

Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd  
[2008] SGCA 27

**Case Number** : CA 48/2007  
**Decision Date** : 27 June 2008  
**Tribunal/Court** : Court of Appeal  
**Coram** : Chan Sek Keong CJ; Andrew Phang Boon Leong JA; V K Rajah JA  
**Counsel Name(s)** : Eu Hai Meng (United Legal Alliance LLC) for the appellant; Philip Ling (Wong Tan & Molly Lim LLC) and Belinda Ang Choo Poh (Belinda Ang Tang & Partners) for the respondent  
**Parties** : Zurich Insurance (Singapore) Pte Ltd — B-Gold Interior Design & Construction Pte Ltd

*Contract – Contractual terms – Admissibility of extrinsic evidence to affect written contracts – Parol evidence rule – Interpretation of contracts – Contractor having contractual obligation to procure insurance coverage for employer – Contractor obtaining contractors' all-risks policy through agent – Judge referring to contract and genesis of policy to construe its terms – Whether reference to extrinsic evidence permissible*

*Contract – Contractual terms – Whether common law contextual approach to contractual interpretation applicable in Singapore – Whether judge interpreting or varying policy – Sections 94, 95, 96, 97, 98, 99 Evidence Act (Cap 97, 1997 Rev Ed)*

*Insurance – Brokers – Agent's insurance company unable to provide requisite coverage – Agent agreeing to gratuitously assist in procuring policy from other insurance companies – Insured making claim under policy – Exclusion clause applicable – Whether agent considered insured's insurance agent – Duties of gratuitous insurance agents – Whether agent potentially liable for breach of duty*

27 June 2008

Judgment reserved.

V K Rajah JA (delivering the judgment of the court):

## Introduction

1 This appeal concerns the scope of a contractors' all-risks ("CAR") insurance policy. Such a beguilingly simple description will often understate the intricacy and complexity of the task confronting the court each time it approaches a contractual document, which is to give effect to the parties' intentions objectively in the face of conflicting subjective interpretations advanced by ingenious counsel. It is a task further complicated by the inherent richness and nuances of the English language and, unfortunately, sometimes by deficient drafting.

2 A central question in the inquiry is the admissibility of extrinsic evidence which may affect the meaning and effect of the words and expressions used in a document – a particularly difficult branch of law which has vexed many an esteemed jurist (see, *inter alia*, John Pitt Taylor, *A Treatise on the Law of Evidence* (A Maxwell & Son, 1848) ("Taylor") at § 810 and Sripada Venkata Joga Rao, *Sir John Woodroffe & Syed Amir Ali's Law of Evidence* (LexisNexis Butterworths, 17th Ed, 2002) ("Woodroffe") at p 3225). Contracts do not exist in a vacuum. Contracts are constituted by words, and, as Oliver Wendell Holmes J famously said in *Towne v Eisner* 38 S Ct 158 (1918) at 159:

A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used.

3 The surrounding circumstances or context of a contract, therefore, are integral to our understanding of its words. However, in more recent times, where legal transactions are not merely proved but also constituted by documents, the courts have evinced considerable anxiety about being overwhelmed by extrinsic evidence of such circumstances, which may sometimes lead them astray from the path of objective inquiry. At this juncture, it is helpful to go back very briefly to the historical origins of this mistrust of context. Centuries ago, in the nascent European legal systems in place prior to the vogue of the seal, the tradition of formal oral transactions (in which documents were purely symbolic rather than constitutive) meant that judicial mistrust was attached not to the oral evidence, but, ironically, to the written document itself. Thereafter, until the 1400s, the written document was, in England, regarded merely as a mode of proof and had none of the pre-eminence that it is presently accorded (for an arresting account of the historical evolution of the legal roles of written and oral evidence, see John H Wigmore, "A Brief History of the Parol Evidence Rule" (1904) 4 Colum L Rev 338). However, in the more recent past, given the pervasiveness of the written word as the preferred form of record-keeping, all sorts of artificial legal barriers in the form of restrictive rules have been erected to impede the admissibility of extrinsic evidence that might affect a written contract. Yet, often, despite rejecting such evidence, the consciousness of the court is affected by that very evidence; this in turn may actually affect the ultimate interpretation of the document at hand. In maintaining otherwise, the law is often perceived as obfuscated, obscure and opaque.

4 Clarity in this area of the law will enable lawyers to advise their clients with far greater confidence. It would clearly be in the wider public interest if parties, especially those engaged in commerce, are able to predict securely how the courts will resolve a particular dispute. Indeed, this is a hallmark of every mature system of commercial law. Parties must know where they stand, and the law would do them a great disservice if the advance from literalism to pragmatic rationalism in the interpretation of contracts becomes, in practice, an unintended retreat to uncertainty. The present appeal provides this court with an opportunity to clarify the position under Singapore law in this fundamentally important area of legal and commercial practice.

5 But, first, a brief overview of the background of this case. The respondent, B!Gold Interior Design & Construction Pte Ltd ("B!Gold"), was engaged by Mediacorp Pte Ltd ("MediaCorp") under a contract dated 27 September 2002 ("the Contract") as a term contractor to carry out maintenance, repair as well as addition and alteration works ("the Works") at Caldecott Broadcast Centre. Pursuant (allegedly) to its obligations under the Contract, B!Gold obtained a CAR policy (No 02 ZSICAR1129958) ("the Policy") from the appellant, Zurich Insurance (Singapore) Pte Ltd ("Zurich Insurance"). On 21 March 2003, a fire caused by the negligence of one of B!Gold's subcontractors, Regius Engineering Pte Ltd ("Regius"), broke out at MediaCorp's premises ("the Fire"). MediaCorp sued both B!Gold and Regius via District Court Suit No 2126 of 2004 ("DC 2126/2004") for the damage caused by the Fire. After MediaCorp successfully obtained judgment as far as its claim against B!Gold ("the Main Action") was concerned (see *Media Corp of Singapore Pte Ltd v B!Gold Interior Design & Construction Pte Ltd* [2006] SGDC 132 ("*MediaCorp (No 1)*"); see also [24]–[25] below), B!Gold commenced third-party proceedings (also under DC 2126/2004) against Zurich Insurance based on the Policy ("the Third-Party Action"). The Third-Party Action was heard by the same district judge who had heard the Main Action ("the District Judge"). The District Judge dismissed B!Gold's claim against Zurich Insurance (see *Media Corporation of Singapore Pte Ltd v B!Gold Interior Design & Construction Pte Ltd* [2007] SGDC 7 ("*MediaCorp (No 2)*"). On appeal, the High Court judge ("the Judge") set aside the District Judge's decision (see *B!Gold Interior Design & Construction Pte Ltd v Zurich Insurance (Singapore) Pte Ltd* [2007] 4 SLR 82 ("*B!Gold Interior Design*"). Zurich Insurance in turn brought the present appeal against the Judge's decision.

6 We have decided to allow the appeal on the ground that the damage caused to MediaCorp's property by the Fire is not covered by the Policy. We now explain the reasons for our decision. To

facilitate the understanding of this judgment, we set out below the schematic layout of our reasoning:

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**The facts**

***The Contract***

7 Pursuant to the Contract, BGold was engaged by MediaCorp as a term contractor to carry out the Works at Caldecott Broadcast Centre from 1 October 2002 to 30 September 2004. Clause 1 of

the Contract stipulated that the Works were to be carried out by B|Gold as and when ordered by MediaCorp pursuant to a signed works order.

8 B|Gold's liability to MediaCorp in respect of injury or damage to property was provided for in cl 19.2 of the conditions annexed to the Contract ("the Conditions of Contract") as follows:[\[note: 1\]](#)

19 DAMAGE TO PERSONS AND PROPERTY

...

19.2 Injury or Damage to Property

The Contractor [*ie*, B|Gold] shall be liable for and shall indemnify MediaCorp in respect of any liability, loss, claim or proceedings arising under any statute or at common law in respect of any injury or damage whatsoever to or any property real or personal arising out of or in the course of or by reason of the execution of the [W]orks provided that the same is due to any negligence, omission or default of the Contractor, his servants or agents or of any sub-contractor, his servants or agents. ...

9 Clause 18 of the Conditions of Contract stipulated B|Gold's obligation to procure certain insurance policies before commencement of the Works. It stated:[\[note: 2\]](#)

18 INSURANCE GENERALLY

The Contractor shall before commencement of any work under [the] Contract ensure that *there [are] in force policies of insurance indemnifying MediaCorp, the Contractor and all sub-contractors against damage to persons and property, for Workmen's Compensation and fire*. All policies shall be retained by the S.O. [*ie*, the superintending officer, who was stated in the Conditions of Contract to be MediaCorp's "Group Chief Executive Officer"] who shall on request and without charge supply the Contractor with a copy.

[emphasis added]

10 The Conditions of Contract did not specify the particular type of insurance policy which B|Gold should obtain in order to indemnify itself, MediaCorp and all subcontractors against "damage to persons and property" as required by cl 18 thereof. Certainly, no reference was made to a CAR policy. In contrast, cll 20 and 21 of the Conditions of Contract expressly set out the requirements relating to insurance for workmen's compensation and for loss or damage by fire as follows:[\[note: 3\]](#)

20 WORKMEN'S COMPENSATION

The Contractor shall before commencement of any work under [the] Contract ensure that there is in force a policy of insurance indemnifying MediaCorp, the Contractor and all sub-contractors from all liabilities under the Workmen's Compensation Act or any statutory modification or reenactment thereof and from all costs and expenses incidental or consequential thereto.

21 FIRE INSURANCE

The Contractor shall before commencement of any work under [the] Contract ensure that there is in force a policy of insurance indemnifying MediaCorp, and the Contractor against loss or damage by fire of all works and buildings constructed or in the course of construction in pursuance of or for the purposes of [the] Contract and all materials and other things delivered on

to the site.

### ***The events leading up to the Policy***

11 The events leading up to B|Gold taking out the Policy with Zurich Insurance are crucial. Before elaborating on them, it is pertinent to note that, for the purposes of the Third-Party Action, the parties had agreed before the District Judge to admit in evidence the affidavits of evidence-in-chief ("AEICs") of their respective witnesses without cross-examination on the basis that B|Gold would not rely on any arguments based on misrepresentation or breach of duty against Zurich Insurance. The implications of this are discussed at [28] and [150] below. As a result of such agreement, the following facts are now not in dispute.

12 The person attending to the financial and insurance requirements of B|Gold at the material time was Yeo Hong Seng ("Yeo"), a director of the company. In late August 2002, Yeo contacted Willy Lee ("Lee"), a general insurance agent with American International Group ("AIG"), who had been attending to the insurance requirements of B|Gold since 1985. Lee was requested to arrange for the necessary insurance cover in accordance with the requirements under the Contract. This request was effected through Lee's wife ("Jacqueline"), who would normally liaise with Yeo on Lee's behalf. On 28 August 2002, Yeo faxed a copy of all the documents relating to the Contract to Lee, together with a cover note which read:[\[note: 4\]](#)

RE: PROJECT FOR TERM CONTRACT TO CARRY OUT MAINTENANCE, REPAIR, ADDITIONAL & ALTERATIONS WORK TO PTE PREMISES PROP[ER]TY

Refer to our telephone conversation yesterday regards *[sic]* the above mention *[sic]* project. Appreciate if you could give me the quotation based on the following information.

Term Contract for the above project : (2) years

Duration for the project : From 01 October 2002 to 30 Sept 2004

Attached a copy of Contract Condition *[sic]* for your reference.

13 After checking with Lee, Jacqueline informed Yeo that the type of insurance cover required under the Contract was not available through AIG and suggested that Yeo approach other insurance companies to inquire about the insurance cover needed. Yeo, citing her lack of familiarity with the insurance industry, requested that Lee assist her in this regard. Lee (through Jacqueline) told Yeo that he would look into the matter and get back to her.[\[note: 5\]](#)

14 Lee later contacted Manfred Long ("Long"), a former colleague from AIG who had since joined Zurich Insurance, and inquired whether Zurich Insurance "could provide the kind of insurance coverage required by [B|Gold]".[\[note: 6\]](#) Long replied in the affirmative. On 3 September 2002, Zurich Insurance received initial instructions via a fax (which was dated 30 August 2002) from Lee addressed to Long ("the 3 September 2002 Note"), which read:[\[note: 7\]](#)

Duration for the project is from 1 Oct 2002 to 30 Sept 2003. Would appreciate if you could provide us the information as soon as possible. Thank you.

Lee also faxed to Long all the documents relating to the Contract which he (Lee) had earlier received from Yeo (see [12] above).

15 Subsequently, Lee faxed a further undated note to Long ("the Undated Note"), which read:[\[note: 8\]](#)

Hi Brother:

These are the in formations [sic] that you required[.] Kindly advice [sic] for additional attention.

**Contractor:** BIGold Interior & [Construction] Pte Ltd.

**Location Risk:** Caldecott [B]roadcast Centre  
Andrew Road  
Singapore 299939

**Type of risk:** Contractor All Risks  
Public Liability – 1,000,000

**Nature of work:** Repairs and Renovations  
Occasional manual digging for poles and temporary supports.

**Duration:** 2 Years

[emphasis added]

The "Type of risk" section of this note also included the handwritten words "& Workmen [sic] Compensation" next to the words "Contractor All Risks", as well as the handwritten remarks "(All policies excess: \$3500)" next to the words "Public Liability – 1,000,000".

16 It is pertinent to emphasise that it was Lee who required Long to obtain a CAR policy for BIGold, as evinced by the Undated Note. However, it is far from clear why this request was made, given that there was no specific reference to a CAR policy in the Contract (see [10] above). Long subsequently called Lee to inform him that Zurich Insurance was able to offer insurance cover to BIGold. The Policy was eventually issued by Zurich Insurance on 23 September 2002. A few days later, on 27 September 2002, MediaCorp and BIGold executed the Contract (see [5] above).

### **The terms of the Policy**

17 Turning to the terms of the Policy, Section I thereof ("Section I") read as follows:[\[note: 9\]](#)

#### SECTION I – MATERIAL DAMAGE

The Company [ie, Zurich Insurance] hereby agree[s] with the Insured [ie, BIGold] that if at any time during the period of cover *the items or any part thereof entered in the Schedule shall suffer any unforeseen and sudden physical loss or damage* from any cause, other than those specifically excluded, in a manner necessitating repair or replacement, the Company will indemnify the Insured in respect of such loss or damage as hereinafter provided by payment in cash, replacement or repair (at their own option) *up to an amount not exceeding in respect of each of the items specified in the Schedule the sum set [out] opposite thereto* and not exceeding in ant [sic] one event the limit of indemnity where applicable and not exceeding in all the total sum expressed in the Schedule as insured hereby.

...

[emphasis added]

18 After a series of special exclusions to Section I (none of which are relevant for the purposes of this appeal), the Policy set out, under the heading "PROVISION APPLYING TO SECTION I", the following memorandum ("Memo 1"): [\[note: 10\]](#)

**Memo 1 – Sums Insured:**

It is a requirement of this Insurance that the sums insured stated in the Schedule shall not be less than for

Item 1 the full value of the contract works at the completion of the construction, inclusive of all materials, wages, freight, customs duties, dues and materials or items supplied by the Principal [*ie*, MediaCorp];

Items 2 & 3 the replacement value of construction plant, equipment and construction machinery; which shall mean the cost of replacement of the insured items by new items of the same kind and same capacity;

and the Insured undertakes to increase or decrease the amounts of insurance in the event of any material fluctuation in wages or prices provided always that such increase or decrease shall take effect only after the same has been recorded on the Policy by the Company.

If, in the event of loss or damage, it is found that the sums insured are less than the amounts required to be insured, then the amount recoverable by the Insured under [the] Policy shall be reduced in such proportion as the sums insured bear to the amounts required to be insured. Every object and cost item is subject to this condition separately.

19 Next came Section II of the Policy ("Section II"), which provided, *inter alia*: [\[note: 11\]](#)

SECTION II – THIRD PARTY LIABILITY

The Company will indemnify the Insured up to but not exceeding the amounts specified in the Schedule against such sums which the Insured shall become legally liable to pay as damages consequent upon

...

(b) accidental loss of or damage to property belonging to third parties

occurring in direct connection with the construction or erection of the items insured under Section I and happening on or in the immediate vicinity of the site during the Period of Cover.

20 Section II had its own set of special exclusions, as follows: [\[note: 12\]](#)

SPECIAL EXCLUSIONS TO SECTION II

The Company will not indemnify the Insured in respect of

...

2. the expenditure incurred in doing or redoing or making good or repairing or replacing

anything covered or coverable under Section I of [the] Policy;

...

4. liability consequent upon

...

b) loss of or damage to property belonging to or held in care, custody or control of the Contractor(s), the Principal(s) or any other firm connected with the project which or part of which is insured under Section I, or an employee or workman of one of the aforesaid ...

[emphasis added]

21 The schedule to the Policy ("the Schedule") contained the following clauses:[\[note: 13\]](#)

Name of Insured: [B!Gold] as Contractor and/or [MediaCorp] as Principal for their respective rights and interests.

Contract Title: Repairs and Renovations  
Occasional manual digging for poles and temporary supports.

Contract Period: From 01/10/02 to 30/09/04  
plus 12 months maintenance period.

Location of Risk[:] Caldecott Broadcast Centre  
Andrew Road  
Singapore 299939

CAR – Contractors All Risk

Town Class . . . . : 01 Town Class 01

Material Damage

Permanent & temporary work including all materials to be incorporated therein

Sum insured . . . . . SGD 500,000

Total Sum Insured: 500,000

Deductible A . . . . All Claims SGD 3,500

ELB – Engineering Liability

Geographical Limits As per Location of Risk

Public Liability	Combined Limit	Limit
Limit of Liability	(Any one Occurrence)	SGD 1,000,000
Limit of Liability	(In the Aggregate)	SGD UNLIMITED

It bears mention that it was only on 18 August 2003 that the name of the insured under the Policy was amended to include B!Gold's subcontractors by an endorsement having effect from 22 August 2003.

22 In the course of this appeal, counsel for Zurich Insurance clarified that the words "ELB – Engineering Liability" in the Schedule were meant to cover engineering works and should be read together with the words "[p]ermanent & temporary work [etc]" to fall within that category. Thus, the Schedule essentially covered (a) "[p]ermanent [and] temporary work including all materials to be incorporated therein" and (b) third party liability (or, to use the terminology of the Schedule, "[p]ublic [l]iability"), with the scope of the insurance cover for these two items delineated by Section I and Section II respectively.

### ***The Fire and the Main Action***

23 In March 2003, MediaCorp instructed B!Gold to carry out, as part of the Works, spalling concrete repair works ("the Repair Works") on the ceiling of an air-handling unit ("AHU") room located on the fourth floor of MediaCorp's television building ("the Television Block"). On 19 March 2003, B!Gold engaged Regius as its subcontractor for the Repair Works.

24 On 21 March 2003, the very date on which the Repair Works were scheduled to commence, the Fire broke out in the AHU room where the repairs were to be carried out ("the AHU Room"). As a result, one of the AHUs ("AHU No 17") was damaged. Furthermore, water used to put out the Fire cascaded down through the air supply ducting and through the porous ceiling tiles to the first, second and third floors of the Television Block, causing serious damage to MediaCorp's production equipment, studios and electrical control cabinets (these damaged items, together with the AHU room and AHU No 17, will be referred to collectively as "the Damaged Property"). A report subsequently prepared by Dr J H Burgoyne & Partners (International) Ltd (a company of consulting scientists and engineers instructed on behalf of MediaCorp) concluded that the Fire had been caused by "smokers' materials discarded by the subcontractors Regius ... who were working to repair spalled concrete at the ceiling of the AHU [R]oom".[\[note: 14\]](#) On 10 May 2004, MediaCorp commenced the Main Action against B!Gold and Regius claiming a sum of \$177,330.55, which consisted of:[\[note: 15\]](#)

- (a) \$34,000 for the repair of AHU No 17;
- (b) \$5,877 for the repair and/or replacement of various items and/or equipment;
- (c) \$113,136, being payment to Disaster Restoration Pte Ltd for "drying, testing, and carrying out repairs to water-affected broadcasting equipment";[\[note: 16\]](#)
- (d) \$11,087 for MediaCorp's "staff hours for cleaning";[\[note: 17\]](#) and
- (e) \$13,230.55 for survey fees and expenses.

It was common ground in the appeal before us that the Damaged Property did not form part of the Repair Works.

25 Interlocutory judgment was entered against Regius in default of its entering an appearance in the Main Action, but, thereafter, MediaCorp took no steps against it. The case between MediaCorp and B!Gold proceeded to trial, and, on 1 March 2006, the District Judge found B!Gold to be in breach

of both the Contract and its common law duty to take reasonable care for the safety of MediaCorp's property (see *MediaCorp (No 1)* ([5] *supra*)). The District Judge entered interlocutory judgment in favour of MediaCorp against BIGold with damages to be assessed. Damages have been assessed on 7 March 2008 at \$177,330.55 with interest thereon. BIGold has not appealed against either the decision on liability or that on quantum in the Main Action.

### ***The Third-Party Action***

#### *The parties' arguments*

26 In the meantime, on 12 October 2004, BIGold commenced the Third-Party Action, seeking, *inter alia*, a declaration that Zurich Insurance was liable under the Policy to indemnify it against all sums which it would become liable and/or be ordered to pay to MediaCorp. It submitted that, on a proper construction of the Policy, the Damaged Property formed part of the property of MediaCorp which was listed in the Schedule and hence fell within the ambit of Section I. Alternatively, the Damaged Property constituted third-party property which was covered under Section II. Furthermore, the damage occasioned by the Fire was "unforeseen", "sudden" and clearly "necessitate[ed] repair or replacement" within the meaning of Section I; the damage was also "accidental" within the meaning of Section II.

27 Zurich Insurance, on the other hand, submitted that it was not liable to indemnify BIGold because:

- (a) the Policy did not cover Regius and/or its servants and agents;
- (b) Section I had not been extended to cover the Television Block or the contents therein;
- (c) the Fire had been caused by the negligent act of Regius and/or its workers and BIGold was not liable for the same;
- (d) the Damaged Property belonged to MediaCorp and could not be regarded as property belonging to a third party, and hence fell outside the scope of Section II; and
- (e) the smoking and discarding of cigarette butts (which had been found to be the cause of the Fire (see [24] above)) could not be considered as "occurring in direct connection with the construction or erection of the items insured under Section I" within the meaning of Section II.

