

MARLEY v. RAWLINGS: REFLECTIONS FROM SINGAPORE

*Marley v. Rawlings*¹

GOH YIHAN* and YIP MAN**

I. INTRODUCTION

The recent U.K. Supreme Court decision in *Marley v. Rawlings*, concerning the rectification of a will pursuant to English legislation, raises two points of reflection for Singapore law. These points arise not from the *ratio* of the case, which was decided on a narrow legislative basis, but from the well-considered *obiter dicta* contained in Lord Neuberger’s judgment.

First, Lord Neuberger propounded that the interpretation of all legal documents, such as contracts or wills, are governed by the same approach. While Lord Neuberger may not have had statutory interpretation in mind, it is likely that any grand theory of interpretation would have to include statutes as well. Indeed, in Singapore, an allusion to a general unified approach was tantalisingly voiced by V.K. Rajah J.A. in *Zurich Insurance (Singapore) Pte Ltd v. B-Gold Interior Design & Construction Pte Ltd*² when he said that “the adoption of the contextual approach to contractual interpretation is conceptually broadly similar to the purposive approach which our courts now adopt *vis-à-vis* statutory interpretation”.³ The question we consider below is whether a unified approach is practicable, given the different natures of legal documents. Second, what is the interplay between interpretation, implication and rectification? In *Sembcorp Marine Ltd v. PPL Holdings Pte Ltd*,⁴ Sundaresh Menon C.J. drew clear distinctions between the three doctrines, ruling that the process of ‘construction’ embodied all of them; each, however, is a distinct doctrine by itself. Similarly, Lord Neuberger in *Marley v. Rawlings* had considered too that there ought to be a bright line separating interpretation and rectification. The merits of bright lines notwithstanding, this note questions whether the doctrines could be easily distinguished, especially in application. Recent English developments suggest that

* Assistant Professor, Faculty of Law, National University of Singapore.

** Assistant Professor, School of Law, Singapore Management University.

¹ [2014] 2 W.L.R. 213 (S.C.).

² [2008] 3 S.L.R.(R.) 1029 (C.A.) [*Zurich Insurance*].

³ *Ibid.* at para. 133.

⁴ [2013] 4 S.L.R. 193 at para. 31 (C.A.) [*Sembcorp Marine*].

the doctrines are shading into each other at the edges, providing important reflections for Singapore law which has not followed English law.

II. FACTS AND HOLDINGS IN *MARLEY v. RAWLINGS*

Before we consider these issues, let us first discuss the facts of *Marley v. Rawlings*. The case involved an unusual set of facts. Mr. and Mrs. Rawlings each executed a will giving each other their estate upon death. However, if the other spouse had already died, or died within a month of the other's death, the estate was to be left to Mr. Marley, whom the Rawlings treated like a son. The two wills were identical except for differences to account for the identity of the testator. By an oversight, the solicitor gave Mr. Rawlings his wife's will and vice versa, with the result that they signed each other's will. The mistake only came to light when Mr. Rawlings, the surviving parent, eventually passed away.

At the time of his death, Mr. Rawlings was a joint tenant of a house with Mr. Marley and, in addition to that, had some £70,000. By the operation of the doctrine of survivorship, the tenancy passed to Mr. Marley. The Rawlings' two sons challenged the validity of Mr. Rawling's will. If the will were invalid, Mr. Rawlings would have died intestate, and his two sons would inherit the £70,000. Mr. Marley brought proceedings to rectify the will under s. 20 of the *Administration of Justice Act 1982*,⁵ which was expectedly opposed by the Rawlings' natural children. Both sides, however, agreed that it was the parents' intention for Mr. Marley alone to inherit the assets on the death of the surviving parent. At first instance, the sons succeeded: Proudman J. held that Mr. Rawlings' will did not satisfy s. 9 of the *Wills Act 1837* and that, even if it did, the will could not be rectified under s. 20 of the 1982 Act. The English Court of Appeal upheld Proudman J.'s judgment. Mr. Marley thus appealed to the U.K. Supreme Court.

