

THE NEW CONTRACTUAL INTERPRETATION IN SINGAPORE: FROM *ZURICH INSURANCE* TO *SEMBCORP MARINE*

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This article seeks in three ways to contribute to the continued refinement of contractual interpretation in Singapore following *Zurich Insurance* and, more recently, *Sembcorp Marine*. First, it identifies the key rulings of law derived from the cases. From these will be distilled the relevant issues in contractual interpretation. In the particular context of Singapore, contractual interpretation encompasses related issues such as the admissibility of extrinsic evidence to interpret contracts and the substantive method used to interpret contracts. It is important to identify and distinguish between the exact issues because their conflation will lead to confusion in an area already affected by much complexity due to the concurrent application of statutory and common law principles. Second, this article evaluates the courts' approaches to those issues. The principal difficulty, as will be seen, is that there is a need to distinguish between statutory and common law principles. This is affected by the perceived need of adhering to the modern commercial reality of contextual interpretation, while balancing that with binding statutory materials. Third, this article suggests some possible reforms in the future. It considers whether it is possible to achieve a commercially sensible approach while keeping within the statutory constraints that bind the courts, or whether legislative reform is required.

I. INTRODUCTION

Five years have passed since the Court of Appeal decided *Zurich Insurance (Singapore) Ltd v. B-Gold Interior Design & Construction Pte Ltd*,¹ a case that restated the law on contractual interpretation in Singapore. And even then, the courts are still refining the principles derived from a decision of undoubted depth. That refinement was recently marked by another Court of Appeal decision of similar importance, *viz. Sembcorp Marine Ltd v. PPL Holdings Pte Ltd*.² Taken together, both *Zurich Insurance* and *Sembcorp Marine* represent the law on contractual interpretation in Singapore. The challenge is to figure out what they mean, and evaluate the correctness of these developments with an eye on possible reforms in the future.

This article seeks to contribute to the law on contractual interpretation in Singapore in three ways. First, it identifies the points of law derived from *Zurich Insurance*, *Sembcorp Marine* and the cases in between. From these points will be distilled the

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¹ [2008] 3 S.L.R.(R.) 1029 [*Zurich Insurance*].

² [2013] SGCA 43 [*Sembcorp Marine*].

relevant issues in contractual interpretation in Singapore. Second, this article will evaluate the courts' approaches to those issues. The courts' approaches are affected by the perceived need of adhering to the modern commercial reality of contextual interpretation, while balancing that with binding statutory materials. Third, this article suggests some outstanding issues to be considered in the future.

II. THE EXISTING LAW

A. Conceptual Points

1. *The Meaning of 'Interpretation' and Associated Terms*

The starting point is to consider what it means to 'interpret' a contract. The cases are united in the view that interpretation is an effort to understand the meaning of the text. Thus, as was held in *Zurich Insurance*, interpretation "usually denotes the process of uncovering meaning in and seeking to understand a text where there is some doubt or room for a difference of opinion".³ The same sentiment was conveyed in *Sembcorp Marine*, where it was said that interpretation refers to the "process of ascertaining the meaning of expressions in a contract".⁴ While the courts did not first distinguish the meaning of 'interpretation' and 'construction',⁵ *Sembcorp Marine* held that there is, in fact, a difference between the two concepts. It said that the construction of a contract refers to the "composite process that seeks to ascertain the parties' intentions, both actual and presumed, arising from the contract *as a whole* without necessarily being confined to the specific words used".⁶ Construction therefore encompasses *both* interpretation and implication. This is merely a matter of semantics and is unlikely to result in any substantive change to the law since the substantive meaning of 'interpretation' remains unchanged.

Significantly, the courts have stressed the anchoring effect of the contractual language in the interpretative process. As Dworkin has put it, "[i]nterpretation is an activity undertaken in relation to an object or a practice already existing, and the shape of that object or practice will be a constraint upon the interpretation that can be applied to it".⁷ Thus, as the cases have repeatedly stressed, the meaning derived through the process of interpretation cannot stray too far from the contractual language used. Indeed, there cannot be, as *Sembcorp Marine* put it, "interpretation of a non-expression, *i.e.* a non-existent expression".⁸

Fidelity to the contractual language also implies that ambiguity or absurdity is necessary before the court will assign a different (albeit equally possible) meaning to that language. This is because such fidelity implies that the language has a default meaning that must be adhered to (hence its anchoring effect) unless

³ See *Zurich Insurance*, *supra* note 1 at para. 41, citing Neil MacCormick, *Rhetoric and the Rule of Law* (Oxford: Oxford University Press, 2005) at 121, 122.

⁴ *Sembcorp Marine*, *supra* note 2 at para. 27. See also *Precise Development Pte Ltd v. Holcim (Singapore) Pte Ltd* [2010] 1 S.L.R. 1083 at para. 32 (H.C.) [*Precise Development*].

⁵ At least not expressly: see *Zurich Insurance*, *supra* note 1 at para. 42.

⁶ *Sembcorp Marine*, *supra* note 2 at para. 31 [emphasis in original].

⁷ Ronald Dworkin, *Law's Empire* (Oxford: Hart Publishing, 1998) at 52.

⁸ *Sembcorp Marine*, *supra* note 2 at para. 28.

ambiguity or absurdity necessitates a departure from such meaning. This, as noted in *Zurich Insurance*, is somewhat antithetical to the modern contextual approach, which posits that words have no default meanings and that everything is dependent on context.⁹ Indeed, the statutory framework in Singapore necessitates a continued adherence to the default meanings of words such that, consistent with the courts' pronouncements, some degree of ambiguity or absurdity is indeed required before an alternative meaning can be given to the contractual language in its plain meaning sense.

From the basic definition of 'interpretation' is derived a more practically relevant point: the distinction between 'interpreting' and 'contradicting, varying, adding to or subtracting from' contractual terms lies in the continued authority of the underlying language. This distinction is important because extrinsic evidence that has the latter effect is inadmissible, whereas evidence is almost always admissible to *interpret* a contract. As was held in *Zurich Insurance*, extrinsic evidence that interprets a contract "does not usurp the authority of the written document or contradict, vary, add to or subtract from its terms"; rather, "[i]t is the writing which operates".¹⁰ In other words, "extrinsic evidence [which interprets] does no more than assist in [the operation of the writing] by assigning a definite meaning to terms capable of such explanation or by pointing out and connecting them with the proper subject-matter".¹¹ In *Pender Development Pte Ltd v. Chesney Real Estate Group LLP*,¹² evidence, if admitted, would have led the court to ignore an express clause of the contract. The High Court held that such an outcome was not an interpretative exercise and that if the parties wanted to argue that the wrong words were used (and hence should be rejected), the correct cause of action was rectification.¹³

2. The Continued Relevance of the Evidence Act¹⁴ and its Significance

While acknowledging that the common law in both Singapore and other jurisdictions has progressed beyond aspects of the *Evidence Act*, the courts have stressed the continued relevance of the *Evidence Act*. For example, *Zurich Insurance* acknowledged that, despite the outmoded distinction between patent and latent ambiguities, these concepts remain relevant in Singapore because of the *Evidence Act*.¹⁵ More recently, *Sembcorp Marine* came out even more strongly to state that the law of evidence in Singapore is governed primarily by the *Evidence Act*, even though it acknowledged that the Act does not directly prescribe a substantive rule of contractual interpretation.¹⁶ The relevance of the *Evidence Act* is to govern the admissibility of extrinsic

⁹ *Zurich Insurance*, *supra* note 1 at para. 46.

¹⁰ *Ibid.* at para. 44, citing H.G. Beale, ed., *Chitty on Contracts*, 29th ed. (London: Sweet & Maxwell, 2004) vol. 1 at para. 12-117 [emphasis omitted].

¹¹ *Ibid.* [emphasis omitted].

¹² [2009] 3 S.L.R.(R.) 1063 (H.C.).

¹³ *Ibid.* at para. 19. See also *Hanwha Non-Life Insurance Co Ltd v. Alba Pte Ltd* [2012] 1 S.L.R. 941 at para. 32 (H.C.) [*Hanwha Non-Life Insurance*].

¹⁴ Cap. 97, 1997 Rev. Ed. Sing.

¹⁵ *Zurich Insurance*, *supra* note 1 at paras. 51, 108. See also *Yamashita Tetsuo v. See Hup Seng Ltd* [2009] 2 S.L.R.(R.) 265 at para. 63 (C.A.) [*Yamashita Tetsuo*].

¹⁶ *Sembcorp Marine*, *supra* note 2 at paras. 38-40, 65.

evidence, and this is done via ss. 93 to 102.¹⁷ This must be correct due to the supremacy of statutory law over the common law in our legal system.

3. *The Zurich Insurance Framework*

Through clarifying the meaning of ‘interpretation’ and acknowledging the continued relevance of the *Evidence Act*, one key contribution by *Zurich Insurance* is to distinguish between the two main issues in contractual interpretation. In doing so, the case sets forth a simple, but conceptually important, framework to be applied in interpreting contracts in Singapore.¹⁸ The *Zurich Insurance* framework, as has been so called,¹⁹ involves a discussion of the admissible evidence (including the parol evidence rule) and the so-called contextual approach. While related, it is important to realise they are not the same. This distinction is recognised by the prescribed two-step framework for the interpretation of contracts in *Zurich Insurance*.²⁰

4. *Pragmatic Concerns Overarching the Conceptual Framework*

Sembcorp Marine raised pragmatic concerns about an unrestrained admission of extrinsic evidence in the interpretation of contracts. While acknowledging that the courts should avoid an unduly strict interpretation of a document that does not represent the parties’ intentions, the Court of Appeal has said that this should not be at the cost of uncertainty and increases in cost and time of proceedings—all potentially caused by an unconstrained admission of extrinsic evidence.²¹ The restraint on the admissible evidence is now effected by the implementation of four requirements in civil procedure.²²

B. *The Admissible Evidence*

With the conceptual points in mind, let us now explore the practically applicable points of law. This is best approached with reference to the *Zurich Insurance* framework. The first step of that framework is to consider whether the extrinsic evidence

¹⁷ See *Zurich Insurance*, *supra* note 1 at paras. 131, 132.

¹⁸ For an arguably confusion of these two issues, see the District Court decision of *New Independent Pte v. Lim Hock Seng* [2009] SGDC 340 at paras. 27-29, where the court appeared to have conflated the use of extrinsic evidence to contradict, vary, add to or subtract from the contractual terms (which was rightly regarded as not permissible if the parties regarded the written contract to embody their entire agreement) and the use of such evidence to ascertain the parties’ intentions (which is use of such evidence for interpretation, and is generally allowed). See also *Gateway 21 Pte Ltd v. Gateway 21 Consultants Pte Ltd (formerly known as Gateway 21 Business Consultants Pte Ltd)* [2010] SGDC 22 at para. 15 and *Hanwha Non-Life Insurance*, *supra* note 13 at para. 33 (where the High Court seemingly thought that the *Zurich Insurance* tripartite requirements were related to the issue of extrinsic evidence being used to vary the contract, where they were actually relevant only where such evidence was used to interpret the contract) for a similar misunderstanding.

¹⁹ See Goh Yihan, “Contractual Interpretation in Singapore: Continued Refinement after *Zurich Insurance*: *Sheng Siong Supermarket Pte Ltd v. Carilla Pte Ltd*” (2012) 24 *Sing. Ac. L.J.* 275 at 283.

²⁰ *Zurich Insurance*, *supra* note 1 at para. 124.

²¹ *Sembcorp Marine*, *supra* note 2 at para. 71.

²² *Ibid.* at para. 73.

sought to be adduced can in fact be admitted. *Zurich Insurance*, after an extensive study of the relevant case law, concluded that although the parol evidence rule (as embodied in s. 94 of the *Evidence Act*) still operates as a restriction on the use of extrinsic material to *affect* a contract, such material is nonetheless admissible for *interpreting* the language of the contract.²³ Thus, assuming that the contract is one to which the parol evidence rule applies, no extrinsic evidence is admissible to *contradict, vary, add to or subtract from* its terms. However, extrinsic evidence is generally admissible to *interpret* the contract even if there is no ambiguity in the contract concerned.²⁴ The extent of the admissible evidence for interpretation is very broad and not confined to empirical facts. This involves, in appropriate cases, a consideration of the commercial purpose of the contract in question.²⁵ However, it is here essential to distinguish between admitting the extrinsic evidence to establish ambiguity for the purpose of departing from the plain meaning (as conveyed by the contractual language), and admitting such evidence to establish a different meaning apart from the plain meaning. It is only for the former purpose that extrinsic evidence can be more freely admitted. However, even here, *Zurich Insurance* has placed some restrictions on admissibility. Whether the extrinsic evidence is admissible depends on whether it is (a) relevant (*i.e.* “it would affect the way in which the language of the document would have been understood by a reasonable man”);²⁶ (b) “reasonably available to all the contracting parties”;²⁷ and (c) “relates to a clear or obvious context”.²⁸ It is important to note that *Zurich Insurance* does not allow the admissibility of *all* extrinsic evidence; the limitations, both statutory and at common law, must be adhered to.²⁹ More recently, *Sembcorp Marine* has grafted additional procedural requirements related to the pleadings to the admissible evidence.

