

appeareth upon the deed or instrument, but there is some collateral matter out of the deed that breedeth the ambiguity.'[163]

The Court of Appeal did not state it, but by merely citing Lord Bacon's anachronistic[164] maxim,[165] it must not be taken to have sanctioned Lord Bacon's rule as to ambiguities, which is that a patent ambiguity is never helped by extrinsic evidence (but a latent ambiguity may be so assisted).[166] The court would have been aware that the Lord Bacon's rule has been discredited as not being really a rule on the parol evidence rule but on pleadings.[167] It would also have been aware that the common law position is quite different from that said by Lord Bacon, in that extrinsic evidence *may* be consulted in relation to a patent ambiguity.[168] In the authoritative decision of *Colpoys* v *Colpolys*, Sir Thomas Pulmer is reported as having said:

> In the case of a patent ambiguity … where the terms used are wholly indefinite and equivocal, and carry on the face of them no certain or explicit meaning, and the instrument furnishes no materials by which the ambiguity thus arising can be removed: if in such cases the Court were to reject the only mode by which the meaning could be ascertained, *viz*, the resort to extrinsic circumstances, the instrument must become inoperative and void. As a minor evil, therefore, common sense, and the law of England (which are seldom at variance), warrant the departure from the general rule, and call in the light of extrinsic evidence.[169]

[163] *Ibid*.

[164] *Wickman Machine Tools* v *Schuler AG*, *supra*, note 93, *per* Lord Simon at 268.

[165] "*Ambiguitas verborum latens verificatione suppletur; nam quod ex facto oritur ambiguum verificatione tollitor*." Maxim 25 (sometimes 23) in Bacon, *A Collection of Some Principall Rules and Maximes of the Common Lawes of England* (1st ed, 1630), at 91.

[166] *Starkie on Evidence*, (3rd ed), vol 3, at 755, 768, *Phipson*, *supra*, note 59, at 1053.

[167] Bacon's statement has come under heavy criticism. FM Morgan, for instance, in *Extrinsic Evidence in the Interpretation of Wills*, (1860) 2 Jurid Soc Pap 351, 378 observed that this statement was not intended to be a complete dissertation upon the use of extrinsic evidence in the judicial interpretation of legal instruments, and it was a maxim relating to pleadings, not to evidence.

[168] *Ibid*. "On the other hand, it is a settled rule that such evidence is inadmissible to explain an ambiguity *apparent* on the face of the instrument. … In the next place, it is always necessarily a matter of extrinsic evidence to *apply* the terms of an instrument to a particular subject-matter the existence of which is also matter of proof. A difficulty in this case occurs, where, although the terms of the instrument be sufficiently definite and distinct, the objects to which it is to be applied are not equally so, and where it is doubtful whether the description applies at all to the particular object pointed out by the evidence, or whether it is not equally applicable to several distinct objects."

[169] (1822) Jacob 451, 463. Also *Doe dem Jersey* v *Smith* 2 Brod & Bing 553. This was confirmed as a proposition in Norton, *A Treatise on Deeds*, *supra* , at 107-108, and in *Wigram* (5th ed), *supra*, note 128, at 73 pl 79.

Does section 95 reflect this approach? At first sight, the section uses the expression "on its face", which appears to indicate that reference can only be had to the four corners of the document to determine whether its language is ambiguous or defective. But this really begs the question. "For there is properly no 'ambiguity' until all the facts of the case have been given in evidence and found insufficient for a definite decision."[170] Thus, simply because an instrument contains technical or parochial terms will not make it ambiguous or defective.[171] The extrinsic evidence constituting the facts of the case must be consulted via section 94(f) before this pronouncement of "ambiguity or defect" can be made.