28 As mentioned earlier (at [11] above), for the purposes of the Third-Party Action, the parties agreed to dispense with the cross-examination of all the witnesses who had filed AEICs. BIGold agreed to do so on the basis of Zurich Insurance's acceptance that, at the time BIGold took out the Policy, it was not told specifically by Zurich Insurance that it had the option of extending the scope of the CAR insurance cover set out therein. In turn, BIGold agreed not to rely on its arguments of misrepresentation or breach of duty by Zurich Insurance (see *BIGold Interior Design* ([5] *supra*) at [21]). Thus, the parties effectively agreed that they would approach the construction of the Policy on the basis that its terms represented the true agreement between them.

#### *The District Judge's decision*

29 On 13 November 2006, the District Judge dismissed BIGold's claim in the Third-Party Action (see *MediaCorp (No 2)* ([5] *supra*)). She gave the following reasons for her decision:

(a) Section I covered “the items or any part thereof entered in the Schedule”. The “items ... entered in the Schedule” were “[p]ermanent [and] temporary work including all materials to be incorporated therein”. This description was clear and left no doubt as to its scope. It did not include the physical premises on which the Works might take place or other items within those premises which were not part of the Works (*id* at [12]).

(b) A CAR insurance policy did not literally cover all risks. The precise ambit of such a policy depended on the construction of its terms and conditions. It had been open to B!Gold to require the insurance cover under Section I to be extended to the physical premises on which the Works might take place and/or to other items within those premises which were not part of the Works. Neither B!Gold nor Lee, however, had asked for such an extension (*id* at [16]–[18]).

(c) The natural and ordinary meaning of the words in Section II, “occurring in direct connection with the construction or erection of [the permanent and temporary works referred to in the Schedule]”, must surely be “*in the course of*” [emphasis in original] (*id* at [21]) those works. In the District Judge’s view, the negligent disposal of cigarette butts fell within this description.

(d) The second special exclusion to Section II (“Special Exclusion 2”), which stated that Zurich Insurance was not liable to indemnify B!Gold for any loss or damage “covered or coverable under Section I” (see [20] above), precluded B!Gold from making a claim under Section II. The Fire had damaged, *inter alia*, the physical premises where the Repair Works were to take place (*ie*, the AHU Room) and other items within those premises. Although those premises and items were not covered under Section I, the parties could have contracted for such cover. Thus, the Damaged Property, being “coverable under Section I”, fell within Special Exclusion 2 (see *MediaCorp (No 2)* at [25]).

(e) Item (b) of the fourth special exclusion to Section II (“Special Exclusion 4(b)”) also precluded B!Gold from relying on Section II. In the District Judge’s view (*id* at [26]):

Special Exclusion 4(b) was clearly intended to exclude any indemnity in respect of loss or damage to the property owned or possessed by [B!Gold itself], [MediaCorp] (who [was] indisputably the named [principal] in the [P]olicy), and any other firms involved in the project or works being insured under the [P]olicy.

The Damaged Property belonged to MediaCorp, and thus fell squarely within the ambit of Special Exclusion 4(b) (*ibid*).

### *The appeal to the High Court*

30 In District Court Appeal No 50 of 2006, B!Gold appealed against the District Judge’s decision in the Third-Party Action. The appeal was heard on 26 March 2007. The Judge allowed the appeal and ordered that the District Judge’s decision be set aside (see *B!Gold Interior Design* ([5] *supra*)). He further declared (*id* at [62]) that Zurich Insurance was liable under the Policy to indemnify B!Gold against all sums, including costs and interest (but less the excess of \$3,500), which B!Gold was liable to pay to MediaCorp in the Main Action and ordered that such sums be paid by Zurich Insurance to B!Gold (presumably upon assessment). The reasons for the Judge’s decision in *B!Gold Interior Design* may be summarised as follows:

(a) B!Gold’s claim in respect of the Damaged Property was not covered under Section I. The Schedule was clear. The words therein “[p]ermanent [and] temporary work” referred to “work to

be erected pursuant to the Contract” (*id* at [30]), while the words “materials to be incorporated therein” referred to “all materials brought onto the contract site for incorporation into the [W]orks” (*ibid*).

(b) BGold’s claim was, however, covered under Section II, which dealt with third-party liability or public liability, *ie*, liability which might be incurred by BGold in the course of its operations (see *BGold Interior Design* at [31]). The question was whether BGold’s claim under this section was excluded by Special Exclusion 2 and/or Special Exclusion 4(b).

(c) Special Exclusion 2 did not apply. The Damaged Property was clearly not covered under Section I; nor was it “coverable” under that section as the Schedule (which defined the items covered by Section I) had to be read in the light of Memo 1 (reproduced at [18] above). In the Judge’s view, what Zurich Insurance contemplated as being insurable under the Policy was limited to the three items mentioned in Memo 1.

(d) Special Exclusion 4(b) was *prima facie* applicable as the words therein, “which or part of which is insured under Section I”, described “the *project* (*ie*, the ... [W]orks) as opposed to the property” [emphasis in original] (see *BGold Interior Design* at [42]). BGold’s argument that those words qualified the word “property” in Special Exclusion 4(b) instead, such that liability under Section II was excluded only if the damage was to items covered under Section I, was rejected.

(e) However, taking into account the genesis of the Policy, *ie*, BGold had taken out the Policy in order to fulfil its obligations under cll 18 and 19 of the Conditions of Contract (reproduced earlier at [8]–[9] above), Special Exclusion 4(b) was inoperable (see *BGold Interior Design* at [55]–[56]). The Judge held that where the insured had relied upon the insurer to provide cover for a specific purpose which was made known to the latter prior to the issue of the policy, but a standard printed exclusion clause in the policy nevertheless purported to take away precisely such cover, the court would be failing in its duty if it did not intervene to deny that exclusion clause efficacy (*id* at [59]). We shall examine this reasoning in greater detail at [134] *et seq* below.

31 In our view, the Judge’s reliance on the Contract (including the Conditions of Contract) and the genesis of the Policy in construing the Policy was not legally permissible; nor did arguments based on justice and fairness compel or justify the court’s intervention. If not for the Judge’s impermissible reference to and reliance on these extrinsic materials, Zurich Insurance would not have been liable to indemnify BGold in respect of the damage caused by the Fire. We shall now elaborate on each of these conclusions, beginning with the Judge’s reliance on the extrinsic materials in question to interpret the Policy. This in turn entails a consideration of the legal principles governing the use of extrinsic materials in contractual interpretation.

## **Our analysis of the Judge’s decision**

### ***The use of extrinsic evidence to affect written contracts***

#### *The law in England*

##### (1) *The common law rule against parol evidence*

32 We shall use as the starting point of our discussion the much-discussed and oft-maligned parol evidence rule at common law. Although long relied on by the English courts as a bulwark against admitting extrinsic evidence for the purposes of interpreting written contracts, the exact formulation

of this common law rule is a matter of some disagreement. In United Kingdom, Law Commission, *Law of Contract: The Parol Evidence Rule* (Law Com No 154, 1986) (Chairman: Beldam J) ("Law Com No 154") at para 1.2, the Law Commission of England and Wales ("the Law Commission") endorsed an earlier definition of the rule as set out in a working paper issued in 1976 (*viz*, Working Paper No 70), which was as follows:

When a transaction is recorded in a document, it is not generally permissible to adduce other evidence of (a) its terms or (b) other terms not included, expressly or by reference, in the document or (c) its writer's intended meaning. There are here three distinct rules which exclude what is known as extrinsic evidence, being evidence outside or extrinsic to the document. The evidence excluded is usually oral, but it may be other documentary evidence. The three rules, either separately or together, are sometimes known as the parol evidence rule.

*The first rule excludes a particular means of proof, namely secondary evidence of a document: where the rule applies it prevents the contents of the document being proved by any means other than the production of the document. This is more usually known as the "best evidence rule".*

*By the second rule extrinsic evidence is inadmissible for the purpose of adding to, varying, contradicting or subtracting from the terms of the document: the writing is conclusive. The third rule deals with the admissibility of facts in aid of the interpretation or construction of documents.*

[emphasis added]

33 We shall refer to the Law Commission's multi-pronged formulation as the "thick" definition of the parol evidence rule. The leading textbooks, however, usually focus on the second limb of the thick definition, which is stated in *Chitty on Contracts* (H G Beale gen ed) (Sweet & Maxwell, 29th Ed, 2004) vol 1 ("*Chitty*") at para 12-096 as follows:

[I]n 1897, Lord Morris accepted [in *Bank of Australasia v Palmer* [1897] AC 540 at 545] that "[p]arol testimony cannot be received to contradict, vary, add to or subtract from the terms of a written contract, or the terms in which the parties have deliberately agreed to record any part of their contract." This rule is usually known as the "parol evidence" rule.

Similarly, Edwin Peel, *Treitel: The Law of Contract* (Sweet & Maxwell, 12th Ed, 2007) ("*Treitel*") states at para 6-012 that:

The parol evidence rule states that evidence cannot be admitted (or, even if admitted, cannot be used) to add to, vary or contradict a written instrument.

We shall refer to this formulation of the parol evidence rule as the "thin" definition.

## (2) *The thin definition of the parol evidence rule*

34 The thick definition of the parol evidence rule, especially its third prong pertaining to the interpretation of documents, is clearly no longer strictly adhered to in England (see [53]–[65] below). Even the thin definition of the rule is beleaguered. The Law Commission expressed the opinion in Law Com No 154 ([32] *supra*) at para 2.7 that this version of the rule:

... is a proposition of law which is no more than a circular statement: *when it is proved or*

*admitted that the parties to a contract intended that all the express terms of their agreement should be as recorded in a particular document or documents, evidence will be inadmissible (because [it is] irrelevant) if it is tendered only for the purpose of adding to, varying, subtracting from or contradicting the express terms of that contract. [emphasis in original]*

Thus, the Law Commission concluded (at para 2.17) that:

[T]here is no *rule of law* that evidence is rendered inadmissible or is to be ignored solely because a document exists which looks like a complete contract. Whether it is a complete contract depends upon the intention of the parties, objectively judged, and not on any rule of law. [emphasis in original]

35 Law Com No 154 was referred to with approval by the English Court of Appeal in *Wild v Civil Aviation Authority* (25 September 1987) (unreported) (see also *Yani Haryanto v E D & F Man (Sugar) Ltd* [1986] 2 Lloyd's Rep 44 at 46, and *Youell v Bland Welch & Co Ltd* [1992] 2 Lloyd's Rep 127 at 140). It has also been endorsed by *Chitty* ([33] *supra*) at para 121099.

36 However, there have also been recent pronouncements by the English courts affirming the survival and importance of the thin definition of the parol evidence rule. In the House of Lords decision of *Shogun Finance Ltd v Hudson* [2004] 1 AC 919, Lord Hobhouse of Woodborough said at [49]:

The rule that other evidence may not be adduced to contradict the provisions of a contract contained in a written document [*ie*, the thin definition of the parol evidence rule] is fundamental to the mercantile law of this country; the bargain is the document; the certainty of the contract depends on it. ... This rule is one of the great strengths of English commercial law and is one of the main reasons for the international success of English law in preference to laxer systems which do not provide the same certainty.

37 There is also continued academic support for it. In *Treitel* ([33] *supra*) at para 61013, it is explained that:

There is much force in this view [that the thin definition of the parol evidence rule is no more than a circular statement] in cases in which, at the time of contracting, both parties actually shared a common intention with regard to the term in question. But in most cases in which the rule is invoked this is not the position: the dispute arises precisely because the parties had different intentions, and one alleges, while the other denies, that terms not set out in the document were intended to form part of the contract. In such cases, the court will attach importance to the appearance of the document: if it *looks* like a complete contract to one of the parties taking a reasonable view of it, then the rule will prevent the other party from relying on extrinsic evidence to show that the contract also contained other terms. ***This result has been described as being simply an application of the objective test of agreement; but, even if it can be so regarded, it is such a common and frequently recurring application of this test as to amount to an independent rule.*** [emphasis added in bold italics]

38 It has been argued that, in deciding whether a document is meant to be a complete contract, the law goes beyond the normal objective test (see [126]–[127] below). As stated in *Treitel* (at para 61013):

That test normally requires the party relying on it [*ie*, the document alleged to constitute the contract] to prove that he reasonably believed that the other party was contracting on the

terms alleged. ***Where a document looks like a complete contract, the party relying on it does not have to prove that he had such a belief: he can rely on a presumption to that effect which it is up to the other party to rebut.*** ... Moreover, the objective test normally prevents a party from relying on his "private but uncommunicated intention as to what was to be agreed" [citing para 2.14 of Law Com No 154 ([32] *supra*)]. ***The presumption which applies in the case of an apparently complete contractual document goes beyond this: it prevents a party from relying on evidence of intention that was not "private and uncommunicated" at all, but simply not recorded in the document.*** For these reasons, it is submitted that the admissibility of extrinsic evidence, where it is proved that the document was not in fact intended to contain all the terms of the contract, does not turn the [thin definition of the parol evidence] rule into a merely "circular statement". [emphasis added in bold italics]

39 In a similar vein, Robert Stevens has wryly noted in "Objectivity, Mistake and the Parol Evidence Rule" in *Contract Terms* (Andrew Burrows & Edwin Peels eds) (Oxford University Press, 2007) ch 6 ("Stevens' article") that "[t]he parol evidence rule [according to the thin definition] is not dead, or even ill, but merely misunderstood" (at p 107). He argues (at p 109) that:

Now it can be said that [the thin definition of] the so-called parol evidence rule is not a separate rule of law at all, but merely a specific application of general principles. The rule does indeed follow as a matter of course from the general rule as to the objective test for agreement. This does not show that the parol evidence rule is dead, but merely that it is a *species* of a wider *genus*. [emphasis in original]

40 Ultimately, the academic disagreements over the status of the thin definition of the parol evidence rule may be unwarranted. The commentators are united in the view that it operates only when it is proved that the document was intended by the parties to contain all the terms of the contract. They also agree that, in determining whether the parties so intended, the court may look at extrinsic evidence and apply the normal objective test, subject to a rebuttable presumption that a contract which is complete on its face was intended to contain all the terms of the parties' agreement (see *Treitel* ([33] *supra*) at para 61013; *Chitty* ([33] *supra*) at para 121098; and Stevens' article at pp 107 and 109). At the heart of the various views articulated at [33]–[39] above, therefore, the proposition undeniably remains: Where a contract has been determined by the court to contain all the terms of the parties' agreement, no extrinsic evidence is admissible to vary the terms of that document. Whether or not this proposition should be given the appellation of a *rule*, a *principle* or an *application* of an existing rule or principle is to a large extent a pointless debate.

(3) *The English courts' use of extrinsic evidence in aid of interpretation*

(A) *THE CONCEPT OF "INTERPRETATION"*

41 "Interpretation", as Neil MacCormick, *Rhetoric and the Rule of Law* (Oxford University Press, 2005) succinctly states (at pp 121–122), 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. In the context of contractual interpretation, the text sought to be understood is the written contract, which constitutes *prima facie* proof of the parties' intentions where the contract is complete on its face (see [132] below). In this regard, Prof Ronald Dworkin's comments in his seminal work, *Law's Empire* (Hart Publishing, 1998), at p 52 should be borne in mind: Interpretation 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. It should also be noted that the term "construction" is often used interchangeably with "interpretation", although some commentators regard these as qualitatively different processes (for examples of the latter view, see Catherine

Mitchell, *Interpretation of Contracts: Current controversies in law* (Routledge-Cavendish, 2007) ("*Mitchell*") at p 26; and *Phipson on Evidence* (Hodge M Malek gen ed) (Sweet & Maxwell, 16th Ed, 2005) ("*Phipson*") at para 43102).

42 Although the third limb of the thick definition of the parol evidence rule deals with the admissibility of extrinsic evidence to aid in the interpretation of contracts (see [32] above), the preponderant academic opinion appears to be that the use of extrinsic evidence in that manner is separate and distinct from the second limb of this definition (*ie*, the thick definition) of the parol evidence rule (which provides further authority for the thin definition of the rule). For example, in *MacGillivray on Insurance Law* (Nicholas Legh-Jones gen ed) (Sweet & Maxwell, 10th Ed, 2003) ("*MacGillivray*") at paras 11137–11138, the differences between these two aspects of the thick definition of the parol evidence rule are summarised as follows:

First, once the terms of the insurance have been recorded in a policy there is a presumption that the policy contains all the terms of the cover, with the consequences that extrinsic evidence, whether oral or in writing, cannot be introduced to contradict, vary, add to or cut down the terms set out in the policy. *This is the "parol evidence" rule. ...*

*There is a second rule, one of construction of contracts, to the effect that where the words of a policy or other document recording the terms of the insurance contract possess a clear meaning, extrinsic evidence is inadmissible to show that the parties intended them to bear a different meaning.*

[emphasis added]

43 Similarly, Stevens' article ([39] *supra*) emphasises (at pp 108–109) that:

*[T]he rule against extrinsic evidence [in the thin definition of the parol evidence rule] needs to be kept distinct from the question as to whether the parties can rely upon extrinsic evidence as an aid to interpretation of a contract [viz, the third limb of the thick definition of the parol evidence rule]. The extent to which the document is to be treated as conclusive of its terms is a question of degree. If all that has been agreed is that no terms other than those embodied in the written document have been agreed to, leading extrinsic evidence to interpret such a document is not inconsistent with the agreement. Indeed such contextual evidence might be indispensable. In recent times the courts have become much less restrictive in admitting such evidence. In principle, there is no tension between this development and [the thin definition of] the parol evidence rule. [emphasis added]*

And, in *Treitel* ([33] *supra*), the use of extrinsic material as an "[a]id to interpretation" (at para 61020) is listed as one of the situations which "fall outside the scope of the [thin definition of the parol evidence] rule" (at para 61012).

44 What, then, is the difference between interpreting a contract and contradicting, varying, adding to or subtracting from its terms? In *Chitty* ([33] *supra*), greater elucidation can be found at para 12117:

Different considerations apply to the admissibility of extrinsic evidence to interpret or explain a written agreement. Extrinsic evidence of this sort does not usurp the authority of the written document or contradict, vary, add to or subtract from its terms. *It is the writing which operates. The extrinsic evidence does no more than assist in its operation by assigning a definite meaning to terms capable of such explanation or by pointing out and connecting them with the proper*

*subject-matter*. Accordingly, no “parol evidence rule” [as set out in the thin definition] ... will apply to such a situation. [emphasis added]

45 Arthur L Corbin’s explanation in “The Interpretation of Words and the Parol Evidence Rule” (1965) 50 Cornell LQ 161 at 171 is also illuminating:

Extrinsic evidence is admissible to aid in the process of interpretation ..., to determine the meaning of language that the parties actually gave to [the written contract], to expound and enforce the contract that the parties actually intended to make. Such evidence is never relevant or admissible when offered for the purpose of establishing another meaning or intention and to expound and enforce a different contract. *Contradiction, deletion, substitution: these are not interpretation*. [emphasis added]

The above observations are consistent with Dworkin’s view (see [41] above) of the interpretive process as being constrained by the form of the object sought to be interpreted, *ie*, the written contract.

46 The concept of “interpretation” set out in *Chitty* at para 12117 (reproduced at [44] above) – namely, “assigning a definite meaning to terms capable of such explanation or ... pointing out and connecting them with the proper subject-matter” – reflects the traditional approach to interpretation, under which ambiguity (or absurdity, or the existence of an alternative technical meaning) is a prerequisite for the admissibility of extrinsic evidence (see further [52] below). This requirement also draws the line between interpreting and varying the terms of a contract. In the former scenario, the court is *explaining* the equivocal language of a contract by *assigning one of a range of possible meanings to its terms*. The shift towards what is often called the “contextual” approach to contractual interpretation, however, appears to have removed this prerequisite of establishing (*inter alia*) ambiguity before extrinsic evidence may be considered when interpreting contracts. This has created further pressure on the *raison d’être* of the thin definition of the parol evidence rule since, in “interpreting” language that is clear on its face, the court sometimes veers dangerously close towards varying, adding to or subtracting from the contract (see [64], [104] and [122]–[123] below). Indeed, it has recently been affirmed in Gerard McMeel, *The Construction of Contracts: Interpretation, Implication, and Rectification* (Oxford University Press, 2007) (“*McMeel*”) at para 1.65 that “the *parol evidence* rule [in its thin definition] ... is dead” [emphasis in original]. We now turn to examine these differing approaches to the interpretation of contracts.

#### (B) THE TRADITIONAL APPROACH

47 We begin with what is now described as the “traditional” approach to the interpretation of contracts (see *McMeel* at paras 1.28–1.30). *McMeel* neatly outlines the scope of the traditional approach with the following propositions:

*The traditional approach: what is the purpose of construction?*

**1.28** First, interpretation is an exercise in ascertaining the ‘intentions of the parties.’ This is immediately qualified by the objective principle which entails that English law is not concerned with either or both parties’ actual or subjective intentions. It is focused on the intentions as manifested in the document which embodies the agreement. In this sense the parties’ intentions are objectively ascertained.

*The traditional approach: what is the approach of the court to language?*

**1.29** Second, these common intentions are to be discerned from the 'plain' or 'natural and ordinary meaning' of the language which [the parties] have employed. A relatively strict or formal approach to language is adopted.

*The traditional approach: what materials or evidence will the court consider?*

**1.30** Third, the court will not ordinarily consider evidence outside the four corners of the document being construed in order to supplement, vary or contradict the written terms. This restrictive approach to 'extrinsic evidence' was known as the *parol evidence rule*. On occasion extrinsic evidence was admitted, but ***usually only in cases of ambiguity or other problems of expression.***

[emphasis added in bold italics]

48 Similarly, *Chitty* ([33] *supra*) states (at para 12118) that:

[U]nder the older restrictive view ... extrinsic evidence is admissible only where the sense and meaning of the words of the written instrument is doubtful or difficulty arises when it is sought to apply the language of the instrument to the circumstances under consideration. *If the words have a clear and fixed meaning, not capable of explanation, extrinsic evidence would not be admissible to show that the parties meant something different from what they have written.* [emphasis added]

49 In Malcolm A Clarke, *The Law of Insurance Contracts* (Informa, 5th Ed, 2006) ("*Clarke*"), the author provides (at para 1513B1) a helpful summary of the circumstances (in relation to a contract of insurance specifically) in which a court may look beyond the strict confines of the contract:

[T]raditionally, if a court wants to go outside the policy, it must use one of three routes. The first route is the *technical* route, that, although the words appear clear they have a technical meaning that is not apparent without seeking extrinsic evidence ... The second route is *ambiguity*, that the words are not clear but ambiguous and the ambiguity must be resolved by taking a wider view ... The third route is *absurdity*, that a literal reading is not just unreasonable but unworkable or absurd and that must be avoided by taking a wider view ... [emphasis added]

50 A word or statement is ambiguous "when it has two (or more) primary meanings, each of [which may] be adopted without distortion of the language" (see Sir Kim Lewison, *The Interpretation of Contracts* (Sweet & Maxwell, 4th Ed, 2007) ("*Lewison*") at para 8.01). Older English authorities classify ambiguity into two categories: (a) patent ambiguity, *ie*, ambiguity which appears from the language of the instrument; and (b) latent ambiguity, *ie*, ambiguity which becomes apparent only when the language is applied to the factual situation (*id* at para 8.02; see also *Phipson* ([41] *supra*) at paras 4315–4316, and *Great Western Railway and Midland Railway v Bristol Corporation* (1918) 87 LJ Ch 414 at 429 (*per* Lord Wrenbury)). In the former case, extrinsic evidence is *inadmissible* to resolve the ambiguity, whereas, in the latter case, any relevant evidence, even direct evidence of the intention of the parties and evidence of their prior negotiations, is *admissible* (see *Lewison* at paras 3.08 and 8.05, but *cf Phipson* at para 4316).