1. Use of Extrinsic Evidence must be Specifically Plead

Sembcorp Marine laid down four requirements of civil procedure relating to the use of extrinsic evidence for the interpretation of contracts.³⁰ These have now been put down in the *Supreme Court Practice Directions*.³¹ These requirements should be regarded as a threshold step even before the *Evidence Act* is considered. However, there may be practical concerns as to how practitioners will know the exact purposes of facts in the contractual interpretative exercise before the discovery process is completed. This may then involve applications to amend pleadings at a later stage,

²³ *Zurich Insurance*, *supra* note 1 at para. 108.

²⁴ *Ibid.* at para. 115. See also *Sheng Siong Supermarket Pte Ltd v. Carilla Pte Ltd* [2011] 4 S.L.R. 1094 at para. 31 (H.C.) [*Sheng Siong Supermarket*].

²⁵ *Zurich Insurance*, *ibid.* at para. 110; *Yamashita Tetsuo*, *supra* note 15 at para. 64; see Part II.C.1 below.

²⁶ *Zurich Insurance*, *ibid.* at para. 125.

²⁷ *Ibid.*

²⁸ *Ibid.* at para. 132. For a more general acceptance of the three requirements, see the High Court decisions of *Goh Guan Chong v. AspenTech, Inc* [2009] 3 S.L.R.(R.) 590 at paras. 57, 79 (H.C.) [*Goh Guan Chong*] and *Sheng Siong Supermarket*, *supra* note 24 at para. 31.

²⁹ *Tjong Very Sumito v. Chan Sing En* [2012] 3 S.L.R. 953 at para. 97 (H.C.) [*Tjong Very Sumito*].

³⁰ *Sembcorp Marine*, *supra* note 2 at para. 73, referred to in *Longyuan-Arrk (Macao) Pte Ltd v. Show and Tell Productions Pte Ltd* [2013] SGHC 160 at para. 47.

³¹ Sing., *The Supreme Court Practice Directions*, Part III, s. 35A. This is also identical to Sing., *The Subordinate Courts Practice Directions*, Part V, s. 35A.

leading to increased time and costs. Practitioners may also have to be more thorough in seeking full discovery from their own clients before being in a position to draft their statement of claim or defence, as the case may be. As this is an evolving area of law, perhaps these procedural issues will be ironed out in due course.

2. *Extrinsic Evidence Inadmissible to Contradict, Vary, Add to or Subtract from Terms*

Extrinsic evidence is generally inadmissible to contradict, vary, add to or subtract from the contractual terms. This is the parol evidence rule, which applies where the contract was intended by the parties to contain all the terms of their agreement.³² The *Evidence Act* preserves the parol evidence rule by way of ten sections.³³ Although *Zurich Insurance* noted the decline of the rule under English law, it is also clear that relevant aspects of the rule continue to apply in Singapore under the *Evidence Act*.³⁴

The first aspect of the rule is that the contents of certain documents—where made provable under Part I of the Act—must be proved by production of those documents, except where secondary evidence is permitted.³⁵ The second aspect is that extrinsic evidence is not admissible to “contradict, vary, add to or subtract from” the terms of a written document, subject to certain provisos.³⁶ The starting point is to consider s. 93, the “proof by documentary evidence” section, which relates to the exclusiveness of documentary evidence and is an aspect of the “best evidence” rule.³⁷ Relatedly, it provides that where a contract has been reduced to a document, that document must be produced as proof, being the best evidence of the agreement reached between the parties. Oral evidence is admissible to prove the agreement only by way of exception, and the relevant exceptions are provided by s. 94, the “exclusion of oral evidence” section.

Section 94 operates in conjunction with s. 93. Section 94 operates only where the contract (among other documents) has been proved under s. 93. It is therefore based on the same principle that documentary evidence is superior to oral evidence and no oral evidence is generally admissible to contradict, add to or subtract from

³² *Zurich Insurance*, *supra* note 1 at para. 111. See also *Tiger Airways Pte Ltd v. Swissport Singapore Pte Ltd* [2009] 4 S.L.R.(R.) 992 at para. 14 (H.C.) [*Tiger Airways*]; *Anti-Corrosion Pte Ltd v. Berger Paints Singapore Pte Ltd* [2012] 1 S.L.R. 427 at para. 24 (C.A.). There is a live issue as to whether the parol evidence rule, encompassed within ss. 93 and 94 of the *Evidence Act*, applies only between the contracting parties or to third parties as well. This will not be covered in this article, but see: *China Insurance Co (Singapore) Pte Ltd v. Liberty Insurance Pte Ltd (formerly known as Liberty Citystate Insurance Pte Ltd)* [2005] 2 S.L.R.(R.) 509 (H.C.); *Lonpac Insurance Bhd v. American Home Assurance Co* [2012] 1 S.L.R. 781 (H.C.).

³³ Law Reform Committee, Singapore Academy of Law, *Report of the Law Reform Committee on the Review of the Parol Evidence Rule* (November 2006) at para. 13 [*Law Reform Committee Report*].

³⁴ *Zurich Insurance*, *supra* note 1 at paras. 71, 111.

³⁵ *Law Reform Committee Report*, *supra* note 33, at para. 13. According to Stephen, primary documentary evidence is the document itself and secondary documentary evidence includes a copy of the document or an oral account of its contents: see James Fitzjames Stephen, *A Digest of the Law of Evidence*, 1st ed. (London: Macmillan and Co, 1876) at 67, 68 [Stephen, *Digest*].

³⁶ *Law Reform Committee Report*, *ibid.* at para. 13.

³⁷ *Ibid.* at para. 31.

the terms of the contract proved by way of documentary evidence.³⁸ Section 93 is said to deal with the exclusiveness of documentary evidence whereas s. 94 deals with the conclusiveness and inclusiveness of documentary evidence. It supplements s. 93 by excluding extrinsic evidence that may be used to control the terms of the contract.³⁹ The purpose of ss. 93 and 94 is to collectively preserve the integrity and conclusiveness of the written document *as to its contents and terms*, but this is an altogether separate matter from the *meaning* of those contents and terms.⁴⁰

Section 94 is, however, subject to six provisos, which largely replicate the exceptions to the parol evidence rule at common law.⁴¹ Under these provisos, parol evidence is admissible exceptionally to prove (a) any vitiating factor such as fraud or illegality; (b) a separate oral agreement that is not inconsistent with the terms of the written contract; (c) a separate oral agreement constituting a condition precedent to the written contract; (d) a distinct subsequent oral agreement to rescind or modify the written contract;⁴² (e) any usage or custom not expressly mentioned in the written contract (and not being inconsistent with its terms) but which are usually annexed to such contracts; and (f) any fact which shows the manner the language of a document is related to existing facts.

3. Extrinsic Evidence Generally Admissible to Interpret Contracts

(a) *General provisions*: While provisos (a) to (e) largely replicate the existing common law exceptions to the parol evidence rule, proviso (f) is slightly different. Although it appears as an exception to s. 94, it is usually regarded as constituting a rule concerning the proof of facts as aids to the interpretation of the contract.⁴³ As was noted in *Sembcorp Marine*, proviso (f) is “a general rule which seems to permit wide recourse to extrinsic evidence”.⁴⁴ Support for such a view can be found in one of Stephen’s works on evidence published after the passage of the *Indian Evidence Act*.⁴⁵ In the *Digest*, Stephen viewed ss. 93 and 94 collectively, under what he termed as “Article 90”.⁴⁶ However, art. 90, while including provisos (a) to (e),⁴⁷ did not contain proviso (f). Instead, proviso (f) was conceived as a sub-point

³⁸ *Ibid.* at para. 39. See also M. Monir, *Principles and Digest of the Law of Evidence: Being a Commentary on the Indian Evidence Act, 1 of 1872*, 7th ed. (Allahabad: The University Book Agency, 1989) vol. 1 at 969.

³⁹ Sudipto Sarkar & V.R. Manohar, *Sarkar’s Law of Evidence*, 16th ed. 2009 Reprint (India: LexisNexis Butterworths Wadhwa Nagpur, 2009) at 1461.

⁴⁰ *Zurich Insurance*, *supra* note 1 at para. 70, citing John Pitt Taylor, *A Treatise on the Law of Evidence* (London: A. Maxwell & Son, 1848) at para. 813.

⁴¹ Discussed in *Zurich Insurance*, *ibid.* at para. 72.

⁴² Except in cases in which such contract, grant, or disposition of property is by law required to be in writing, or has been registered according to the law in force for the time being as to the registration of documents.

⁴³ See e.g., V. Kesava Rao, *Sir John Woodroffe & Syed Amir Ali’s Law of Evidence*, 18th ed. (India: LexisNexis Butterworths Wadhwa Nagpur, 2009) at 3711, 3712; Ratanlal Ranchhoddas & Dhirajlal Keshavlal Thakore, *Ratanlal and Dhirajlal’s The Law of Evidence*, 23rd enlarged ed. (India: LexisNexis Butterworths Wadhwa Nagpur, 2010) at 1148, 1149.

⁴⁴ *Sembcorp Marine*, *supra* note 2 at para. 48.

⁴⁵ *Indian Evidence Act, 1872* (Act No. 1 of 1872) [*Indian Evidence Act*].

⁴⁶ Stephen, *Digest*, *supra* note 35 at 88.

⁴⁷ *Ibid.* at 88, 89.

under a separate “Article 91”, which dealt with “what evidence may be given for the interpretation of documents”.⁴⁸ Stephen further noted that arts. 90 and 91 dealt with different matters—art. 91 dealt with the *interpretation* of documents by oral evidence, whereas art. 90 defined the cases in which documents were *exclusive evidence*.⁴⁹

Thus, proviso (f) is more related to the next six sections of the *Evidence Act*, which together deal with the evidence that may be adduced to interpret the terms proved under ss. 93 and 94. These sections, ss. 95 to 100 of the *Evidence Act*, correspond to sub-points of Stephen’s art. 91. As was noted in *Zurich Insurance*, these sections “embody the scope and limitation of proviso (f)”.⁵⁰ *Sembcorp Marine* expressed the same sentiment, but regarded ss. 93 to 100 as embodying a ‘strict’ view on the admissibility of extrinsic evidence to influence the interpretation of a written document (which includes a contract).⁵¹ This seemingly cuts back on the supposed breadth which proviso (f) to s. 94 allows for extrinsic evidence to be admitted. But the sentiments in *Zurich Insurance* and *Sembcorp Marine* can be reconciled—extrinsic evidence is almost always admissible to ascertain whether there is an ambiguity. However, depending on the type of ambiguity then identified, ss. 95 to 100 operate to restrict the admissible extrinsic evidence used to discern a meaning other than the plain meaning of the contractual language. Indeed, in *Soon Kok Tiang v. DBS Bank Ltd*,⁵² it was held that even if the contractual words do not appear to be ambiguous, the background context should be considered in order to determine the existence of any latent ambiguity.⁵³ This recognises that there are two distinct uses of extrinsic evidence.⁵⁴

It is important to discuss each of ss. 95 to 100 in turn because they may affect, indirectly, the full application of the modern contextual approach. We start with s. 95, which provides that in the instances where patent ambiguity arises—either by the language used being obviously uncertain (though intelligible), or so defective as to be meaningless—no evidence may be given to cure the ambiguity. This does not conflict with the holding in *Zurich Insurance* that extrinsic evidence is admissible for interpretation regardless of the presence or absence of ambiguity.⁵⁵ Extrinsic evidence is admissible to ascertain whether the language is ambiguous or defective. Indeed, *Sembcorp Marine* referred to *Charter v. Charter*⁵⁶ in which Lord Penzance

⁴⁸ *Ibid.* at 91, 92.

