We acknowledge, with thanks, the permission of the author, editor and publisher to reproduce this article on the Singapore Judicial College microsite. Not to be circulated or reproduced without the prior permission of the author, editor and publisher.
THE RELATIONSHIP BETWEEN INTERPRETATION, IMPLICATION AND RECTIFICATION IN SINGAPORE

GOH YIHAN*

The ascertainment of parties’ intentions in a contract under English law is largely dictated by several clear distinctions, namely, the interpretation of express terms, the implication of terms, and the rectification of the contract. In recent times, those distinctions have begun to weaken, as illustrated by the recent English High Court decision of Procter & Gamble Co. v. Svenska Cellulosa AB, [2012] EWHC 498 (Ch). This paper uses Procter & Gamble to examine the weakening distinctions in English law before turning to consider whether the traditional distinctions remain (and should remain) intact in Singapore. It also makes some broader observations on the Singapore courts’ approach in the specific area of contract law in light of increasing English recourse to broad, unifying concepts.

I. INTRODUCTION

The ascertainment of parties’ intentions in a contract under English law is largely dictated by several clear distinctions, namely, the interpretation of express terms, the implication of terms, and the rectification of the contract. In recent times, those distinctions have begun to weaken. First, following the Privy Council decision of Attorney General of Belize v. Belize Telecom Ltd.,1 the officious bystander, who used to stand between interpretation and implication, has given way to the reasonable man, the embodiment of the objective approach in construction which is said to underlie both interpretation and implication.2 Second, the clear line that divided interpretation and rectification has been blurred following the House of Lords decision of Chartbrook Ltd. v. Persimmon Homes Ltd.,3 which extended the objective approach in interpretation to rectification. The result is that the ascertainment of parties’ intention under English law may now be loosely said to be based on the concept of “interpretation”.

The purpose of this paper is not to critique this new unifying concept of “interpretation” – at least not overtly. Instead, its main purpose is to consider whether the traditional distinctions between interpretation, implication and rectification remain under Singapore law and whether this

* Assistant Professor, Faculty of Law, National University of Singapore. I would like to thank the student editors of the Singapore Law Review for excellent and thorough editorial work; their efforts have improved this article. Needless to say, all errors remain my own.

3 [2009] 1 A.C. 1101 [Chartbrook].
should be the case. To do this, this paper commences with an examination of the English position. It argues that the distinctions between interpretation, implication and rectification have weakened in English law. This will be shown by recourse to the recent English High Court decision of Procter & Gamble Co. v. Svenska Cellulosa AB, which illustrates the weakening of the distinctions between interpretation, implication and rectification, as well as how a decision in one area inevitably leads to the same conclusion in the others. Following a discussion of the English position, this paper then turns to the Singapore position. It will be argued that the present Singapore position maintains clear distinctions between interpretation, implication and rectification. This is driven in part by the Singapore courts’ preference for clear and practically applicable tests, as opposed to unifying concepts that may not be as practically applicable as specific tests. This can also be accounted for by the relevant statutory regime which governs contractual interpretation in Singapore, which may not support a blurring between interpretation and rectification. Ultimately, it will be suggested that the Singapore position in this area is a feasible one to take in that it balances conceptual clarity with practical application. And more broadly, this approach to the specific issue of the distinctions between interpretation, implication and rectification also sheds light on the general approach that the Singapore courts take with respect to the law of contract.

II. WEAKENING DISTINCTIONS IN ENGLISH LAW

Before dealing with the Singapore position, we turn first to the English position. The examination of the English position takes place through an examination of the recent English High Court decision of Procter & Gamble, as supplemented by allusions to more general principles. In Procter & Gamble, the Procter & Gamble Company (P&G) contracted for the sale of its European tissue towel manufacturing business to Svenska Cellulosa Aktiebolaget (SCA) under the terms of an Asset Sale and Purchase Agreement (“the ASPA”). The dispute that arose concerned the interpretation of a supplementary contract known as the Transitional Supply and CPN Conversion Agreement, specifically whether it provided expressly or impliedly for a fixed exchange rate; if not, whether it should be rectified to provide for such a rate. The TS&CPN was necessitated by P&G’s removal of proprietary paper-making technology from two manufacturing sites, one of which was located in the U.K.; the technology was not amongst the assets sold. More particularly, the TS&CPN provided for the supply of contract products from those sites to SCA at fixed prices (subject to two immaterial exceptions) whilst the removal of technology was being completed.