In support of this observation, one notes that only section 95 uses the expression "ambiguous or defective". A distinction must be made between language which is "uncertain" and that which is "ambiguous".[172] In contrast, in sections 98 and 99, the words of the document in question are not described as being "ambiguous" or "defective". Sections 98 and 99 are arguably only illustrations of uncertainties engendered by the language used. If this reflects Stephen's careful choice of words in section 95, "ambiguity" thus must refer to a higher order of obscurity, beyond mere "uncertainty" and closer towards "unmeaning".[173] A document can only be found to be "unmeaning" when a person of competent skill and information is unable to interpret it.[174] Arguably this is a question of degree. There can be some instances where the extrinsic evidence, even if consulted, will be of no avail. But again, there can be other instances where extrinsic evidence will shed the only illuminating light. This is the tension between section 94(f) and section 95, which the Court of Appeal in *Citicorp* v *Wee Ah Kee* rightly observes,

[170] Jennings and Harper, *Jarman on A Treatise on Wills*, I, (8th ed, 1986 rep), 533. The same sentiments were echoed by Lord Davey in *Higgins* v *Dawson*, *supra*, note 69, at 10.

[171] Woodroffe and Amir Ali, *supra*, note 144, at 186-187. Otherwise, s 95 would be inconsistent with s 100.

[172] *Phipson*, *supra*, note 59, at 1054.

[173] This interpretation of s 95 is in some way borne out by the language of the what is arguably the equivalent provision in Article 98 of the *Digest*, at 116. Here, Stephen defined the rule as: "If the words of a document are *so defective or ambiguous as to be unmeaning*, no evidence can be given to show what the author of the document intended to say." This rule suggests that it is not any kind of defect or ambiguity for which resort may not be had to extrinsic evidence. It is a defect or ambiguity which is "so defective or ambiguous as to be unmeaning" which bars any reference to even the solitary extrinsic evidence which may shed light on it – the author's statement of intention.

[174] Norton, *The Law of Evidence applicable to the courts of the East India Company* (2nd ed, 1859), at 280.

[175] Para 58.

exists.[175]

The two illustrations to section 95 capture the two senses of a patent ambiguity: (i) where no meaning has been expressed, or (ii) where the language is intelligible but it is obviously uncertain. For instance, where the instrument evinces two or more inconsistent statements of intention, it would clearly be ambiguous.[176] This is nicely brought out in the illustration (a), in which a contract offering two different prices would be ambiguous.[177] This illustration must have been inspired by *Saunderson* v *Piper,*[178] where it was held that where two different values – one in figures and the other in words – were written on a bill of exchange, extrinsic evidence was inadmissible to show which was the correct value.[179] But the illustration cannot be as unequivocal as it looks. If the agreement reads, "I sell you a hard disk at 2048 Mb or 2240 Mb", extrinsic evidence in the form of prevailing industry practices may show that two capacities are customarily stated because the smaller one indicates formatted, the larger one unformatted, capacity.[180]

Again, illustration (b) confirms that a blank cannot be filled in by extrinsic evidence.[181] But even blanks may be remedied by extrinsic evidence. For instance, in *Price* v *Page*,[182] the court admitted the claim of a son of the testator's niece, on parol evidence that he had been brought up by the testator and that the testator had promised to provide for him, even though in the will, the bequest was made to "[blank] Price, son of [blank] Price". The court held that on the extrinsic evidence, the blank was only an omission as to the Christian name of the beneficiary. Again, where by virtue of the extrinsic evidence, a reason can be offered for the existence of the blank, the "ambiguity or deficiency" can be cured. In *Harry* v *Wall*[183] where a creditor refused to set the amount of his debt opposite to his name in a

[176] Norton, *supra*, note 76, at 107.

[177] See also *Karuthan Chettiar* v *Parameswara* [1966] 2 MLJ 151, where a rate of interest expressed as "18% per annum month" was held to be an ambiguity which would not be clarified by extrinsic evidence.

[178] (1839) 5 Bing (NC) 425.

[179] Of course, this actual problem has been resolved by way of substantive law. See s 9(2), Bills of Exchange Act (Cap 23), which confirms that in a case of such a discrepancy, the sum expressed in words prevails over the sum expressed in figures.

[180] In the disk drive industry, these two capacities are quoted for one disk drive, because some operating systems can reformat a disk to a higher formatted capacity than the factory or default formatting. Formatting a disk takes up space because formatting involves placing (or mapping) formatting information such as calibrating and error-correcting data on the tracks of the cylinders of a disk drive.