⁴⁹ *Ibid.* at 158. Indeed, the Law Commission of India, in their 69th and 185th Reports, which discussed various aspects of the *Indian Evidence Act*, discussed “the first five provisos” and “the sixth proviso [*i.e.* proviso (f)]” differently: see *e.g.*, Law Commission of India, *Review of the Indian Evidence Act, 1872* (185th Report, 2003) at 441.

⁵⁰ *Zurich Insurance*, *supra* note 1 at para. 75.

⁵¹ See *Sembcorp Marine*, *supra* note 2 at para. 50:

Since the exclusionary nature of ss 95 and 96 pulls in opposite direction to the permission nature of s 94(f), it is arguable that when s 94(f) is read with ss 95 and 96 as it must be, the extent of extrinsic evidence that may be admitted under s. 94(f) is not as extensive as one might otherwise expect.

See also *Tjong Very Sumito*, *supra* note 29 at para. 97.

⁵² [2011] 2 S.L.R. 716 (H.C.) [*Soon Kok Tiang*].

⁵³ *Ibid.* at paras. 26, 34. See also *Lim Keenly Builders Pte Ltd v. Tokio Marine Insurance Singapore Ltd* [2011] 4 S.L.R. 286 at para. 28 (C.A.).

⁵⁴ *Cf. Ground & Sharp Precision Engineering Pte Ltd v. Midview Realty Pte Ltd* [2008] SGHC 160 at paras. 21, 22.

⁵⁵ *Zurich Insurance*, *supra* note 1 at para. 108.

⁵⁶ (1871) 2 L.R. 2 P. & D. 315 (Ct. of Probate) [*Charter*].

held that he was entitled to admit “evidence as to the circumstances under which the testator wrote his will, as to the different names and circumstances of the people about him, and other surrounding matters” so as to “judge under what state of things he wrote his will”.⁵⁷ This type of evidence, which places the court in the position of the party (or parties) who drafted the contract, is largely “admissible without restriction”.⁵⁸

However, when such evidence reveals that the ambiguity is patent, then pursuant to s. 95, extrinsic evidence may not be used to supply an alternative meaning or provide a solution so as to cure the ambiguity. In *Sembcorp Marine*, it was implied that the evidence excluded under s. 95 is exclusively the “intention of the drafter”.⁵⁹ However, it is unlikely that the section precludes only such evidence for it is phrased generally, viz. “evidence may not be given of facts”, and does not refer specifically to the drafter’s intention, even if such evidence may predominantly be facts that “show [the words’] meaning or supply [their] defects”.⁶⁰ Section 95 is based on the old cases of *Clayton v. Lord Nugent*⁶¹ and *Baylis v. A.G.*,⁶² with each corresponding to the respective illustrations accompanying the provision.⁶³ In *Clayton*, a card which supplied meaning to initials appearing in a will was ruled inadmissible, whereas in *Baylis*, evidence as to the testator’s intention to fill in a blank was similarly held inadmissible.⁶⁴ This has been explained on the basis that, in an instance of patent ambiguity, the intention of the maker of the contract becomes a matter of speculation and so the contract fails.⁶⁵

Zurich Insurance characterised s. 95 as being “extremely narrow” in its operation but it is unclear what this means.⁶⁶ It might be more accurate to say that extrinsic evidence already admitted under proviso (f) cannot be used to cure patent ambiguities in the parties’ intention as expressed in the contract.⁶⁷ Indeed, this was how the High Court understood this proposition in *Tjong Very Sumito*, even though s. 95 was not referred to.⁶⁸ However, in *Master Marine AS v. Labroy Offshore Ltd.*,⁶⁹ it was held, in the context of the interpretation of a performance bond, that where the wording of

⁵⁷ *Sembcorp Marine*, *supra* note 2 at para. 54, citing *Charter*, *ibid.* at 317, 318 [emphasis omitted].

⁵⁸ *Sembcorp Marine*, *ibid.* at paras. 55, 64.

⁵⁹ *Ibid.* at para. 59. The Court of Appeal did not actually say that ss. 95 and 96 excluded only the subjective declarations of intention of the drafters. However, at para. 52 of the judgment, the court raised the question, “What exactly did Sir James intend to be caught by the exclusionary provisions, viz, ss 95 and 96 of the [Evidence Act]?” This is then followed by an acknowledgement that the English cases forming the basis of those sections are instructive in ascertaining “the main type of extrinsic evidence that he had intended to preclude by way of ss 95 and 96”: *ibid.* Hence it is reasonable to infer that the court’s analysis of those cases explained the type of extrinsic evidence excluded under ss. 95 and 96.

⁶⁰ Although it appears that the Court of Appeal’s analysis of the prevailing common law is correct: see Kim Lewison, *The Interpretation of Contracts*, 5th ed. (London: Sweet & Maxwell, 2011) at 414.

⁶¹ (1844) 13 M. & W. 200, 153 E.R. 83 (Ex. Ct.).

⁶² (1741) 2 Atk. 239, 26 E.R. 548 (Ch.).

⁶³ The second more than the first; however see Stephen, *supra* note 35 at 92, 94, in which Stephen identifies these two cases as illustrating the equivalent of the “patent ambiguity” section.

⁶⁴ Cf. *Price v. Page* (1799) 4 Ves. Jr. 680, 31 E.R. 351 (Ch.); *Harrhy v. Wall* (1817) 1 B. & Ald. 103, 106 E.R. 39 (K.B.).

⁶⁵ *Sarkar’s Law of Evidence*, *supra* note 39 at 1552.

⁶⁶ *Zurich Insurance*, *supra* note 1 at para. 76.

⁶⁷ *Ibid.* at para. 76.

⁶⁸ *Tjong Very Sumito*, *supra* note 29 at para. 97.

⁶⁹ [2012] 3 S.L.R. 125 (C.A.) [*Master Marine*].

the bond instrument is “patently ambiguous”, the “court’s only recourse is to refer to extrinsic evidence for a better understanding of the parties’ objective intentions and/or commercial purpose”.⁷⁰ There is nothing wrong with that statement if the Court of Appeal meant that extrinsic evidence can be looked at to discern whether there was an ambiguity to begin with. However, with respect, if the court meant that extrinsic evidence can be used to depart from the patently ambiguous meaning in the contractual language, then that might require some reconsideration given that s. 95 of the *Evidence Act* quite clearly prohibits such use.

Closely related to s. 95 is s. 96, the “plain language” section. Rather than being concerned with outward ambiguity, it is concerned with outward clarity, which arises because of the ‘plainness’ of the language when *applied* to existing facts. In such cases, no evidence may be admitted to explain that the contractual language was not meant to apply to such facts. This may be regarded as another way of characterising a situation “where external circumstances do not create any doubt or difficulty as to the proper application of those words to claimants under the instrument”.⁷¹ Extrinsic evidence is, however, admissible to show that the language “applies accurately to existing facts”.⁷² Again, this is consistent with *Sembcorp Marine*, in which the Court of Appeal said that evidence of such surrounding circumstances may be admitted “without restriction”.⁷³ However, where the language applies accurately to existing facts, extrinsic evidence may not be given to show an alternative meaning. As Denman L.C.J. said in *Rickman v. Carstairs*, “[t]he question... is not what was the intention of the parties, but what is the meaning of the words they have used”.⁷⁴ Again, according to *Sembcorp Marine*, the excluded evidence is the drafter’s intention⁷⁵ but s. 96 is not drafted so specifically. In *Zurich Insurance*, the Court of Appeal cautioned that s. 96 should “not be read too restrictively”.⁷⁶ Presumably this means that the section must be given full effect to; indeed, the court cited from an academic commentary on the section, which says that when the contractual language is plain on its face, it must be given effect to.⁷⁷

The next three sections concern latent ambiguity and provide instances where such ambiguity may be present. Latent ambiguity is one that “arise[s]... extrinsically in the application of an instrument of clear and definite intrinsic meaning to doubtful subject-matter”.⁷⁸ Extrinsic evidence is first admissible to ascertain the ambiguity. This is consistent with the analysis in both *Zurich Insurance* and *Sembcorp Marine*. If the ambiguity is latent, then extrinsic evidence may be given to show an alternative meaning other than that conveyed by the plain meaning of the contractual language.

⁷⁰ *Ibid.* at para. 36.

⁷¹ See *Shore v. Wilson* (1842) 9 Cl. & F. 355 at 565, 8 E.R. 450 at 532 (H.L.). See also Daniel Seng, “Another Clog on the Construction of Contracts? Parol Evidence Rule and Use of Extrinsic Evidence” [1997] Sing. J.L.S. 457 at 488.

⁷² Seng, *ibid.*

⁷³ *Sembcorp Marine*, *supra* note 2 at paras. 55, 64.

⁷⁴ *Rickman v. Carstairs* (1833) 5 B. & Ad. 651 at 663, 110 E.R. 931 at 935 (K.B.).

⁷⁵ *Sembcorp Marine*, *supra* note 2 at para. 59; see also *supra* note 59.

⁷⁶ *Zurich Insurance*, *supra* note 1 at para. 77.

⁷⁷ *Ibid.* at para. 77, citing *Butterworths’ Annotated Statutes of Singapore* (Singapore: Butterworths Asia, 1997 Issue) vol. 5 at 275.

⁷⁸ Thomas Starkie, *A Practical Treatise on the Law of Evidence, and Digest of Proofs in Civil and Criminal Proceedings*, 3rd ed. (London: Stevens & Norton, 1842) vol. 3 at 755, 768 [emphasis omitted].

This is explainable on the basis that since such ambiguities arise from an extrinsic fact, extrinsic evidence is admissible to explain away the ambiguity.⁷⁹ However, what is the type of extrinsic evidence that may be admitted for this purpose? *Sembcorp Marine* took the view that this could only be the drafter's subjective declaration of intention. After an analysis of the prevailing case law at the time the *Indian Evidence Act* was drafted, it held that "extrinsic evidence in the form of parol evidence of the drafter's intentions is generally inadmissible unless it can in some way be brought within the exceptions in ss. 97 to 100".⁸⁰ *Zurich Insurance*, on the other hand, did not take such a narrow view. In summarising its view of the applicable law, *Zurich Insurance* held that:⁸¹

(e) In some cases the extrinsic evidence in question leads to possible alternative interpretations of the written words (*i.e.*, the court determines that latent ambiguity exists)... In arriving at the ultimate interpretation of the words to be construed, the court may take into account subjective declarations of intent.

It is evident from this passage that "subjective declarations of intent" was *not* intended to be the *only* type of extrinsic evidence that may be admitted to cure latent ambiguities.⁸² There is thus an open question of just exactly what is admissible. In any event, subjective declarations of intention cannot be admitted even in this instance if it was what one party would have intended in a hypothetical situation, and this hypothetical intention was never disclosed to the other contracting party.⁸³ To be admissible, the subjective declaration of intention also has to be held at the time the contract was entered into.⁸⁴

The first section, s. 97, refers to the situation where otherwise plain contractual language is rendered meaningless in reference to existing facts. This provision finds expression in the common law of the time as well. For example, in *Allgood v. Blake*,⁸⁵ Blackburn J. said that "[t]he general rule is to give the words their natural meaning unless, when applied to the subject matter... they produce... an absurdity".⁸⁶ *Zurich Insurance* noted that, strictly speaking, this section does not pertain to latent ambiguity since the context does not reveal possible alternative meanings but, rather, renders the original language meaningless.⁸⁷ This, as we discuss below,⁸⁸ is a significant point because it concerns whether subjective declarations of intention can be admitted in this instance.

⁷⁹ See *e.g.*, *Doe d. Chichester v. Oxenden* (1816) 4 Dow. 65 at 92, 3 E.R. 1091 at 1100 (H.L.).

⁸⁰ *Sembcorp Marine*, *supra* note 2 at para. 65.

⁸¹ *Zurich Insurance*, *supra* note 1 at para. 132 [emphasis added].

⁸² See also *Precise Development*, *supra* note 4 at para. 32.

⁸³ See *Smile Inc Dental Surgeons Pte Ltd v. Lui Andrew Stewart* [2012] 4 S.L.R. 308 at para. 42 (C.A.) [*Smile Inc*].

⁸⁴ *Ibid.* at para. 42. Some courts have, however, rejected declarations of subjective declarations of intention outright, without considering *Zurich Insurance* or the *Evidence Act*, and on the basis of English law: see *e.g.*, *VVF Singapore Pte Ltd v. Sovakar Nayak* [2012] SGHC 126 at para. 47 [*VVF Singapore*]; *International Research Corp PLC v. Lufthansa Systems Asia Pacific Pte Ltd* [2013] 1 S.L.R. 973 at para. 56 (H.C.) [*International Research*]. Cf. *Overseas Union Enterprise Ltd v. Three Sixty Degree Pte Ltd* [2013] 3 S.L.R. 1 at para. 54 (H.C.).