4 [2012] EWHC 498 (Ch) [Procter & Gamble].
5 Ibid.
6 Referred to as “the ASPA” hereafter.
7 Referred to as “the TS&CPN” hereafter.
The prices so fixed were derived from P&G’s “firm plant budgets” for 2007/2008 and expressed in euros. However, it was specified that in the case of products from the U.K. site, actual payment should be in pounds sterling. Significantly for SCA’s case, a document forming part of a Schedule to the TS&CPN and setting out P&G’s “firm plant budgets” for 2007/2008 contained at its foot an annotation of a fixed exchange rate between the pound sterling and euro. It was argued on behalf of SCA that this annotation, taken together with the provision of fixed prices and the payment for products from the U.K. site in pound sterling, expressly or impliedly mandated a fixed exchange rate of pound sterling and euro for all prices stated in euro to be payable in sterling. In the alternative, it was argued that the TS&CPN should be rectified to include such an exchange rate.

A Preliminary Point about Ambiguity in Contractual Interpretation

In a careful judgment, Hildyard J. ruled against SCA on all of its arguments. His judgment, covering interpretation, implication and rectification, illustrates the close relationship between all three doctrines and how the distinctions among them continue to be weakened. But his treatment of SCA’s argument of an express term, and the application of some well-known authorities, including the recent U.K. Supreme Court decision of Rainy Sky SA v. Kookmin Bank, requires evaluation within its own confines. Hildyard J. found that the fixed prices were stated in euros, and did not regard the annotation of a fixed exchange rate as constituting an express term that would effectively supersede other carefully drafted parts of the TS&CPN in a casual and indirect manner; the annotation was thus nothing more than an illustration of how the pound sterling costs in the budgets had been arrived at. It may well be asked whether Hildyard J.’s careful consideration of the context was necessary in light of Lord Clarke’s statement in Rainy Sky SA that “[w]here the parties have used unambiguous language, the court must apply it”. On the facts, it is arguable that the language used in the TS&CPN may not have been “unambiguous” given the presence of the annotation. More broadly, however, the concept of “unambiguous language” raises some difficulties that may reduce its applicability even in a case unlike Procter & Gamble.

A claim that words are unambiguous, according to Corbin, contains a simultaneous assertion that any other interpretation is untrue. It is important to recognise that “ambiguity” is a relative concept, and a belief that words have an “unambiguous meaning” is also a subscription to a set of meaning that may well have been departed from in a given contract. As perceptively stated by McLauchlan, the possibility of such a departure means that there is simply a “strong indication”
that the words were used in a conventional or ordinary sense but no more. Judges may be rightly concerned with the uncertainty that an open-textured contextual approach may engender, and that may well justify recourse to a default rule based on giving effect to “unambiguous language”, but the default rule must be departed from in the appropriate case. Just what is an appropriate case requires a consideration of the context, much like Hildyard J.’s approach, although the degree of scrutiny could be reduced in a case with more “unambiguous language”.

The use of “ambiguity” in the context of Singapore is similar. In particular, the Evidence Act, which governs aspects of the contractual interpretation exercise in Singapore, contemplates a presumption that “unambiguous language” is intended to apply according to its plain meaning unless there is evidence to the contrary. This is made clear in section 96, the “plain language” provision. This interpretation of section 96 also enables the operation of subsequent provisions of the Evidence Act. In particular, section 97, which deals with latent ambiguity, provides that “[w]hen 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”. This provision must have been intended to work in tandem with section 96. In both provisions, the notion that words have plain or fixed meanings is presupposed, but the second provision states that the plain meaning may be rebutted where the admissible context reveals an alternative meaning. It would be a senseless distinction if the admissible context for the “plain language” provision were limited in the former provision even though the underlying premise behind both provisions is the same.