The U.K. Supreme Court reversed the decisions below. There were two judgments issued. Lord Hodge's judgment was confined to observations on how Scots law might have addressed the issue and although those observations are interesting, they are not relevant to present purposes. Lord Neuberger issued the leading judgment, and ordered rectification of Mr. Rawling's will under s. 20 of the 1982 Act. Although the decision was based on statute, Lord Neuberger was of the view that even in common law, the court has the power to rectify the will but that power can be no wider than the statutory power under s. 20,⁶ which allows for rectification of a will if the court is satisfied that the will fails to carry out the testator's intentions in consequence of either "a clerical error" or "a failure to understand his instructions". In coming to this conclusion, Lord Neuberger affirmed that wholesale correction, as in the case of substituting Mr. Rawling's will with Mrs. Rawling's, could be rectification. However, the greater the extent of correction sought, the harder it will be for the claimant to prove his case. Further, Lord Neuberger said that the word "will" under s. 20 does not refer to only valid wills—it would encompass Mr. Rawlings' "will" which was invalid for failing certain formality requirements. A distinction was drawn between an invalid will and a will that is nonsensical. In

⁵ *Administration of Justice Act 1982* (U.K.), 1982, c. 53 [1982 Act].

⁶ *Marley v. Rawlings*, *supra* note 1 at paras. 28 and 30.

the present case, Mr. Rawlings' "will" was intended by him to be a will; the problem was with its nonsensical meaning insofar as it purported to deal with Mrs. Rawlings' estate. That it was nonsensical is an issue of interpretation (and application), rather than validity. Finally, Lord Neuberger was of the view that the phrase "clerical error" under s. 20 imported no technical, specific meaning, and should encompass a mistake arising out of routine office work, as was the error in the case. While the result was unexceptional, the case is, however, noteworthy for Lord Neuberger's *obiter* observations on the general law, to which we now turn.

III. THE INTERPRETATION OF DOCUMENTS: A UNIVERSAL APPROACH?

A. A Unified Approach for Private Documents

Lord Neuberger thought that "the approach should be the same" whether one is interpreting a will or contract.⁷ This is because, whatever the nature of the document, the courts' aim is to "identify the intention of the party or parties to the document by interpreting the words used in their documentary, factual and commercial context".⁸ The fact that a contract is agreed between multiple parties, whereas a will is a unilateral document, was not sufficiently compelling, in Lord Neuberger's view, to justify interpreting them differently. To this end, he pointed out that a patent, which is a unilateral document, is interpreted the same way as a contract.⁹ The commonality of these documents is that they are intended by its drafter to convey information, and that, subject to any statutory requirement to the contrary, mandates a universal approach that looks at the drafter's intention.

In truth, Lord Neuberger's suggestion is not quite "revolutionary",¹⁰ and one that the Singapore courts will probably not be unreceptive towards. Indeed, in *Sembcorp Marine*, Menon C.J. had noted that the common law parol evidence rule in the late 19th century precluded the admissibility of evidence of the subjective intention of the drafter save where there was a latent ambiguity.¹¹ This rule applied equally to both contracts and wills. This rule found expression in the *Indian Evidence Act*¹² from which the Singapore *Evidence Act*¹³ was derived. Although the admissibility of evidence (governed by the *Evidence Act*) is different from rules of contractual construction, it is clear, as the courts have pointed out, that the rules of evidence may *affect* the application of the specific rules of contractual interpretation. Clearly, the universal approach for contractual and non-contractual documents, based on the commonality identified by Lord Neuberger, would certainly be affected by what kind of evidence could be introduced to interpret the document in question. As such, given the common underlying rule concerning the admissibility of evidence to interpret both contracts and wills in Singapore, it is conceivable that a unified approach extends to their interpretation as well.

⁷ *Ibid.* at para. 20.

⁸ *Ibid.*

⁹ *Ibid.* at para. 22.

¹⁰ *Ibid.* at para. 23.

¹¹ *Sembcorp Marine*, *supra* note 4 at para. 59.

¹² *Indian Evidence Act, 1872* (Act No. 1 of 1872).

¹³ Cap. 97, 1997 Rev. Ed. Sing.

B. A Unified Approach that Extends to Statutory Interpretation?

Lord Neuberger's comment, even though it does not expressly consider statutory interpretation, echoes Rajah J.A.'s suggestion in *Zurich Insurance* that "the adoption of the contextual approach to contractual interpretation is conceptually broadly similar to the purposive approach which our courts now adopt *vis-à-vis* statutory interpretation",¹⁴ save that Rajah J.A.'s proposal is more ambitious and extends beyond private documents to include even statutes.