(1873) L.R. 8 Ex. 160 (Ex. Ct.).

⁸⁶ *Ibid.* at 163.

⁸⁷ *Zurich Insurance*, *supra* note 1 at para. 79 [references omitted].

⁸⁸ See Part III.B.2 below.

The second section, s. 98, relates to an ‘equivocation’, or where the contractual language used might have been meant to apply to only one of several things that are each susceptible to the same description used. This is based on⁸⁹ *Doe v. Needs*,⁹⁰ in which evidence of the testator’s statements of intention and circumstances were admissible to ascertain which of two “George Gords” he meant.⁹¹

Finally, the third section, s. 99, concerns the situation where the contractual language could apply partially to two sets of existing facts but the whole does not apply correctly to either. This third instance is sometimes regarded as a specific application of the first instance.⁹² It is based on⁹³ several cases,⁹⁴ all of which illustrate that evidence of surrounding circumstances may be admitted to show which of the two sets of existing facts the contract was meant to refer to.

The final three provisions relevant to the admissible evidence to explain the contractual terms, *viz.* ss. 100 to 102, relate mainly to technical matters, and will not be covered here.

(b) *Extrinsic evidence almost always admissible to provide context in order to assess presence or absence of ambiguity:* As already discussed, extrinsic evidence is almost always admissible, but only for the specific purpose of establishing whether the contractual language is ambiguous. The need to ascertain ambiguity comes about because, pursuant to ss. 95 to 99 of the *Evidence Act*, this affects whether it is permissible for the court to depart from the plain meaning and apply the contextual meaning. *Zurich Insurance* noted the fallacy in imposing a prerequisite of ambiguity before extrinsic evidence can be considered. The fallacy arises because extrinsic evidence is necessarily considered to establish whether there is ambiguity in the first place.⁹⁵ An examination of the language itself cannot, without recourse to the external context by extrinsic evidence, reveal whether it is ambiguous.⁹⁶ Thus, if there is no ambiguity, the plain meaning governs. If the plain meaning applies, then there is no need to consider extrinsic evidence to provide the context to arrive at an alternative meaning. If there is patent ambiguity, extrinsic evidence cannot be used to provide the context to depart from the ambiguous meaning. If there is latent ambiguity, then extrinsic evidence may be considered to depart from the plain meaning. Therefore, at no point is extrinsic evidence used to interpret the contractual language broadly; everything is tied first to the finding of ambiguity, and it is for this specific purpose that extrinsic evidence is generally admissible.

(i) The *Zurich Insurance* tripartite requirements: As was held in *Zurich Insurance*, the admissibility of extrinsic evidence for this purpose is governed by the tripartite requirements of relevancy, reasonable availability and a clear or obvious context.⁹⁷ However, it is unclear whether these requirements have been transformed from an

⁸⁹ Stephen, *Digest*, *supra* note 35 at 93, 95.

⁹⁰ (1836) 2 M. & W. 129, 150 E.R. 698 (Ex. Ct.).

⁹¹ *Zurich Insurance*, *supra* note 1 at para. 79.

⁹² *Law Reform Committee Report*, *supra* note 33 at para. 58.

⁹³ Stephen, *Digest*, *supra* note 35 at 93-95.

⁹⁴ *Doe v. Hiscocks* (1839) 5 M. & W. 363, 151 E.R. 154 (Ct. Ex.); *Ryall v. Hannam* (1847) 10 Beav. 536, 50 E.R. 688 (Ch.); *Stringer v. Gardiner* (1859) 27 Beav. 35, 54 E.R. 14 (Ch.).

⁹⁵ *Zurich Insurance*, *supra* note 1 at para. 52.

⁹⁶ See *e.g.*, *ibid.* at para. 116.

⁹⁷ *Ibid.* at para. 132, but *cf.* para. 129. See also *Gay Choon Ing v. Loh Sze Ti Terence Peter* [2009] 2 S.L.R.(R.) 332 at para. 88 (C.A.) [*Gay Choon Ing*], in which the “clear or obvious context” requirement

evidentiary requirement to one involving pleadings after *Sembcorp Marine*. *Sembcorp Marine* referred to *Charter*,⁹⁸ in which Lord Penzance held that he was entitled to admit “evidence as to the circumstances under which the testator wrote his will, as to the different names and circumstances of the people about him, and other surrounding matters” so as to “judge under what state of things he wrote his will”.⁹⁹ According to *Sembcorp Marine*, this type of evidence, which places the court in the position of the party (or parties) who drafted the contract, is “admissible without restriction”.¹⁰⁰ It remains an open question whether “without restriction” means jettisoning the *Zurich Insurance* tripartite requirements. *Sembcorp Marine* did make reference to the *Zurich Insurance* tripartite requirements when it said that its own four requirements of civil procedure are “entirely consonant” with them.¹⁰¹ Indeed, while the *Zurich Insurance* tripartite requirements affect the admissibility of extrinsic evidence, the *Sembcorp Marine* requirements seemingly only affect the weight of such evidence. It was said in *Sembcorp Marine* that extrinsic facts before the court in a manner not consistent with the four requirements of civil procedure “will not be accorded any weight”.¹⁰² By referring only to weight, the Court of Appeal was seemingly conscious in drawing a distinction between weight and admissibility. Thus, it is likely that the *Zurich Insurance* tripartite requirements survive *Sembcorp Marine*, and are distinctly different from the four requirements of civil procedure. Whereas the *Zurich Insurance* tripartite requirements affect the very admissibility of extrinsic evidence, the requirements in *Sembcorp Marine* have a less theoretically drastic effect.¹⁰³ In practice, however, the two sets of requirements are likely to operate in tandem. This is because adherence to the four requirements of civil procedure (at the pleadings stage) would normally mean that the *Zurich Insurance* tripartite requirements are simultaneously satisfied. It is therefore still important to discuss each of the *Zurich Insurance* tripartite requirements.

The first requirement is that the extrinsic evidence concerned must be “relevant”. *Zurich Insurance* endorsed Lord Hoffmann’s restatement in *Investors Compensation Scheme Ltd v. West Bromwich Building Society*¹⁰⁴ that extrinsic evidence is relevant if “it would affect the way in which the language of the document would have been understood by a reasonable man”.¹⁰⁵ Similarly, in *Tiger Airways*, the High Court held that the test of relevancy is an objective one that asks whether a reasonable man would have regarded the extrinsic evidence as relevant to determining the context of the contract. This requirement of relevance is seemingly simple to satisfy.¹⁰⁶ There is, however, one example in which the test of relevancy was not satisfied. In *Goh*

was regarded as not going to admissibility, but whether the court could “adopt a different interpretation from that suggested by the plain language of the contract”.

⁹⁸ *Charter*, *supra* note 56.

⁹⁹ *Sembcorp Marine*, *supra* note 2 at para. 54, citing *Charter*, *ibid.* at 317, 318.

¹⁰⁰ *Sembcorp Marine*, *ibid.* at paras. 55, 64.

¹⁰¹ *Ibid.* at para. 74.

¹⁰² *Ibid.* at para. 74.

¹⁰³ Theoretical because admitted evidence accorded no weight is as useless as unadmitted evidence.

¹⁰⁴ [1998] 1 W.L.R. 896 (H.L.).

¹⁰⁵ *Zurich Insurance*, *supra* note 1 at para. 125.

¹⁰⁶ *Sheng Siong Supermarket*, *supra* note 24 at para. 44.

Guan Chong,¹⁰⁷ the High Court held that a draft that was worded by the defendant alone was not “relevant” because it would only point to the subjective intention of the defendant and hence would not be helpful in objectively ascertaining the parties’ intentions.¹⁰⁸ However, this seems to go against the court’s finding earlier that prior negotiations, of which different versions were presented by the plaintiff and defendant respectively, were “relevant”.¹⁰⁹ Indeed, if only one side drafted such negotiations, then, applying its own reasoning in relation to the drafts, the negotiations would also have failed the “relevancy” test. Thus, it appears that an inconsistent standard of “relevancy” was used in *Goh Guan Chong* and that the requirement of “relevancy” should be regarded as one that is easily satisfied, even with regard to subjective declarations of intention.

The second requirement of “reasonable availability” is often a straightforward requirement, although it should be noted that actual knowledge of availability is irrelevant as the inquiry is an objective one.¹¹⁰ This requirement was easily satisfied in *Sheng Siong Supermarket* as there was actual availability to both parties. In *Goh Guan Chong*,¹¹¹ extrinsic evidence that was only available to one of the contracting parties was held inadmissible as evidence of the parties’ objective intention, as was the case in *Ng Teck Sim Colin v. Hat Holdings Pte Ltd*.¹¹²

On the basis of promoting certainty, the Court of Appeal in *Zurich Insurance* imposed a third requirement of a “clear or obvious” context before extrinsic evidence can be admitted.¹¹³ The High Court in *Tiger Airways* explained that this means that the extrinsic evidence that is tendered before the court must point to a clear or obvious context before the court can say with any certainty that such evidence is of assistance to the court. According to the court, this makes logical sense because if the extrinsic evidence points to a context that is far from clear or obvious, then the court would be acting within the realm of speculation.¹¹⁴ Similarly, in *Smile Inc*, the Court of Appeal explained that “the context must allow the court to objectively ascertain a clearly defined or definable intention held by both parties with respect to how the contractual term in question should be interpreted”.¹¹⁵

(ii) Attributes of document: Additionally, the admissibility of extrinsic evidence is also restricted by the attributes of the document in question.¹¹⁶ For example, the interpretation of standard form contracts and documents intended for commercial circulation should generally be guided by a restrictive examination of the context. Thus, in *Ascend Foodstuff Solution Pte Ltd v. Lim Tian Sye trading as Eng Kee Chee Huat*,¹¹⁷ a tenancy agreement, which is required by s. 6(d) of the *Civil Law*

¹⁰⁷ *Supra* note 28 at para. 81.

¹⁰⁸ *Ibid.* at para. 79.

¹⁰⁹ *Ibid.* at para. 80.

¹¹⁰ *Tiger Airways*, *supra* note 32 at para. 20.

¹¹¹ *Supra* note 28 at para. 71.

¹¹² [2010] 4 S.L.R. 840 at para. 56 (H.C.).

¹¹³ For an application of this requirement, see *Soon Kok Tiang*, *supra* note 52 at para. 34.

¹¹⁴ *Tiger Airways*, *supra* note 32 at para. 22.

¹¹⁵ *Smile Inc*, *supra* note 83 at para. 43.

¹¹⁶ *Zurich Insurance*, *supra* note 1 at para. 110.

¹¹⁷ [2009] SGDC 31 [*Ascend Foodstuff*].

*Act*¹¹⁸ to be in writing, was treated as a type of contract where extrinsic evidence could not be considered so readily. The District Court held that this was one type of contract where the courts “must exercise restraint in its interpretation so as not to engender commercial uncertainty and encourage pointless litigation”.¹¹⁹ Similarly, the Court of Appeal noted in *Master Marine* that a performance bond was a document which the court should be restrained in its examination of the external context and extrinsic evidence.¹²⁰ Like a standard form contract, there is a presumption for these documents that all the terms of the agreement are recorded within it. Indeed, because the purpose of such documents is to ensure expediency in payment, there is commercial sense in ensuring that the beneficiary and bank can determine quickly if the demand is valid simply by looking at the bond instrument itself, and not to the external context.¹²¹

It should be noted that this restriction, which is founded upon the attributes of the document, is not found in the *Evidence Act* and is more of a common law development. There is thus nothing strictly to prevent the admission of extrinsic evidence pursuant to the attributes of the document. Perhaps this factor is better regarded as a question of weight—the attributes of documents may affect the weight of otherwise admissible extrinsic evidence tending to show the context. Moreover, it is important to note that the limited admissibility (or weight) of extrinsic evidence for certain categories of documents does *not* mean that the contextual approach is not used. In *Precise Developments*, the High Court held that extrinsic evidence could not be admitted to interpret a word in standard boilerplate clause contained in a standard form contract. The court rightly held that it was not possible to “fully employ the contextual approach” in this regard—it is only the *extent* of the contextual approach that was curtailed by the limited admissibility (or weight) of extrinsic evidence, not its application altogether.¹²²

(iii) Certain types of extrinsic evidence not admissible to assess presence or absence of ambiguity: Certain types of extrinsic evidence, such as prior negotiations and subsequent conduct, remain inadmissible even to discern an ambiguity,¹²³ unless being used to resolve a latent ambiguity.¹²⁴ The key question in this area, which has yet to be resolved by the Singapore courts, is whether prior negotiations and subsequent conduct should be admitted.