Moreover, in Wigram’s work on the admissibility of extrinsic evidence in the interpretation of wills – by which Stephen said he was heavily influenced in formulating the Indian Evidence Act – the notion that the plain meaning of words is not absolute finds expression in his first three Propositions, all of which correspond to various provisions in the Evidence Act. By Proposition 1, “[a] testator is always presumed to use the words in which he expresses himself, according to their strict and primary acceptation” unless otherwise contradicted from the context of the will. Proposition 2 provides that the plain meaning of words should be applied if such meaning is “sensible with reference to extrinsic circumstances”. And finally, Proposition 3 states that the plain meaning of words can be departed from when such meaning is “insensible with reference to extrinsic circumstances.” Proposition 2 is reflected in the section 96 of the Evidence Act, and Proposition 3 clearly influenced the first of the provisions that deal with latent ambiguity, viz.

14 James Wigram, An Examination of the Rules of Law, Respecting the Admission of Extrinsic Evidence in Aid of the Interpretation of Wills, 2d ed. (London: Charles Hunter, 1835) at 13.
15 Ibid. at 15.
16 Ibid. at 29.
sections 97 to 99. These Propositions likewise contemplated the notion that words have plain or fixed meanings, but also that such meanings can be departed from if the context reveals otherwise.

B. Distinction Between Interpretation and Implication

We turn now to the more substantive issue at hand, namely, the distinction between interpretation and implication in English law. Returning to Procter & Gamble, having found that there was no express term stipulating a fixed exchange rate, Hildyard J. next dealt with SCA’s argument that there was an implied term to this effect. In dealing with this issue, Hildyard J. distinguished between the processes of “inference” and “implication”. According to him, “inference” refers to “the process of spelling out in words a provision which is to be inferred from particular express terms that they used the parties must have meant to include”. “Implication”, in contrast, refers to “the process of writing in a provision in order to give effect to the obvious objective intention of the parties as evinced by the instrument read as a whole in its admissible factual context”. It is difficult to discern the difference between “inference” from express terms and the “interpretation” of those terms. Both involve the “spelling out in words” of the parties’ obligations as discerned from the express terms. Indeed, somewhat ironically, Hildyard J.’s acknowledgement of Lord Hoffmann’s proposition in the Belize case that implication is really a matter of interpretation in fact renders the distinction between “inference” and “interpretation” (and “implication”, for that matter) moot. Ultimately, as if to prove the point being made, Hildyard J. acknowledged that his earlier conclusion in relation to the effect of the annotation as an express term applied equally to reject the argument based on inference. Therefore, the supposed distinction between “inference” and “implication” may not actually exist. More broadly, the use of more or less the same factors as those relevant in relation to the express term argument to reject the argument based on implication illustrates a consequence of a composite approach: whereas an approach based on the traditional tests gives the court more leeway to “improve” the contract, the Belize approach does not.

1. Contractual interpretation under English law

To understand the weakening distinction between interpretation and implication under English law, it is necessary first to discuss the relevant principles dealing with contractual interpretation. In this respect, the modern contextual approach, which governs contractual interpretation in modern times, is typically traceable to Lord Hoffmann’s speech in Investors Compensation Scheme Ltd
v. West Bromwich Building Society,\textsuperscript{18} where he summarised the modern contextual approach in five points. It is possible to use the passage to discern several elements of the modern contextual approach. Thus, according to Lord Hoffmann, interpretation is the “ascertainment of the meaning which the document would convey to a \textit{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”.\textsuperscript{19} This is the essence of the modern contextual approach and posits that interpretation, properly understood, must not take place in a vacuum, but rather in consideration of all the relevant background information. Important also is the fact that it is a \textit{reasonable} person who assesses what the meanings of the terms are. Interpretation is thus based on reasonableness.