[181] *Baylis* v *Att-Gen* (1741) 2 Atk 239, *Hunt* v *Hort* (1791) 3 Br CC 311.

[182] *Price* v *Page* (1799) 4 Ves jun 680.

[183] (1817) 1 B & Ald 104.

composition deed, the court held that he was nonetheless bound by the terms of the composition to the amount of his then existing debt. Both cases are good illustrations of the significance of the use of extrinsic evidence, presumably under section 94(f), in resolving "uncertainties", and the need to be chary of classifying "uncertainties" as "ambiguities".

In summary, section 95 more or less states a truism: that an incurable ambiguity is fatal.[184] Such circumstances are admittedly rare.

3. *Section 96: Exclusion of evidence against application of document to existing facts*

> When language used in a document is plain in itself and when it applies accurately to existing facts, evidence may not be given to show that it was not meant to apply to such facts.

Section 96 states that "when language used in a document is plain in itself *and when it applies accurately to existing facts*, evidence may not be given to show that it was not meant to apply to such facts." It is not limited to a document whose language is "plain in itself". The conjunctive "and" is significant: the plain language must also apply "accurately to existing facts".

The language of section 96 also bears a certain resemblance to the statement of Tindal CJ in *Shore* v *Wilson* in the quotation reproduced above.[185] The reference to "when it applies accurately to existing facts" is arguably just another way of expressing "where external circumstances do not create any doubt or difficulty as to the proper application of those words to claimants under the instrument, or the subject-matter to which the instrument relates …".

Thus section 96 presupposes the partial operation of section 94(f),[186] to show "in what manner the language of a document is related to existing facts" so as to enable the language to apply accurately to existing facts. Extrinsic evidence here is adduced to confirm the *prima facie* interpretation of the plain words of the document. In the illustration, where A conveys to B by deed "my estate at Kranji containing 100 hectares", the fact that "A has an estate at Kranji containing 100 hectares" is already before the court. The language used in this deed is plain, and it applies accurately to existing facts. But once that is established, there is no room for the further

[184] Woodroffe and Amir Ali, *supra*, note 144, at 185.
[185] *Supra*, note 74.
[186] *Cf* Woodroffe and Amir Ali, *supra*, note 144, at 190.

admission of extrinsic evidence to contradict this conclusion.

A local case which arguably illustrates section 96, though the section was not referred to, is *Wong Kai Chung* v *Automobile Association of Singapore*.[187] In this case, the agreement between the agent Wong and the borrower AAS provided that commission at 4% would be payable if the agent procured a S$6 million loan at the interest rate of between 6% and 9%, "or any other interest rate agreed upon". The trial judge, relying on section 94(f), admitted extrinsic evidence that a bank's best customers would have been charged a minimum rate of 10.25% on loans, and statements from AAS's witnesses that they would not have paid Wong his commission if the interest was above 9%, to conclude that neither party could be thinking that Wong would be paid his 4% commission if he procured a loan from a bank at a rate above 9%. So when Wong eventually procured the loan for AAS at a rate higher than 9%, the trial judge ruled that AAS was justified in refusing to pay Wong's commission.

The Court of Appeal reversed the trial judge's decision, ruling that resort need not be had to "subjective evidence to interpret the written word."[188] The court noted that since AAS retained the option to accept Wong's procured loan at a rate above 9%, which they did, they had to pay the 4% commission to Wong. The court found that this gave effect to the "plain and natural meaning" of the expression "or any other interest rate agreed upon" read with the following expression "We are agreeable to the above charges [for Wong's commission] provided the loan is successful and the terms are acceptable to us in every respect" as found in the agreement.