Zurich Insurance departed from the present English position (embodied in *Investors Compensation* and, more recently, *Chartbrook Ltd v. Persimmon Homes*

¹¹⁸ Cap. 43, 1999 Rev. Ed. Sing.

¹¹⁹ *Ascend Foodstuff*, *supra* note 117 at para. 35.

¹²⁰ *Master Marine*, *supra* note 69 at para. 35; see also *York International Pte Ltd v. Voltas Limited* [2013] SGHC 124 at para. 19.

¹²¹ *Master Marine*, *ibid.* at para. 35.

¹²² *Precise Development*, *supra* note 4 at para. 33. However, the court was perhaps not right in saying that it was “an artificial exercise for the court to attribute to the parties an intention that never existed” if it were to admit extrinsic evidence to interpret a word in a standard boilerplate clause since the parties never contemplated an alternative meaning to the word. However, that was exactly what the court did—in implying that the parties “intended” by a standard boilerplate clause to adhere to the “ordinary” meaning of the word concerned, there was equally an artificial imputation of intention. Hence, the artificiality of the exercise is not the right reason for excluding otherwise admissible extrinsic evidence.

¹²³ *Zurich Insurance*, *supra* note 1 at para. 132.

¹²⁴ *Ibid.* at para. 50.

*Ltd*¹²⁵) by accepting the possibility of admitting extrinsic evidence in the form of prior negotiations and subsequent conduct.¹²⁶ However, it was also held that such evidence would likely be inadmissible for non-compliance with the requirements that the parties' intentions be objectively ascertained and that the threshold requirement that the context be clear or obvious.¹²⁷ The holding that such evidence is inadmissible for being subjective in nature goes against other passages in *Zurich Insurance* (and later, *Sembcorp Marine*) that the parties' subjective declarations of intention can be admitted in instances of latent ambiguity.¹²⁸ It will be discussed below¹²⁹ the appropriate ambit of the objection based on subjectivity.

Although *Zurich Insurance* was non-committal on the admissibility of prior negotiations and subsequent conduct, the High Court in *Goh Guan Chong* referred to the "not altogether convincing" reasons for excluding prior negotiations,¹³⁰ and interpreted *Zurich Insurance* as having decided that extrinsic evidence, including prior negotiations, could be admitted to interpret latently ambiguous terms so long as the tripartite requirements in *Zurich Insurance* are fulfilled. In *Gay Choon Ing*, the Court of Appeal held that subsequent conduct that was in direct contradiction of the terms of the concluded contract could not be admitted to interpret the contract concerned, although it also noted the sentiments in *Zurich Insurance*, i.e. that the admissibility of such evidence required further scrutiny in the future.¹³¹

A detailed scrutiny has so far not been undertaken, but there have been cases that tangentially discussed the issue. For example, in *Lian Hwee Choo Phebe v. Maxz Universal Development Group Pte Ltd*,¹³² the Court of Appeal held that a contract must generally be interpreted as at the date it was made and in light of the circumstances prevailing on the date.¹³³ In doing so, it endorsed the long-standing objection against the use of subsequent conduct in interpreting contracts stated in *James Miller & Partners Ltd v. Whitworth Street Estates (Manchester) Ltd*,¹³⁴ that is, to interpret a contract beyond its date of creation would result in "a contract [meaning] one thing the day it was signed, but by reason of subsequent events meant something different a month or a year later".¹³⁵ However, to be fair, the court

¹²⁵ [2009] 1 A.C. 1101 (H.L.).

¹²⁶ *Zurich Insurance*, *supra* note 1 at para. 132. Although it has to be noted that, even under English law, prior negotiations may be admitted if they form part of the admissible background. However, the contours of this exception are not clear.

¹²⁷ *Ibid.* For an example where prior negotiations failed the tripartite *Zurich Insurance* requirements, see *Bidvest Australia v. Deacons Singapore Ltd* [2010] SGHC 128 at para. 53 [*Bidvest Australia*].

¹²⁸ See text accompanying notes 62, 80 above.

¹²⁹ See Part III.B.2 below.

¹³⁰ See *Goh Guan Chong*, *supra* note 28 at paras. 54, 55.

¹³¹ *Gay Choon Ing*, *supra* note 97 at para. 88.

¹³² [2009] 2 S.L.R.(R.) 624 (C.A.) [*Lian Hwee Choo Phebe*].

¹³³ *Ibid.* at para. 11.

¹³⁴ *James Miller & Partners Ltd v. Whitworth Street Estates (Manchester) Ltd* [1970] A.C. 583 (H.L.) [*James Miller*].

¹³⁵ *Ibid.* at 603. See also *Abundance Development Pte Ltd v. Absolut Events & Marketing Pte Ltd* [2009] SGHC 198 at para. 6, where similar reference was made, and where it was said that subsequent conduct could be used to ascertain the terms of an oral and only partially expressed agreement; *Sundercan Ltd v. Salzman Anthony David* [2010] SGHC 92 at para. 27, where the issue as to whether subsequent conduct can be used was also left open; *Rockline Ltd v. Silverlink Holdings Ltd* [2010] SGHC 127 at para. 19, where the court held more determinatively that "post-contractual conduct was irrelevant when construing a written contract".

probably did not intend to endorse this objection specifically in relation to the use of subsequent conduct. Indeed, it later said that articles of a company, which it rightly regarded as a type of contract, should be interpreted in view of future changes in circumstances. Thus, what can be said at best is that the court left the issue open in *Lian Hwee Choo Phebe*. However, in *VVF Singapore*, the High Court referred to the objection in *James Miller* and held that recourse to subsequent conduct to interpret the contract was “on shaky ground”.¹³⁶ In other cases, the courts have actually used subsequent conduct to interpret contracts even though this is usually done not in pursuance of a general rule. For example, in *Sports Connection Pte Ltd v. Deuter Sports GmbH*,¹³⁷ the Court of Appeal, while distancing itself from laying down any general principle relating to the admissibility of subsequent conduct, did in fact rely on an email sent after the contract concerned was signed to ascertain the context surrounding the intention of the parties when they entered into the contract concerned.¹³⁸

On the whole, it can be said that while there is some inclination for allowing the use of prior negotiations and subsequent conduct in the interpretation of contracts, the courts have, on balance,¹³⁹ expressly left the issue open for further consideration at a later date, although it was said in *Sembcorp Marine* that even if such evidence were allowed in the future, it should be done with “full consciousness of the concerns [relating to admissibility]... and in compliance with the pleading requirements... prescribed”.¹⁴⁰

(c) *Extrinsic evidence in the presence of latent ambiguity may lead to an alternative meaning apart from the plain meaning:* In *Zurich Insurance*, the Court of Appeal noted that ambiguity still plays a role in that the court can only depart from the plain meaning of the contractual language if latent ambiguity is found.¹⁴¹ Apart from *Sembcorp Marine*, which regarded the only type of admissible evidence for this purpose to be subjective declarations of intention, the cases have not discussed in detail the type of extrinsic evidence that can be so admitted.

¹³⁶ *VVF Singapore*, *supra* note 84 at para. 52.

¹³⁷ [2009] 3 S.L.R.(R.) 883 (C.A.).

¹³⁸ *Ibid.* at paras. 70, 71. However, under English law, such evidence would probably be admissible as part of the relevant background. The Singapore cases which have admitted prior negotiations do not appear to draw the distinction between admissible prior negotiations going towards the background, and those that do not. See also *Abundance Development Pte Ltd v. Absolut Events & Marketing Pte Ltd* [2009] SGHC 198 at para. 6, where subsequent conduct was also used to interpret the ambit of a contract; *Sundercan Ltd v. Salzman Anthony David* [2010] SGHC 92 at para. 28, where the court “assumed” that subsequent conduct could be admitted; *EC Investment Holding Pte Ltd v. Ridout Residence Pte Ltd* [2011] 2 S.L.R. 232 at para. 79.

¹³⁹ Even though *Zurich Insurance* was expressly non-committal, some courts have read *Zurich Insurance* as standing for the proposition that the admissible extrinsic evidence includes prior negotiations and subsequent conduct: see *e.g.*, *Fico Sports Inc Pte Ltd v. Thong Hup Gardens Pte Ltd* [2011] 1 S.L.R. 40 at para. 60 (H.C.) [*Fico Sports*]; *Sembcorp Marine Ltd v. PPL Holdings Pte Ltd* [2012] 3 S.L.R. 801 at para. 62 (H.C.); *Shin Khai Construction Pte Ltd v. FL Wong Construction Pte Ltd* [2013] SGHCR 4 at para. 37.

¹⁴⁰ *Sembcorp Marine*, *supra* note 2 at para. 75.

¹⁴¹ *Zurich Insurance*, *supra* note 1 at para. 108.

C. The Interpretative Approach

1. General Characteristics: Objective and Contextual

The *second step* of the *Zurich Insurance* framework concerns the task of interpretation. The prior question of admissibility does not tell us *how* it is done. The Singapore courts, following the English common law, have said interpretation is done objectively, that is, recourse is had to the parties' expressed intention in the contractual language rather than their actual intention.¹⁴² This, according to *Zurich Insurance*, is the "cornerstone of the theory of contract and permeates our entire approach to contractual interpretation".¹⁴³ An objective approach usually means that evidence of the parties' subjective declarations of intention is not admissible.¹⁴⁴ However, *Zurich Insurance* and *Sembcorp Marine* both recognised that such evidence can be admitted to cure a latent ambiguity.¹⁴⁵ As we see below, this is not incorrect, but such evidence is admitted on a very limited basis.

Interpretation is also to be done "contextually". Much emphasis has been made of the fact that contracts are not made in a vacuum, and that words are at times "penumbral".¹⁴⁶ The context is all-important, hence the extrinsic evidence admissible under the *Evidence Act* can assist the court in coming to the objectively correct meaning of the contractual language, especially where the contractual language is "ambiguous or capable of having more than one meaning".¹⁴⁷ As a preliminary matter, it was held in *Lee Chee Wei v. Tan Hor Peow Victor* that the presence of an entire agreement clause does not generally prevent the adoption of the contextual approach.¹⁴⁸ Also, a contextual understanding would be especially important where the contract was not drafted properly.¹⁴⁹ In *International Research Corp PLC v. Lufthansa Systems Asia Pacific Pte Ltd*, the High Court noted that the contextual approach does not usurp the plain meaning rule; rather, the plain meaning rule operates within the contextual method.¹⁵⁰ To be more precise, what the court probably meant is that

¹⁴² *Ibid.* at para. 125. See also *Yamashita Tetsuo*, *supra* note 15 at para. 62; *Tiger Airways*, *supra* note 32 at para. 24; *Straits Advisors Pte Ltd v. Behringer Holdings (Pte) Ltd* [2009] SGHC 86 at para. 14; *Fico Sports*, *supra* note 139 at para. 60; *Shanghai Tunnel Engineering Co Ltd v. Econ-NCC Joint Venture* [2011] 1 S.L.R. 217 at para. 46 (H.C.) [*Shanghai Tunnel*]; *LW Infrastructure Pte Ltd v. Lim Chin San Contractors Pte Ltd* [2011] 4 S.L.R. 477 at para. 43 (H.C.) [*LW Infrastructure*]; *Ang Tin Yong v. Ang Boon Chye* [2012] 1 S.L.R. 447 at para. 11 (C.A.) [*Ang Tin Yong*]; *Edwards Jason Glenn v. Australia and New Zealand Banking Group Ltd* [2012] SGHC 61 at paras. 33-35. It is usually said that this is the meaning as would be understood by a reasonable person. However, this reasonable person is probably not always a business person; depending on the context, he may not be a business person at all: *cf. Goh Eng Wah v. Daikin Industries Ltd* [2008] SGHC 190 at para. 45 [*Goh Eng Wah*].

¹⁴³ *Zurich Insurance*, *supra* note 1 at para. 125.

¹⁴⁴ *Ibid.* at para. 127.

¹⁴⁵ See *ibid.* at para. 50; *Sembcorp Marine*, *supra* note 2 at para. 59.