51 In England, the distinction between patent and latent ambiguity has been criticised. Lord Simon of Glaisdale in *L Schuler AG v Wickman Machine Tool Sales Ltd* [1974] AC 235 remarked (at 268):

[T]he distinction between patent ambiguities, latent ambiguities and equivocations as regards

admissibility of extrinsic evidence are based on outmoded and highly technical and artificial rules and introduce absurd refinements.

However, the distinctions remain relevant in Singapore in view of the Evidence Act (Cap 97, 1997 Rev Ed) (see [75]–[80] below).

52 It is important to note that, under the traditional approach to contractual interpretation, ambiguity, absurdity or the existence of an alternative technical meaning is ostensibly a *prerequisite* for the court's journey outside the contract towards its external context (see [46] above). This, on considered reflection, seems odd. Ambiguity under the traditional approach encompasses latent ambiguity (see *McMeel* ([46] *supra*) at para 1.86). Yet, in order to establish whether or not there is latent ambiguity in a contract, the court would first have to be cognisant of its external context. Then, if latent ambiguity indeed arises, extrinsic evidence would be used to resolve that ambiguity. Furthermore, it is difficult to see how the traditional approach would work in the context of what *Clarke* ([49] *supra*) refers to as "the technical route" (at para 1513B1) since, on the plain language of the contract, it may not be apparent at all that the particular word has an alternative technical meaning. The court would have to refer to extrinsic material *first* in order to detect the existence of the alternative technical meaning. Thus, in denying the role of extrinsic evidence in the interpretation of contracts, proponents of the traditional approach are only creating frustration, conflict and inconsistency (see also [114]–[120] below).

(C) THE SHIFT TO THE CONTEXTUAL APPROACH

53 Over the past few decades, the traditional approach has increasingly been sidelined in favour of an approach which has been variously described as the "purposive" approach, the "commercial" approach, the "common sense" school and the "contextual" approach (see *McMeel* at para 1.31). For present purposes, we prefer to use the expression "contextual approach" to describe this newer approach simply because the "context" of a contract is wide enough to encompass include its commercial object and purpose as well. A useful image is provided in *Clarke* of the context of a contract (at para 1513) as follows:

The context is a series of circles: the phrase, the sentence, the paragraph, the part of the [contract], the whole of the [contract], and then, outside the [contract] itself, the past dealings of the parties [subject to the rule against the admissibility of pre-contractual negotiations (see [62] and [132] below)], the trade context, and the objects which the [contract] was intended to achieve.

From this, it is apparent that the word "context" has at least two possible meanings: first, the document as a whole, which includes the provisions other than those sought to be interpreted and the organisation of the document ("internal context"); and, second, the circumstances surrounding the formation of the contract, including the object or purpose for which it was entered into ("external context"). In this judgment, it is the *external* context of a contract (and *not* its internal context) that we refer to when we use the word "context".

54 In England, the seeds of the paradigm shift to the contextual approach were arguably first sown by the House of Lords in *Prenn v Simmonds* [1971] 1 WLR 1381, where Lord Wilberforce said (at 1383–1384):

The time has long passed when agreements, even those under seal, were isolated from the matrix of facts in which they were set and interpreted purely on internal linguistic considerations. ... We must ... inquire beyond the language and see what the circumstances were with reference to

which the words were used, and the object, appearing from those circumstances, which the person using them had in view.

55 Lord Wilberforce reiterated this principle in *Reardon Smith Line Ltd v Yngvar Hansen-Tangen* [1976] 1 WLR 989 ("*Reardon Smith Line*") at 995–996, as follows:

In a commercial contract it is certainly right that the court should know the commercial purpose of the contract and this in turn presupposes knowledge of the genesis of the transaction, the background, the context, the market in which the parties are operating.

56 The high watermark of the contextual approach was reached in *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896 ("*Investors Compensation Scheme*"). In what has become regarded as the most lucid modern restatement of this approach, Lord Hoffmann stated (at 912–913):

... I think I should preface my explanation of my reasons with some general remarks about the principles by which contractual documents are nowadays construed. I do not think that the fundamental change which has overtaken this branch of the law, particularly as a result of the speeches of Lord Wilberforce in *Prenn v. Simmonds* ... [at] 1384–1386 and *Reardon Smith Line* ... is always sufficiently appreciated. The result has been, subject to one important exception, to assimilate the way in which such documents are interpreted by judges to the common sense principles by which any serious utterance would be interpreted in ordinary life. Almost all the old intellectual baggage of "legal" interpretation has been discarded. The principles may be summarised as follows.

(1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.

(2) The background was famously referred to by Lord Wilberforce as the "matrix of fact," but this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to the exception to be mentioned next, it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.

(3) The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification. The law makes this distinction for reasons of practical policy and, in this respect only, legal interpretation differs from the way we would interpret utterances in ordinary life. The boundaries of this exception are in some respects unclear. But this is not the occasion on which to explore them.

(4) The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax: see *Mannai Investments Co. Ltd. v. Eagle Star Life Assurance Co. Ltd.* [1997] A.C. 749.

(5) The “rule” that words should be given their “natural and ordinary meaning” reflects the common sense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, 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. Lord Diplock made this point more vigorously when he said in *Antaios Compania Naviera S.A. v. Salen Rederierna A.B.* [1985] A.C. 191, 201:

“if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business commonsense, it must be made to yield to business commonsense.”

57 The second of Lord Hoffmann’s propositions in *Investors Compensation Scheme* (as set out in the preceding paragraph) must now be qualified and read in the light of *Bank of Credit and Commerce International SA v Ali* [2002] 1 AC 251 (“*BCCI v Ali*”), in which Lord Hoffmann clarified (at [39]) his reference to “absolutely anything” (in *Investors Compensation Scheme* at 913) as follows:

... I should say in passing that when, in *Investors Compensation Scheme* ... I said that the admissible background included “absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man”, I did not think it necessary to emphasise that I meant anything which a reasonable man would have regarded as *relevant*. I was merely saying that there is no conceptual limit to what can be regarded as background. It is not, for example, confined to the factual background but can include the state of the law (as in cases in which one takes into account that the parties are unlikely to have intended to agree to something unlawful or legally ineffective) or proved common assumptions which were in fact quite mistaken. But the primary source for understanding what the parties meant is their language interpreted in accordance with conventional usage: “we do not easily accept that people have made linguistic mistakes, particularly in formal documents”. I was certainly not encouraging a trawl through “background” which could not have made a reasonable person think that the parties must have departed from conventional usage. [emphasis in original]

We shall refer to Lord Hoffmann’s propositions in *Investors Compensation Scheme*, as qualified by the above extract from *BCCI v Ali*, as “the *Investors Compensation Scheme* restatement”.

58 Despite this qualification, serious disquiet has periodically been expressed about the *Investors Compensation Scheme* restatement. For example, in *The “Tychy” (No 2)* [2001] 2 Lloyd’s Rep 403 at [29], Lord Phillips of Worth Matravers MR said:

With respect to Lord Hoffmann, we are inclined to think that a little intellectual hand luggage is no bad thing when approaching the task of construing a contract.

Several other judges have expressed concerns regarding the likelihood of an increase in legal costs and the length of commercial litigation, as well as uncertainty concerning what might be embraced by the “matrix of facts” (*per* Lord Wilberforce in *Prenn v Simmonds* ([54] *supra*) at 1384) in any particular matter (see, for example, the comments by Lightman J in *Wire TV Ltd v CableTel (UK) Ltd* [1998] CLC 244 at 257 that “a very large part of the flood of evidence in [that] case on the factual matrix ... was legally inadmissible and the greater part of the remainder was totally unhelpful”). Further, it has been noted that the position of third parties (in terms of whether they may rely on the written agreement alone where the words in question have only one meaning which is not evidently nonsensical, or whether they must construe the relevant words in view of all the surrounding circumstances of the agreement) does not seem to have been considered at all (see the observations

of Saville LJ in the English Court of Appeal's decision in *National Bank of Sharjah v Dellborg* (9 July 1997) (unreported)). There is also an inarticulate anxiety that some judges may seek refuge under the generous shade of the umbrella of "matrix of facts" in order to rewrite commercial bargains, especially since counsel are now employing considerable ingenuity in discovering intricate "ambiguities" against the backdrop of a broader "matrix".

59 By and large, however, the *Investors Compensation Scheme* restatement has been unreservedly adopted by the English courts and has yielded more principled decisions. It has been applied in a myriad of cases (see, for instance, the cases cited in *Lewison* ([50] *supra*) at para 1.02, fn 19). Thus, in the recent English Court of Appeal case of *Phillips v Rafiq* [2007] 1 WLR 1351, Ward LJ was able to state (at [8]):

It is common ground between the parties that the proper approach [to contractual interpretation] is, of course, the enunciation of principle expressed by Lord Hoffmann in *Investors Compensation Scheme* ...

(D) THE IMPACT OF THE INVESTORS COMPENSATION SCHEME RESTATEMENT

60 Views about the impact of the *Investors Compensation Scheme* restatement have been mixed. Some commentators have expressed concerns that it goes too far; others, on the other hand, are of the view that it merely covers old ground (for an example of the latter view, see *NLA Group Ltd v Bowers* [1999] 1 Lloyd's Rep 109, where Timothy Walker J stated (at 112) that "Lord Hoffmann was simply overruling old and outdated cases by reference to an approach to construction which has been followed in the Commercial Court for many years").

61 In our view, the significance and impact of the *Investors Compensation Scheme* restatement is aptly summarised in *Mitchell* ([41] *supra*) at p 60 as follows:

The significance of Lord Hoffmann's speech lies in its recognition that all understanding relies upon context to a greater or lesser extent, and that contractual interpretation is no different. The 'reasonable person', in deciphering communicative utterances, utilises all necessary background knowledge to access meaning. Thus a plain meaning or literal approach is not an alternative to contextual interpretation, but can only be understood as operating within contextual method. On the whole, the new approach is to be welcomed, not least because it can be seen as a reflection of two factors of undeniable importance to modern contract thinking. One of these is the realisation that contracts are first and foremost social phenomena. The other is the increasing European influence over domestic law. Although the shift to contextual interpretation can be seen as part of these wider developments, the method of contextual interpretation, as least as it is applied in contract law, is not without difficulties.

Whether or not, by the *Investors Compensation Scheme* restatement, Lord Hoffmann was in fact making new law or merely declaring the existing state of the law, there is no gainsaying that "[t]he *Investors Compensation Scheme* restatement certainly represented a watershed, representing a decisive endorsement of the modern approach" (see *McMeel* ([46] *supra*) at para 1.101). Two features of this pragmatic approach are significant.

62 First, the scope and quantity of extrinsic evidence that can be used in the exercise of interpretation has now increased. It should be noted, however, that the prohibition on evidence of the prior negotiations of the contracting parties and their declarations of subjective intent apparently remains applicable (see Lord Hoffmann's third proposition in *Investors Compensation Scheme* ([56] *supra*)); such evidence may, however, be admitted and used to interpret a contract *after* the court

has determined that it contains a latent ambiguity (see [50] above and [132] below). The restriction on evidence of prior negotiations has been said to arise out of the principle that the parties' intentions have to be objectively ascertained (see *Prenn v Simmonds* ([54] *supra*)). It has come under fire in England (see Gerard McMeel, "Prior Negotiations and Subsequent Conduct – The Next Step Forward for Contractual Interpretation" (2003) 119 LQR 272 ("McMeel's article") and Donald Nicholls, "My Kingdom for a Horse: The Meaning of Words" (2005) 121 LQR 577 ("Nicholls' article"); note also in our local context Art 8(3) of the United Nations Convention on Contracts for the International Sale of Goods, which is applicable in Singapore by virtue of s 3 of the Sale of Goods (UN Convention) Act (Cap 283A, 1996 Rev Ed)). (We will deal with this point in greater detail at [132] below.) The second, and by far more important, impact of the *Investors Compensation Scheme* restatement is the change in the way in which contractual interpretation is to be carried out. From Lord Hoffmann's fourth proposition in this restatement (see [56] above), it appears that ambiguity is no longer a prerequisite for the admissibility of extrinsic evidence. Furthermore, the court may conclude that the "wrong words or syntax" (see *Investors Compensation Scheme* at 913) have been used, *ie*, the court may substitute what it deems to be the correct language or syntax for that used in the contract. This creates an immediately apparent tension with the thin definition of the parol evidence rule as articulated at [33] above.

63 Indeed, this tension surfaced in *Investors Compensation Scheme* itself. In that case, the issue was the meaning of a provision in a claim form ("section 3(b)") used by Investors Compensation Scheme Ltd ("ICS"), which read as follows (at 900):

I.C.S. agrees that the following claims shall not be treated as a 'third party claim' (as defined in section 4 of this form) for the purposes of this agreement and that the benefits of such claims shall enure to you [*ie*, the investors who had entered into home income plans under which they took out mortgages on their homes with, *inter alia*, West Bromwich Building Society] absolutely: *Any claim (whether sounding to you in rescission for undue influence or otherwise) that you have or may have against the West Bromwich Building Society in which you claim an abatement of sums which you would otherwise have to repay to that society in respect of sums borrowed by you ... [emphasis added]*

If the italicised words in the above passage were interpreted as meaning all possible claims which the investors might have against West Bromwich Building Society ("WBBS"), the benefit of the investors' claims against WBBS would not have been assigned to ICS and ICS would have lost its case against WBBS (ICS had, as the assignee of the investors' rights against WBBS, sued the building society). At first instance, Evans-Lombe J's view was that the broad interpretation of section 3(b) (*ie*, the provision applied to all possible claims which the investors might have against WBBS) was the more natural meaning of the words in question, but held that such meaning was displaced by a consideration of the surrounding circumstances and, in particular, by the need for an "efficient system" (*id* at 901) to enable ICS to recover its outlay. As such, he construed section 3(b) as meaning that "the investor should retain any claim for an abatement of his debt which arose out of a claim for rescission, whether for undue influence or otherwise" (*id* at 912). The English Court of Appeal agreed with Evans-Lombe J's view that the broad interpretation was the natural meaning of section 3(b), but did not regard the result as commercially ridiculous. It thus adopted the broad interpretation of this provision, rather than Evans-Lombe J's (narrower) interpretation.

64 In the House of Lords, Lord Hoffmann, who delivered the judgment of the majority, endorsed Evans-Lombe J's interpretation of section 3(b) (*id* at 912). The dissenting opinion of Lord Lloyd of Berwick neatly expressed the concern that, in so doing, the majority might have overstepped the line between interpreting and varying a contract (*id* at 904):

[Counsel for ICS] submits that section 3(b) means “any claims sounding in rescission (whether for undue influence or otherwise) in which you claim an abatement ...” I agree with Evans-Lombe J. that such a construction does violence to the language. I know of no principle of construction (whether by reference to what Lord Wilberforce said in *Prenn v. Simmonds* ... [[54] *supra*] at 1384–1386 or otherwise) which would enable the court to take words from within the brackets, where they are clearly intended to underline the width of “any claim,” and place them outside the brackets where they have the exact opposite effect. As Leggatt L.J. said in the Court of Appeal, such a construction is simply not an available meaning of the words used; and it is, after all, from the words used that one must ascertain what the parties meant. *Purposive interpretation of a contract is a useful tool where the purpose can be identified with reasonable certainty. But creative interpretation is another thing altogether. The one must not be allowed to shade into the other.* [emphasis added]

65 It seems plain to us that the majority’s approach in *Investors Compensation Scheme* still fell within the realm of interpretation. If section 3(b) were interpreted in the broad sense – *ie*, if it meant that the investors retained the benefit of all possible claims which they might have against WBBS, the words in parentheses in that provision would have been otiose. As Lord Hoffmann put it (at 912):

[T]he parenthes[e]s seemed very strange against the background of the law. If it [*ie*, section 3(b)] was exhaustive, why was “sounding in rescission for undue influence” singled out? What about rescission on other grounds, or claims for breach of statutory or common law duty? It was rather like providing in a lease of a flat that the tenant should not keep “any pets (whether neutered Persian cats or otherwise).” Something seemed to have gone wrong.

In the light of the above, it may be said that the House of Lords was merely *clarifying* and *explicating* section 3(b) in accordance with the interpretive presumption against redundant words (usually called “surplusage” (see *Lewison* ([50] *supra*) at para 7.03)). After all, reading section 3(b) as simply covering all claims which the investors might have against WBBS would equally have done violence to the language of this provision by ignoring an entire adjectival phrase (*ie*, the words in parentheses) that was presumably deliberately inserted by the drafter.

66 Nevertheless, there is no doubt that the line between *interpreting* a contract and contradicting, adding to, varying or subtracting from its terms is often difficult to draw. With this in mind, we turn now to discuss the law in Singapore on the use of extrinsic evidence in contractual interpretation. In the light of our discussion of the English position, we will focus on the following issues:

- (a) whether the parol evidence rule (as set out in the thin definition at [33] above) is alive and well in Singapore;
- (b) if it is, whether and in what circumstances extrinsic evidence is admissible to interpret a written contract; and
- (c) where the line between interpreting a contract on the one hand and varying, adding to or subtracting from its terms on the other should be drawn.

### *The law in Singapore*

#### (1) *The statutory framework*

##### (A) OVERVIEW

67 In Singapore, the admissibility of extrinsic evidence is *prima facie* governed by ss 93–102 of the Evidence Act, which is largely modelled on the Indian Evidence Act of 1872 (Act 1 of 1872) (“the Indian Act”) drafted by Sir James Fitzjames Stephen. Sections 91–100 of the Indian Act are *in pari materia* with the sections of the Evidence Act relating to extrinsic evidence (namely, ss 93–102 of the Evidence Act).

(B) SECTIONS 93–94 OF THE EVIDENCE ACT

68 Section 93 of the Evidence Act provides:

**Evidence of terms of contracts, grants and other dispositions of property reduced to form of document**

**93.** When the terms of a contract or of a grant or of any other disposition of property have been reduced by or by consent of the parties to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of such contract, grant or other disposition of property or of such matter except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions of this Act.

“Secondary evidence” is defined in s 65 of the Evidence Act to include, *inter alia*, certified, electronic and other types of copies of an original document; it does not pertain to the type of extrinsic material which is in issue in the present appeal.

69 Section 94 of the Evidence Act provides:

**Exclusion of evidence of oral agreement**

**94.** When the terms of any such contract, grant or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to section 93, no evidence of any oral agreement or statement shall be admitted as between the parties to any such instrument or their representatives in interest for the purpose of contradicting, varying, adding to, or subtracting from its terms subject to the following provisions:

(a) any fact may be proved which would invalidate any document or which would entitle any person to any decree or order relating thereto; such as fraud, intimidation, illegality, want of due execution, want of capacity in any contracting party, the fact that it is wrongly dated, want or failure of consideration, or mistake in fact or law;

(b) the existence of any separate oral agreement, as to any matter on which a document is silent and which is not inconsistent with its terms, may be proved; in considering whether or not this proviso applies, the court shall have regard to the degree of formality of the document;

(c) the existence of any separate oral agreement constituting a condition precedent to the attaching of any obligation under any such contract, grant or disposition of property, may be proved;

(d) the existence of any distinct subsequent oral agreement, to rescind or modify any such contract, grant or disposition of property, may be proved 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;

(e) any usage or custom by which incidents not expressly mentioned in any contract are usually annexed to contracts of that description may be proved; except that the annexing of such incident would not be repugnant to or inconsistent with the express terms of the contract;

(f) any fact may be proved which shows in what manner the language of a document is related to existing facts.

70 The material words in s 94, “contradicting, varying, adding to, or subtracting from”, are taken almost verbatim from the opening sentence of *Taylor* ([2] *supra*) at § 813 (see also *Cutts v Brown* ILR 1880 Cal 328 at 338). A perceptive explanation of the purpose and intent of s 94 may be found in the same passage from *Taylor* (*ie*, § 813), as follows:

[T]he ... general rule ... respecting the admissibility of extrinsic evidence to affect what is in writing, is, that parol testimony cannot be received to contradict, vary, add to or subtract from, the terms of a valid written instrument [*ie*, the thin definition of the parol evidence rule]. This rule of the common law, which may be traced back to remote antiquity, is founded on the obvious inconvenience and injustice that would result, if matters in writing, made by advice and on consideration, and intended finally to embody the entire agreement between the parties, were liable to be controlled by what Lord Coke expressively calls, “the uncertain testimony of slippery memory”. When parties have deliberately put their mutual engagements into writing, in such language as imports a legal obligation, it is only reasonable to presume, that they have introduced into the written instrument every material term and circumstance; and, consequently, all parol testimony of conversations held between the parties, or of declarations made by either of them, whether before, or after, or at the time of, the completion of the contract, will be rejected; because such evidence, while deserving far less credit than the writing itself, would inevitably tend, in many instances, to substitute a new and different contract for the one really agreed upon, and would thus, without any corresponding benefit, work infinite mischief and wrong.

71 Thus, s 94 of the Evidence Act statutorily embodies the thin definition of the parol evidence rule as articulated above at [33]. For this reason, it is the thin definition of the parol evidence rule which applies in Singapore; references hereafter in this judgment to “the parol evidence rule” should be read accordingly. Section 94 complements s 93 by ensuring that where the sole evidence of a contract consists of “the document itself” (*per* s 93), that contract is not varied, contradicted, added to or subtracted from unless the circumstances described in one or more of the six accompanying provisos (*ie*, provisos (a)–(f) to s 94) are satisfied. Put another way, it is often said that s 93 makes documentary evidence *exclusive* while s 94 makes it *conclusive* (see *Woodroffe* ([2] *supra*) at pp 3338–3339; Sudipto Sarkar & V R Manohar, *Sarkar’s Law of Evidence* (Wadhwa & Co, 16th Ed, 2007) (“*Sarkar*”) at p 1416; *Halsbury’s Laws of Singapore* vol 10(2) (LexisNexis, 2006 Reissue) at para 120.329; and *Butterworths’ Annotated Statutes of Singapore* vol 5 (Butterworths Asia, 1997 Issue) (“*Butterworths’ Annotated Statutes*”) at p 245).