The more ambitious goal of unifying the approaches for statutory interpretation and contractual interpretation (and by extension, the interpretation of private, non-contractual documents) raises more difficult issues. To contain the discussion, we will examine these difficulties by comparing contracts and statutes, but the analysis applies broadly, if not equally, to other kinds of non-contractual documents. Justice Kirby, writing extrajudicially, identifies three fundamental differences between contracts and statutes which, he argues, accounts for the differences in the interpretation rules of the documents.¹⁵ First, a contract is "created" differently from a statute. The former is an agreement between relatively small number of people; a statute is, however, an "agreement" only in the broadest political sense, and one that is entered into between many more parties. It follows that there will be few available extrinsic materials that inform the meaning of contracts. By contrast, there are many public documents, such as explanatory memoranda and the ministerial second reading speech, which accompany the promulgation of a statute and elucidate the statutory text.¹⁶

Second, a statute has a wider scope and longer anticipated duration than a contract. Statutory provisions tend to therefore take on a broader operation and a wider meaning. This in turn makes it inappropriate to restrict the meaning of the statutory text to the strict "intentions" of the original drafters,¹⁷ a technique that might be more suited for a contract. In particular, contemporary ideas of justice and fairness might influence the interpretation of statutory provisions, and provide cause for departing from the original intention of the drafters.¹⁸ For example, in *Yemshaw v. Hounslow London Borough Council*,¹⁹ Lady Hale said that the definition of the term "violence" in the U.K. *Housing Act 1996* has "moved on" with the times, to be interpreted differently as intended during the drafting of the legislation. But even so, Lady Hale's progressive statutory interpretation had attracted trenchant criticisms,²⁰ and leaves one to wonder if the supposedly more "liberal" statutory interpretation could be stated so widely, or, if it is so markedly different from contractual interpretation.

¹⁴ *Zurich Insurance*, *supra* note 2 at para. 133.

¹⁵ The Hon Justice Michael Kirby, "Towards a Grand Theory of Interpretation: The Case of Statutes and Contracts" (2003) 24 Stat. L. Rev. 95.

¹⁶ *Ibid.* at 108.

¹⁷ *Ibid.* at 106. The notion that statutory interpretation is dependent on the "original intention" of its original drafters finds one of its strongest modern day supporters in Justice Antonin Scalia of the United States Supreme Court: see Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* (Princeton: Princeton University Press, 1997).

¹⁸ Kirby, *supra* note 15 at 107.

¹⁹ [2011] 1 W.L.R. 433 at paras. 24–29.

²⁰ See Chris Bevan, "Interpreting Statutory Purpose—Lessons from *Yemshaw v. Hounslow London Borough Council*" (2013) 76 Mod. L. Rev. 735.

Finally, it is said that different interpretative rules for contracts and statutes are in part necessitated by the different remedies that are available for correcting the linguistic deficiencies of the two kinds of documents. Justice Kirby observed that the courts could provide relief from contractual language via rectification or equitable remedies but in the case of a statute, the remedies are more limited.²¹ Unless the statutory language can be “construed” to overcome the deficiency naturally, the only “remedy” is legislative amendment or more exceptionally, repeal, owing to the “democratic legitimacy” of the legislative source.²²

Whilst Justice Kirby’s observations are all very well made, this does not mean that a unified approach is impossible. Perhaps, unification could be approached on two levels: a general, overarching level and a more detailed and specific application level. And it is the general level that we are concerned with here, and on which we think there are sufficient commonalities to justify a unified approach. Indeed, a highly significant work by Aharon Barak, formerly president of the Supreme Court of Israel, presents such a possibility. Barak persuasively argues for a universal theory of interpretation—the purposive approach—to all legal documents.²³ The key to understanding Barak’s theory is to imagine a range of “intents”—from the “subjective intent” (which deduces the meaning of the text from the intention of the drafter) to the “objective intent” (which deduces the meaning of the text from fundamental principles of the legal system). A different type of legal document would therefore have a different starting point on this range of “intents”, with the appropriate interpretation to be taken accordingly.²⁴ Thus, the interpretation of statutes (especially constitutions) may have a different conception of the “purposive approach” and may disregard the actual intent of its drafters in favour of some broader notion of policy. On the other hand, the interpretation of contracts or wills will start with another conception of the “purposive approach” and place the intention of the drafters (as objectively determined) at the forefront of its consideration.²⁵