¹⁴⁶ *Zurich Insurance*, *ibid.* at para. 122. See also *Yamashita Tetsuo*, *supra* note 15 at para. 63; *Straits Advisors Pte Ltd v. Behringer Holdings (Pte) Ltd* [2010] 1 S.L.R. 760 at para. 8 (C.A.) [*Straits Advisors*]; *Van Der Laan Elisabeth Maria Everarda v. Billionaires Management Worldwide (BMW) Pte Ltd* [2010] SGHC 180 at para. 22; *Master Marine*, *supra* note 69 at para. 41.

¹⁴⁷ *Ong Chay Tong & Sons (Pte) Ltd v. Ong Hoo Eng* [2009] 1 S.L.R.(R.) 305 at para. 15 (C.A.).

¹⁴⁸ *Lee Chee Wei v. Tan Hor Peow Victor* [2007] 3 S.L.R.(R.) 537 at para. 41 (C.A.). See also *Bidvest Australia*, *supra* note 127 at para. 62.

¹⁴⁹ *Straits Advisors*, *supra* note 146 at para. 8.

¹⁵⁰ *International Research*, *supra* note 84 at paras. 53, 54.

at times the plain meaning of the words, in light of the context, sufficiently gives effect to the parties' intentions. There is therefore no need to depart from that plain meaning.¹⁵¹

However, in *Healthcare Supply Chain (Pte) Ltd v. Roche Diagnostics Asia Pacific Pte Ltd*,¹⁵² the High Court held that *Zurich Insurance* did not hold that the contextual approach was to be the primary rule in the interpretation of a contract in that "one begins the construction of a contract by reference to it [meaning the contextual approach], and through it enter an expressway into extrinsic evidence not ordinarily permissible in the construction of a written contract, especially one that appears complete on the face of it."¹⁵³ If the High Court meant that the contextual approach cannot justify the admission of otherwise inadmissible extrinsic evidence, then it must be correct, for the admissibility of extrinsic evidence is an entirely different issue from the contextual approach. However, if the High Court meant that the contextual approach does not always apply,¹⁵⁴ then with respect, that must be reconsidered.¹⁵⁵ *Zurich Insurance*, and now *Sembcorp Marine*, has stated in no uncertain terms that the contextual approach governs contractual interpretation in Singapore. There may be a question as to how *far* it applies, but there is no doubt that it *applies*.

Pursuant to the contextual approach, context is both derived externally and internally. External context largely refers to the surrounding circumstances including "facts and circumstances which were (or ought to have been) in the mind of the [drafter] when he used those words".¹⁵⁶ This can also include the attributes of the document in question,¹⁵⁷ the "legal, regulatory and factual matrix constituting the background in which the contract was drafted or the utterance made",¹⁵⁸ the commercial purpose of the transaction or provision,¹⁵⁹ and such facts can also be provided for by the recitals to the contract. In *Tiger Airways*, the High Court explained that recitals are often the ready source of the "background" or "factual matrix", even if

¹⁵¹ *Ibid.* at para. 69.

¹⁵² [2011] 3 S.L.R. 476 (H.C.) [*Healthcare Supply Chain*].

¹⁵³ *Ibid.* at para. 6.

¹⁵⁴ *Ibid.* at para. 8.

¹⁵⁵ To be fair, it is not entirely clear what the High Court intended in *Healthcare Supply Chain*. At one point, the court noted that *Zurich Insurance* did not hold that all cases began with the contextual approach. However, it then said that this was not a directive that all contractual interpretation began with an examination of extrinsic evidence, supplementing its earlier view that *Zurich Insurance* did not hold that it was always obligatory for the court in all cases of contractual interpretation to refer to extrinsic evidence in order to understand the context of the contract and that context can be understood from the document itself: see *Healthcare Supply Chain, ibid.* at para. 8. This seems to suggest an inconsistent understanding of just what is meant by "contextual approach". For a contrary view that the contextual approach is mandatory, see *QBE Insurance (International) Limited v. USL Asia Pacific Pte Ltd* [2012] SGDC 84 at para. 103.

¹⁵⁶ *Sembcorp Marine, supra* note 2 at para. 59.

¹⁵⁷ *Zurich Insurance, supra* note 1 at para. 110.

¹⁵⁸ *Goh Eng Wah, supra* note 142 at para. 45. See also *Lian Hwee Choo Phebe, supra* note 132 at para. 11; *Goh Guan Chong, supra* note 28 at para. 69; *Fico Sports, supra* note 139 at para. 61 (although the court phrased this as "essence and attributes of the document", an expression which *Zurich Insurance* used to affect the range of admissible extrinsic evidence, rather than context).

¹⁵⁹ See *Goh Eng Wah, ibid.* at para. 45; *Yamashita Tetsuo, supra* note 15 at para. 64; *Indulge Food Pte Ltd v. Torabi Marashi Bahram* [2010] 2 S.L.R. 540 at paras. 9, 52 (H.C.); *Soo Nam Thoong v. Phang Song Hua* [2011] SGHC 159 at para. 14; *International Research, supra* note 84 at para. 74.

they do not bind the parties contractually.¹⁶⁰ However, context that is not relevant would not be used in the interpretative exercise. In *LW Infrastructure*, the High Court found that the parties did not have regard to standard forms when they concluded the contract in question and hence such evidence was not part of the context.¹⁶¹ Indeed, such evidence would probably not pass the *Zurich Insurance* tripartite requirements.

The internal context simply refers to the entire contract or, as was defined in *Zurich Insurance*, “the document as a whole, which includes the provisions other than those sought to be interpreted and the organisation of the document”.¹⁶² The internal context is relevant simply because adherence to it gives effect to the bargain entered into between the parties; in other words, this gives effect to the legitimate expectations of the parties which arose from the bargain.¹⁶³ In *Tiger Airways*, the High Court referred to the long-standing law, embodied previously in *Travista Development Pte Ltd v. Tan Kim Swee Augustine*,¹⁶⁴ that a clause must be considered in the context of the whole document.¹⁶⁵

Related to the importance of context is the specific proposition that a commercially sensible interpretation would generally be preferred for commercial contracts. In *Ang Tin Yong*, a deed was construed in a way that accorded with “business common sense and its commercial purposes”.¹⁶⁶ In doing so, the Court of Appeal endorsed Lord Steyn’s explanation for such an approach in *Mannai Investment Co Ltd v. Eagle Star Life Assurance Co Ltd*—a commercial interpretation would more likely give effect to the parties’ intention in a commercial situation.¹⁶⁷ There is nothing special about this proposition; it is simply a specific application of the contextual approach. Thus, where the context is commercial in nature, it is more likely that a commercially sensible interpretation would be preferred.

2. Canons of Interpretation

The existing canons of interpretation continue to be relevant as well, although they are only a guide and not exhaustive.¹⁶⁸ *Zurich Insurance* endorsed McMeel’s summary of the applicable principles as “canons of interpretation”.¹⁶⁹ These canons were summarised in *Master Marine*, where it was also held that they are just “signposts” and not rules to be applied rigidly in every case.¹⁷⁰ It should be noted that these “canons” replicate much of what has been said elsewhere in *Zurich Insurance* and other cases. It is probably better to regard them as a summary of the applicable law, rather than adding anything new.

¹⁶⁰ *Tiger Airways*, *supra* note 32 at para. 34, referring to Gerard McMeel, *The Construction of Contracts: Interpretation, Implication, and Rectification* (Oxford: Oxford University Press, 2007) at para. 4.25.

¹⁶¹ *LW Infrastructure*, *supra* note 142 at para. 43.

¹⁶² *Zurich Insurance*, *supra* note 1 at para. 53.

¹⁶³ *Tan Jin Sin v. Lim Quee Choo* [2009] 2 S.L.R.(R.) 938 at para. 20 (C.A.).

¹⁶⁴ [2008] 2 S.L.R.(R.) 474 at para. 20 (C.A.).

¹⁶⁵ *Tiger Airways*, *supra* note 32 at para. 30.

¹⁶⁶ *Ang Tin Yong*, *supra* note 142 at para. 12.

¹⁶⁷ *Mannai Investment Co Ltd v. Eagle Star Life Assurance Co Ltd* [1997] A.C. 749 at 771 (H.L.) [*Mannai Investment*].

¹⁶⁸ *Zurich Insurance*, *supra* note 1 at para. 131.

¹⁶⁹ *Ibid.* at para. 131, citing McMeel, *supra* note 160 at paras. 1.124-1.133. See also *Tiger Airways*, *supra* note 32 at para. 25.

¹⁷⁰ *Master Marine*, *supra* note 69 at para. 41.

3. *Specific Application: Departure from the Plain Meaning*

Zurich Insurance noted that neither ambiguity nor the existence of an alternative technical meaning is a prerequisite for the court's consideration of extrinsic material. Instead, the court will *first* take into account the plain language of the contract together with relevant extrinsic material that is evidence of its context. Then, if, in the light of this context, the plain language of the contract becomes ambiguous (*i.e.* it takes on another plausible meaning) or absurd, the court will be entitled to put on the contractual term in question an interpretation which is different from that demanded by its plain language.¹⁷¹ However, this different interpretation must be one that the words can bear. If the words cannot bear this different meaning, the better remedy may well be rectification. Indeed, in *Master Marine*, the Court of Appeal held that “[a]s far as possible, the court should adhere to the plain meaning of the words”, except in cases of patent and latent ambiguities.¹⁷² It was earlier pointed out that the court's reference to the possible departure from the plain meaning in patent ambiguities should be reconsidered. The court's reference to general adherence to the plain meaning appears at first blush to be cutting back on the general thrust of the contextual approach, but it really is just a recognition of the local statutory regime that still pays heed to the plain meaning.

An application of this approach can be seen in *Shanghai Tunnel*. In that case, the plaintiff argued that extrinsic evidence showed that a supplemental agreement was to be construed as a compromise agreement with certain consequences. The High Court held that “such extrinsic evidence can only be resorted to when words of the contract are not clear and unambiguous or when the circumstances make ambiguous what would otherwise be plain”.¹⁷³ This is a roughly accurate statement of the law. It would be more accurate to say that extrinsic evidence can, subject to the *Zurich Insurance* tripartite requirements, be generally relied on to establish if there is any ambiguity. However, extrinsic evidence cannot be referred to give an alternate meaning other than the plain meaning except where there are certain types of ambiguities. In applying its stated principles, the court in *Shanghai Tunnel* noted that the plain, unambiguous language of the supplemental agreement showed the lack of any intention for that agreement to be a compromise agreement. There was no reciprocity in the waiver of claims required of the plaintiff.¹⁷⁴ There was also nothing in the surrounding circumstances that rendered the plain language of the supplemental agreement ambiguous.¹⁷⁵ As such, the court did not think that a departure from the plain meaning was warranted.¹⁷⁶

However, one must not regard it impossible to depart from the plain meaning, even if the plain meaning is well-established. In *Ter Yin Wei v. Lim Leet Fang*, the High Court held that certain key phrases in a discharge voucher were “clear and unambiguous and with a meaning that was plain and fixed” and have been “construed

¹⁷¹ *Zurich Insurance*, *supra* note 1 at para. 130.

¹⁷² *Master Marine*, *supra* note 69 at para. 42.

¹⁷³ *Shanghai Tunnel*, *supra* note 142 at para. 49.

¹⁷⁴ *Ibid.* at para. 53.

¹⁷⁵ *Ibid.* at para. 60.

¹⁷⁶ For another general application of this approach, see *Soon Kok Tiang*, *supra* note 52 at para. 35.

consistently, upheld time and again and have acquired a certain meaning in law”.¹⁷⁷ As such, the court appeared to suggest that the use of context in such cases would be to contradict or vary the contract, which is impermissible. This may require some reconsideration as there is always the possibility that even apparently clear words can be rendered ambiguous by the context; it all depends on the context.

III. OUTSTANDING ISSUES

A. *Summary of Outstanding Issues*

From the above analysis, the law on contractual interpretation in Singapore is largely settled. However, there are some outstanding issues that we will deal with in this part. In relation to the admissible evidence, the first (conceptual) issue is the basis of the *Zurich Insurance* tripartite requirements. If both *Zurich Insurance* and *Sembcorp Marine* are correct that the *Evidence Act* is the primary source of law governing the admissibility of extrinsic evidence, then we need to ask what is the source of the tripartite requirements. If they are not from the *Evidence Act* and are inconsistent with the Act, then their legitimacy may be questioned. The second issue is practical: just what is the scope of the admissible subjective declarations of intention, and how does this square with the principle that contractual interpretation is an objective exercise? The third issue is also practical, and relates to the admissibility of prior negotiations and subsequent conduct.