While the Court of Appeal condemned the use of "subjective evidence" of a party's unilateral intention to interpret the instrument in question, on further analysis, the court actually relied on the extrinsic evidence to found its conclusion. The trial judge received extrinsic evidence as to the prevailing prime rates. But this extrinsic evidence actually worked to the disadvantage of AAS because the Court of Appeal noted that despite this rate, AAS had difficulty in procuring a loan at between 12% and 13%. On this basis, the court concluded that "AAS's greater difficulty was in getting a loan at all."[189] The court must have been confident that the extrinsic evidence admitted *via* section 94(f) confirmed the plain meaning of the language used in the instrument, and so section 96 operated to shut out other contrary extrinsic evidence. It is perhaps also worth noting that the extrinsic evidence of the genesis of this agreement with Wong was insufficiently cogent (the credibility

[187] *Supra*, note 129.
[188] *Ibid*, at 581.
[189] *Ibid*.

of AAS's witnesses was questioned by the Court of Appeal) to displace the extrinsic evidence actually relied on by the Court of Appeal and the *prima facie* language of the agreement.

4. *Section 97: Evidence as to document meaningless in reference to existing facts*

> When language used in a document is plain in itself, but is meaningless in reference to existing facts, evidence may be given to show that it was used in a peculiar sense.

Section 97 is an illustration of what is termed a "latent ambiguity" at common law. It is an "ambiguity" which "arise[s] extrinsically in the application of an instrument of clear and definite intrinsic meaning to doubtful subject-matter."[190] In such a case, it is precisely because the ambiguity arises from an extrinsic fact or circumstance that extrinsic evidence must be admissible to explain away the ambiguity.[191]

The reference to "peculiar sense" is a reference to the sense in which the parties used the language in the instrument,[192] after reference to the extrinsic facts. This is in contrast with the "plain language" of the document, procured without reference to extrinsic facts. In the equivalent provision in his Digest, Article 98(5), Stephen described the two different senses of the language used as the "less proper meaning" and "proper legal meaning" respectively.[193] He illustrated this distinction with a reference to a bequest to "children", where the testator had no legitimate and only illegitimate children.[194] But these expressions should not be directly transposed into section 97 without noting that the "plain language" need not always have a legal connotation, and the "peculiar sense" need not be one which has a "less proper meaning".

For section 97 to operate, such plain language must be "meaningless in reference to existing facts". It should be pointed out that the reference

[190] *Starkie on Evidence*, *supra*, note 166, vol 3, at 755 and 768. "An important distinction has already been adverted to between ambiguities which are *apparent* on the face of an instrument, and those which arise merely extrinsically in the *application* of an instrument of clear and definite intrinsic meaning to doubtful subject-matter. An ambiguity apparent on reading an instrument is termed *ambituitas patens*; that which arises merely upon its application, *ambiguitas latens*."

[191] *Doe d Chichester* v *Oxenden* (1810) 3 Taunt 147; (1816) 4 Dow 65, *per* Gibbs CJ at 92; *Selwood* v *Mildmay, supra*, note 140; *Colpoys* v *Colpolys*, *supra*, note 169.

[192] *Watcham* v *East Africa Protectorate* [1919] AC 533, *per* Lord Atkinson at 540; *Wickman Machine Tools* v *Schuler AG*, *supra*, note 93, *per* Lord Wilberforce at 261.

[193] *Digest*, *supra*, note 44, at 116.

[194] *Ibid*, at 119.

to "meaningless" is not a conclusive one, unlike the ambiguity attendant in section 95. Here the uncertainty in the language of the document, identified by the court by consulting the "existing facts" *via* section 94(f), can be cured with reference to other kinds of extrinsic evidence – "evidence … to show that [the language] was used in a peculiar sense". The effect is that "[g]enerally speaking, ambiguities, or any other difficulties, patent or latent, are all alike as regards the right and duty to compare the documents with extrinsic facts, and as regards the possibility that they may vanish when this is done."[195] Section 97 thus illustrates very nicely the need for the extrinsic evidence that is consulted to work within the parameters of the language of the document, and the interplay between extrinsic evidence and the linguistic interpretation of a document.