72 Under s 94 of the Evidence Act, extrinsic evidence can only be admitted in spite of the parol evidence rule if it comes within one or more of the provisos to the section. Proviso (f) to s 94 of the Evidence Act (“proviso (f) to s 94”) is particularly relevant for the purposes of this appeal. The general view of this proviso appears to be that it is not really an exception to s 94, but, rather, a

fundamental rule of interpretation, the application of which is dealt with in ss 95–100 of the Evidence Act. For instance, in *Sarkar*, proviso (6) to s 92 of the Indian Act (“the Indian proviso (6)”), which is *in pari materia* with proviso (f) to s 94, is described in the following terms (at pp 1538–1539):

This is the last of the proviso[s] to this section [*ie*, s 92 of the Indian Act] and is expressed in very general terms. This is really a rule regarding the interpretation or construction of documents, and it embodies one of its principal canons. Wherever a court has to deal with a document which has been proved, its object is to endeavour to ascertain its real meaning, and for this purpose extrinsic evidence is sometimes necessary. ...

The rule of construction of construction embodied in [the Indian] proviso 6 is applicable when the words of [a] document taken by themselves are not clear in their meanings. ... ***Proviso (6) is of an exceptional nature, in so far as it is not an exception to the rule laid down in the main part of the section. It is a substantive provision itself laying down the law relating to the admissibility of extrinsic evidence as an aid to the construction of a document in cases in which it is necessary to find out how the document is related to existing facts*** ... [*E*]xtrinsic evidence is admissible for the purpose of showing the circumstances in which the document came to be executed with a view to arrive at the true effect of the transaction to which the document relates ...

... Parol evidence is in no case admissible to alter or vary the terms of a written instrument. The extrinsic evidence admissible under this proviso is to be confined to surrounding facts so intimately connected with the instrument that they afford reliable material for ascertaining the *identity* of the parties or the *nature and extent* of the subject-matter referred to in the document. ***The scope and limitation of the rule embodied in this proviso will be found in the following sections (93–98) [ie, ss 95–100 of the Evidence Act]. They should be read together.*** ...

[emphasis added in bold italics]

73 It is significant that in Sir Harry Lushington Stephen, *A Digest of the Law of Evidence by the late Sir James Fitzjames Stephen* (Macmillan & Co Ltd, 12th Ed, 1936) (“*Stephen’s Digest*”) at pp 115–117, the rule in proviso (f) to s 94 is classified, along with the other rules in ss 95–102 of the Evidence Act, under Art 98, which is headed: “What evidence may be given for the interpretation of documents”. (It is also important to note that, in *Stephen’s Digest*, Stephen acknowledged a great debt to the work of Vice-Chancellor Wigam, *Extrinsic Evidence in Aid of the Interpretation of Wills*, stating that Art 98 differed from the six propositions of the Vice-Chancellor only in its arrangement and form of expression and in the fact that it was not restricted to the interpretation of wills (see *Stephen’s Digest* at p 210)). The rules in provisos (a)–(e) to s 94 of the Evidence Act, on the other hand, are dealt with under Art 97, which is headed: “Evidence of terms of judgments, contracts, grants and other dispositions of property reduced to a documentary form”.

74 In other words, under the Evidence Act, the admissibility of extrinsic evidence to interpret a contract is governed by proviso (f) to s 94 together with ss 95–100 of this Act. Thus, an important issue in respect of proviso (f) to s 94 is whether ambiguity should be a precondition for its application and, linked to this, its relationship with the common law contextual approach to interpretation (see further [108], [121] and [132] below).

(C) SECTIONS 95–100 OF THE EVIDENCE ACT

75 It only remains for us to briefly discuss ss 95–100 of the Evidence Act, which, as noted at

[72] and [74] above, embody the scope and limitation of proviso (f) to s 94. Section 95 reads as follows:

### **Exclusion of evidence to explain or amend ambiguous document**

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

#### *Illustrations.*

(a) A agrees in writing to sell a horse to B for \$500 or \$600. Evidence cannot be given to show which price was to be given.

(b) [A] deed contains blanks. Evidence cannot be given of facts which would show how they were meant to be filled.

76 Section 95 applies in cases of patent ambiguity (see [50] above). However, the illustrations in s 95 itself and case authorities show that only patent ambiguity which reflects an ambiguity in the contracting parties' *intentions* will be fatal to a contract (see, for example, *Karuthan Chettiar v Parameswara Iyer* [1966] 2 MLJ 151, where the ambiguity arose from the words "[r]ate of interest: 18% per annum/month" (at 152)). As *Sarkar* ([71] *supra*) explains at p 1552:

This section has reference to documents the language of which is so vague or defective on their face as to convey no meaning [*ie*, illustration (b)] or so inherently ambiguous as to render the meaning uncertain [*ie*, illustration (a)]. On account of the inherent ambiguity or imperfection in the language or the deficiency or inconsistency of the words used, the intention of the maker of the document becomes a matter of pure speculation and the document fails.

The operation of s 95 is thus extremely narrow. In fact, this section operates as a limit on the scope of proviso (f) to s 94. In other words, when the language of a contract contains a patent ambiguity that reflects ambiguity of intention, extrinsic evidence is not admissible in spite of proviso (f) to s 94 because, as stated in *Sarkar* at p 1538, "admission of such evidence would not be interpreting a contract, but making a new one" (although we are of the view that it would be more accurate to say that extrinsic evidence which has been admitted under proviso (f) to s 94 cannot be used to cure patent ambiguities in the parties' intention as expressed in the contract (see [50] above)).

77 Section 96 of the Evidence Act states:

### **Exclusion of evidence against application of document to existing facts**

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

#### *Illustration*

A conveys to B by deed "my estate at Kranji containing 100 hectares". A has an estate at Kranji containing 100 hectares. Evidence may not be given of the fact that the estate meant was one situated at a different place and of a different size.

The somewhat narrow wording of s 96, which refers to the specific situation where the language in a document "applies accurately to existing facts", is probably attributable to its provenance as a rule of interpretation pertaining to wills (see [73] above). This section should therefore not be read too

restrictively. Like s 95 of the Evidence Act, s 96 should be viewed as prescribing a common-sense limit on the use of extrinsic evidence which has been admitted under proviso (f) to s 94. In *Butterworths' Annotated Statutes* ([71] *supra*), it is stated (at p 275) that:

The earlier section [*ie*, s 95] and the present section [*ie*, s 96] *lay down the outer limits of interpretation* in the sense that they mark the place where the language used by the writer must prevail over any extrinsic evidence and the place where extrinsic evidence may prevail over the language. So just as where the language is patently ambiguous it cannot be cured by extrinsic evidence, so where the language used is plain on its face, it must be given effect to, although it can be shown that the writer has made a mistake. [emphasis added]

Similarly, in *Woodroffe* ([2] *supra*) at p 3510, the explanation of s 94 of the Indian Act (which is *in pari materia* with s 96 of the Evidence Act) makes clear that:

When a court is asked to interpret a document, it looks at its language. If the language is clear and unambiguous and applies accurately to existing facts, the court accepts the plain and ordinary meaning ... When it is said that a court should look into all the circumstances to find an author's intention, it is only for the purpose of finding out whether the words apply accurately to existing facts. If, however, the words are clear in the context of the surrounding circumstances, the court cannot rely on them to attribute to the author an intention contrary to the plain meanings of the words used in the document.

78 We turn next to ss 97–99 of the Evidence Act, which are best addressed together as they deal with different *species* of the *genus* of latent ambiguity. The provisions are as follows:

### **Evidence as to document meaningless in reference to existing facts**

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

#### *Illustration*

A conveys to B by deed "my plantation in Penang".

A had no plantation in Penang, but it appears that he had a plantation in Province Wellesley, of which B had been in possession since the execution of the deed.

These facts may be proved to show that the deed related to the plantation in Province Wellesley.

### **Evidence as to application of language which can apply to one only of several persons**

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

#### *Illustrations*

(a) A agrees to sell to B for \$500 "my white horse". A has 2 white horses. Evidence may be given of facts which show which of them was meant.

(b) A agrees to accompany B to Halifax. Evidence may be given of facts showing whether Halifax in Yorkshire or Halifax in Nova Scotia was meant.

**Evidence as to application of language to one of two sets of facts to neither of which the whole correctly applies**

**99.** When the language used applies partly to one set of existing facts and partly to another set of existing facts, but the whole of it does not apply correctly to either, evidence may be given to show to which of the 2 it was meant to apply.

*Illustration*

A agrees to sell to B "my land at X in the occupation of Y". A has land at X, but not in the occupation of Y, and he has land in the occupation of Y, but it is not at X. Evidence may be given of facts showing which he meant to sell.

79 Strictly speaking, s 97 does not pertain to latent ambiguity since, after the context is considered, multiple meanings of the words in question do not exist; rather, the original language becomes meaningless in the light of the surrounding circumstances so as to convince the court that such language could not have been used in what s 97 calls its "plain" sense. However, we are aware that certain leading commentators have been content to describe the scenario posited in s 97 as a kind of latent ambiguity (see, for instance, *Sarkar* ([71] *supra*) at p 1561 and *Butterworths' Annotated Statutes* ([71] *supra*) at p 276). Section 98 is concerned with a type of latent ambiguity known at common law as "equivocation" (see *Sarkar* at p 1562). In such cases, even direct declarations of the contracting parties' intent may be admitted to resolve the ambiguity (*id* at p 1568). Finally, s 99 is concerned with latent ambiguities which arise because of an inaccurate description or name so that the description or name is partly correct and partly incorrect. For instance, in the illustration in s 99, because neither set of given facts fully corresponds with the contractual provision (*viz*, A's agreement to sell to B "[his] land at X in the occupation of Y" [emphasis in original omitted]), the provision itself becomes capable of alternative meanings, *ie*, it may refer to the sale of A's land at X or of A's land in the occupation of Y. Thus, extrinsic evidence is admissible to resolve the ambiguity. Again, it may be noted that ss 97–99 all pertain to ambiguity *about facts* (usually the identity of persons or the subject matter of an agreement), the reason being that these sections likewise originated as rules of interpretation applying to wills (see [73] above).

80 As s 100 of the Evidence Act is a straightforward provision, it is not necessary for us to discuss it, but we will set it out for the sake of completeness:

**Evidence as to meaning of illegible characters, etc**

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

*Illustration*

A, a sculptor, agrees to sell to B "all my mods". A has both models and modelling tools. Evidence may be given to show which he meant to sell.

(2) *The case law*

81 We turn now to the case law in Singapore, with a particular focus on the movement towards the contextual approach to contractual interpretation and its ramifications for the parole evidence rule as encapsulated in s 94 of the Evidence Act.

82 In *Citicorp Investment Bank (Singapore) Ltd v Wee Ah Kee* [1997] 2 SLR 759 ("*Citicorp Investment Bank (Singapore)*"), the Court of Appeal examined the operation of the parole evidence rule and the admissibility of extrinsic evidence in the interpretation of contracts in Singapore. In that case, the defendant bank ("Citicorp") had, under a loan agreement ("the original loan agreement"), advanced to the plaintiff borrower ("Wee") a principal sum of US\$4.25m for the purchase of shares in a company ("the Shares"). Pursuant to the original loan agreement, Wee had granted to Citicorp: (a) a charge over the Shares, and (b) an option to purchase, during the option period, 30% of the Shares. Wee subsequently sought an extension of time to repay the principal sum plus interest. The parties thus entered into a fresh agreement ("the fresh loan agreement"), the pertinent portion of which read as follows (at [45]):

The call option [granted pursuant to the original loan agreement] ... *shall be terminated subject to* (1) your payment to Citicorp of a sum of US\$800,000 on or before 15 December 1995, and (2) your [fulfilment] of your obligation to repay the loan under the [original] loan agreement ... [emphasis in original]

Wee eventually repaid Citicorp the loan plus accrued interest, but not the sum of US\$800,000. As a result, Citicorp delivered only part of the Shares to Wee and held on to the rest, alleging that it was entitled to retain them as security for the call option fee of US\$800,000. In determining whether Citicorp was entitled to retain part of the Shares, the Court of Appeal had to rule on two issues: first, whether the option was invalid as a clog on the equity of redemption; and, second (and more relevantly for our purposes), if the option was found to be valid, whether, by the terms of the fresh loan agreement, Wee still owed Citicorp a further \$800,000 for the termination of the option. As the Court of Appeal put it (at [47]):

If the terms were such that the option was to be terminated *forthwith* in consideration of a promise to pay US\$800,000, then this would arguably constitute an 'indebtedness' caught by the charge. If so, [Citicorp] was entitled to retain the [S]hares. On the other hand, if the terms were *contingent* so that the option was to be terminated only upon (1) payment of US\$800,000 and (2) repayment of the loan, then no debt had accrued: the US\$800,000 was never paid; the option was never terminated; the option had lapsed. In other words, [Citicorp] could not retain the [S]hares because [Wee] would owe no further debt after fully discharging his debt under the [original] loan agreement. [emphasis in original]

83 As Wee's application was for summary judgment for the return of the Shares, counsel for Citicorp argued that the interpretation of the terms of the fresh loan agreement would warrant a trial. The thrust of counsel's argument was that extrinsic evidence must be adduced under proviso (f) to s 94 of the Evidence Act (Cap 97, 1990 Ed) ("the 1990 Act") and the witnesses cross-examined in order to ascertain the true sense of the words as used by the parties (see *Citicorp Investment Bank (Singapore)* at [48]). The Court of Appeal robustly rejected this argument. Its reasoning is worth setting out at some length, as follows:

62 We recognise that there may be instances where extrinsic evidence of surrounding circumstances may be necessary to aid the interpretation of a document. In such cases, the 'matrix' of facts within which the contract is set is relevant: see *Mt Elizabeth Hospital Ltd v Allan Ng Clinic for Women* [1994] 3 SLR 639 at p 652, *Reardon Smith Line* ([[55] *supra*]) ...

63 But, while extrinsic evidence may be adduced in appropriate cases, there is an important qualification which has been stated in *Phipson on Evidence* (14th Ed, 1990) at p 1050 in the following manner:

With regard to the limits of interpretation, it is to be remembered that the function of the court is merely declaratory of what is in the document, not speculative as to what was probably intended to be there. *Moreover the meaning imputed must be one which the words are reasonably adequate to convey: 'All latitude of construction shall submit to this restriction, that the words may bear the sense which by construction is put upon them. If we step beyond this line, we no longer construe men's deeds, but make deeds for them'.* (See *Gibson v Minet* [(1791) 1 H Bl 569; 126 ER 326]; *Re Lewis's Will Trusts* [1985] 1 WLR 102.) ...

Ultimately, the latitude which a court is prepared to give is a question of degree.

64 It is in the same vein that Tindal CJ had stated in *Shore v Wilson* (1842) 9 Cl & Fin 354 at pp 565–566; 8 ER 450 [at 532], more than a hundred years ago, as follows:

The general rule I take to be, that where the words of any written instrument are free from ambiguity in themselves, and **where external circumstances do not create any doubt or difficulty as to the proper application of those words** to claimants under the instrument, or the subject-matter to which the instrument relates, such instrument is always to be construed according to the strict, plain, common meaning of the words themselves; and that in such case evidence *dehors* the instrument, for the purpose of explaining it according to the surmised or alleged intention of the parties to the instrument, is utterly inadmissible.

65 The Earl of Halsbury LC also expressed a similar view in *North Eastern Railway Co v Lord Hastings* [1900] AC 260 at p 263:

The words of a written instrument must be construed according to their natural meaning, and it appears to me that no amount of acting by the parties can alter or qualify words which are plain and unambiguous.

So far as I am aware, no principle has ever been more universally or rigorously insisted upon than that written instruments, if they are plain and unambiguous, must be construed according to the plain and unambiguous language of the instrument itself.

66 Accordingly, s 94(f) [*ie*, proviso (f) to s 94 of the 1990 Act] must be relied upon scrupulously, **its application limited to situations whereby the proposed alternative meaning is one which the words of the document can properly bear. No evidence of any intention inconsistent with the plain meaning of the words should be admitted, for the object of any extrinsic evidence is not to vary the language, but merely to explain the sense of the words as used by the parties** (see also *Sarkar on Evidence* at p 1282). Hence, in *Wong Kai Chung v Automobile Association of Singapore* [1993] 2 SLR 577, this court stated that s 94(f) 'does not permit the admission of subjective evidence to interpret the written word', and proceeded to find that there was no ambiguity in the relevant document. Any evidence of negotiations leading up to the contract is also inadmissible since it is the final agreement which records a consensus: see *Prenn v Simmonds* [(1954) *supra*] ...

6 7 **We therefore took the position that where words of a written agreement have a clear and fixed meaning, not susceptible of explanation, extrinsic evidence is inadmissible**

**to show that the parties meant something different from what they have written:** see *Bank of New Zealand v Simpson* [1900] AC 182. **Otherwise, no contract will be worth the paper it is written on if clear and unambiguous words can be easily displaced by extrinsic evidence in an attempt to explain a contrary meaning.**

68 ***In our view, the language of the letter agreement [ie, the fresh loan agreement] was plain and unambiguous. There was no need to resort to the surrounding circumstances or extrinsic evidence to ascertain its meaning.*** It clearly stated that the termination of the option was 'subject to' conditions. If those conditions were not fulfilled, there was no termination. Nowhere in the letter agreement did it say that a debt of US\$800,000 was due from the respondent [ie, Wee]. If the option was indeed to be terminated immediately, and the respondent had promised to pay US\$800,000, then the letter agreement should have stated that the option was to be terminated 'forthwith', and [that] the respondent owed US\$800,000 with 'immediate effect'. It had to be borne in mind that it was, after all, the bank [ie, Citicorp] that [had] drafted the letter, not some ordinary lay person. We did not think it was open to a vast institution like the bank to claim that it did not know the meaning of the words [which] it used.

[emphasis added in bold italics]

Thus, the judgment in *Citicorp Investment Bank (Singapore)* was a staunch affirmation of the parol evidence rule. The Court of Appeal alluded to the common law contextual approach to contractual interpretation (*id* at [62]), but firmly restricted its potential application by taking a restrictive view of proviso (f) to s 94 of the 1990 Act, which is identical to (the present) proviso (f) to s 94 (for ease of discussion, the term "proviso (f) to s 94" shall be used hereafter to refer to proviso (f) to s 94 of both the 1990 Act and the present Evidence Act). It appeared to be saying that extrinsic evidence was only admissible under that proviso where the words of a written agreement did *not* have a clear and fixed meaning, *ie*, where the language of the document was *not* "plain and unambiguous" (see *Citicorp Investment Bank (Singapore)* at [68]). It should be noted that the Court of Appeal appeared to accept that *latent* ambiguity could also render the language of a contract susceptible of alternative explanation (see the emphasised portion of Tindal CJ's reasoning in *Shore v Wilson* (1842] 9 Cl & Fin 354; 8 ER 450, which was relied on by the court at [64] of *Citicorp Investment Bank (Singapore)*). This seems to contradict the court's rigid insistence that extrinsic evidence was inadmissible *unless* the language was ambiguous (see also [52] above).

84 The Court of Appeal's view of the impact of proviso (f) to s 94 was roundly criticised in Daniel Seng, "Another Clog on the Construction of Contracts? The Parol Evidence Rule and the Use of Extrinsic Evidence" [1997] SJLS 457 ("Seng's article") at 463 as introducing an unjustified qualification to the proviso. Seng's view (at 481) was that:

*[T]he parol evidence provisions in the [1990] Act have never barred the admission of extrinsic evidence as part of the "factual matrix" of the case, nor confined its use to only instances where the language of a written document is unclear or ambiguous. The principal section confirming this, section 94(f), permits the proof of "any fact ... which shows in what manner the language of a document is related to existing facts." It is conspicuously free of qualifications, unlike the other exceptions in section 94. [emphasis added]*

Under this view, proviso (f) to s 94 is the statutory analogue of the common law contextual approach to contractual interpretation.

85 However, the Court of Appeal's view remained unchanged in *Tan Hock Leng v L & M Group*

*Investments Ltd* [2002] 2 SLR 213 (“*Tan Hock Leng*”) (see especially [11] and [13]), although, in that case, the court did not make any explicit reference to *Citicorp Investment Bank (Singapore)* ([82] *supra*). On the facts of *Tan Hock Leng*, the court found that the relevant provision was unclear on its face and, thus, extrinsic evidence was admissible under proviso (f) to s 94.

86 The next significant case is *MAE Engineering Ltd v Fire-Stop Marketing Services Pte Ltd* [2005] 1 SLR 379 (“*MAE Engineering*”). The appellant in that case (“MAE”) had selected the respondent (“Fire-Stop”) to supply and install fire-rated board cladding to the air-conditioning, mechanical and ventilation (“ACMV”) duct of a project. Based on MAE’s estimate that 5,000m<sup>2</sup> of duct required cladding, the parties agreed that Fire-Stop would perform the work at the rate (quoted by Fire-Stop) of \$80/m<sup>2</sup>. A document (“T/007”) was signed whereby Fire-Stop would keep its offer open until its appointment was approved by the owners and consultant of the project. The first paragraph of T/007 stated (see *MAE Engineering* at [4]):

During our recent evaluation exercise re the above Project, M/s [Fire-Stop] Marketing Services Pte Ltd represented by Mr S H Tan, the final lump sum offer price to MAE Engineering Pte Ltd (MAE) is S\$400,000/- (Singapore Dollars Four Hundred Thousand Only) (5,000m<sup>2</sup> x \$80/m<sup>2</sup>). In consideration of S\$1 (the receipt of which you acknowledged) this offer price to MAE remains valid and irrevocable throughout MAE’s negotiations in seeking the approval and final decision from the customer and consultant. If final approval is given, you have agreed to enter into a contract with MAE.

The arrangement was subsequently formalised in a subcontract dated 17 April 2000 (“the subcontract”). The preamble of the subcontract stated (*id* at [18]):

Further to your confirmation [of the] agreed Lump Sum price of S\$400,000.00 ... we hereby confirm the award for the provision of Supply, Delivery, Installation, Warranty & Endorsement of 2 Hours Fire Rated Board Cladding to 5000M<sup>2</sup> of ACMV Ductwork ... [emphasis in original]

Clause 1.1 of the subcontract reiterated:

This Sub-Contract Agreement is for the provision of *Supply, Delivery, Installation, Warranty & Endorsement of 2 Hours Fire Rated Board Cladding to 5000M<sup>2</sup> of ACMV Ductwork* ... [emphasis added in bold italics]

8 7 It was common ground that the total area of ACMV duct actually cladded exceeded 5,000m<sup>2</sup>, and MAE did not attempt to hold Fire-Stop to the ostensible lump sum price of \$400,000. The issue was whether, on a true and proper construction of the subcontract, payment to Fire-Stop should have been based on the area of cladded or uncladded ACMV duct (MAE would have to pay more in the former case). The trial judge ruled in Fire-Stop’s favour and held that payment should be based on the external surface area of cladded ACMV duct.