Whether the drafter is a testator, contracting party or Parliament, he or she entered into the relevant document with some intention. If it is accepted that the courts’ duty is to uphold that intention, then it is obvious why the interpretative approach, on a general level, is largely the same. The cases are united in the view that interpretation is an effort to understand the meaning of the text and give effect to the intention within. In respect of contractual interpretation, this point is underscored by the Court of Appeal’s judgment in *Sembcorp Marine*: contractual interpretation refers to the “process of ascertaining the meaning of expressions in a contract”.²⁶ The same is true for statutory interpretation—the dominant interpretative approach used by the Singapore courts is the purposive approach as mandated by s. 9A(1) of the

²¹ Kirby, *supra* note 15 at 108, 109.

²² *Ibid.* at 109.

²³ Aharon Barak, *Purposive Interpretation in Law* (Princeton: Princeton University Press, 2005). See also Gabriela Shalev, “Interpretation in Law: Chief Justice Barak’s Theory” (2002) 36 *Isr. L.R.* 123; and Thomas A. Balmer, “What’s a Judge To Do?” (2006) 18 *Yale J.L. & Human.* 139. Also see more generally a discussion on the difficulties with the concept of legislative intent: Neil Duxbury, *Elements of Legislation* (Cambridge: Cambridge University Press, 2012) at c. 4.

²⁴ Shalev, *ibid.* at 123.

²⁵ *Ibid.*

²⁶ *Sembcorp Marine*, *supra* note 4 at para. 27. See also *Precise Development Pte Ltd v. Holcim (Singapore) Pte Ltd* [2010] 1 S.L.R. 1083 at para. 32 (C.A.).

Interpretation Act.²⁷ The value of such a general approach must not be discounted. It first informs the purpose to the whole exercise of interpretation, and this purpose then guides the more specific application of rules. Indeed, various branches of law are founded on such broad notions, with more specific guidance. For example, the law of contract may be said to be based, very generally, on the effecting of promises, but that general guidance is that specifically applied in each area of contract law.

Thus, this general purposive interpretation approach is then applied to each type of document with specific guidelines, taking into account the differences in the nature and purpose of the document in question. For example, even where contracts are concerned, the starting point is of course to discern the parties' intentions. But from this starting point, the detailed rules might differ, for example, between a negotiated contract and a standard form contract. This is what we mean when we say that specific rules in relation to types of documents will differ, even if the general starting point should always be to discern the parties' intention. Thus, to return to our example concerning a negotiated contract and a standard form contract, the interpretation of the latter should generally be guided by restrictive examination of the context and underlined by a presumption that all the terms are contained within it. This is because the purpose of a standard form contract is to ensure expediency in payment, and allow the parties to determine their rights under the contract quickly by looking at just the contract itself. These considerations were indeed applied by the Court of Appeal in *Master Marine AS v. Labroy Offshore Ltd*,²⁸ a case concerning a performance bond, and upon which, the Court of Appeal cautioned judicial restraint in the examination of the external context and extrinsic evidence.²⁹ Where statutes are concerned, the constitutional framework and the separation of powers restrict interpreters from stretching the meaning of statutory provisions. The purposive interpretation of a statute is both mandated as well as circumscribed by legislation such as s. 9A of the *Interpretation Act*. Thus, for example, in *AAG v. Estate of AAH, deceased*,³⁰ the Court of Appeal disregarded social developments since the enactment of the *Inheritance (Family Provision) Act*³¹ and decided that the original legislative intent present at the time of enactment was determinative of the correct interpretation of the provisions concerned.

A unified approach on a general level merits full consideration on another occasion and within a more expansive project. The point that is being made here is that one ought not to hastily dismiss the possibility of a unified approach. A unified approach has several merits, the chief of which is directing the courts' focus on the overriding goal to give effect to the drafter's intention, and to appreciate that whatever the nature of the document, language is an expression, but not necessarily the most accurate gauge, of the drafter's intent. This helps the courts to develop rules that will give effect to the overriding objective, and only develop different rules that are necessary

²⁷ Cap. 1, 2002 Rev. Ed. Sing. Indeed, in the High Court decision of *Public Prosecutor v. Low Kok Heng* [2007] 4 S.L.R.(R.) 183 at para. 39, Rajah J.A. stated that any discussion on the construction of statutes in Singapore takes place against the backdrop of that section.

²⁸ [2012] 3 S.L.R. 125 (C.A.).