It is additionally and relatedly objective, in that the subjective intention of the contracting parties is not taken into account. This means that the search is not for what the parties \textit{actually} intended, but what they reasonably had intended. However, objectivity is not pursued to the exclusion of the contracting parties. The objective principle\textsuperscript{20} was neatly encapsulated in the words of Blackburn J. in the oft-cited English decision of Smith v. Hughes,\textsuperscript{21} 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.”\textsuperscript{22}

2. The implication of terms in fact under English law

Turning now to the implication of terms (in fact), in the Privy Council case of Belize, Lord Hoffmann explained that the implication of terms in fact is really an exercise of contractual interpretation. Thus, whenever a court sought to imply a term in fact, it must ask itself “whether such a provision would spell out in express words what the instrument, read against the relevant background, would reasonably be understood to mean”.\textsuperscript{23} This is the only question to be asked, and “other tests” such as the “business efficacy” or the “officious bystander” tests are not different

\textsuperscript{18} [1998] 1 W.L.R. 896 (H.L.) [Investors Compensation].
\textsuperscript{19} Ibid. at 912.
\textsuperscript{21} (1871) L.R. 6 Q.B. 597.
\textsuperscript{22} Ibid. at 607.
\textsuperscript{23} Supra note 1 at para. 21.
or additional tests. Indeed, Lord Hoffmann goes on to elaborate as such:

“Likewise, the requirement that the implied term must ‘go without saying’ is no more than another way of saying that, although the instrument does not expressly say so, that is what a reasonable person would understand it to mean. Any attempt to make more of this requirement runs the risk of diverting attention from the objectivity which informs the whole process of construction into speculation about what the actual parties to the contract or authors (or supposed authors) of the instrument would have thought about the proposed implication. The imaginary conversation with an officious bystander in Shirlaw v Southern Foundries (1926) Ltd [1939] 2 KB 206, 227 is celebrated throughout the common law world. Like the phrase ‘necessary to give business efficacy’, it vividly emphasises the need for the court to be satisfied that the proposed implication spells out what the contact would reasonably be understood to mean. But it carries the danger of barren argument over how the actual parties would have reacted to the proposed amendment. That, in the Board’s opinion, is irrelevant. Likewise, it is not necessary that the need for the implied term should be obvious in the sense of being immediately apparent, even upon a superficial consideration of the terms of the contract and the relevant background. The need for an implied term not infrequently arises when the draftsman of a complicated instrument has omitted to make express provision for some event because he has not fully thought through the contingencies which might arise, even though it is obvious after a careful consideration of the express terms and the background that only one answer would be consistent with the rest of the instrument. In such circumstances, the fact that the actual parties might have said to the officious bystander ‘Could you please explain that again?’ does not matter.”

A few comments might be made about this passage, the chief of which is that Lord Hoffmann very clearly disfavours the use of the traditional tests centring on “business efficacy” or the “officious bystander”. In fact, Lord Hoffmann’s view is that the use of such tests may distract the court from the true enquiry, which is what the contract, read in light of the relevant background information, means to a reasonable observer. Necessarily, the only “test” that would apply under such an approach is that which underlies contractual interpretation, i.e., the reasonable meaning to be attributed to the contractual words taken in their proper context, both internal and external.

24 Ibid.
25 Ibid. at para. 25.
A related comment is that the criterion of “reasonableness” has overtaken that of “necessity” in
governing when terms are to be implied. This is clear from Lord Hoffmann’s explanation that
“necessity” simply reflects what the contract would reasonably be understood to mean.26

Subsequent English cases have largely accepted Lord Hoffmann’s statement of the applicable
law in Belize, notwithstanding the fact that it is not actually binding, being a Privy Council decision.
An obvious example, in the context of the present paper, is Procter & Gamble, in which Hildyard
J. acknowledged that the implication of terms in fact is really an exercise in interpretation. In the
English Court of Appeal decision of Crema v. Cenkos Securities plc,27 Aikens L.J. summarised
Lord Hoffmann’s statement of the law in Belize in the following terms:

“The principles are: (1) a court cannot improve the instrument it has to construe
to make it fairer or more reasonable. It is concerned only to discover what the
instrument means. (2) The meaning is that which the instrument would convey
to the legal anthropomorphism called “the reasonable person”, or the “reasonable
addressee”. That “person” will have all the background knowledge which would
reasonably be available to the audience to whom the instrument is addressed.
The objective meaning of the instrument is what is conventionally called the
intention of “the parties” or the intention of whoever is the deemed author of
the instrument. (3) The question of implication of terms only arises when the
instrument does not expressly provide for what is to happen when some particular
(often unforeseen) event occurs. (4) The default position is that nothing is to be
implied in the instrument. In that case, if that particular event has caused loss,
then the loss lies where it falls. (5) However, if the “reasonable addressee” would
understand the instrument, against the other terms and the relevant background,
to mean something more, i.e. that something is to happen in that particular event
which is not expressly dealt with in the instrument’s terms, then it is said that the
court implies a term as to what will happen if the event in question occurs. (6)
Nevertheless, that process does not add another term to the instrument; it only
spells out what the instrument means. It is an exercise in the construction of the
instrument as a whole. In the case of all written instruments, this obviously means
that term is there from the outset, i.e. from the moment the contract was agreed,
or the articles of association were adopted or the statute was passed into law.”28

---

26 See also infra note 27 at para. 39.
28 Ibid. at para. 38.
In that case, Aikens L.J. further commented that Lord Hoffmann’s statement of the law on implication applies whether the contract is “wholly oral or … partly oral and partly in writing”.29

3. Blurring of the distinction

Thus understood, it is little wonder why the distinction between interpretation and implication (of terms in fact) has been regarded as blurred under English law. There is, in effect, no longer any clear distinction between interpretation and implication. The test that applies to govern interpretation likewise applies to implication; indeed, the traditional tests of “business efficacy” and the “officious bystander” are no longer regarded as freestanding or independent. Rather, they are explained on the basis that they are specific elaborations of the test used to govern interpretation.

C. Distinction Between Interpretation and Rectification

Returning once again to Procter & Gamble, in dealing with SCA's argument for rectification, Hildyard J. distinguished between the reformation of an existing contract to correct a shared mistake in the expression of a common intention, and the giving of effect to a different understanding not intended to be expressed by the words used by the party but said to have been additionally agreed to. Demonstrating the thin line between interpretation and rectification, it was said that once SCA's argument based on the interpretation of an express term failed, it became evident that the parties did not share a common intention to have a fixed exchange rate. This suggested that SCA’s plead for rectification was being used to introduce a new term into the contract. The question thus became whether SCA was “mending an instrument or mending a bargain”.30 Hildyard J. found that the evidence fell well short of the “convincing proof” required to justify rectifying the contract that makes sense without reforming it in the way proposed.

But, more relevantly, Lord Hoffmann’s view in Chartbrook that rectification involves reference to a reasonable objective observer, as given effect to in Procter & Gamble, also blurs the divide between interpretation and rectification further. Here it is important to draw a distinction between what is known as “common law rectification” and “equitable rectification”. As McMeel explains, the differences between the two are primarily that the former takes place through the process of interpretation, whereas the latter requires a qualifying mistake; and also that the former is subject to the exclusionary rules of evidence, especially against prior negotiations, whereas the latter is not.31 And, according to McMeel, the modern contextual approach towards the interpretation

29 Ibid. at para. 41; but see ibid. at para. 71 (Morritt C.).
30 Supra note 4 at para. 109.
of contracts (in the form of common law rectification) may mean the eventual demise of the equitable remedy of rectification. Thus, it is the equitable form of rectification that is likely to be overtaken. In *Investors Compensation*, Lord Hoffmann explained that courts have the power to correct mistakes in expression through the process of interpretation. Points 4 and 5 of his celebrated restatement are relevant for this purpose:

“(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…

(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.”