88 The Court of Appeal allowed MAE’s appeal for several reasons. First, the court noted that, on a plain and ordinary reading of the subcontract, the figure of 5,000m<sup>2</sup> must have referred to the area of uncladded duct since the cladding was to be installed to 5,000m<sup>2</sup> of ACMV duct (see [86] above). Counsel for MAE took issue with Fire-Stop’s contention that the term was ambiguous and could also refer to the area of cladded duct. It was submitted that if Fire-Stop’s argument were accepted, it would mean that MAE would in effect be asking Fire-Stop to install cladding to an area of ductwork that was already cladded.

89 In response to Fire-Stop's contention that, even if the figure of 5,000m<sup>2</sup> were held to refer to the area of uncladded duct, it did not necessarily indicate that *payment* should also be based on the area of uncladded duct, the Court of Appeal reasoned as follows:

23 If one were to read the [subcontract] in isolation from the surrounding circumstances, this may be an arguable proposition. However, it is trite law that when construing a contract, the court must also look at the factual matrix in which the agreement was made, as the surrounding circumstances including "the 'genesis' and 'aim' of the transaction" are relevant: *Prenn v Simmonds* [(54) *supra*] ... at 1385. As Lord Wilberforce explained in *Reardon Smith Line* [(55) *supra*] ... at 995–996 (approved by the Court of Appeal in *Mt Elizabeth Hospital Ltd v Allan Ng Clinic for Women* [1994] 3 SLR 639 at 652, [35]):

No contracts are made in a vacuum: there is always a setting in which they have to be placed. The nature of what is legitimate to have regard to is usually described as "the surrounding circumstances" but this phrase is imprecise: it can be illustrated but hardly defined. In a commercial contract it is certainly right that the court should know the commercial purpose of the contract and this in turn presupposes knowledge of the genesis of the transaction, the background, the context, the market in which the parties are operating.

and at 997:

[W]hat the court must do must be to place itself in thought in the same factual matrix as that in which the parties were.

24 Although evidence of prior negotiations is inadmissible as it does not represent any consensus between the parties, evidence of an antecedent agreement is an objective fact that the court should take into account as part of the "factual matrix" in which the parties made their contract (Kim Lewison, *The Interpretation of Contracts* (3rd Ed, 2004) at para 3.05). In the present case, the parties did sign a pre-award document which incorporated forms T/007 and T/008. The document clearly provided that Fire-Stop would be paid "S\$400,000 (Singapore Dollars Four Hundred Thousand Only) (5,000m<sup>2</sup> x \$80/m<sup>2</sup>)" for the cladding work. The underlined formula demonstrates that the area of 5,000m<sup>2</sup> did more than simply specify the amount of work Fire-Stop was required to perform; it was obviously a vital component of the basis of payment as well. The fact that the figure S\$400,000 corresponded exactly to the revised rate based on the area of the uncladded duct could hardly be a coincidence.

[underlining and emphasis in original]

On the particular facts of *MAE Engineering*, the reception of extrinsic evidence via the common law contextual approach did not contravene s 94 of the Evidence Act because the evidence in fact bolstered the natural and ordinary meaning of the subcontract. Perhaps for this reason, the Court of Appeal did not discuss proviso (f) to s 94. Furthermore, the court referred to *Citicorp Investment Bank (Singapore)* [(82) *supra*] only for the proposition that every contract should be construed as a whole and no words should be ignored (see *MAE Engineering* at [20]). Thus, although the decision in *MAE Engineering* is significant for its endorsement of the common law contextual approach, it is unclear how the obstacle in the form of a restrictively-interpreted proviso (f) to s 94 (as advocated in *Citicorp Investment Bank (Singapore)*) was overcome.

90 In contrast, two High Court decisions which, coincidentally, were released on the same date (*viz*, 28 February 2005) – *Standard Chartered Bank v Neocorp International Ltd* [2005] 2 SLR 345 ("*Standard Chartered Bank*") and *China Insurance Co (Singapore) Pte Ltd v Liberty Insurance Pte Ltd*

[2005] 2 SLR 509 (“*China Insurance Co*”) – did address this issue.

91 In *Standard Chartered Bank*, the plaintiff bank had granted banking facilities, comprising a term loan and overdraft facilities, to the defendant’s subsidiary (“the borrower”). The facility letter stated that the purpose of the overdraft facility was to meet the borrower’s working capital requirements. The defendant executed a guarantee for the sum of \$1.5m for “all monies, obligations and liabilities” [emphasis in original omitted] (*id* at [7]) which might become due any time thereafter. A board resolution was also passed stipulating that the defendant was to provide the guarantee in the form and content required by the plaintiff. Subsequently, the borrower defaulted on the loan. Pursuant to the guarantee, the plaintiff demanded from the defendant payment of the principal sum of \$1.5m and interest thereon.

92 The defendant contended, *inter alia*, that the extent of its liability under the guarantee was limited to overdraft facilities employed by the borrower strictly for the purposes of the latter’s working capital. It sought to rely on the facility letter and the board resolution to prove this. The plaintiff vigorously disputed this on the basis that the material terms of the guarantee, *viz*, “all moneys, obligations and liabilities”, were unambiguous and, thus, the defendant’s liability was to be determined solely by reference to the guarantee. In rejecting the plaintiff’s submission, the court stated:

3 5 *The plaintiff’s contention was that the sum total of the defendant’s liability was to be determined merely by reference to the terms of the guarantee. That is not entirely correct. It is settled law that “where words of a written agreement have a clear and fixed meaning, not susceptible of explanation, extrinsic evidence is inadmissible to show that the parties meant something different from what they have written”: Citicorp Investment Bank (Singapore) ... [(82) supra]] at [67]. Broadly speaking, if the purport of a guarantee is plain from the terms of the document, extrinsic evidence will not be admissible to alter, vary or contradict its terms (see also s 96 of the [Evidence Act]). However the immediate events surrounding the giving of a guarantee may be relevant and “admissible in evidence to determine the existence and the application of the terms of the guarantee having regard to the provisions of [ss 93–94 of the Evidence Act]”: Citibank NA v Ooi Boon Leong [1981] 1 MLJ 283 at 282. Such evidence could be relevant in determining the context in which the guarantee was given and to be interpreted; it must not be applied for the purposes of contradicting unambiguous language, but rather to see if there are circumstances addressing the alleged inchoate attachment of a purported contractual obligation.*

3 6 *The matrix approach to contractual interpretation so succinctly summarised by Lord Hoffmann in ... Investors Compensation [Scheme] ... is in accordance with ... [proviso (f) to s 94]. It advocates a commercially-sensible approach in divining the objective intentions of the parties to a document. This approach has the requisite suppleness to permit a departure from the literal terms of a document, where necessary, to allow the court to objectively find a rational meaning contingent upon the proper commercial context. It cannot be gainsaid that when parties draft contracts they do not usually expect the court to indulge in excessive formalism. In the ultimate analysis, the task of the court is to arrive at the reasonable meaning of the documents without artificial rules that fetter its sole objective of ascertaining the true intention of the parties. Substance takes precedence over form. This approach also recognises the chameleon-like character of words, phrases and sentences. They take their true meaning from their contextual usage and not invariably from the dictionary. This commonsense approach is not, however, to be interpreted as an unbridled license to import subjective expressions of intent or to cast away established rules of interpretation which eschew reliance on prior negotiations and subjective expressions of intent.*

[emphasis added]

93 Thus, the court recognised that under the contextual approach to contractual interpretation, extrinsic evidence could be admitted *even if the terms of the contract were unambiguous*, so long as it was not applied for the purpose of *contradicting* the written terms in contravention of the parol evidence rule. Significantly, the court articulated the view that the common law contextual approach was “in accordance with” (see *Standard Chartered Bank* at [36]) proviso (f) to s 94, thus implicitly adopting Seng’s thesis (at [84] above). (It should be noted, however, that the court ultimately held that, on the facts, the extrinsic evidence which the defendant sought to rely on to limit the scope of the guarantee was inadmissible and, thus, the plaintiff’s claim did fall within the ambit of the guarantee (see *Standard Chartered Bank* at [41], [44] and [48]).)

94 In *China Insurance Co* ([90] *supra*), BT Engineering Pte Ltd (“BT”) had obtained a workmen’s compensation industrial risks policy from the defendant insurance company for the period 1 April 2002–21 March 2003. This policy was later extended to include Keppel Shipyard as well. BT also obtained a workmen’s compensation policy from the plaintiff insurance company for the period 19 April 2002–19 July 2002. This particular policy was intended to cover work to be done on board two vessels situated at Keppel Shipyard. It likewise embraced both BT and Keppel Shipyard as the insured parties (collectively referred to as “the Insured Parties”). Subsequently, one of BT’s employees (“the Employee”) was involved in an accident whilst working on board one of the two vessels covered under the policy with the plaintiff. The Employee in turn commenced proceedings against the Insured Parties for damages arising from his personal injury.

95 The plaintiff did not dispute that it was liable under its policy to indemnify the Insured Parties in the personal injury claim should the Employee succeed in his action. Not content with awaiting the outcome of the personal injury claim, the plaintiff initiated proceedings to obtain a declaration that the defendant was legally liable to indemnify the plaintiff to the extent of 50% of any amount which the plaintiff was liable to pay the Insured Parties as a result of the latter’s potential liability to the Employee in the personal injury claim. The plaintiff based its claim for such contribution on the doctrine of double insurance. Andrew Phang Boon Leong JC thus had to determine if the subject matter and the risk covered by the plaintiff’s and the defendant’s respective policies were the same, in which case there would be a situation of double insurance resulting in the defendant’s obligation to contribute. The defendant denied that the insurance cover under the two policies was similar on the basis of, *inter alia*, three affidavits which showed that the defendant had communicated to BT that the defendant’s policy excluded risk relating to work on vessels and that BT had duly sought additional cover for the specific project by way of another insurance policy.

96 Phang JC was able to decide, on a plain and reasonable construction of the documents themselves, that the risks covered in the two policies were different (see *China Insurance Co* ([90] *supra*) at [30]). Thus, his remarks on the sections of the Evidence Act pertaining to the parol evidence rule and the common law contextual approach to contractual interpretation were *obiter*. Be that as it may, they do shed further light on the position in Singapore *vis-à-vis* the use of extrinsic evidence to interpret a written contract.

97 Phang JC appeared to accept the continued force of the parol evidence rule as set out in s 94 of the Evidence Act, although he held (*id* at [31]) that, on the facts, the rule did not apply as the plaintiff and the defendant were essentially strangers to each other’s contracts or policies (the judge pointed out that s 94 applied only “as between the parties” (*ibid*) to the contract). On the facts, Phang JC applied s 93 of the Evidence Act instead. However, he was of the view that (see *China Insurance Co* at [45]–[46]):

[T]here is no reason in principle why one or more common law exceptions [to the rule against extrinsic evidence] should be excluded if they do, in fact, otherwise apply to the present facts and are *not inconsistent* with ss 93 and 94 of the Evidence Act.

I have in mind, in particular, the well-established common law principle to the effect that extrinsic evidence is admissible to aid the court in establishing the factual matrix which, in turn, would help the court in construing the contract(s) concerned.

[emphasis in original]

The judge then referred approvingly to, *inter alia*, the cases of *Reardon Smith Line* ([55] *supra*), *Investors Compensation Scheme* ([56] *supra*) and *MAE Engineering* ([86] *supra*). He continued (at [51] of *China Insurance Co*):

Returning to the present case, it is clear that the [extrinsic] evidence in the present case does, in fact, aid in establishing what the factual matrix is. It might be argued by counsel for the plaintiff that the principle presently considered is only applicable in situations where the relevant contract(s) are ambiguous. *I do not think that this is necessarily the case, for any aid to construction which does not add to, vary or contradict the relevant documents ought to be permitted.* [emphasis added]

Thus, *China Insurance Co* added to the growing body of local case law adopting the contextual approach to contractual interpretation while affirming, at the same time, the continued existence of the parol evidence rule (as statutorily embodied in the Evidence Act).

98 Phang JC further suggested that proviso (f) to s 94 “might, arguably at least, be a possible analogue of the common law [contextual approach]” (*id* at [53]). However, noting that, as a result of *Citicorp Investment Bank (Singapore)* ([82] *supra*) and *Tan Hock Leng* ([85] *supra*), “[i]t [was] clear ... that [proviso (f) to s 94 would] only come into play when there [was] some latent ambiguity in the contractual document itself” (see *China Insurance Co* at [53]), he opined that there were “possible problems in correlating the provision with the existing common law principles” (*ibid*). The judge then referred to Seng’s article ([84] *supra*) at, *inter alia*, 473, in which the writer had concluded that the restrictive view taken by the Court of Appeal in *Citicorp Investment Bank (Singapore)* to proviso (f) to s 94 was not easily reconcilable with cases in which the Singapore courts had accepted the common law contextual approach, citing, as examples of the latter, *Diversey (Far East) Pte Ltd v Chai Chung Ching Chester* [1993] 1 SLR 535 and *Mt Elizabeth Hospital Ltd v Allan Ng Clinic for Women* [1994] 3 SLR 639. It is apparent, therefore, that the judge, while favouring the more liberal approach to proviso (f) to s 94, felt constrained by the views of the Court of Appeal on this subject. The judge concluded with an impassioned appeal for reform (see *China Insurance Co* at [66]):

[T]he various issues and difficulties raised with respect to the parol evidence rule in general, and the interpretation as well as application of ss 93 and 94 of the Evidence Act in particular, have, in turn, raised the more general question as to whether or not the time is now appropriate for a re-examination of these provisions with a view to possible reform. I have indicated a sample of the specific difficulties as well as the possible need for legislative reform. I can do no more than this. As I have already mentioned, reform of these provisions is outside the purview of the courts. However, it is legitimate, in my view, to raise these various issues for a number of reasons. First, the parol evidence rule originated from the common law. Secondly, the courts must interpret and/or apply ss 93 and 94 of the Evidence Act. Thirdly, the difficulties lie not just within the provisions themselves and in the relationship between them but also in the relationship between these provisions and the common law (the last-mentioned branch of law being one which is

administered by the courts). It is therefore hoped that the appropriate bodies might consider reform of this very problematic rule as embodied within equally problematic statutory provisions in the not too distant future.

99 In response to these concerns, the Law Reform Committee ("LRC") of the Singapore Academy of Law published a report in 2006 on the review of the parole evidence rule as embodied in the Evidence Act (see Law Reform Committee, Singapore Academy of Law, *Report of the Law Reform Committee on the Review of the Parol Evidence Rule* (November 2006) (Chairman: Leslie Chew SC) ("the LRC Report"). Notably, the LRC did not recommend the abolition of the parole evidence rule, nor did it agree with the Law Commission that the parole evidence rule was merely a circular proposition (see the Law Commission's view at para 2.7 of Law Com No 154 ([32] *supra*) (reproduced at [34] above)). Instead, the LRC concluded (at para 93 of the LRC Report):

On balance, the statutory rule continues to serve a useful function and should be retained. The statutory rule has a central place in the Evidence Act. It helps to promote a measure of discipline in contractual relationships, so that parties apply greater care when drafting contracts and other like documents. The benefits of the rule in promoting certainty, especially in commercial contracts, remains relevant today. However, to avoid injustice that may result from a strict application of the statutory rule, it should be kept flexible by allowing for additional exceptions developed under the common law.

Even more significantly, the LRC endorsed Seng's view of proviso (f) to s 94 (see [84] above), saying (at para 125 of the LRC Report):

On balance, a broader and more permissive application of [proviso] (f) is to be preferred. It accords with the modern approach to construction of contracts.

100 In the meantime, when the Court of Appeal next faced the issue of the use of extrinsic evidence to affect a written contract in *Singapore Telecommunications Ltd v Starhub Cable Vision Ltd* [2006] 2 SLR 195 ("*Singapore Telecommunications*"), it did not hesitate to invoke, without addressing the attendant conceptual difficulties, the common law contextual approach to contractual interpretation. In that case, by a contract dated 16 June 1995 ("the NLA"), the appellant ("SingTel") agreed to lease its optical fibres and underground ducts ("the Facilities") to the respondent ("SCV") for the purposes of cable television ("CTV") roll-out in Singapore. As SCV could not confirm its technical requirements for CTV transmission to commercial and landed properties ("Excluded Properties") in time, the parties agreed that the NLA would only cover high-rise residential apartments ("Permitted Properties"). This was expressly stated in cl 1.2 of Exhibit A of the NLA ("Exhibit A"). It was further stipulated in cl 1.3 of Exhibit A that Excluded Properties were outside the NLA's ambit.

101 Negotiations on a lease of the Facilities for CTV roll-out to Excluded Properties ("the Prospective Lease") continued after the NLA was concluded. Dissatisfied with the rates quoted by SingTel for the Prospective Lease, SCV wrote to the former stating that it would not lease the Facilities where landed properties (which formed part of the Excluded Properties) were concerned, but would instead either build its own infrastructure or, where it was not viable to do so, lease the Facilities from SingTel on an *ad hoc* basis. SingTel replied to SCV stating that it "respect[ed]" (*id* at [7]) the latter's decision.

102 Subsequently, SingTel discovered that SCV had built extensions from that part of the CTV transmission infrastructure which lay outside the Facilities ("the Extensions") and had been "tapping", *ie*, using the Extensions to convey CTV signals from Permitted Properties onwards to Excluded Properties. SingTel sued SCV for breach of the NLA, claiming that it had lost revenue which it would

otherwise have earned under the Prospective Lease. The trial judge held that, although SCV had breached the NLA by tapping, SingTel could not recover the revenue allegedly lost due to Art 8.5(a) of the NLA ("Art 8.5(a)"), which stated that neither party to the NLA would be liable for (*id* at [51]):

... any indirect, incidental, consequential, or special damages (including, without limitation, damages for harm to business, lost revenues, or lost profits) regardless of the form of action or whether such Party had reason to know of such damages ...

The trial judge held that since loss of revenue was one of the heads of damages listed in parentheses, damages for such loss were excluded. The Court of Appeal allowed SingTel's appeal against the trial judge's interpretation of Art 8.5(a). In so doing, it firmly endorsed the contextual approach to contractual interpretation (see [24]–[25] and [52] of *Singapore Telecommunications*).

103 The court concluded (*id* at [55]):

[T]he contractual structure of the NLA was expressed in terms of the Facilities leased under the NLA (and as a corollary, the signals transmitted by those Facilities) being used in respect of Permitted Properties. A separate agreement on the lease of the Facilities in relation to Excluded Properties was envisaged. In these circumstances, it would be astonishing (unless compelled to do so by the words used in the NLA) to attribute to the parties an intention to exclude a liability for tapping, a subject matter which they never thought about. By analogy with [*Hong Realty (Pte) Ltd v Chua Keng Mong* [1994] 3 SLR 819], the application of Art 8.5(a) (also an exclusion clause) must be restricted to the particular circumstances the parties had in mind at the time they entered into the NLA. Tapping was not under consideration at the material time and thus, Art 8.5(a) cannot be taken to exclude liability for such act or conduct. That Art 8.5(a) does not apply, extend to or embrace tapping accords with the commercial purpose and construction of this provision. The commercial purpose of Art 8.5(a) was to protect each party to the NLA against the risk of non-performance or mis-performance by the other in relation to Permitted Properties. Put another way, *Art 8.5(a) was meant to apply only where the types of damages listed arose while the parties were doing what was contemplated under the NLA, ie, using the Facilities to provide cable television services to Permitted Properties*. We therefore hold that SingTel is not precluded by Art 8.5(a) from claiming damages from SCV. [emphasis added]

In other words, the court effectively read the words "any ... damages" in Art 8.5(a) as "any ... damages arising out of the use of the Facilities under the NLA".

104 *Singapore Telecommunications* ([100] *supra*) is extremely pertinent to this appeal for two reasons. First, it concerned the interpretation of an exclusion clause. Second, it was the first significant case in which the application of the contextual approach actually led to an interpretation of a written contractual term that did not accord with its plain and ordinary language. In contrast, in *MAE Engineering* ([86] *supra*), the extrinsic evidence in fact confirmed the natural and ordinary meaning of the relevant terms (see [88]–[89] above); in *China Insurance Co* ([90] *supra*), the external context supported the interpretation that was arrived at on the basis of the contractual documents themselves (see [96] above); and in *Standard Chartered Bank* ([90] *supra*), the extrinsic evidence was inadmissible on the facts of the case. In respect of *Singapore Telecommunications*, however, it is possible to take the view that the court had, in interpreting Art 8.5(a), strayed into the territory of *adding to or varying* the plain and ordinary language of a contractual term. Doubts would therefore arise about the robustness of the parol evidence rule as statutorily embodied in s 94 of the Evidence Act. We shall address this issue in greater detail at [122]–[123] below.

105 We come now to the recent Court of Appeal case of *Sandar Aung v Parkway Hospitals*

*Singapore Pte Ltd* [2007] 2 SLR 891 (“*Sandar Aung*”). In *Sandar Aung*, the appellant’s mother (“the Patient”) was admitted to the respondent hospital (“the Hospital”) to undergo an angioplasty. At the time of the Patient’s admission, the appellant had signed two documents issued by the Hospital – an estimate of hospital charges (“the Estimate”) and a standard form contract stating the Hospital’s conditions of services and policies (“the Standard Contract”). The Estimate for the Patient’s angioplasty computed the total estimated hospital charges to be \$15,227.30. The appellant later signed an undertaking agreeing to be jointly and severally liable with the Patient for “all charges, expenses and liabilities incurred by and on behalf of the [P]atient” (see *Sandar Aung* at [7]) (“the Undertaking”). Unfortunately, unanticipated complications in the Patient’s recovery after surgery resulted in a medical bill that far exceeded the amount presented in the Estimate. The Court of Appeal had to determine, *inter alia*, whether the appellant’s liability in the Undertaking referred to only the expenses related to the Patient’s angioplasty or all the expenses incurred as a result of the medical services provided by the Hospital to the Patient.