In relation to the interpretative approach, the main (conceptual) question concerns the *basis* of the contextual approach. It seems almost to be assumed that the contextual approach applies, but it is less asked why this should be the case.

B. *The Admissible Evidence*

1. *Conceptual Question: Basis of the Zurich Insurance Tripartite Requirements*

In order to explain the *Zurich Insurance* tripartite requirements, it is necessary to first identify three relevant but distinct questions in the law of evidence. The first question concerns the facts that may be proved. This is answered by Part I of the *Evidence Act*. The primary rule is s. 5 of the Act, which provides that evidence may be given of the existence or non-existence of every fact in issue or of any relevant fact, as defined by the Act. The second question concerns the mode of evidence that may be adduced to prove these facts. Part II of the *Evidence Act* answers this question. Thus, even if a fact is declared to be relevant by Part I, certain types of evidence may not be adduced to prove such a fact if Part II excludes the adduction of such evidence. In the context of contractual interpretation, the second question assumes some significance because certain sections of the *Evidence Act*, specifically those in Chapter VI—“Exclusion of oral by documentary evidence”, provide that certain facts to do with the existence of a contract, for example, may only be proved by *documentary* evidence and not oral evidence. The third question concerns the

¹⁷⁷ *Ter Yin Wei v. Lim Leet Fang* [2012] 3 S.L.R. 172 at para. 27 (H.C.).

substantive rules that are applied in the interpretation of contracts. As alluded to above, the *Evidence Act* does not contain any rule that deals with the interpretation of contracts; the contextual approach finds no direct expression in the Act.

With this background in mind, we start our evaluation of the *Zurich Insurance* tripartite requirements first with the fundamental question of which facts are relevant (and hence provable) under the *Evidence Act*. Consider, as a starting point, the “state of things” provision in s. 7 and the “supporting inferences” provision of s. 9 of the *Evidence Act*, which appear *prima facie* wide enough to make the “factual matrix”—the focus of the modern contextual approach—relevant and hence provable under the *Evidence Act*. In fact, Illustration (a) to s. 9, which provides that “[t]he state of A’s property and of his family at the date of alleged will may be relevant facts” to ascertain “whether a given document is the will of A”. This seems at least analogous to the relevant background information in contractual interpretation. The only way in which this might not be so is if they were expressly excluded by virtue of some other provision. Obviously, this does not mean that everything and anything is admissible. The general provision of s. 5—that “[e]vidence can only be given of facts in issue or relevant facts” and of nothing else—continues to control. The result is that relevance continues to be important, but that one has to fall back upon the very general test of relevance set out in Part I in deciding what facts a party can be allowed to prove, and what facts a party cannot.

It is in this context that we examine the *Zurich Insurance* tripartite requirements. It seems that these requirements are concerned with the facts that may be proved, as opposed to the evidence that may be adduced to prove those facts. If this is correct, it is submitted that the *Evidence Act* does not *outwardly* support these requirements. Turning to the requirement of relevancy, the usage of “relevance” in *Zurich Insurance* is not the technical sense prescribed by Part I of the *Evidence Act*. In particular, and as already mentioned, the *Evidence Act* enacts that “[o]ne fact is said to be relevant to another when the one is connected with the other in any of the ways referred to in the provisions of this Act relating to the relevancy of facts”.¹⁷⁸ Thirteen sections of the same Act lay down the situations in which facts are “relevant”, and no more.¹⁷⁹

The second requirement of “reasonable availability” is likewise not expressly provided for in the *Evidence Act* and is derived from *Investors Compensation*. According to *Investors Compensation*, the inquiry revolves around the fundamental question of whether the reasonable man would derive assistance or help from the extrinsic evidence concerned. The requirement of “reasonable availability” in *Zurich Insurance* is simply a specific facet of this broader inquiry, which is not provided for in the *Evidence Act*.

The third requirement of a “clear or obvious context” may also be cast in the same light. This requirement of a “clear or obvious” context is simply an elaboration of the relevance test discussed earlier. Where extrinsic evidence is unclear, it will also be generally unhelpful to the reasonable man’s understanding of the contractual terms, thereby failing the requirement of “relevance”. Likewise, this is not provided for in the *Evidence Act*.

¹⁷⁸ *Evidence Act*, *supra* note 14, s. 3(2).

¹⁷⁹ See *Lee Chez Kee v. Public Prosecutor* [2008] 3 S.L.R.(R.) 447 at para. 69 (C.A.).

Therefore, the tripartite requirements of relevance, reasonable availability, and clear or obvious context do not, outwardly at least, give effect to the “relevancy” requirement in the *Evidence Act*. However, this is not fatal to the continued applicability of these requirements. While possibly justifiable on pragmatic grounds as not being inconsistent with the *Evidence Act*, the better view is that these requirements can find an anchor in the relevancy provisions—either ss. 7 or 9 of the *Evidence Act*. If this is correct, then the *Zurich Insurance* tripartite requirements can be conceived as specific applications or elaborations of the broad admissibility provisions in the *Evidence Act*.

2. Practical Question: Admissibility of Subjective Declarations of Intention

As mentioned above, both *Zurich Insurance* and *Sembcorp Marine* (and some other cases) recognised that subjective declarations of intention may be admitted to cure a latent ambiguity. Since this seems to go against the objective principle of contractual interpretation, its correctness (and scope, if correct) must be ascertained.

The prevailing common law approach at the time the *Indian Evidence Act* was enacted exceptionally allowed subjective declarations of intention to be admitted to resolve a latent ambiguity. This has been explained on the basis that there is no problem with contradicting or varying the document in this case because the problem is with two or more meanings, each of which is entirely consistent with the contractual language. Instead, the consideration of extrinsic evidence in cases of latent ambiguity *explains* the document.¹⁸⁰ The admission of subjective declarations of intention therefore does not offend the parol evidence rule. However, this fails to explain why the admission of such evidence does not contradict the rule that contractual interpretation is objective. In *Mannai Investment*, Lord Hoffmann said that subjective declarations of intention are not admissible for interpreting contracts, and also said that the special rules relating to latent ambiguities were capricious and incoherent.¹⁸¹ However, as has been cogently argued, it is an open question whether the exceptional rule that allowed subjective declarations of intention to resolve a latent ambiguity survives the English restatement on contractual interpretation following *Mannai Investment* and *Investors Compensation*.¹⁸² On the one hand, it may be said that Lord Hoffmann’s restatement did not expressly do away with the exceptional rule, but it may also be said, on the other hand, that such an exception would be undesirable for it goes against the general tenor of objectivity that has been repeatedly emphasised by modern courts.

Where does this leave us in Singapore? The answer is actually clearer than the English position because the *Evidence Act* recognises latent ambiguities and allows for extrinsic evidence to resolve them. Although the *Evidence Act* does not expressly spell out that subjective declarations of intention can be admitted, the sections dealing with latent ambiguities are wide enough to admit such evidence. Furthermore, the

¹⁸⁰ See Lewison, *supra* note 60 at 418.

¹⁸¹ *Mannai Investment*, *supra* note 167 at 777, 778. See also Lewison, *ibid.* at 420.

¹⁸² See Lewison, *ibid.* at 420.

prevailing common law approach at the time of its enactment was indeed to admit such evidence.¹⁸³

Both *Zurich Insurance* and *Sembcorp Marine* recognise that subjective declarations of intention can be admitted to resolve latent ambiguities. The only unanswered question is whether subjective declarations of intention are admissible under ss. 97, 98 and 99, or only ss. 98 and 99. This question arises because ss. 97, 98 and 99 have traditionally been assumed to deal with latent ambiguities. However, *Zurich Insurance* noted that s. 97 did not strictly concern a latent ambiguity because the context there does not reveal possible alternative meanings but rather, renders the original language meaningless.¹⁸⁴ This is a significant point because the cases that allowed subjective declarations of intention to be admitted have all concerned situations where there are two equally possible meanings consistent with the contractual language.¹⁸⁵ Indeed, Wigmore summarised the law as involving only cases of “equivocations”:¹⁸⁶

The foregoing exception [that subjective declarations of intention are inadmissible] has itself an exception, namely, that declarations of intention, though ordinarily excluded from consideration, are receivable to assist *in interpreting an equivocation*—that is a term which upon application to external objects, is found to fit two or more of them equally.

Sections 98 and 99 are usually taken to represent the statutory enactment of “equivocations”, not s. 97. In cases involving “equivocations”, subjective declarations of intention are admitted because there are two equally possible meanings and the court has to make a choice between them. The subjective intention therefore becomes, in effect, a decisive solution of last resort. However, such evidence is not as decisive in a situation where the context has simply rendered the contractual language meaningless, as in the case of s. 97. In that case, other types of extrinsic evidence may well be available to resolve the latent ambiguity. And because subjective declarations of intention are only admitted exceptionally, they should not be admitted under s. 97 since there are other possible types of extrinsic evidence that can be used there. If this is correct, then it is arguable that subjective declarations of intention are admissible under the *Evidence Act* under ss. 98 and 99, and not s. 97.

3. Practical Question: Prior Negotiations and Subsequent Conduct

Finally, in relation to the admissibility of prior negotiations and subsequent conduct, it is submitted that the Singapore courts should restate, once and for all, the permissibility of the admission of prior negotiations and subsequent conduct (even though it should be noted that even under English law, such evidence may be admitted if, generally speaking, they form part of the admissible background). This will avoid the occasional ‘mental gymnastics’ to get out of the prior negotiations exclusion, as

¹⁸³ *Lord Waterpark v. Fennell* (1859) 7 H.L. Cas. 650, 11 E.R. 259 (H.L.). See also the cases discussed in Lewison, *ibid.* at 418, 419, including the more modern cases of *Re Jeffery* [1914] 1 Ch. 375 (Ch.) and *Alampi v. Swartz* [1964] 43 D.L.R. (2d) 11 (Ont. C.A.).

¹⁸⁴ *Zurich Insurance*, *supra* note 1 at para. 79 [references omitted].

¹⁸⁵ See *e.g.*, *Altham's Case* (1610) 8 Co. Rep. 150b, 77 E.R. 701 (K.B.); *Lord Cheyney's Case* (1590) 5 Co. Rep. 68a, 77 E.R. 158 (K.B.).

¹⁸⁶ See the reproduced passage in Lewison, *supra* note 60 at 419.

evident in *Sheng Siong Supermarket*. The High Court in that case had to consider whether an inchoate contract was admissible because it appears to constitute evidence of prior negotiations. The court got around this problem by characterising the said contract as a *product* of prior negotiations and hence was a post-negotiation document. However, this reasoning, with respect, offends the rule in English law that earlier drafts of the final contract are generally inadmissible, which rule is in fact a specific example of the rule against prior negotiations. The exclusionary rule is not in fact narrowly against prior negotiations only but rather, against all pre-*contractual* evidence. The rationale is that these documents, concluded before the final contract, are not helpful towards the interpretation of contracts. Thus, the High Court's reasoning in *Sheng Siong Supermarket*, while overcoming the exclusionary rule on a technical basis, does not answer the fundamental objection against the admission of such evidence.

The exclusion of prior negotiations and subsequent conduct may require reconsideration as being a matter not contemplated by the *Evidence Act*.¹⁸⁷ In this regard, it is important that the *Evidence Act* has provided for the instances where extrinsic evidence (which can include prior negotiations) may (or may not) be admitted for the interpretation of a contract. A common law development that justifies exclusion of prior negotiations on a different basis would be inconsistent. If so, the recognition of the exclusionary rule, based as it is on a different rationale for excluding prior negotiations, would be inconsistent with the *Evidence Act* and must be rejected pursuant to s. 2(2) of the same Act.

C. The Interpretative Approach: The Basis of the Contextual Approach

A theoretical question concerns the basis for the contextual approach in the Singapore context. *Zurich Insurance* regarded that to be embodied within the terms of proviso (f) of s. 94.¹⁸⁸ *Sembcorp Marine* subtly departed from this view and held instead that the predominant purpose of proviso (f) to s. 94 is to “address the question of *when* (and what type of) evidence may be admissible, as opposed to *how* a document is to be construed”.¹⁸⁹ The basis for the distinction was based on Stephen's placement of proviso (f) to s. 94 under Part II of the *Evidence Act*, which he said was concerned with “the *mode* of proving relevant facts”.¹⁹⁰ In *Sembcorp Marine*, the effect of proviso (f) to s. 94 was held to not to embody the contextual approach; instead, assuming that the contextual approach applied in the first place, the proviso's effect is to affect the

¹⁸⁷ See Goh Yihan, “The Case for Departing from the Exclusionary Rule against Prior Negotiations in the Interpretation of Contracts in Singapore” (2013) 25 Sing. Ac. L.J. 182.