As already mentioned, this is more commonly regarded as “common law rectification” as opposed to equitable rectification. As Sir Martin Nourse explained in *Holding & Barnes plc v. Hill House Hammond Ltd.*, this is really a process of construction which enables the court to correct an obvious clerical error in a document that it may conform to the obvious intention of the parties. Understood this way, it is clear that the process of interpretation – through which common law rectification may be effected – may well become a more potent tool than equitable rectification. Whichever way one characterises it – whether common law rectification is a process of interpretation or equitable rectification in the guise of construction – it is clear that the power of the courts to correct obvious errors in such a manner would grow to overshadow the more stringent requirements under equitable rectification.

---

32 Ibid. at viii.
33 Ibid. at 488–89.
36 Ibid. at para. 47.
The only possible difference between the two forms of rectification remains the extended admissibility of evidence for the equitable form of rectification. As an aside, the permissibility of drawing upon inadmissible evidence at the process of interpretation at the stage of rectification illustrates the inconsistent approach that English law takes with regard to two doctrines that ultimately answer the same question about the parties’ intentions. But more relevantly, as McMeel has pointed out, the “decisive extension of an objective theory of intention from interpretation to rectification … in Chartbrook undermines [equitable rectification’s] potential operation as a subjective safety net.” Moreover, since there is no need to prove a qualifying mistake (unilateral or common) in so far as common law rectification is concerned, it may be that counsel (and courts) will seek primary recourse to that form of rectification, as opposed to equitable rectification, since the result produced is more or less the same. Thus understood, the distinction between interpretation and rectification (understood here in its more traditional, equitable form) is also weakening as a matter of English law.

Thus far, we have seen that the distinctions between interpretation, implication and rectification have weakened in English law. Procter & Gamble, it bears repeating, is a paradigm example. The failure of one argument premised on the interpretation of an express term inevitably, via a domino effect, led to the failure of other arguments based on previously quite separate grounds of implication and rectification. As demonstrated above, this shows that the distinctions between the three grounds are weakened in English law. The question that remains is whether the Singapore courts should follow suit and give effect to such a weakening in Singapore contract law.

III. DISTINCTIONS INTACT IN SINGAPORE

It will be shown below that, in contrast to the English position, the Singapore position maintains the traditional distinctions between interpretation, implication and rectification. This is in part due to the Singapore courts’ rejection of an umbrella justificatory concept of “interpretation” to account for (in particular) interpretation and implication. It will also be shown below that the Evidence Act also bars the Singapore courts from adopting any view of rectification that effectively combines it with interpretation pursuant to one of the points under Lord Hoffmann’s restatement in Investors Compensation. Before the distinction between interpretation and implication is examined in detail,

37 Supra note 31 at viii.
38 Ibid.
it is necessary to first consider the law relating to these aspects by way of the relevant background.

A. Interpretation and Implication

1. Contractual interpretation under Singapore law

As the present author has mentioned elsewhere, the law relating to the interpretation of contracts in Singapore must now be discussed in the light of the Singapore Court of Appeal decision of Zurich Insurance (Singapore) Pte. Ltd. v. B-Gold Interior Design & Construction Pte. Ltd. Contractual interpretation, as outlined in Zurich Insurance, inevitably involves a discussion of the parol evidence rule and the so-called contextual approach. Whilst related, it is important to realise they are not the same. Whereas the parol evidence rule governs the admissibility of extrinsic evidence to aid in the interpretation of contracts, it does not directly tell us how to interpret. That, on the other hand, is informed by the contextual approach.

Zurich Insurance prescribes a two-step framework to be used for the interpretation of contracts. The first step is to consider whether the extrinsic evidence sought to be adduced can in fact be admitted. The Court of Appeal in Zurich Insurance, after an extensive study of the relevant case law, concluded that although the parol evidence rule (as embodied in section 94 of the Evidence Act) still operates as a restriction on the use of extrinsic material to affect a contract, extrinsic material is admissible for the purpose of interpreting the language of the contract. Extrinsic evidence is admissible to interpret the contract even if there is no ambiguity in the contract concerned. Whether the extrinsic evidence is admissible depends on whether it is (a) relevant (i.e., it would affect the way in which the language of the document would have been understood by a reasonable man); (b) reasonably available to all the contracting parties; and (c) relates to a clear and obvious context. According to the Court of Appeal, the extent of the admissible evidence is