106 The court firmly and lucidly stated (*id* at [29]):

It is clear that, ***at common law, it has always been open to the court to have recourse to extrinsic material where such material would aid in establishing the factual matrix which would (in turn) assist the court in construing the contract in question. This assumes, of course, that the reference to such material would not result in the contravention of the parol evidence rule which is statutorily embodied within ss 93 and 94 of the Evidence Act*** ... This is, in fact, precisely the situation in the present case. The key concept here is that of *context*. No contract exists in a vacuum and, consequently, its language must be construed in the context in which the contract concerned has been made. We would go so far as to state that even ***if the plain language of the contract appears otherwise clear, the construction consequently placed on such language should not be inconsistent with the context in which the contract was entered into if this context is clear or even obvious, since the context and circumstances in which the contract was made would reflect the intention of the parties when they entered into the contract and utilised the (contractual) language they did.*** It might well be the case that ***if a particular construction placed on the language in a given contract is inconsistent with what is the obvious context in which the contract was made, then that construction might not be as clear as was initially thought and might, on the contrary, be evidence of an ambiguity.***

[emphasis added in bold italics]

107 The court also stated (*id* at [35]) that “[r]eference may also be usefully made to the views of Lord Hoffmann in the leading House of Lords decision of *Investors Compensation Scheme*”, and set out the *Investors Compensation Scheme* restatement (reproduced at [56] above). The court concluded (at [37] of *Sandar Aung*):

It is clear, in our view, that the common law principle [as stated in the quotation at [106] above], whose purpose and rationale is set out in the case law above, is applicable to the present appeal. In particular, this court is justified in looking at, *inter alia*, the Estimate in order to arrive at the conclusion that the *factual matrix* clearly demonstrated that the ambit and scope of the contract between the appellant and the [Hospital] was confined to the angioplasty procedure.

108 It is evident from the Court of Appeal’s reasoning in *Sandar Aung* ([105] *supra*) that in Singapore, the parol evidence rule (as statutorily embedded in s 94 of the Evidence Act) still operates as a restriction on the use of extrinsic material to affect a contract. However, extrinsic material is

admissible for the purpose of interpreting the language of the contract. In this respect, *Sandar Aung* acknowledges that extrinsic material is admissible even if no ambiguity is present in the plain language of the contract. However, ambiguity still plays an important role, in that the court can only place on the relevant contractual word, phrase or term an interpretation which is different from that to be ascribed by its plain language if a consideration of the context of the contract leads to the conclusion that the word, phrase or term in question may take on two or more possible meanings, *ie*, if there is latent ambiguity (as defined at [50] above). In *Sandar Aung*, after the Estimate was taken into account, the phrase "all charges, expenses and liabilities incurred by and on behalf of the [P]atient" could plausibly be taken to mean all charges, expenses and liabilities incurred by and on behalf of the Patient *in respect of the envisaged angioplasty*. Thus, the court had a legitimate basis to place a narrower interpretation on the contractual term (or, in more informal parlance, to "read down" that term) which would not otherwise have been warranted by its broad and general language. It may be possible to argue that what the court did in *Sandar Aung* in fact constituted variation of the relevant contractual terms in contravention of s 94 of the Evidence Act. This issue shall be addressed in greater detail at [122]–[123] below. It remains to be noted that proviso (f) to s 94 was not discussed in *Sandar Aung*. Thus, the issue of whether ambiguity was a prerequisite for the application of this proviso and its relationship with the common law contextual approach to contractual interpretation was left open.

### (3) *Summary of the applicable principles in Singapore*

109 As is evident from the discussion above, the law in Singapore on whether, when and to what extent extrinsic evidence may be admitted for the purposes of interpreting a written contract has seen significant developments, especially in the move towards the contextual approach to contractual interpretation. We take the present opportunity to clarify and consolidate our view of this area of the law as it currently stands.

#### (A) *ATTRIBUTES OF THE DOCUMENT IN QUESTION*

110 In their zealous resistance to extrinsic material, the proponents of the traditional approach to contractual interpretation (as outlined at [47]–[49] above) have neglected the commercial reality and logic that reference to such evidence is necessary even before the actual interpretive exercise takes place (see [52] above). The first and foremost consideration in approaching any written contract must be the essence and attributes of the document being examined. Different genres of documents may require different treatment by the court at various stages of the analytical process. For example, for standard form contracts and documents intended for commercial circulation (*eg*, negotiable instruments), the presumption that all the terms of the agreement between the parties are contained in the contract will be almost impossible to rebut. Such documents are examples *par excellence* of contracts that *look* complete to the parties (see [37] above); laymen are also more likely to attach greater importance to the written document in this particular context such that, on an objective view, it is difficult to say that the parties did not intend the agreement to be wholly contained in the written document. Furthermore, when interpreting such a contract, the courts will usually be more restrained in its examination of the context of the contract. There are many commercial contracts that will be relied on by persons who may have no more than a rudimentary understanding of the background to such contracts. These third parties must be able to enforce the plain words of such documents unless there is a reason to believe that the relevant contextual peculiarities were made known or made available to them before they entered into the contract in question. If the courts do not exercise restraint in interpreting such documents, this could engender commercial uncertainty and thereby encourage pointless litigation. In this regard, we respectfully agree with the following extra-judicial observations of Lord Steyn in "The Intractable Problem of the Interpretation of Legal Texts" (see *Commercial Law and Commercial Practice* (Sarah Worthington ed) (Hart Publishing, 2003) ch 5

at p 126), as follows:

The common law does not in principle differentiate between the interpretation of a rudimentary cobbled-together contract and a sophisticated standard form contract; between the interpretation of a consumer contract and a commercial contract; or between the interpretation of a domestic [contract] and [a] transnational contract. *That is not, however, to say that in working out what is the best interpretation of a contract a court may not have to take into account, for example, a consumer as opposed to a commercial context, or the need for uniformity in international transactions.* [emphasis added]

(B) THE PAROL EVIDENCE RULE

111 As mentioned earlier, in Singapore, the parol evidence rule lives on in s 94 of the Evidence Act (see [71] above) and has been applied assiduously by the courts in case law (see [82]–[98] and [105]–[108] above). The Singapore courts have always been mindful of the need for contractual certainty, especially in commercial agreements (such as the Policy in the present case). In *Forefront Medical Technology (Pte) Ltd v Modern-Pak Pte Ltd* [2006] 1 SLR 927, the High Court emphasised (at [24]) that not only is “[s]anctity of contract ... vital to certainty and predictability in commercial transactions”, but also (at [26]):

[T]he *perception* of [the] importance [of commercial certainty and predictability] is deeply entrenched within the commercial legal landscape in general and in the individual psyches of commercial parties (and even non-commercial parties, for that matter) in particular. [emphasis in original]

112 However, the parol evidence rule only operates where the contract was intended by the parties to contain all the terms of their agreement. Where the contractual terms are ambiguous on their face, it is likely that the contract does not contain all the terms intended by the parties. Furthermore, in order to ascertain whether the parties intended to embody their entire agreement in the contract, the court may take cognisance of extrinsic evidence or the surrounding circumstances of the contract (see [40] above).

113 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 (see s 94 of the Evidence Act).

(C) ADMITTING EXTRINSIC EVIDENCE IN AID OF INTERPRETATION

114 We affirm our approval of the contextual approach to contractual interpretation manifested in *Sandar Aung* ([105] *supra*). There is considerable force in Seng’s thesis (see [84] above) that proviso (f) to s 94 should be given a permissive interpretation which does not make ambiguity a prerequisite for the admissibility of extrinsic evidence in aid of contractual interpretation. Seng’s view has been adopted (at least implicitly) in two High Court decisions, *viz*, *Standard Chartered Bank* ([90] *supra*) and *China Insurance Co* ([90] *supra*), and we agree with it.

115 In reaching this conclusion, we found the views expressed in some of the leading commentaries and cases on the Indian Act helpful, although we must acknowledge that they do not invariably speak with one voice. In discussing the scope of the Indian proviso (6) (which is *in pari materia* with proviso (f) to s 94), the author of *Woodroffe* ([2] *supra*) clarifies (at p 3475) that:

Up to a certain stage, and apart from any question of ambiguity, extrinsic evidence is necessary

to point [out] the operation of the simplest instrument. ... 'Some evidence', says Wood, VC in [*In re Feltham's Trusts* (1855) 1 K & J 528; 69 ER 528], 'is necessary in any case of a will, that is to say, evidence to show the subjects and objects of the gift.'

... In reality, external information is requisite in construing every instrument: but when any subject is thus discovered which not only is within the words of the instrument, according to their natural construction, but exhausts the whole of those words, then the investigation must stop; you are bound to take the interpretation which entirely exhausts the whole of the series of expressions used by the author of the instrument, and are not permitted to go any further.

[emphasis added]

Thus, extrinsic evidence is always admissible even if there is no ambiguity in the contract sought to be interpreted. Although *Woodroffe* goes on to state (at p 3477) that "where the language used in a document is clear, no evidence should be received *to explain away the language*" [emphasis added], this does not preclude the admission of extrinsic evidence *imprimis* to determine if the terms of the documents require explanation in the light of that evidence.

116 The following cases (which are listed in *Woodroffe* at p 3476, fn 6) on the scope of the Indian proviso (6) confirm this view. In *Ram Narain Prasad Singh v Manki Singh* AIR 1954 Pat 562 ("*Ram Narain*"), the issue was whether parol evidence was admissible to prove that documents which on their face appeared to be mortgage deeds in fact constituted documents of absolute sale. The court stated (at 566, *per* Ahmad J) that the Indian proviso (6):

... comes into play only when there is a latent ambiguity in a document, that is, when the language of the document is not *prima facie* consistent with *the existing facts*, or, in other words, when there is a conflict in the plain meaning of the language used in the document and the facts existing or *when they put together lead to an ambiguity*. In [a] case, therefore, when the language used in a document is plain and not in any way ambiguous *in reference to facts existing*, there is no scope for coming into play of the rule of interpretation laid down in [the Indian] proviso (6) ... [emphasis added]

Thus, although the court asserted that latent ambiguity was a prerequisite for the application of the Indian proviso (6), the reality is that its own reasoning envisaged the admissibility of extrinsic evidence of *the existing facts*, upon which basis the court would then determine whether or not there was any (latent) ambiguity in the contract. Thus, when the court said that the Indian proviso (6) did not come into play unless there was a latent ambiguity in the document in question, what it must have meant was that the extrinsic evidence sought to be admitted would not be allowed to create a different interpretation of the relevant contractual language if that language was plain and unambiguous in reference to the existing facts. This is in fact the *limit* that s 96 of the Evidence Act (which is *in pari materia* with s 94 of the Indian Act) sets on the use of extrinsic evidence (see [77] above). The court in *Ram Narain* could not have intended this limit to be replicated via a restrictive interpretation of the Indian proviso (6).

117 Furthermore, the actual holding of the court in *Ram Narain* appeared to be based on the view that it was being asked to vary or contradict the terms of the mortgage deeds, and not to interpret them. Thus, Ahmad J concluded (at 568):

I, therefore, doubt whether [the Indian] proviso (6) ... is at all available to prove that what is on the face a mortgage document is in fact an absolute sale. The very terms of a mortgage deed in general are so different to those of a deed of sale that any attempt to construe such a mortgage

deed as a deed of sale will inherently result in the variation and the contradiction of the terms of the mortgage deed.

In other words, the Indian proviso (6) was inapplicable simply because the court was *not* engaging in any *interpretation* of a contractual document, and not because there was no latent ambiguity in the mortgage deeds in question. In the light of the foregoing, *Ram Narain* is but equivocal authority for the proposition that ambiguity must exist before extrinsic evidence may be admitted under proviso (f) to s 94 to aid in the interpretation of a contract.

118 In *Sukumar Banerjee v Hiralal Chatterjee* AIR 1954 Cal 48, the complainant alleged that, on the basis of a bogus order, the accused had obtained a large sum of money from him and had given him a false cheque which was dishonoured. The complainant gave oral evidence that the accused had held out that the complainant was going to provide certain supplies as a subcontractor of the accused. The relevant document did not contain the word "sub-contractor" (*id* at 48). The court held that the relevant document was not a finally concluded agreement, and thus allowed the complainant's oral evidence on the basis that s 92 of the Indian Act did not apply. However, it also said, *obiter*, that, even if s 92 did apply, the complainant's oral evidence would be allowed in under the Indian proviso (6) (*ibid*):

It is always open to show how the terms of a document are related to [an] existing state of things and it is therefore always open to prove that the terms are those given to a sub-contractor; oral evidence is in such cases not excluded.

Significantly, the court did not even consider whether or not there was ambiguity in the relevant document before opining that the complainant's oral evidence could be admitted under the Indian proviso (6).

119 In *Chhuttu v Kayam Khan* AIR 1953 Bho 18 ("*Kayam Khan*"), the question before the court was whether a transfer deed was "a sale out and out" (*id* at [7]) or "a mortgage by conditional sale" (*ibid*). The court noted that, in order to raise a plea of the transfer being a mortgage, it was not necessary that the condition of re-conveyance should have been embodied in the document of sale itself (see *Kayam Khan* at [9]). It then went on to state (*ibid*):

*Even adhering to the terms of the document it would appear that extrinsic circumstances, showing the real intention of the parties, can be proved under ... [the Indian] proviso (6) ...* [emphasis added]

The court further postulated a scenario where the parties "agreed to re-convey the property before the execution of the sale-deed and executed a separate document accordingly" (*ibid*). It stated that, in such a scenario (*ibid*):

The whole transaction may thus be found to be evidenced by the two documents read together and the intention of the parties gathered from both of them. *Once this is done, the surrounding circumstances may help to arrive at the real intention of the parties and the nature of the whole transaction ...* [emphasis added]

Nowhere in *Kayam Khan* was ambiguity said to be a prerequisite for the application of the Indian proviso (6).

120 It is apposite to note that *Sarkar* ([71] *supra*) expresses a different view from that set out in *Woodroffe* ([2] *supra*). At p 1539 of *Sarkar*, it is explicitly stated that the Indian proviso (6):

... comes into play when there is latent ambiguity in a document, i.e., when its language is not *prima facie* consistent with the existing facts, or in other words, when there is a conflict between the plain meaning of the language used and the facts existing or when put together they lead to an ambiguity ... [emphasis added]

However, the authorities cited for this proposition are, to put it bluntly, dubious. *Ram Narain* ([116] *supra*) is one of them and we have already discussed above how this case in fact envisages the admissibility of extrinsic evidence for the purposes of determining whether ambiguity exists in a contract (see [116] above). The decision in *Chandra Sekhar Pathak v Mural Gope* AIR 1957 Pat 673 ("*Chandra Sekhar Pathak*") is problematic on the same ground as the court felt bound by the decision in *Ram Narain* (see *Chandra Sekhar Pathak* at 674). In *Basanti Devi v Official Receiver* AIR 1936 Lah 508, the issue was whether the terms of a deed of compromise providing that land which had already been attached would remain attached until the whole amount due was paid up created a charge over that land. Although Jai Lal J approved the refusal of the judge in the court below to admit extrinsic evidence that a charge had been created, he himself took the surrounding circumstances into consideration when he concluded (at 510):

The expressions used read in the light of the circumstances which are apparent on the record leave no doubt that in the present case there was no question of a charge in the contemplation of the parties when they entered into the compromise. [emphasis added]

121 Thus, it is our view that the contextual approach to contractual interpretation, as accepted by our courts and elaborated at [125]–[130] and [132] below, is statutorily embedded in proviso (f) to s 94. Although the proviso appears to admit extrinsic evidence only to show how the language of the document is related to *existing facts*, this is due to its provenance as a rule relied on for construing wills (see *Ram Narain* at 567; see also [73] above). Now, the proviso is applicable to all types of contractual documents and, thus, evidence is admissible not only in order to ascertain the identity or extent of the subjects referred to in a document or the sense in which particular terms have been used, but also to "clear up any other doubt that may arise in applying the document to the case" (*per Phipson* ([41] *supra*) at para 43123; see also *Woodroffe* at p 3474).

122 One qualification to our endorsement of the contextual approach, must, however, be made. In the light of the continued robustness of the parol evidence rule in our law, the courts must remain ever vigilant to ensure that, in interpreting a contract, extrinsic evidence is only employed to illuminate the contractual language and not as a pretext to contradict or vary it. The courts are allowed to depart from the plain and ordinary meaning of the contract to some extent. The very recognition that surrounding circumstances may create ambiguity about the language used in a contract involves acceptance that words do not have fixed and clearly delineated meanings. Rather, words are sometimes penumbral; the context of the contract breaks down the rigidly defined boundaries of meaning, introduces hues and shades, and defines the contours and limits of the penumbra. Thus, even in its ostensibly conservative reasoning in *Citicorp Investment Bank (Singapore)* ([82] *supra*), the Court of Appeal only required that the meaning imputed by the court be one which "the words are reasonably adequate to convey" (*id* at [63] (see the passage quoted at [83] above)). The question of whether this restriction has been breached is one of degree.

123 In *Singapore Telecommunications* ([100] *supra*) and *Sandar Aung* ([105] *supra*), this court read down the scope of ostensibly broad provisions in the light of extrinsic evidence that objectively revealed that the parties had specific and narrower objects in mind when entering into the contracts in question. In *Singapore Telecommunications*, the word "damages" in Art 8.5(a) took on a different shade when considered in the context of the purpose of the NLA and the Prospective Lease (see [103] above). In *Sandar Aung*, the meaning of the words "all ... liabilities" in the Undertaking was

similarly altered in the light of the Estimate (see [107]–[108] above). It is our view that, in both of these cases, the court’s interpretation of the material words was well within the scope of the meaning that those words could bear. However, where the court concludes that the parties must, for whatever reason, have used the wrong words or syntax and seeks to reject the actual words used by the parties altogether (see Lord Hoffmann’s fourth proposition in the *Investors Compensation Scheme* restatement (reproduced at [56] above)), the alternative of rectification exists and may be the more appropriate remedy.

124 Having established the legitimacy of the contextual approach under proviso (f) to s 94, we shall now address the question of what this approach entails. There are two main issues: the first concerns what extrinsic evidence is admissible in aid of contractual interpretation; the second concerns the way in which the task of interpretation is to be carried out.

(D) THE APPROACH UNDER PROVISOR (F) TO SECTION 94

125 Turning to the first issue, we endorse Lord Hoffmann’s view that extrinsic material is admissible if:

(a) it is relevant – *ie*, it would affect the way in which the language of the document would have been understood by a reasonable man (see *BCCI v Ali* ([57] *supra*) at [39] (reproduced at [57] above)); and

(b) it was reasonably available to all the contracting parties (see *Investors Compensation Scheme* ([56] *supra*) at 912 (reproduced at [56] above)).

Such material is not confined to conventional empirical facts (such as the existence of an object or the occurrence of an event), but can include the state of the law, as in cases in which the court takes into account that parties are unlikely to have intended to agree to something which is unlawful or legally ineffective (see *BCCI v Ali* at [39]). However, it must always be borne in mind that the purpose of interpretation is to give effect to the intention of the parties *as objectively ascertained*. Objective ascertainment of the parties’ intentions (known as “the objective principle”) is the cornerstone of the theory of contract and permeates our entire approach to contractual interpretation.

126 The objective principle was neatly encapsulated in *Smith v Hughes* (1870–1871) LR 6 QB 597 at 607 by Blackburn J as follows:

If, whatever a man’s real intention may be, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party, and that other party upon that belief enters into the contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party’s terms.

In a similar vein, Lord Steyn pithily summarised the position thus in *Deutsche Genossenschaftsbank v Burnhope* [1996] 1 Lloyd’s Rep 113 at 122:

It is true [that] the objective of the construction [of contracts] is to give effect to the intention of the parties. But our law of construction is based on an objective theory. The methodology is not to probe the real intentions of the parties but to ascertain the contextual meaning of the relevant contractual language. Intention is determined by reference to expressed rather than actual intention.

127 Thus, the extrinsic material sought to be admitted must always go towards proof of what the parties, from an objective viewpoint, ultimately agreed upon. It is for this reason that declarations of subjective intent and the prior negotiations of the parties have been said to be normally inadmissible in England, although doubts have been expressed about the continued viability of the principle (see [62] above). Our view on such evidence is set out at [132] below. For present purposes, it is sufficient to note that the focus on the narrow task of ascertaining the parties' objective intention ought to prevent parties from adducing or trawling through large amounts of allegedly useful background material, often in misguided Micawberian attempts to persuade a court to favour their subjective interpretations of the contract. As aptly stated in Richard Calnan, "Construction of Commercial Contracts: A Practitioner's Perspective" in *Contract Terms* ([39] *supra*) ch 2 ("Calnan's article") at p 21:

Establishing the 'surrounding facts' should involve only a limited enquiry into the background which would have been apparent to someone in the same position as the parties at the time the contract was entered into.

128 Crucially, the context of the contract must be clear or obvious. This was emphasised in *Sandar Aung* ([105] *supra*), where the court stated (at [29]) that it would:

... go so far as to state that even if the plain language of the contract appears otherwise clear, the construction consequently placed on such language should not be inconsistent with the context in which the contract was entered into *if this context is clear or even obvious* ... [emphasis added]

The court added that (*ibid*):

It might well be the case that if a particular construction placed on the language in a given contract is inconsistent with what is the ***obvious context in which the contract was made***, then *that* construction might *not* be as clear as was initially thought and might, on the contrary, be evidence of an ambiguity. [emphasis added in bold italics]

129 We have already emphasised the importance of contractual certainty (see [111] above). In our view, the benefits of adopting, via proviso (f) to s 94, the contextual approach to contractual interpretation (*viz*, flexibility and accord with commercial common sense) will be maximised and its costs (*viz*, increased uncertainty and added litigation costs) minimised if, as a threshold requirement for the court's adoption of a different interpretation from that suggested by the plain language of the contract, the context of the contract should be clear and obvious. This is not a call for a retreat to literalism. In our view, this threshold requirement to some extent addresses the central weakness of contextualism – uncertainty. It is necessary and desirable to lay down this threshold requirement in order to achieve the right balance between commercial certainty and the imperative of giving effect to the objective intentions of the contracting parties.

130 In respect of the second issue outlined at [124] above, it has already been noted that ambiguity is no longer a prerequisite for the court's consideration of extrinsic material (see [114] above); thus, neither is absurdity or the existence of an alternative technical meaning. Instead, the court will *first* take into account the plain language of the contract together with relevant extrinsic material which is evidence of its context. *Then, if, in the light of this context*, the plain language of the contract becomes ambiguous (*ie*, it takes on another plausible meaning) or absurd, the court will be entitled to put on the contractual term in question an interpretation which is different from that demanded by its plain language. This is in fact merely making explicit the role of extrinsic evidence, which was previously obfuscated under the traditional approach (see [52] above).

131 As for the exact interpretation that should be assigned to the provisions of the contract, the court will draw upon all the usual canons and techniques of contractual interpretation (for an overview thereof, see *Lewison* ([50] *supra*) at ch 7) in arriving at it, for instance, the *contra proferentum* rule, the rule that specific provisions will be given greater weight than general provisions, etc. It will undoubtedly be beneficial to the business and legal communities if we set out how these canons of construction relate to the contextual approach that is to be adopted under proviso (f) to s 94. To this end, we find the following summary of principles in *McMeel* ([46] *supra*) at paras 1.124–1.133 helpful and endorse its application in Singapore (it should be noted that *McMeel* uses the terms “interpretation” and “construction” interchangeably in the passage below):

*The aim of construction*

First, the aim of the exercise of construction of a contract or other document is to ascertain the meaning which it would convey to a reasonable business person.