At common law, evidence of the writer's intention that the words were used in a peculiar sense is inadmissible,[196] unless the words amount to an equivocation.[197] However, section 97 merely indicates that "evidence may be given to show that it was used in a peculiar sense" without indicating that the evidence cannot include the writer's intention. This probably reflects Stephen's disapproval of, in his view, the illogical common law distinction drawn between admitting extrinsic evidence of surrounding circumstances, and excluding evidence of the writer's intention. Though one can argue that the distinction is preserved in the wording of the sections (compare section 97, which uses the expression "evidence … to show", with section 98, which has the expression "evidence … of facts which show to which of those persons or things it was intended to apply"), the Indian commentators have come around to support Stephen's view.[198]

Both sections 96 and 97 demarcate the two ends of a spectrum of interpretation. At one end, there is section 96, where the plain words apply accurately to existing facts. At the other end, there is section 97, where the plain words are meaningless in reference to existing facts. Between these two ends of a continuum are interposed sections 98 and 99. Section 98 can be treated as a species of section 96,[199] because the language of the document applies equally accurately, not to one set of existing facts, but to two or more sets of existing facts. Section 99 in turn deals with an instance where the language of the document applies inaccurately[200] to two or more sets of existing facts. There will of course be instances where

[195] *Thayer*, *supra*, note 45, at 425.
[196] *Allgood* v *Blake*, *supra*, note 62; *Grant* v *Grant*, *supra*, note 63.
[197] See the discussion below, for s 98.
[198] See, *eg,* Woodroffe and Amir Ali, *supra*, note 144, at 195.
[199] Woodroffe and Amir Ali, *supra*, note 144, at 193.
[200] *Ibid*, at 194.

the words of an instrument are neither meaningless in reference to existing facts, nor do they apply accurately to existing facts, nor do they fall within the ambit of sections 98 and 99. Here, resort must be had to section 94(f), which, as is submitted, is the Descartian ether[201] that fills the interstices of all these parol evidence provisions.

In the accompanying illustration, Stephen cites as an example a case where a deed seeks to convey "my plantation in Penang" but the grantor had no plantation in Penang but in Province Wellesley, of which the grantee was in possession since the execution of the deed. This may be contrasted with the case of *Millers* v *Travers*, where the testator sought to bequeath estates in Limerick when his estates were not in Limerick but in Clare, for which extrinsic evidence was disallowed.[202] This case could be distinguished on the basis that the illustration concerned a deed, but *Millers* v *Travers* concerned a will. Whereas the deed will become meaningless since without the extrinsic evidence, it will transfer no subject-matter, the bequest in the will does not become meaningless but it lapses and passes pursuant to a residuary devise in the will.[203]

5. *Section 98: Evidence as to application of language which can apply to one only of several persons*

> When the facts are such that the language used might have been meant to apply to any one, and could not have been meant to apply to more than one of several persons or things, evidence may be given of facts which show to which of those persons or things it was intended to apply.

At common law, the only instance where the intention of the writer can be admitted by the parol evidence rule is where there is an equivocation in the language of the document.[204] An equivocation is "a description which seems *equally applicable* to more than one person or thing, or class of persons

[201] In physics, it was once thought that there is a substance of great elasticity and subtlety that permeates the whole of space, to allow light and other kinds of radiation to propagate. This theory has since been abandoned following Einstein's publication of his Special Theory of Relativity, and after scientific experiments failed to detect this elusive ether. In this sense, perhaps the analogy is a poor one, because the extrinsic evidence which courts consult *via* S 94(f) is neither elusive nor intangible.

[202] *Supra*, note 118.

[203] Wills Act (Cap 352), s 19.

[204] *Thornton* v *Wilkes* (1455) YB Mich 34 Hen 6 pl 36; *Cheyney's Case* (1591) 5 Co Rep 68; *Raffles* v *Wichelhaus* (1864) 2 H & C 906; *Doe d Gord* v *Needs* (1836) 2 M & W 129; *Doe d Morgan* v *Morgan* 1 C&M 235; *Re Jackson* [1933] Ch 237.

[205] Norton, *supra*, note 76, at 107.

or things, where only one is intended."[205] This is the rule is found in section 98, which applies "when the facts are such that the language used might have been meant to apply to any one [person or thing], and could not have been meant to apply to more than one … person or thing".