²⁹ *Ibid.* at para. 35; see also *York International Pte Ltd v. Voltas Limited* [2013] SGHC 124 at para. 19.

³⁰ [2010] 1 S.L.R. 769 (C.A.).

³¹ Cap. 138, 1985 Rev. Ed. Sing.

to take into account the differences. The general approach is then supplemented by specific guidelines particular to each type of legal document.

IV. THE RELATIONSHIP BETWEEN INTERPRETATION, IMPLICATION AND RECTIFICATION

We next consider the relationship between interpretation, implication and rectification. For the sake of clarity, this part is concerned with the application of these doctrines to contractual documents. While we have argued for a unified approach towards the interpretation of legal documents, a more focused consideration of the relationship of interpretation (whether general or specific), implication and rectification as applied to contractual documents could aptly illustrate the point. In *Marley v. Rawlings*, Lord Neuberger did not have to articulate the precise distinctions between interpretation and rectification, as the appeal was based primarily on rectification.³² He, however, acknowledged that the issue is a difficult one and is not merely one of “academic ... categorisation”.³³ He went on to point out that if it were an issue of interpretation, the relevant document has always had the meaning and effect as determined by the court. Rectification, on the other hand, would mean that the document as rectified bears a different meaning from that which appears on the face of the original document. The court has the power to refuse rectification or order it on terms. Even if the argument on interpretation had been pursued vigorously in *Marley v. Rawlings*,³⁴ one would have thought that interpretation, no matter how benevolent and liberal, would not have achieved the outcome, at least not naturally, since the mistake was not one concerning the meaning of words. Perhaps, for this reason, interpretation was not relied upon as the primary ground by *Marley*.³⁵

Indeed, one normally only turns to rectification when the desired result cannot be achieved by interpretation.³⁶ This question is especially significant for Singapore law because the Court of Appeal had said in *Sembcorp Marine* that “construction” encompassed interpretation, implication and rectification—the underlying assumption being that bright lines could be drawn between the three doctrines. This assumption is reinforced by the court’s pronouncement in *Sembcorp Marine* that where a gap in the contract arose because parties had mistakenly recorded their intentions in the contract, the remedy should be rectification, not implication. Yet, recent English cases show that the distinctions between the three doctrines in the contractual context are weakening, and therefore, indirectly pointing away from such bright line divisions. In view of space constraints, the discussion below will only address the application of the doctrines in the contractual context where the problems of distinction are particularly pronounced, but they will provide points for ponder in respect of the non-contractual context as well.

³² *Marley v. Rawlings*, *supra* note 1 at para. 41.

³³ *Ibid.* at para. 40.

³⁴ *Ibid.* at para. 34.

³⁵ *Ibid.* at para. 41.

³⁶ See e.g., *Fowler v. Fowler* (1859) 4 De G. & J. 250, 45 E.R. 97. John McGhee, ed., *Snell’s Equity*, 32nd ed. (London: Sweet & Maxwell, 2010) at para. 16-007; David Hodge Q.C., *Rectification: The Modern Law and Practice Governing Claims for Rectification for Mistake* (London: Sweet & Maxwell, 2010) at para. 1-41.

A. Weakening Distinctions

The weakening distinctions between interpretation, implication and rectification can be seen in several English cases. In *Investors Compensation Scheme Ltd v. West Bromwich Building Society*,³⁷ Lord Hoffmann said that “if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had”. This has been thought to blur the line between interpretation and rectification, and some might go so far as to suggest that only a fine distinction is left.³⁸ The weakening of the distinctions between the doctrines is further underscored by the English High Court’s judgment in *Procter & Gamble Co. v. Svenska Cellulosa AB*.³⁹ Essentially, the failure of one argument premised on the interpretation of an express term inevitably, via a domino effect premised on weakening distinctions between the doctrines, led to the failure of other arguments based on the separate grounds of implication and rectification. First, Hildyard J. distinguished between the processes of “inference” and “implication”. “Inference” refers to “the process of spelling out in words a provision which is to be inferred from particular express terms that they used the parties must have meant to include”. “Implication”, by contrast, refers to “the process of writing in a provision in order to give effect to the obvious objective intention of the parties as evinced by the instrument read as a whole in its admissible factual context”.⁴⁰ These finely drawn lines are unhelpful to say the least. It is difficult to appreciate the distinctions between “inference” from “interpretation” of express terms, as both involve the “spelling out” of the parties’ obligations based on express terms. To add to the confusion, and somewhat ironically, Hildyard J. affirmed Lord Hoffmann’s proposition in *Attorney-General for Belize v. Belize Telecom Ltd*⁴¹ that implication is really a matter of interpretation. This effectively renders any distinction between “inference” and “interpretation” (and “implication” for that matter) non-existent.