*The objective principle*

Secondly, the *objective principle* is therefore critical in defining the approach the courts will take. They are concerned usually with the expressed intentions of a person, not his or her actual intentions. The standpoint adopted is that of a reasonable reader. [See in this regard the earlier discussion at [125]–[127] above].

*The holistic or ‘whole contract’ approach*

Thirdly, the exercise is one based on the *whole contract* or an *holistic approach*. Courts are not excessively focused upon a particular word, phrase, sentence, or clause. Rather the emphasis is on the document or utterance as a whole.

*The contextual dimension*

Fourthly, the exercise in construction is informed by the *surrounding circumstances* or *external context*. Modern judges are prepared to look beyond the four corners of a document, or the bare words of an utterance. It is permissible to have regard to the *legal, regulatory, and factual matrix* which constitutes the background in which the document was drafted or the utterance was made.

*Business purpose*

Fifthly, within this framework due consideration is given to the *commercial purpose* of the transaction or provision. The courts have regard to the overall purpose of the parties with respect to a particular transaction, or more narrowly the reason why a particular obligation was undertaken.

*Lawful effect*

Sixthly, a construction which entails that the contract and its performance are lawful and effective is to be preferred.

Contra proferentem

Seventhly, where a particular species of transaction, contract, or provision is one-sided or onerous it will be construed strictly against the party seeking to rely on it.

*Avoiding unreasonable results*

Eighthly, a construction which leads to very unreasonable results is to be avoided unless it is required by clear words and there is no other tenable construction.

*Specially negotiated terms*

Ninthly, a specially agreed provision should override an inconsistent standard provision which has not been individually negotiated.

*Generally provisions versus precise provisions*

Tenthly, a more precise or detailed provision should override an inconsistent general or widely expressed provision.

[emphasis added in original]

Needless to say, the above principles are only a guide and are by no means exhaustive; they also have to be read in the light of the observations which we made earlier. In arriving at the final interpretation to be placed on a contract, the court must bear in mind the limits represented by ss 94–96 of the Evidence Act (see [69]–[77] above). The court may also be aided by ss 97–99 of the Evidence Act (see [78]–[79] above). We should add finally that, as stated in *Mitchell* ([41] *supra*) at p 148:

[T]he courts must remain mindful of the fact that in the end, commercial parties should have as much control over interpretative method as they do over other terms of the contract.

In this regard, the potential impact of what are commonly called “entire agreement clauses” should be noted (see *Lee Chee Wei v Tan Hor Peow Victor* [2007] 3 SLR 537 at [25] and [41]).

(F) SYNOPSIS

132 *To summarise, the approach adopted in Singapore to the admissibility of extrinsic evidence to affect written contracts is a pragmatic and principled one. The main features of this approach are as follows:*

(a) A court should take into account the essence and attributes of the document being examined. The court’s treatment of extrinsic evidence at various stages of the analytical process may differ depending on the nature of the document. In general, the court ought to be more reluctant to allow extrinsic evidence to affect standard form contracts and commercial documents (see [110] above).

(b) If the court is satisfied that the parties intended to embody their entire agreement in a written contract, no extrinsic evidence is admissible to contradict, vary, add to, or subtract from its terms (see ss 93–94 of the Evidence Act). In determining whether the parties so intended, our courts may look at extrinsic evidence and apply the normal objective test, subject to a rebuttable presumption that a contract which is complete on its face was intended to contain all the terms of the parties’ agreement (see [40] above). In other words, where a contract is

complete on its face, the language of the contract constitutes *prima facie* proof of the parties' intentions.

(c) Extrinsic evidence is admissible under proviso (f) to s 94 to aid in the interpretation of the written words. Our courts now adopt, via this proviso, the modern contextual approach to interpretation, in line with the developments in England in this area of the law to date. Crucially, ambiguity is not a prerequisite for the admissibility of extrinsic evidence under proviso (f) to s 94 (see [114]–[120] above).

(d) The extrinsic evidence in question is admissible so long as it is relevant, reasonably available to all the contracting parties and relates to a clear or obvious context (see [125] and [128]–[129] above). However, the principle of objectively ascertaining contractual intention(s) remains paramount. Thus, the extrinsic evidence must always go towards proof of what the parties, from an objective viewpoint, ultimately agreed upon. Further, where extrinsic evidence in the form of prior negotiations and subsequent conduct is concerned, we find the views expressed in McMeel's article ([62] *supra*) and Nicholls' article ([62] *supra*) persuasive. For this reason, there should be no absolute or rigid prohibition against evidence of previous negotiations or subsequent conduct, although, in the normal case, such evidence is likely to be inadmissible for non-compliance with the requirements set out at [125] and [128]–[129] above. (We should add that the relevance of subsequent conduct remains a controversial and evolving topic that will require more extensive scrutiny by this court at a more appropriate juncture.) Declarations of subjective intent remain inadmissible except for the purpose of giving meaning to terms which have been determined to be latently ambiguous (see [50] above; see also sub-para (e) below).

(e) In some cases, the extrinsic evidence in question leads to possible alternative interpretations of the written words (*ie*, the court determines that latent ambiguity exists). A court may give effect to these alternative interpretations, always bearing in mind s 94 of the Evidence Act. In arriving at the ultimate interpretation of the words to be construed, the court may take into account subjective declarations of intent (see [50] above). Furthermore, the normal canons of interpretation apply in conjunction with the relevant provisions of the Evidence Act, *ie*, ss 95–100 (see [75]–[80] and [131] above).

(f) A court should always be careful to ensure that extrinsic evidence is used to explain and illuminate the written words, and not to contradict or vary them. Where the court concludes that the parties have used the wrong words, rectification may be a more appropriate remedy (see [123] above).

133 It remains to be noted that, while we are aware that the impetus towards the contextual approach is in part due to the Europeanisation of the English common law, this shift also accords with common sense and logic. We also note that in several other common law jurisdictions such as Australia, New Zealand and Hong Kong, the contextual approach now prevails over the traditional approach (for an admirably lucid and comprehensive overview of the current Australian position, see J J Spigelman, "From text to context: Contemporary contractual interpretation" (2007) 81 ALJ 322). The traditional approach does not accord with ordinary commerce. Under that approach, the courts, faced with a wealth of text but a dearth of context, have often attributed to contracting parties artificial objective intentions that are divorced from reality. For the reasons given above, the contextual approach is here to stay in Singapore. It is also intriguing to note that, while meretricious symmetry or convergence is not the holy grail of legal jurisprudence, the adoption of the contextual approach to contractual interpretation is conceptually broadly similar to the purposive approach which our courts now adopt *vis-à-vis* statutory interpretation.

*The Judge's reliance on extrinsic evidence in the present case*

134 Reverting to the facts of the present appeal, the parties have not disputed that the terms of the Policy represented the complete agreement between them. Thus, s 94 of the Evidence Act applied squarely to constrain the Judge's reference to extrinsic evidence. By holding an entire exclusion clause (*viz*, Special Exclusion 4(b)) to be inoperable, the Judge – with respect – strayed far into the realm of *varying* a contract in contravention of s 94. This was not a case where the court read down broad words within the scope of their penumbral meaning (*cf* the decisions in *Singapore Telecommunications* ([100] *supra*) and *Sandar Aung* ([105] *supra*) as analysed at [123] above); nor could one argue that this was merely a case of aggressive or intrusive interpretation. Instead, it was a case where the court read an entire provision *out* of the contract being construed. There is a conceptual difference between attributing a meaning to words or phrases that might strain the contours of their penumbral meaning and simply ignoring a provision altogether. Thus, on the basis of the parol evidence rule (as statutorily embodied in s 94 of the Evidence Act) alone, the Judge's approach was legally impermissible.

135 Even if we accept that the Judge was relying on proviso (f) to s 94 and applying the contextual approach to interpretation, he ought not to have referred to the context of the Policy as that context was not clear or obvious. There is a patent lack of clarity as to what precisely was communicated between Lee and Long. As mentioned above (at [14]), Lee averred that he had contacted Long to ask if AIG could provide "the kind of insurance coverage required by [BIGold]"[\[note: 18\]](#) and Long had replied in the affirmative. There is no evidence as to what details Lee gave of the "kind of insurance coverage" required, or, indeed, whether he gave any details at all. As it turned out, Lee later requested specifically for insurance cover in respect of "Contractor All Risks" and "Public Liability" (see the Undated Note (reproduced at [15] above)). It is unclear to us why and how he decided to make this request, given that the Contract did not specifically require BIGold to obtain a CAR policy (see [10] and [16] above).

136 Lee further deposed that, after Long confirmed that Zurich Insurance could provide the requisite insurance cover, he (Lee) had acted as the facilitator between BIGold and Zurich Insurance *vis-à-vis* the terms of the Policy, and had in that capacity faxed the documents relating to the Contract to Long as well as sought Long's professional advice on "the appropriate insurance coverage to be given to [BIGold] under the Contract".[\[note: 19\]](#) However, this assertion is decidedly not in fact borne out by the 3 September 2002 Note and the Undated Note (reproduced at, respectively, [14] and [15] above). Although there were requests by Lee for information and advice from Long, these requests must be read in the light of Lee's own specification in the Undated Note that the types of risk sought to be insured against were "Contractor All Risks" and "Public Liability". Thus, the words in that note, "[k]indly advise [*sic*] for additional attention", could have meant: "Please advise us as to how to proceed to get the insurance coverage requested, *ie*, contractors' all-risks insurance and public liability insurance". In this regard, there was no specific request by Lee that there should be congruence between the insurance policies to be issued by Zurich Insurance and the requirements which BIGold had to comply with pursuant to cll 18 and 19 of the Conditions of Contract.

137 Counsel for BIGold insisted that, as Zurich Insurance had chosen to dispense with cross-examination of Lee (see [11] and [28] above), Lee's affidavit evidence stood unchallenged and should be accepted as such by this court. However, even if we accept Lee's testimony that he had sought Long's professional advice on the appropriate insurance coverage to be given for the purposes of *the Contract*, a copy of which had been sent to Long, this does not explain how and why Zurich Insurance subsequently decided to issue its standard CAR policy, with the particular scope of insurance cover detailed above (at [17]–[22]), to BIGold. Clause 18 of the Conditions of Contract stipulated that BIGold should ensure that "there [were] in force *policies* of insurance indemnifying

MediaCorp, the Contractor [*ie*, BGold] and all sub-contractors against damage to persons and property" [emphasis added]. As mentioned, the Contract did not refer specifically to a CAR policy. There was also nothing in the Contract to indicate that the CAR policy to be issued by Zurich Insurance to BGold had to cover all types of damage to persons and property, including damage by fire to MediaCorp's property (and, in so doing, deviate from the standard cover provided in Zurich Insurance's CAR policies). BGold could have obtained other policies of insurance for such cover.

138 In any case, BGold's claim was for an indemnity in respect of its *third-party liability* to MediaCorp. Strictly speaking, the Conditions of Contract did not even require BGold to obtain such coverage since cl 18 thereof merely required BGold to obtain insurance indemnifying each of the parties named in that clause (*ie*, MediaCorp, BGold and "all sub-contractors") against *damage to persons and property*. In view of this, it remains unclear to us why and how Lee decided to also ask for insurance cover in respect of "Public Liability" in the Undated Note (see [15] above).

139 Accordingly, we conclude that the context of the Policy was not clear or obvious, given the obscurity surrounding the exact communications which took place between Lee and Long, as well as the circumstances under which Lee decided to request for and/or under which Zurich Insurance decided to provide a CAR policy specifically. Even if the Judge had managed to cross the hurdle posed by s 94 of the Act, he would have run afoul of the requirements of the contextual approach as elucidated above (at [125]–[129]). As such, it was plainly legally impermissible for the Judge to allow the genesis of the Policy to affect his interpretation of that policy.

140 In this regard, the cases which the Judge purported to rely on as authorities supporting his approach did not provide much assistance. The first of these was the decision of the Supreme Court of Victoria in *Carlingford Australia General Insurance Ltd v EZ Industries Ltd* [1988] VR 349 ("*Carlingford Australia*"). In that case, a mining company ("E Z Industries") took out an insurance policy with Carlingford Australia General Insurance Ltd ("Carlingford") for indemnity in respect of liability arising out of personal injury and property damage caused by the events stipulated in the policy. The question was whether an exclusion clause in the insurance policy operated to relieve Carlingford of its liability to indemnify E Z Industries against claims by longshoremen employed by E Z Industries' subsidiary (which was also covered under the policy) for personal injuries sustained as a result of uploading a cargo of lead concentrate powder mined and shipped by the subsidiary. Although each of the longshoremen wore the usual protective equipment, they were injured by the dust settling on their faces and hands and by their inhalation of the dust. The relevant exclusion clause read (*id* at 350–351):

This policy shall not apply:

(a) ...

(i) To Personal Injury or Property Damage arising out of the discharge, dispersal, release or escape of smoke, vapours, soot, fumes, acids, alkalis, toxic chemicals, liquids, or gases, waste materials or other irritants, contaminants or pollutants into or upon land, the atmosphere or any water course or body of water; but this exclusion does not apply if such discharge, dispersal, release or escape is caused by a sudden unexpected and unintended happening.

141 Gobbo J (who delivered the judgment of the majority) rejected the insurer's interpretation of the above exclusion clause in the insurance policy and reasoned (*id* at 352):

It was said that it was not to the point that the effect of the clause might be so wide as to

entirely deprive an insured handling a whole range of substances capable of causing pollution discharges of any meaningful cover under its indemnity policy. It was said that if the clause was not ambiguous then its apparently very wide meaning had to be given effect to, no matter that this was unexpected and would be capable of leaving very little covered in respect of a major part of the insured's activities.

In my view this is not a legitimate approach to construction of an insurance policy exclusion clause. *Where the effect given to the language is such as to do violence to the policy as a whole and produce a both unexpected and irrational result, then there is in fact uncertainty and some ambiguity created.* In such a situation, ordinary principles as to resolution of ambiguities come into play. Thus the present exclusion clause is capable of excluding any liability in relation to any release of any liquid or vapour. Strictly speaking, this would exclude any spillage from any cause, since the words liquids and vapours are capable of such wide operation as to be wholly uncertain in the ambit of their meaning.

*In these circumstances it is, in my view, proper to treat the clause as being ambiguous in its language. ...*

[emphasis added]

Gobbo J then preferred a reading of the exclusion clause that was limited to the discharge, dispersal, release or escape of the listed substances *due to active polluting activity*, and therefore held that the incidental release of lead concentrate dust did not fall within its ambit (*id* at 353).

142 One may question Gobbo J's interpretation of the exclusion clause and whether that interpretation was in fact an available alternative meaning of the material words. However, as noted above (at [134]), there is a conceptual difference between attributing a meaning to words or phrases that might strain the contours of their penumbral meaning and simply ignoring a provision altogether. In the present case, the Judge did not even suggest a possible alternative meaning of Special Exclusion 4(b) or the words therein "property belonging to or held in care, custody or control of ... [MediaCorp]". He simply sought to disregard those words altogether. With respect, *Carlingford Australia* does not serve as authority for such an approach.

143 The judge also relied on the Privy Council case of *Home Insurance Company of New York v Victoria-Montreal Fire Insurance Company* [1907] AC 59 ("*Home Insurance Company*"). In that case, a railway company ("Canadian Pacific Railway") was insured by an insurance company ("Western Assurance"). Twenty per cent of Western Assurance's liability under the policy issued to Canadian Pacific Railway was insured by Home Insurance Company of New York ("Home Insurance") under a reinsurance policy, and Home Insurance in turn reinsured a portion of its liability to Western Assurance with Victoria-Montreal Fire Insurance Company ("Victoria-Montreal"). In the case of both Victoria-Montreal and Home Insurance, the reinsurance was effected by attaching to a printed fire insurance policy in the standard form ("the Original Policy") a typewritten slip or rider containing the special terms of the reinsurance. The Original Policy was not amended except for the insertion of the prefix "re" before the word "insure", thus changing the expression "does insure" to "does re-insure". The slip or rider was headed: "Attached to and forming part of Policy No. 16,186 [*ie*, the Original Policy]. W. Morgan. Re-insurance. Home Insurance Company of New York" (*id* at 62). It contained (along with some other provisions which were not material to the case) a provision which was usual in reinsurance contracts, whereby the adjustment of claims were left in the hands of Western Assurance and the loss was made payable ten days after presentation of proof of payment.

144 Canadian Pacific Railway was paid by Western Assurance in respect of property loss and

damage caused by a fire. Home Insurance in turn paid its proportion of the loss to Western Assurance. Victoria-Montreal then denied Home Insurance's claim under Home Insurance's reinsurance policy with it on the basis of a limitation clause contained in the Original Policy, which stated that no action could be brought on the policy unless it was commenced within 12 months after the fire.

145 The Privy Council held that the limitation clause was inapplicable to the reinsurance contract between Home Insurance and Victoria-Montreal for the following reasons (*id* at 64):

[I]t will be observed that *the typewritten slip [ie, the typewritten rider attached to the Original Policy] is complete in itself. It contains all that is required for a re-insurance contract.* If the sentence in question [*ie, the limitation clause in the Original Policy*] be read into it, the [Original Policy] upon which the slip is engrafted will after all add nothing to the agreement but one unreasonable condition. *The rest of the [Original Policy] is foreign to the purposes of a re-insurance contract, inconsistent with the special terms contained in the slip, and in some places in direct conflict with its provisions.*

It will also be observed that the slip does specify a series of cases in which no claim can be made under the policy. It may fairly be presumed that if it had been in the minds of the parties to exclude claims for loss in any other case, that case would have been specified in the same connection. To specify there all cases but one, and to leave that one to be discovered in another part of the instrument among a multitude of irrelevant provisions, is (to say the least) somewhat misleading.

A clause prescribing legal proceedings [within] a limited period is a reasonable provision in a policy of insurance against direct loss to specific property. In such a case the insured is master of the situation. He can bring his action immediately. In a case of re-insurance against liability the insured is helpless. He cannot move until the direct loss is ascertained between parties over whom he has no control, and in proceedings in which he cannot intervene. ...

*It is difficult to suppose that the contract of re-insurance was engrafted on an ordinary printed form of policy for any purpose beyond the purpose of indicating the origin of the direct liability on which the indirect liability, the subject of the re-insurance, would depend, and setting forth the conditions attached to it.*

[emphasis added]

146 Again, *Home Insurance Company* ([143] *supra*) is simply no authority for the approach which the Judge took. In that case, the Privy Council had to construe an instrument that had been carelessly patched together from two effectively separate contracts. The court in effect found that, on an objective view, Home Insurance and Victoria-Montreal had intended for their agreement to be embodied in the typewritten rider. Thus, one can in fact read this as a case where the court declined to admit extrinsic evidence to contradict the terms of the reinsurance contract, *ie*, the court applied the parol evidence rule (although the court itself made no explicit reference to that rule). We fail to see how this case supports the Judge's approach *vis-à-vis* the admissibility of extrinsic material in interpreting a written contract.

147 The final case that the Judge relied on was the English Court of Appeal's decision in *Hydarnes Steamship Company v Indemnity Mutual Marine Assurance Company* [1895] 1 QB 500 ("*Hydarnes Steamship Company*"). In brief, Lopes LJ rejected a clause in a contract for insurance on freight ("the commencement clause") which stated that (*id* at 508):

[T]he assurance aforesaid shall commence upon the freight and goods or merchandize [sic] on board thereof from the loading of the said goods or merchandize [sic] on board the said ship or vessel at Monte Video.

His reasoning (*id* at 507–508) is reproduced below for ease of discussion:

The question is whether the risk had attached. It was said, on the one hand, that it had never attached, because no meat ever was loaded on board the ship. It was said, on the other hand, that it had attached, because the refrigerating machinery broke down after the vessel had left Monte Video, and before she finally sailed from Buenos Ayres. The question depends on the construction of the policy, which like any other document must be construed as far as possible according to the ordinary meaning of the words used, having regard to the circumstances which existed at the time when the contract was made. In this case it was well known to both parties to the contract that no frozen meat ever was loaded at Monte Video. It was also clear that, as soon as the vessel finally sailed with the meat on board, the freight would no longer be at risk, except in the event of the ship's not arriving, because by the terms of the contract the freight was to be earned on the arrival of the ship, even though the meat should have had to be jettisoned. Therefore, what the assured especially required to be protected against was the loss of the freight, not by a peril of the sea, but by the breaking down of the refrigerating machinery during the period which elapsed between the ship's arrival at Monte Video and her final sailing on her voyage to England. The very object of the insurance was to cover that period. That being so, the insurance is expressed to be upon "freight of meat valued at 3000*l*, warranted free from all claims (except general average and salvage charges) unless caused by stranding, sinking, burning, or collision, but to be liable for any loss occasioned by breaking down or machinery until final sailing of the vessel ... at and from Monte Video ... to any port or ports in the United Kingdom." If it had stopped there I should imagine there would have been no difficulty in construing the words. The difficulty arises from a subsequent part of the policy, which is mainly in print [*ie*, the commencement clause] ... It is argued that the meaning of that clause is that the risk was not to attach until the frozen meat had been loaded. But it appears to be impossible to give it that meaning, because it is admitted that all parties knew that frozen meat could not be loaded at Monte Video, which is the place mentioned in the clause. This clause, as it stands, is clearly inconsistent with the previous part of the policy. The question is which portion of the policy is to take effect. It appears to me that we must give effect to the earlier part, and reject so much of the subsequent printed clause as refers to the loading of the said goods or merchandize [sic] on board the said ship or vessel, as being inapplicable to the state of things which existed. Rejecting those words, the effect is that the insurance is on freight, and is to commence at and from Monte Video. Upon this construction of the policy all difficulty disappears.

148 Again, the facts of *Hydarnes Steamship Company* are distinguishable from those of the present appeal. In the former case, the object of the insurance policy was expressed in the policy itself as being insurance upon the "freight of meat valued at 3,000*l*, warranted free from all claims (except general average and salvage charges) unless caused by stranding, sinking, burning, or collision, but to ... [include] any loss occasioned by breaking down or machinery until final sailing of the vessel ... at and from Monte Video ... to any port or ports in the United Kingdom" (see the passage reproduced at [147] above). As such, as Lopes LJ put it (see *Hydarnes Steamship Company* at 508), the "[commencement] clause, as it [stood], [was] clearly inconsistent with the previous part of the policy [*ie*, that part of the policy which set out the items being insured]" and "the question [was] which portion of the policy [was] to take effect" (*ibid*). Thus, the court interpreted the commencement clause in the light of the *internal* context (as defined at [53] above) of the insurance policy. The case did not concern the issue of whether and when evidence of the *external* context may be adduced and relied on to affect the interpretation of a contract. There is a further distinction

– viz, while allowing the commencement clause to have effect in *Hydarnes Steamship Company* would have led to an absurdity (because there would in effect never have been any insurance protection), giving effect to Special Exclusion 4(b) in the present case does not have such a consequence.