¹⁸⁸ *Zurich Insurance*, *supra* note 1 at para. 121.

¹⁸⁹ *Sembcorp Marine*, *supra* note 2 at para. 42 [emphasis in original]. Later, the court noted that “[t]here is no doubt that our decision in *Zurich Insurance* on the compatibility of the contextual approach with the provisions of the [Evidence Act] is correct” (at para. 46). However, this does not endorse the holding in *Zurich Insurance* that the contextual approach is embodied within the proviso. It is quite a different matter to say that something embodies a concept against it merely being compatible with such a concept. In the latter instance, compatibility does not imply embodiment, only non-conflict.

¹⁹⁰ *Sembcorp Marine*, *supra* note 2 at para. 43, citing James Fitzjames Stephen, *An Introduction to the Indian Evidence Act* (London: Thacker, Spink & Co, 1904).

extent to which the contextual approach applied by limiting the extrinsic evidence admissible to interpret contracts.¹⁹¹

While the *Evidence Act* does not outwardly prescribe any substantive contractual interpretative approach,¹⁹² modern courts have read the modern contextual approach into it, particularly via proviso (f) to s. 94. That this is done is not by itself incorrect, but this ought not to be mistaken as being driven by the modern contextual approach. The interpretation of the *Evidence Act*, a piece of legislation written more than a century before *Investors Compensation*, should not be affected by the later case and developments thereafter.

A more appropriate starting point is thus to consider the prevailing interpretative approach at the time when the *Indian Evidence Act* (the predecessor of our *Evidence Act*) was enacted. The *Indian Evidence Act* was, after all, intended to codify the English evidence law of the time.¹⁹³ The courts have always maintained the legitimacy and importance of interpreting contracts in their proper contexts and have been doing so since the 19th century or even earlier. At that time, contractual interpretation was largely regarded as “liberal”.¹⁹⁴ It was liberal in the sense that the search was for the parties’ true intentions, ascertained by consideration of the surrounding facts and circumstances,¹⁹⁵ as opposed to adhering to the strict literal sense of contractual terms.¹⁹⁶ Thus, the *Indian Evidence Act* was probably not intended to supersede the contextual interpretative approach. Just as the contextual approach continued to be advocated by the courts of that time despite the restrictive rules governing the admissible background information, so too can the contextual approach exist simultaneously with the *Indian Evidence Act*. While it is true that the common law parol evidence rule and the *Indian Evidence Act* both restricted the background information available to the interpreting party, these restrictions did not render the contextual approach inapplicable since *some* context was still made available. What resulted was a weaker version of the contextual approach, but that did not militate against the adoption of some form of contextual approach. Therefore, the acceptance of such an approach is not *prima facie* wrong.

The quite separate (and important) question now is the *extent* to which the contextual approach applies as indirectly affected by the *Evidence Act*. We start with the closest indication of the legislative intention behind the *Indian Evidence Act*, viz. Stephen’s *Digest*. In contrast with the *Indian Evidence Act*, Stephen’s *Digest* does contain substantive rules. For example, notwithstanding its stated purpose as concerning “what evidence may be given for the interpretation of documents”, art. 91 contains certain rules that govern how to interpret a document. Specifically, art. 91(1) provides, “(1) Putting a construction upon a document means ascertaining the meaning of the signs or words made upon it, and their relation to facts”. Article 91(1) is significant as it subtly encapsulates an interpretative approach that is quite unlike

¹⁹¹ *Sembcorp Marine*, *supra* note 2 at para. 44.

¹⁹² Neither does the *Indian Contract Act, 1872* (Act No. 9 of 1872) or its equivalents prescribe an interpretative approach.

¹⁹³ See Stephen, *Digest*, *supra* note 35 at 2.

¹⁹⁴ Samuel Comyn, *A Treatise of the Law Relative to Contracts and Agreements Not Under Seal* (London: A. Strahan, 1807) vol. 2 at 532.

¹⁹⁵ *Shore v. Wilson*, *supra* note 71 at 565 and 532 respectively for the different reporters.

¹⁹⁶ H.T. Colebrooke, *Treatise on Obligations and Contracts* (London: Black, Kingsbury, Parbury, and Allen, Leadenhall-Street, 1818) at 65.

the modern contextual approach. Stephen makes repeated reference to the “meaning of the signs or words” of a document. The *Evidence Act*, in contrast, employs almost exclusively the different phrasing “the language used in a document” in the equivalent (or similar) provisions. “Language used” may not preclude the modern contextual approach, as it is an express departure from the meaning of the signs or words. Rather than be dictated by the inherent meanings of signs and words, “language” at least suggests a departure from this stance, or even an adoption of a more contextual approach.

However, it does not follow that because the *Evidence Act* does not preclude the contextual approach, such an approach can be fully accepted. At the most, we have seen thus far that the *Evidence Act* allows recourse to the context via proviso (f) of s. 94. To that extent, it *indirectly* supports a contextual approach. However, the application of a contextual approach merely connotes that the context should be looked at in the interpretation process; it does not tell us the extent to which the context may be looked at. The stronger version posits that words are inherently open-textured and can take on a variety of different meanings depending on the context in which the contract concerned was made. To cater for this open-textured nature of words, the extrinsic evidence admissible is purposely made very broad, subject to the exceptions against the admissibility of prior negotiations and subsequent conduct. This modern approach does not find full expression in the *Evidence Act*, even if the contextual approach applies to some extent in Singapore.

IV. THE FUTURE AHEAD

In assessing the way forward, one question that might be asked is whether there is any problem with retaining the approach taken in the *Evidence Act*. One apparent advantage of the modern contextual approach (that is, the contextual approach unaffected by the *Evidence Act*) is that it dismisses the distinction between patent and latent ambiguities, which has been largely discredited. This affords the courts more flexibility in admitting extrinsic evidence to interpret the contract,¹⁹⁷ rather than allowing extrinsic evidence freely only when establishing whether there is an ambiguity in the first place. However, according to one commentator,¹⁹⁸ the modern contextual approach has seen a retreat of late following the decision of the English Supreme Court in *Rainy Sky SA v. Kookmin Bank*.¹⁹⁹ Lord Clarke in that case had stated that “[w]here the parties have used unambiguous language, the court must apply it”.²⁰⁰ This seems to impose a criterion of ambiguity before the plain meaning of the contractual words can be departed from. Taken a step further, this may also restrict the range of admissible evidence to interpret the contract unless there is ambiguity. If this reading of *Rainy Sky* is correct, there is not much difference between the prevailing modern contextual approach and the *Evidence Act*.

Compared thus, it is suggested that the *Evidence Act* is actually closer to the modern contextual approach than one might think. The main difference is the criterion

¹⁹⁷ Cf. Alan Berg, “Thrashing Through the Undergrowth” (2006) 122 Law Q. Rev. 354.

¹⁹⁸ Paul Davies, “Interpreting Commercial Contracts: A Case of Ambiguity?” [2012] L.M.C.L.Q. 26 at 27.

¹⁹⁹ [2011] 1 W.L.R. 2900 (S.C.) [*Rainy Sky*].

²⁰⁰ *Ibid.* at para. 23.

of ambiguity, which restricts the extrinsic evidence admissible for the specific purpose of interpretation, but even that difference may be narrowing. Nonetheless, if reform is needed, it is submitted that any reform cannot be premised on a ‘liberal’ interpretation of the *Evidence Act*. There is no real distinction between a ‘liberal’ and an ‘illiberal’ interpretation; the only question, according to the theory of statutory interpretation prevalent in the Commonwealth, is whether an interpretation furthers the intention of Parliament.²⁰¹ A ‘liberal’ interpretation of the *Evidence Act* runs the risk of judicially changing what Parliament never intended to do (and still has not done). By its very nature, and taking into account its historical origins, the *Evidence Act* is incapable of sustaining the entire modern contextual approach. Any legislative reform should amend the *Evidence Act* to delete the specific provisions concerning latent and patent ambiguity. And, further, what is really required here is that proviso (f) to s. 94 be elevated to an independent provision of its own, thereby providing clear legislative intent that the contextual approach is to apply, and that ambiguity does not dictate whether the plain meaning of words can be departed from.

V. CONCLUSION

This article has considered *Zurich Insurance*, *Sembcorp Marine*, and the cases in between, in an attempt to summarise the present law, identify outstanding issues, and suggest possible solutions. As for the present law, it can be restated in the following terms:

1. The *Zurich Insurance* framework governs contractual interpretation in Singapore. It identifies two distinct questions, *viz.* first, what extrinsic evidence is admissible to interpret contracts and, second, what is the interpretative approach to interpreting contracts.
2. The admissible evidence is governed primarily by the *Evidence Act* and, secondarily, by the common law, provided that the latter is not inconsistent with the *Evidence Act*. Therefore:
 - Extrinsic evidence, pursuant to ss. 93 and 94 of the *Evidence Act*, is generally inadmissible to contradict, vary, add to or subtract from the terms of the contract.
 - Extrinsic evidence is generally admissible to interpret contracts specifically for the purpose of ascertaining whether there is an ambiguity. However, extrinsic evidence that is being relied on for this purpose:
 - Must be pleaded properly and fulfil the four requirements of civil procedure laid down in *Sembcorp Marine* (and now embodied in the *Supreme Court Practice Directions* and *Subordinate Courts Practice Directions*);
 - Must satisfy all of the *Zurich Insurance* tripartite requirements, which are all substantiated by provisions of the *Evidence Act*; and
 - May be affected by the attributes of the document—certain types of documents may mandate a lesser consideration of the extrinsic

²⁰¹ See generally Goh Yihan, “Statutory Interpretation in Singapore: 15 Years on from Legislative Reform” (2009) 21 *Sing. Ac. L.J.* 97.

evidence tending to show context (although it was suggested above this is better viewed as a question of weight).

Whether prior negotiations and subsequent conduct can be admitted for this purpose remains an open question.

- Where there is no ambiguity revealed by extrinsic evidence admissible pursuant to the *Zurich Insurance* tripartite requirements, such extrinsic evidence may be used to interpret the contract, but this is subject to the interpretative approach laid down in *Zurich Insurance* that the plain meaning governs in such cases. Section 96 of the *Evidence Act* may also apply to exclude certain types of extrinsic evidence in this regard.
 - Where there is patent ambiguity revealed by extrinsic evidence admissible pursuant to the *Zurich Insurance* tripartite requirements, then, pursuant to s. 95 of the *Evidence Act*, extrinsic evidence may not be used to resolve the patent ambiguity. While *Sembcorp Marine* suggests that this restriction is exclusively on parties' subjective declarations of intention, s. 95 is not phrased so narrowly.
 - Where there is latent ambiguity revealed by extrinsic evidence admissible pursuant to the *Zurich Insurance* tripartite requirements, then extrinsic evidence is not excluded by ss. 97, 98 and 99 of the *Evidence Act*. Subjective declarations of intention are specifically not excluded to resolve a latent ambiguity, although it is an open question whether such evidence may be considered under s. 97.
3. The interpretative approach to be used is both objective and contextual.
- The objective principle is concerned with what a reasonable person, with the relevant background knowledge in mind, would have understood the contractual language to mean.
 - The contextual approach requires the consideration of the relevant background facts as revealed by the extrinsic evidence, although the *Evidence Act* controls the admissible extrinsic evidence. Because of this, the contextual approach may not apply in as strong a fashion as under English law.
 - Pursuant to this approach, the court will *first* take into account the plain language of the contract together with relevant extrinsic material that is evidence of its context. *Then, if in the light of this context*, the plain language of the contract becomes ambiguous (*i.e.* it takes on another plausible meaning) or absurd, the court will be entitled to put on the contractual term in question an interpretation which is different from that demanded by its plain language.
 - Existing canons of interpretation apply, but these are more of guides than absolute rules.

As for the outstanding issues, the primary ones relate to the scope of the admissibility of subjective declarations of intention, as well as prior negotiations and subsequent conduct. On the whole, however, the law relating to contractual interpretation in Singapore has benefited from the extensive and illuminating analyses taken in both *Zurich Insurance* and *Sembcorp Marine*.