Rectification is a no less difficult territory.⁴² A distinction must first be drawn between “common law rectification”⁴³ and “equitable rectification”. The former takes place through the process of interpretation, whereas the latter requires a qualifying mistake; and also that the former is subject to the exclusionary rules of evidence, especially against prior negotiations, whereas the latter is not.⁴⁴ The modern contextual approach towards the interpretation of contracts (in the form of common law rectification) may mean the eventual demise of the equitable remedy of rectification. In *Investors Compensation*, Lord Hoffmann explained that courts have the power to

³⁷ [1998] 1 W.L.R. 896 (H.L.) [*Investors Compensation*].

³⁸ See, generally, Sir Richard Buxton, “‘Construction’ and Rectification after *Chartbrook*” [2010] Cambridge L.J. 253.

³⁹ [2012] EWHC 498 (Ch); aff’d [2012] EWCA Civ 1413 [*Procter & Gamble*].

⁴⁰ *Ibid.* at para. 70.

⁴¹ [2009] 1 W.L.R. 1988 (P.C.) [*Belize*].

⁴² We are here discussing rectification due to a common mistake, rather than a unilateral mistake; for literature on the latter, see David McLauchlan, “The ‘drastic’ remedy of rectification for unilateral mistake” (2008) 124 Law Q. Rev. 608.

⁴³ This a term of art used by academics even if it may also refer to construction having an effect similar to rectification in equity.

⁴⁴ See Gerard McMeel, *The Construction of Contracts: Interpretation, Implication, and Rectification*, 2nd ed. (Oxford: Oxford University Press, 2011) at 493.

correct mistakes in expression through the process of interpretation.⁴⁵ In *Procter & Gamble*, Hildyard J. distinguished between the reformation of an existing contract to correct a shared mistake in the expression of a common intention, and the giving of effect to a different understanding not intended to be expressed by the words used by the party but said to have been additionally agreed to. It was held that once the interpretation argument had failed in the case, it was evident that rectification was not sought on the basis of a common intention but rather, it was pleaded to introduce a new term into the contract. The line between interpretation and common law rectification can be markedly thin in some instances, and some may regard there to be no difference between the two at all. More relevantly, Lord Hoffmann's view in *Chartbrook Ltd v. Persimmon Homes*⁴⁶ that rectification involves reference to a reasonable objective observer, as given effect to in *Procter & Gamble*, further blurs the divide between interpretation and rectification.

B. Distinctions Maintained in Singapore

Whilst English law might struggle to distinguish between interpretation, implication and rectification, the Singapore courts are likely to fare better, in part due to the Singapore courts' rejection of an umbrella justificatory concept of "interpretation" to account for (in particular) interpretation and implication. Indeed, in the first place, there are local Court of Appeal cases that have distinguished interpretation from implication, albeit before *Belize* was decided. For example, in *Panwah Steel Pte Ltd v. Koh Brothers Building & Civil Engineering Contractor (Pte) Ltd*,⁴⁷ the appellant faced the procedural question of whether it was effectively raising the same argument rejected by the court below (*i.e.*, the implication of a term) packaged in a different way (*i.e.*, a purposive interpretation of the contract). The Court of Appeal held that the two arguments were different. In particular, it drew a distinction between the *interpretation* of express terms and the *implication* of non-express terms.⁴⁸ This is therefore a clear distinction between implication and interpretation. Secondly, the Court of Appeal has in cases such as *MFM Restaurants Pte Ltd v. Fish & Co Restaurants Pte Ltd*⁴⁹ and *Foo Jong Peng v. Phua Kiah Mai*,⁵⁰ albeit *obiter*, directly responded to Lord Hoffmann's characterisation of interpretation in *Belize*. The Court of Appeal was critical of the unnecessarily high level of abstraction which the characterisation of interpretation has engendered.⁵¹ In its view, this would result in a lack of concrete rules (and consequent normative guidance) as well as uncertainty.⁵² These determinative views of the Court of Appeal, coupled with a lineage of Singapore cases that have applied the traditional tests towards implication (as distinguished from interpretation), constitute strong reasons why the Singapore courts will fare better in maintaining the distinction between interpretation and implication.