149 Having decided that the Judge’s reliance on the context of the Policy to interpret Special Exclusion 4(b) was legally impermissible, we now turn to his views grounded on justice and fairness.

### ***Arguments based on justice and fairness***

150 In our view, amorphous notions based on justice and fairness did not warrant the Judge straying beyond the confines of the Policy. The Judge’s conclusion that giving effect to Special Exclusion 4(b) would be “contrary to all sense of justice and fair play” (see *BIGold Interior Design* ([5] *supra*) at [56]) was based on his view that BIGold had relied on Zurich Insurance to provide insurance cover for the specific purpose of BIGold’s compliance with cll 18 and 19 of the Conditions of Contract, which purpose had been made known to Zurich Insurance without the latter demurring (see [30] above). However, we have already noted (at [135]–[139] above) that the lack of clarity regarding the communications between Lee and Long, which rendered the context of the Policy unclear, precluded the Judge from referring to that context when construing the Policy. In any case, BIGold had agreed not to rely on any arguments based on misrepresentation or breach of duty against Zurich Insurance (see [11] and [28] above). The Judge’s reasoning would effectively allow these arguments in by the back door, without giving Zurich Insurance a chance to respond. This would be unjust.

151 Furthermore, BIGold arguably has another – and, in our view, more appropriate – remedy, namely, that against Lee. Lee was BIGold’s insurance agent. It was his duty to ensure that the Policy adequately covered BIGold’s needs. Once BIGold signed the Policy, it was bound by its terms under normal contractual principles (in the absence of vitiating factors such as fraud or duress).

152 It is of little import that Lee had expressly told Yeo (through Jacqueline) that the type of insurance cover required under the Contract was not within the scope of his services (see [13] above) or that, on Lee’s unchallenged evidence, he had merely been acting as a facilitator between BIGold and Zurich Insurance (see [136] above), a point which counsel for BIGold emphasised at the hearing of this appeal. The fact remains that Lee was BIGold’s agent in arranging for the insurance required by the Contract. As noted in Tan Lee Meng, *Insurance Law in Singapore* (Butterworths Asia, 2nd Ed, 1997) at p 530:

Apart from insurance brokers, any person who has agreed to procure insurance cover for another person may be regarded as that other person’s agent for [the purpose of obtaining insurance]. For instance, shippers who sell goods under [CIF] contracts and solicitors and other professional persons who act for their clients in effecting insurance cover may also be regarded as their clients’ agents.

153 That BIGold may pursue a claim against Lee (on the basis of the latter being its agent) is illustrated by the following cases. In *Yuill & Co v Scott Robson* [1908] 1 KB 270, a seller of bullocks agreed in a contract of sale with the buyer to insure the cattle “against all risks” (*id* at 275). Pursuant to this obligation, the seller effected an ordinary all-risks Lloyd’s policy which contained a “free of capture, seizure and detention” clause. The cattle, which were shipped from Buenos Aires to Durban, became diseased during the journey and had to be slaughtered because the South African authorities refused to allow them to land. The underwriters refused to pay for the loss on the basis of the “free of capture, seizure and detention” clause. The English Court of Appeal held the seller liable for failing to provide the comprehensive insurance cover required by the contract. Even though the seller was not a professional insurance agent or broker, he had agreed to procure insurance for the

buyer and could be regarded as the buyer's agent for the purposes of obtaining such insurance.

154 In *Norwest Refrigeration Services Pty Ltd v Bain Dawes (WA) Pty Ltd* (1984) 55 ALR 509 ("*Norwest Refrigeration Services Pty Ltd*"), the Australian High Court rejected a submission that a shipping co-operative ("the Co-op") had, in obtaining insurance for its members through an insurance broker, functioned merely as an intermediary acting in a voluntary capacity for the transmission of the insurance proposal to the insurer via the broker. The court agreed with the reasoning of Olney J in the court below that (at 512–513):

[T]he Co-op had held itself out as being prepared to arrange insurance for such of its members who had requested this to be done. This being so the Co-op was under a duty to exercise proper care to ensure either that it arranged insurance of the type requested by the members or that it warned a prospective insured of the limitations that would be contained in any insurance cover that it arranged for the member.

155 The language of the Australian High Court in *Norwest Refrigeration Services Pty Ltd* (at 513), viz, "duty to exercise proper care", demonstrates that the legal justification for designating as an agent any person who has agreed to procure insurance cover for another lies in tort. The principle is that a person who undertakes to perform a task or service for another assumes a responsibility towards and owes a *prima facie* duty of care to the latter. The seminal case in this regard is *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145 ("*Henderson*"), a decision of the House of Lords. In that case, claims were brought by underwriting members (known as "Names") of Lloyd's who had incurred heavy personal liabilities arising out of alleged negligent underwriting by the managing agents of syndicates of which they were members. In some cases, a "members' agent" was interposed between the Name and the managing agent so that, *prima facie*, there was no privity of contract between the Name and the managing agent; in other cases, there was a direct contractual link between the two. In both cases, the Names brought claims in tort against the managing agents in order to take advantage of the more generous limitation period paid down in the Latent Damage Act 1986 (c 37) (UK). In holding that a duty of care arose in both situations, Lord Goff of Chieveley said (at 182):

[T]here is in my opinion plainly *an assumption of responsibility* in the relevant sense by the managing agents towards the Names in their syndicates. The managing agents have accepted the Names as members of a syndicate under their management. They obviously hold themselves out as possessing a special expertise to advise the Names on the suitability of risks to be underwritten; and of the circumstances in which, and the extent to which, reinsurance should be taken out and claims should be settled. The Names, as the managing agents well knew, placed implicit reliance on that expertise, in that they gave authority to the managing agents to bind them to contracts of insurance and reinsurance and to the settlement of claims. I can see no escape from the conclusion that, in these circumstances, *prima facie* a duty of care is owed in tort by the managing agents to such Names. [emphasis added]

156 The significance of the House of Lords' decision in *Henderson* is well-summarised in *W V H Rogers, Winfield and Jolowicz on Tort* (Sweet & Maxwell, 17th Ed, 2006) at para 5132 as follows:

Since *Henderson*, assumption of responsibility has been the basis of recovery in a wide range of situations and as we have seen it is to some extent a rival to the *Caparo* test [ie, the tripartite formula laid down by the House of Lords in *Caparo Industries Plc v Dickman* [1990] 2 AC 605, which consists of: (a) reasonable foreseeability, (b) proximity, and (c) fairness, justice and reasonableness] as the general approach to the duty of care question. ...

In few, if any of these cases has the defendant expressly assumed responsibility in the sense that he has recognised that he will incur a legal liability if he fails in it, but this is not necessary – the assumption of the responsibility in question is one which is based on the law’s objective assessment of the situation.

157 Furthermore, the rule that a person who agrees to procure insurance for another should be regarded as the latter’s agent for the purpose of obtaining that insurance is to a certain extent necessitated by commercial practicality. As *MacGillivray* ([42] *supra*) puts it (at para 3611):

Most insurance business is in practice transacted through agents, and for good reason. Insurers, for their part, are almost always incorporated companies, which can only act by their agents, from the directors down to a local agent soliciting proposals for insurance. ... In company business also, the assured is often assisted by retaining a broker or other intermediary to obtain the best possible terms available and to represent him in negotiations with the insurers. *Moreover, it is often the case that agency enters into insurance transactions regardless of the role of brokers, because the course of business may demand that one party shall effect an insurance on property on behalf of another. Thus in [CIF] export sales it is usual for the seller to take out an insurance on the buyer’s behalf to cover all or part of the transit of the goods, and it is frequently the case that parties to a building or construction contract, for example, will arrange for a single contractors’ risks policy to be taken out by one of them to cover the interests of all.* [emphasis added]

Since parties to a commercial contract often agree that one of their number will procure insurance cover for one or all of the parties, it makes sense to impose a duty of care on the person who is to arrange for such insurance so as to ensure that he acts with the skill and care that may be reasonably expected of a person in his position (see the English Court of Appeal case of *Chaudhry v Prabhakar* [1989] 1 WLR 29 at 34).

158 In our view, the principle that a person who has agreed to procure insurance for another becomes the latter’s agent for the purpose of obtaining insurance and thus owes him a duty of care is eminently justified by both commercial reality and existing principles of tort law. In the present case, the following unchallenged facts gave rise to the assumption of responsibility by Lee to BIGold:

(a) Yeo had requested Lee’s assistance in arranging for a CAR policy as it was the first time that BIGold was seeking to obtain this kind of insurance. Jacqueline (who usually liaised with Yeo on Lee’s behalf (see [12] above)) had informed Yeo that Lee would check “on [her] behalf”[\[note: 20\]](#) and get back to her.

(b) Lee had in fact contacted Long to ask if Zurich Insurance could provide the kind of insurance required by BIGold (see [14] above). When Long confirmed that it could, Jacqueline had informed Yeo that Lee would be recommending someone who was able to arrange for the necessary insurance cover.

(c) Lee had faxed to Long all the documents relating to the Contract which he had earlier received from Yeo (see [14] above) and had requested Long’s advice on “Contractor All Risks” and “Public Liability” insurance specifically (see the Undated Note reproduced at [15] above). Long subsequently replied to Lee saying that Zurich Insurance was able to offer the necessary insurance cover to BIGold.

159 The fact that Lee had assumed the responsibility of procuring the requisite insurance cover for BIGold by the time the Fire broke out is further confirmed by his conduct after the Fire. If Lee had

not in fact assumed such responsibility, there would have been no reason for the following actions on this part:

- (a) After the Fire, it was Lee who called Long to inform him of the incident. Thereafter, BGold, Zurich Insurance and MediaCorp all communicated with Lee regarding their respective claims under the Policy in relation to the Fire.[\[note: 21\]](#)
- (b) Lee attended a meeting sometime in April 2003 with Li Xizhen (BGold's manager) during which they negotiated the extension of the Policy to cover subcontractors (see [21] above).
- (c) When a new claims manager at Zurich Insurance was appointed, Lee contacted him to reiterate BGold's stance on extending insurance cover to subcontractors. The claims manager eventually informed Lee that Zurich Insurance was willing to amend the Policy in this manner. Lee called Li Xizhen to inform her of this. When the endorsement to the Policy effecting this amendment was ready, Lee collected it "on behalf of [BGold]".[\[note: 22\]](#)
- (d) After the Policy was amended, Lee discussed the amendment with Li Xizhen. During this discussion, it was agreed that BGold would object to the effective date of the extended insurance cover stated in the endorsement to the Policy (BGold's view was that the Policy should have covered subcontractors right from the outset). To this end, Li Xizhen prepared and handed Lee a letter addressed to Zurich Insurance for Lee to convey to Zurich Insurance.[\[note: 23\]](#)

160 It is inconsequential that Lee acted gratuitously in assisting BGold to obtain the Policy. The duties owed in tort by gratuitous agents are set out in F M B Reynolds, *Bowstead and Reynolds on Agency* (Sweet & Maxwell, 18th Ed, 2006) at paras 61025–61026 as follows:

A gratuitous agent will be liable to his principal if in carrying out the work he fails to exercise the degree of care which may reasonably be expected of him in all the circumstances.

... Where there is no contract between principal and agent, it would seem that the alleged agent cannot be liable for pure failure to do what he undertook to do without consideration. However, he can certainly be liable in tort for negligently failing to complete, or to complete with due care, work which he has undertaken and upon which he has embarked. Thus a person who gratuitously agrees to procure insurance for another may owe a duty of care in respect of the manner in which he does so.

161 The English courts have consistently recognised these principles (see, eg, *Wilkinson v Coverdale* (1793) 1 Esp 75; 170 ER 284 in relation to a gratuitous agent's duty to ensure adequate insurance cover; *Norwest Refrigeration Services Pty Ltd* ([154] *supra*) in relation to a gratuitous agent's duty to warn about his principal about exclusion clauses; and *Chaudhry v Prabhakar* ([157] *supra*) in relation to a gratuitous agent's duty not to make negligent misstatements). The Singapore High Court has also adopted these principles (see, *inter alia*, *Koh Keow Neo v Chee Johnny* [2004] 3 SLR 385 at [90] and [92] (although no breach of duty was found on the facts in that case)).

162 Thus, so long as Lee failed to fulfil the standard of care expected of a gratuitous agent – viz, what is reasonably expected of the agent in all the circumstances, having regard to factors such as the skill and experience which he has or represents himself as having (*per* Stuart-Smith LJ in *Chaudhry v Prabhakar* at 34) – he would be potentially liable for breaching his duty of care to BGold as its (gratuitous) insurance agent. For present purposes, the question of whether Lee has indeed breached such duty is not for us to determine. We merely note that the courts ought not to conflate

distinct causes of action and disregard the plain terms of a contract under the guise of justice when alternative avenues for obtaining justice exist. The Judge was mistaken in concluding that the applicable principles of law left a lacuna which had to be filled by considerations of fairness and justice.

163 The danger of allowing the courts to impose their own peculiar sense of what is fair and just in each case is that the concepts of “fairness” and “justice” are almost infinitely malleable. Indeed, in contrast with the conventional view whereby commercial certainty on the one hand and individualised fairness and justice on the other are depicted as mutually exclusive, Calnan regards fairness as tipping the scales in favour of commercial certainty (see Calnan’s article ([127] *supra*) at p 20):

*Perhaps the most important ingredient of fairness in commercial law is the requirement for certainty.* There are a number of reasons for this. Commercial parties need to be able to plan their transactions with a reasonable degree of certainty that they will achieve the desired result. In the event of a dispute, they also want to be able to avoid the cost and delay inherent in litigation. Indeed, certainty is not important just to the parties to the contract; in practice, the benefit of a contract is often assigned or charged to a third party who is unaware of the background and simply wants to be able to rely on the written document. [emphasis added]

164 Given the ease with which arguments based on fairness and justice can be manipulated to suit their wielder’s needs, such arguments should never be the sole reason for deviating from established principles of law (the applicable principles in the present appeal being those outlined above at [132]). In our view, the court below misjudged the point at which the scales between certainty and fairness should be balanced in this case. There was no legal principle warranting the Judge’s decision to allow extrinsic evidence to affect his interpretation of the Policy, nor would excluding such extrinsic material result in an unfair or unjust result. Having decided this, we now turn to the question of the proper scope and meaning of the Policy.

## **Our interpretation of the Policy**

### ***Whether BGold’s claim falls under Section II***

165 As BGold’s claim is for an indemnity in respect of its liability to pay MediaCorp compensation for the Damaged Property, it falls within Section II, which deals with third-party liability (see [19] above). In Summons in Chambers No 19257 of 2004 (filed under DC 2126/2004), BGold had asked for certain preliminary issues to be determined, including the question of whether, upon a proper construction of the Policy, Zurich Insurance was liable under Section II to indemnify BGold in respect of all sums which the latter should become liable to pay MediaCorp in the Main Action. At the hearing of the summons on 8 March 2005, the deputy registrar noted in his minute sheet, *inter alia*, that BGold was “still allowed to make the claim” under Section II for third-party property damage notwithstanding that the Damaged Property belonged to MediaCorp. We accept the submission by counsel for BGold that, given this determination by the deputy registrar, both BGold and Zurich Insurance proceeded on the basis that MediaCorp was a third party for the purposes of BGold’s claim under Section II. We also note that there is provision for “Cross Liability Cover” in the Schedule, which means that when one of the insured parties named in the Schedule makes a claim against another insured party under the Policy, that claim is treated as a claim by a third party and thus falls within the ambit of Section II (see, *eg*, *Speno Rail Maintenance Australia Pty Ltd v Hamersley Iron Pty Ltd* (2000) 23 WAR 291 and *National Vulcan Engineering Insurance Group Ltd v Transfield Pty Ltd* (2003) 59 NSWLR 119). Thus, the key question is whether either Special Exclusion 2 or Special Exclusion 4(b) applies to exclude Zurich Insurance’s liability to indemnify BGold.

### **Whether Special Exclusion 2 applies**

166 Special Exclusion 2 provides that Zurich Insurance will not indemnify B|Gold in respect of the expenditure incurred in repairing or replacing anything “covered or coverable” under Section I (see [20] above). We agree with the Judge that the Damaged Property (consisting of, *inter alia*, the AHU Room and AHU No 17) was not “covered” under Section I as the items entered in the Schedule (which correspond to the items covered under Section I) were confined to “[p]ermanent [and] temporary works including all materials to be incorporated therein”. In fact, B|Gold appeared to have conceded this point for the purposes of the appeal, since its arguments largely pertained to the question of whether the Damage Property was “coverable” within the meaning of Special Exclusion 2.

167 We find that the Damaged Property was not “coverable” under Section I either. The interpretation propounded by Zurich Insurance, *viz*, that “coverable” means “could have been covered by the parties’ agreement”, would effectively obviate coverage under Section II since it would always be open to Zurich Insurance to argue that the insured could, by agreement, have included in Section I the particular property for which a claim under Section II is being made. The reasoning of the Judge in this regard (see *B|Gold Interior Design* ([5] *supra*) at [37]) was, in our view, impeccable.

168 Instead, “coverable” in Special Exclusion II should be read to mean “intended to be covered”, not by reference to the Contract or any other extrinsic agreement, but by reference to the terms of the Policy itself. Counsel for Zurich Insurance disagreed with the Judge’s conclusion that what Zurich Insurance contemplated as being coverable under Section I was limited to the three items mentioned in Memo 1 (see [30] above). We accept that Memo 1 pertains to the issue of *quantum*, as is evidenced by its heading (“Sums Insured”) and its stipulation that the sums insured shall not be less than the values stipulated for the three items listed therein. However, we find persuasive the argument by counsel for B|Gold that Memo 1 indicates *by inference* what type of property Zurich Insurance contemplated as being coverable under Section I, namely, “the contract works” (see the first item in Memo 1) and “construction plant, equipment and construction machinery” (see the second and third items in Memo 1). This view is cemented by the wording of cl (b) of Section II, which refers to “accidental loss of or damage to property belonging to third parties occurring in direct connection with *the construction or erection of the items insured under Section I*” [emphasis added] (see [19] above). It is thus apparent that the items insured under Section I must be the result of construction or erection, *ie*, they cannot encompass the existing property of MediaCorp.

169 As such, the Damaged Property, being MediaCorp’s existing property, was not “covered or coverable under Section I” within the meaning of Special Exclusion 2. Accordingly, we find that Special Exclusion 2 does not operate to preclude Zurich Insurance’s liability to indemnify B|Gold under Section II.

### **Whether Special Exclusion 4(b) applies**

170 Turning to Special Exclusion 4(b), we find that it is plainly applicable on its face. The Judge correctly concluded that the words in Special Exclusion 4(b), “which or part of which is insured under Section I”, should be read as “qualifying the *project* (*ie*, the ... [W]orks) as opposed to the property” [emphasis in original] (see *B|Gold Interior Design* at [42]), as reading these words as a qualification to “property” instead would render unintelligible the phrase “an employee or workman of one of the aforesaid” following thereafter. Thus read, Special Exclusion 4(b) negates Zurich Insurance’s obligation to indemnify B|Gold in respect of B|Gold’s liability to third parties consequent upon loss of or damage to property belonging to or held in the care, custody or control of any of the four classes of persons listed in that provision, namely: (a) “the Principal(s)” (*ie*, MediaCorp (see [21] above)); (b) B|Gold itself; (c) any other firm connected with the Works; and (d) an employee or a workman of

such a firm or of MediaCorp or of B!Gold.

171 In this case, since B!Gold's third-party liability arose from damage to property belonging to MediaCorp, Special Exclusion 4(b) is clearly operative on its face. Since it has already been determined (see [139] above) that extrinsic material cannot be taken into account to construe Special Exclusion 4(b) in such a way as to render it inoperative, we find that this provision does exclude Zurich Insurance's liability to indemnify B!Gold under Section II.

## Conclusion

172 In view of our finding that Special Exclusion 4(b) (although not Special Exclusion 2) applies to preclude B!Gold from making a claim under Section II, the appeal is allowed with costs to Zurich Insurance here and below. The usual consequential orders are to be observed.

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[\[note: 1\]](#) See Zurich Insurance's core bundle ("ACB") at vol 2, p 51.

[\[note: 2\]](#) *Ibid.*

[\[note: 3\]](#) *Ibid.*

[\[note: 4\]](#) See B!Gold's supplemental core bundle ("RSCB") at p 1.

[\[note: 5\]](#) See para 8 of the affidavit of evidence-in-chief filed by Yeo on 17 October 2006 ("Yeo's AEIC") (at Record of Appeal, vol 4 Part C, p 507), and paras 6-7 of the affidavit of evidence-in-chief filed by Lee on 17 October 2006 ("Lee's AEIC") (at Record of Appeal, vol 4 Part C, p 569).

[\[note: 6\]](#) See para 7 of Lee's AEIC (at Record of Appeal, vol 4 Part C, p 569).

[\[note: 7\]](#) See RSCB at p 2.

[\[note: 8\]](#) *Id* at p 4.

[\[note: 9\]](#) See ACB, vol 2 at p 42.

[\[note: 10\]](#) *Id* at pp 42-43.

[\[note: 11\]](#) See ACB, vol 2 at p 44.

[\[note: 12\]](#) *Ibid.*

[\[note: 13\]](#) See ACB, vol 2 at pp 33-34.

[\[note: 14\]](#) See Record of Appeal, vol 4 Part C at p 670.

[\[note: 15\]](#) See MediaCorp's statement of claim filed on 10 May 2004 at para 14.

[\[note: 16\]](#) *Ibid.*

[\[note: 17\]](#) *Ibid.*

[\[note: 18\]](#) See para 7 of Lee's AEIC (at Record of Appeal, vol 4 Part C, p 569).

[\[note: 19\]](#) See para 8 of Lee's AEIC (at Record of Appeal, vol 4 Part C, p 570).

[\[note: 20\]](#) See para 8 of Yeo's AEIC (at Record of Appeal, vol 4 Part C, p 507).

[\[note: 21\]](#) See para 11 of Lee's AEIC (at Record of Appeal, vol 4 Part C, p 570).

[\[note: 22\]](#) *Id* at para 16 (at Record of Appeal, vol 4 Part C, p 572).

[\[note: 23\]](#) *Id* at para 17 (at Record of Appeal, vol 4 Part C, p 572).

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