It is implicit in section 98 that reliance is made upon extrinsic evidence of the kind in section 94(f), for then the court could discern that the language of the document as applied to the facts are such as to lead to an equivocation. The court must first be convinced that an equivocation arises. For instance, in *Doe d Westlake* v *Westlake*,[206] a testator had three brothers, Thomas, Richard and Matthew, and all three brothers each had a son named Simon. In his will, he gave legacies to Thomas, Richard's daughter and Matthew's wife. He also bequeathed a certain estate "unto Matthew Westlake, my brother, and to Simon Westlake, my brother's son …" The defendant, Simon Westlake, son of Richard, sought to adduce evidence of the testator's declarations that he meant Simon, the son of Richard and not Simon, son of Matthew. The court was not convinced that an equivocation arose here because "in point of legal construction, when the testator is speaking of his brother's son, he must be taken to speak of the son of that brother who was then particularly in his mind." Since there was extrinsic evidence to show that Matthew had a son named Simon Westlake, the court declared that Simon Matthew Westlake must be the person intended. Transposing this case to the Evidence Act, the court in *Westlake* v *Westlake* ruled that the case was a section 96 case, and not a section 98 case, on the basis of its reliance on section 94(f) extrinsic evidence. There was no occasion for the court to rely on evidence of the testator's declarations of intent.

As Thayer puts it, the rule on equivocations "presupposes that the resources of construction, aided by all admissible extrinsic facts, have been first exhausted."[207] After this threshold is crossed, extrinsic evidence in the form of "facts to show which person or thing the language was *intended* to apply" comes in. This extrinsic evidence will be "of the circumstances of the case and of statements made by any party to the document as to his intentions in reference to the matter to which the document relates."[208]

It is worth noting that Stephen may have intended to reflect the position at common law, even though he did not agree that reference to the writer's intention should be confined to equivocations,[209] for this is the only parol evidence provision which refers to such intention. Consistent with the observations above about the use of extrinsic evidence to ascertain that there

[206] (1820) 4 B & Ald 57.
[207] *Thayer*, *supra*, note 45, at 455, *Phipson*, *supra*, note 59, at 1077.
[208] Art 98(8), *Digest*, *supra*, note 44, at 117.
[209] *Digest*, *supra*, note 44, at 210-213.

is an equivocation, extrinsic evidence of the writer's intention to resolve the equivocation is "not adduced for explaining the words or meaning of the [document], but either to supply some deficiency, or remove some obscurity, or to give some effect to expressions that are unmeaning or ambiguous."[210]

6. *Section 99: Evidence as to application of language to one of two sets of facts to neither of which the whole correctly applies*

> When the language used applies partly to one set of existing facts and partly to another set of existing facts, but the whole of it does not apply correctly to either, evidence may be given to show to which of the two it was meant to apply.

Section 99 can be distinguished from section 98. Unlike section 98 where there is no inaccuracy in the language of the document but the uncertainty arises from its application to the facts, section 99 deals with an inaccuracy in the description of identity or of the subject-matter. Thus extrinsic evidence will demonstrate at least two sets of existing facts, to each of which the language applies, but not with complete accuracy. As Article 98(7), the equivalent provision in the Digest, explains, "the document applies in part but not with accuracy or not completely to the circumstances of the case". However, the distinction between sections 98 and 99 is often one of degree. This is well illustrated by the case of *Charter* v *Charter*,[211] where a testator in a will appointed "my son Forster Charter" as his executor. He had two sons, William Forster Charter and Charles Charter. Lord Penzance treated the case as one involving both the common equivalents of sections 98 and 99, because that part of the language which employed "my son [blank] Forster" was an equivocation, and so he admitted evidence of the testator's intention. In the House of Lords,[212] the members were of the view that there was no equivocation but a mere "latent ambiguity", and so while extrinsic evidence was admissible, evidence of intention was not. Lord Selborne however expressed considerable sympathy for Lord Penzance's views, and doubted the distinction which was made between equivocations and latent ambiguities, and between admitting extrinsic evidence and excluding evidence of intention.[213]

Because an uncertainty is created by the possible but inaccurate application

[210] *Doe d Simon Hiscocks* v *Hiscocks*, *supra*, note 103, at 368.
[211] (1871) LR 2 P & D 315.
[212] (1874) LR 7 HL 364.
[213] *Ibid*, at 383.

of the language used to two different sets of extrinsic facts, extrinsic evidence "may be given to show to which of the two it was meant to apply."[214] At common law, this extrinsic evidence excludes evidence of intention.[215] But Stephen was of the view that evidence of intention should be admissible in either case.[216] In his Digest, however, he preserved the common law position that extrinsic evidence of intention was inadmissible outside of equivocations in Article 98(7). However, our section 99 is not similarly fettered and so there may be room for the use of evidence of intention as part of the extrinsic evidence under the section.