⁴⁵ *Ibid.* at 488, 489.

⁴⁶ [2009] 3 W.L.R. 267 (H.L.).

⁴⁷ [2006] 4 S.L.R.(R.) 571 (C.A.).

⁴⁸ *Ibid.* at para. 13.

⁴⁹ [2011] 1 S.L.R. 150 (C.A.).

⁵⁰ [2012] 4 S.L.R. 1267 (C.A.).

⁵¹ *Ibid.* at para. 98.

⁵² *Ibid.*

Turning to the distinction between interpretation and rectification, it must first be said that, in Singapore, it is unlikely that “common law rectification” applies in light of certain provisions in the *Evidence Act*. In particular, the English cases must be read in their proper context. The parol evidence rule in English law—which may potentially bar the court from correcting any obvious errors—is a common law construct and not statutorily enshrined. It can thus be ignored under English law. By contrast, the presence of the parol evidence rule in the *Evidence Act*—interpreted by the Court of Appeal in *Zurich Insurance* as encompassing the “thin” version—means that the scope for “common law rectification” in Singapore may be narrower than in England. Whereas the English courts may not be bound by the “plain” meaning of the contractual words, the presupposition of such a concept in the parol evidence rule as embodied in the *Evidence Act* may mean that the Singapore courts are so bound, at least to some extent. More specifically, s. 95 of the *Evidence Act* provides that extrinsic evidence may not be used to interpret contractual clauses or show the defects of such clauses that are otherwise nonsensical. If this section were applied to the facts of *Marley v. Rawlings*, it is conceivable that the Supreme Court would not have been able to rectify the will concerned. Thus, in Singapore, it is an open question the extent to which the courts may make use of “common law rectification”. There is little doubt that they can (and have) made use of equitable rectification, and insofar as that is quite distinct to interpretation, the Singapore courts have continued to maintain the distinction between the two.

More recently, in *Sembcorp Marine*, the Court of Appeal held that a clear line needs to be drawn between implication and rectification. It held that if the parties’ intentions were mistakenly recorded in the contract, the resulting gap should be corrected by rectification rather than implication. By containing the ambit of implication, the Singapore courts have an easier task in distinguishing between the three doctrines in application, thereby giving concrete guidance to practitioners in framing their issues with greater precision. The judicial pronouncements also serve to set the tone for the future developments of the doctrines: in a way, as a caution against the coalescence of the doctrines in disparate and less thoughtful judgments. However, it may be wondered if it is always possible to shoehorn one’s case into one doctrine or another, especially because a plaintiff is likely to plead the doctrines in the alternative to maximise the chances of success. There will always be difficult cases, even where the clearest rules are laid down.

V. CONCLUSION

Marley v. Rawlings, while an English decision touching on the interpretation of wills, provides food for thought in various aspects of Singapore law due to Lord Neuberger’s broader pronouncements. In particular, this note has sought to show that the general approach that underlies the interpretation of legal documents, both private and public, is the same. This echoes the sentiments of Lord Neuberger in *Marley v. Rawlings* and Rajah J.A. in *Zurich Insurance*. But having such a broad approach without concrete guidance is not *practically useful by itself*. What must be realised is that the broad approach must be specifically fleshed out in respect of different types of legal documents. Thus, different type of documents, while united by the same starting point, that is, the discernment of the parties’ intentions, may be susceptible

to different presumptions, *etc.*, which refine how the broad approach is to be applied. We have given the example concerning negotiated and standard form contracts to illustrate this. The second point from *Marley v. Rawlings* concerns the distinction between interpretation, implication and rectification. While the English courts have begun to recognise the difficulty of not maintaining a sensible distinction between the doctrines, the Singapore courts have steadfastly hung on to those distinctions. And perhaps this is for the better. While the English courts seem concerned with overarching theoretical explanations, such as a concept of “interpretation” that covers implication and other areas of contract law, the Singapore courts have repeatedly emphasised that such broad guidelines are practically difficult to apply. Theory may have a nice ring to it, but theory cannot equip the practical lawyer with the tools to practise the law. What is needed is a balance and the Singapore courts’ insistence on drawing distinctions between interpretation, implication and rectification, while recognising an underlying broad approach, points at the correct balance.