7. *Section 100: Evidence as to meaning of illegible characters, etc*

> Evidence may be given to show the meaning of illegible or not commonly intelligible characters, of foreign, obsolete, technical, local and provincial expressions, of abbreviations and of words used in a peculiar sense.

Section 100 is a section which sanctions reference to extrinsic evidence to show the meaning of the language used in an instrument. As Parke B explains in *Shore* v *Wilson:*

> Where any doubt arises upon the true sense and meaning of the words themselves … the sense and meaning of the language may be investigated and ascertained by evidence *dehors* the instrument itself; for reason and commonsense agree, that by no other means can the language of the instrument be made to speak the real mind of the party. Such investigation does of necessity take place in the interpretation of instruments written in a foreign language, – in the case of ancient instruments where, by lapse of time, and change of manners, the words have acquired in the present age a different meaning from that which they bore when originally employed, – in cases where terms of art or science occur, – in mercantile contracts which, in many instances, use a peculiar language employed by those who are conversant in trade or commerce; and in other instances in which the words, beside their general common meaning, have acquired, by custom or otherwise, a well-known peculiar idiomatic meaning in the particular country in which the party using them was dwelling, or in the particular society of which he formed a member, and in which he passed his life.[217]

[214] *Simmonds* v *Woodward* [1892] AC 100, 105-106; *Wray* v *Wray* [1905] 2 Ch 349.
[215] *Doe* v *Hiscocks*, *supra*, note 103, at 368, *Bernasconi* v *Atkinson* (1873) 10 Hare 345; *Drake* v *Drake* 8 HLC 172.
[216] *Digest*, *supra*, note 44, at 210-213.
[217] *Supra*, note 74, at 555-556.

In *Shore* v *Wilson* itself, the court admitted extrinsic evidence to show the meaning of an obsolete expression used in the testator's will. Stephen also cites *Charrington* v *Wooder*[218] as an illustration of the equivalent provision in the Digest, Article 98(2), where the House of Lords consulted extrinsic evidence to determine the meaning of a simple expression, "fair market price". This reference to the extrinsic evidence to interpret the language of the instrument is eminently part of the interpretation process, which requires the court to put itself in the position of the writer of the instrument. In this respect, section 100 is a species of the rule in section 94(f).

There is admittedly some overlap between section 100 and section 96. This overlap is principally resolved by noting that there are two categories of characters or words referred to in section 100. The first category relates to words which suffer from a physical limitation: they cannot even be made out – they are illegible or not commonly intelligible characters. The second category relates to words which have acquired a secondary meaning – they are foreign, obsolete, technical, local and provincial expressions, abbreviations and words used in a peculiar sense. As to the first category, the physical limitation is manifest from the written instrument, and this triggers the admission of further extrinsic evidence to give meaning to such words. As to the second cat, the limitation is a linguistic or contextual one. Before evidence can be given of the secondary meaning of such words, the court must be satisfied from the instrument itself or from the extrinsic evidence of the circumstances of the case, that the word ought to be construed, not in its popular or primary signification, but according to its secondary signification.[219]

8. *Analysis of Citicorp* v *Wee Ah Kee*

In the light of this analysis, what role would extrinsic evidence play in the interpretation process in *Citicorp* v *Wee Ah Kee*?

Perhaps counsel for Citicorp did point out to the court that the term in question, "shall be terminated subject to …" is in itself somewhat uncertain. The expression "shall be *terminated*" was used, and not the expression "shall be *terminable*",[220] which would have been more in line with Wee's contention that the call option survived the agreement of 6 December 1994, and that

[218] *Supra*, note 64.
[219] *Holt & Co* v *Collyer* 16 Ch D 718, *per* Fry J at 720; *Rayner* v *Rayner* [1904] 1 Ch 176.
[220] I am grateful to A/Prof Tan Yock Lin for this observation.
[221] *Tiverton Estates Ltd* v *Wearwell Ltd* [1974] 1 All ER 209; *Diamond* v *Matthew Lim* [1981] 1 MLJ 56; *Koh Peng Moh* v *Tan Chwee Boon* [1962] MLJ 353

the agreement was a contingent one. However, the expression "subject to" is a well-worn legal phrase, evidencing a contingency.[221] Because the Court of Appeal held that the bank had drafted the letter upon legal advice,[222] it was unsympathetic to arguments by counsel, noting that "We did not think it was open to a vast institution like the bank to claim that it did not know the meaning of the words it used."[223]

That may be so. But it is respectfully submitted that an analysis of what little of the extrinsic evidence before the court, leaves some doubts as to the commercial rationale of the agreement, if interpreted the way Wee contended it should be read.[224] Of course, the court should never try to undo a bad bargain which a party has made, but Citicorp's interpretation appears to make more commercial sense, though it is not without its problems. For instance, if the call option was decoupled from the loan and terminated immediately, why is there a reference to Wee's existing loan obligations, when the consideration for the termination of the call option should be the sum of US$800,000 only? But conversely, if the call option was contingently terminable, why was the discharge of the loan made a condition, when presumably, the call option was exercisable independently of the loan in the original loan agreement?

If the court had access to more extrinsic evidence such as the circumstances in which Citicorp agreed to extend the loan, and the genesis of the 6 December 1994 agreement, perhaps it would be better able to assert that the language of the agreement was plain and it applied accurately to existing facts.[225] As it is, Citicorp is in effect contending that the expression "subject to" is used in a peculiar sense,[226] in the sense of "in consideration of". The additional extrinsic evidence may confirm or preclude this interpretation. There was no evidence to suggest that the expression "subject to" was used in a strict legal sense here and the lack of formality of the agreement seems to favour the application of section 100, or at least call for the admission of extrinsic evidence *via* section 94(f) to clear the haze of mystery shrouding the agreement and its language.

VII. Conclusion

It is not the thesis of this article that a court will never be able to award summary judgment in any case involving the interpretation of instruments.

[222] Para 68.
[223] *Ibid*.
[224] See main text starting at note 23.
[225] S 96.
[226] S 100.

As noted in the article, there are instances where extrinsic evidence is necessarily speculative, or immaterial, or simply irrelevant. And where the language of the instrument is clear and unequivocal, and it applies accurately to the parties and to the subject-matter in question, there is little other extrinsic evidence can do. The goal of this article is a humbler one: it is that a court should not unnecessarily deprive itself of the utility of extrinsic evidence, and it should not too quickly conclude that extrinsic evidence is immaterial unless it is reasonably confident that the language of a document is plain and it applies accurately to existing facts.[227] Without consulting *any* extrinsic evidence at all, it is not possible to *a priori* assert that the language of a document is clear and unambiguous. The court has to first put itself in the context or factual matrix in which the document was made.

We should give the cleansing waters of extrinsic evidence a chance, to work within the river banks of the language of the instrument, which will eventually lead us to the elusive estuary of interpretation.

Postscript

After this article was completed and sent for typesetting, the English Court of Appeal in the recent case of *Scottish Power plc* v *Britoil (Exploration) Ltd and Ors* (unreported) *The Times*, 2 December 1997 had the opportunity to review the law concerning the use of extrinsic evidence in the interpretation of contracts. It reached a conclusion that was quite similar to that independently reached in this article, in that contracts were not to be construed in a vacuum and the court was entitled to know the surrounding circumstances which prevailed when the contract was made. But while the court could consult the factual matrix, it should confine itself only to facts which both parties would have had in mind and known that the other had in mind when the contract was made, but not other facts which would contribute little to the understanding of the contract. This last observation is consistent with the analysis in this article of the wide scope of section 94(f) for admitting extrinsic evidence, but the need for judicial control to filter out those items of evidence which are not sufficiently relevant to the interpretation process.

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[227] S 96.

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