41 Ibid. at para. 124.
42 Ibid. at para. 108.
44 Zurich Insurance, ibid. at para. 125.
45 Ibid. at para. 132. But see also ibid. at para. 129: “In our view, the benefits of adopting, via proviso (f) to s 94, the contextual approach to contractual interpretation (viz, flexibility and accord with commercial common sense) will be maximised and its costs (viz, increased uncertainty and added litigation costs) minimised if, as a threshold requirement for the court’s adoption of a different interpretation from that suggested by the plain language of the contract, the context of the contract should be clear and obvious.” For a more general acceptance of the three requirements, see the High Court decision of Goh Guan Chong v. AspenTech, Inc., [2009] 3 Sing. L.R. (R.) 590 at paras. 57 and 79 and Sheng Siong Supermarket, supra
very broad and is not confined to empirical facts. This involves, in appropriate cases, a consideration of the commercial purpose of the contract in question. However, it bears repeating that the Court of Appeal in Zurich Insurance cautioned that the contextual approach did not allow a court to contradict or vary the terms of a contract under the pretext of “interpreting” it.

The second step concerns the task of interpretation. This involves the application of the contextual approach under the terms of proviso (f) of section 94 of the Evidence Act. The Court of Appeal in Zurich Insurance noted that neither ambiguity nor the existence of an alternative technical meaning is a prerequisite for the court’s consideration of extrinsic material. This must be correct. Indeed, despite wording in section 96 that suggests otherwise, it has been rightly argued that this section “presupposes the partial operation” of proviso (f) to section 94 to “show ‘in what manner the language of a document is related to existing facts’ so as to enable the language to apply accurately to existing facts.”

The illustration to section 96 makes this clear: it refers to a description of an estate that cannot be contradicted by evidence of a different estate. However, unless one has had recourse to evidence of the “existing fact”, that is, the estate as originally described, one is not capable of ascertaining whether the plain meaning is correct or not. The key to understanding why extrinsic evidence is admissible is that it is being admitted not to provide a positive meaning to the contractual word, but rather to establish whether there is, in a negative sense, an ambiguity. Indeed, according to Zurich Insurance, the court will first take into account the plain language of the contract together with relevant extrinsic material that is evidence of its context. Then, if the plain language of the contract becomes ambiguous (i.e., it takes on another plausible meaning) or absurd in the light of this context, 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. Furthermore, the existing canons of interpretation continue to be relevant as well, although they are only a guide and not exhaustive.

From this broad framework, it is clear that the Singapore approach towards contractual interpretation largely follows the English contextual approach, as restated in Investors Compensation.

---

47 Supra note 40 at para. 122. See also Yamashita Tetsuo, supra note 46 at para. 21: “While I recognise that the line between construing a contract to determine the real objective intention of the parties and rewriting a contract can, in particular circumstances, be a fine one, the court should be astute not to impose, under the guise of construing a document, its own sense of fairness or reasonableness on a transaction entered into between two commercial parties who are well capable of taking care of their respective interests and who have obviously engaged in much bargaining before concluding the arrangement finally arrived at (as was the case in this appeal).”
49 Supra note 40 at para. 130. See also Sheng Siong Supermarket, supra note 43 at para. 60.
50 Zurich Insurance, ibid. at para. 131.
The approaches are not entirely similar due to the influence of certain provisions of the Evidence Act. However, certain core principles remain consistent across both approaches: both stress the need for context, and importantly for present purposes, both also emphasise the need for objectivity. Interpretation is the objective ascertainment of the parties’ intention according to the available context. The question is whether this understanding of interpretation covers implication and rectification in the Singapore context as well.

2. The implication of terms in fact under Singapore law

We deal first with the implication of terms (in fact) under Singapore law. As with the preceding discussion, before we discuss the distinction (if any) between interpretation and implication, a summary of the applicable law would be useful. The implication of terms in fact traditionally encompasses a very strict approach: terms would be implied only where it is necessary to give effect to the presumed intention of both parties to the contract.\(^{51}\) This is in apparent contrast to the modern approach put forward by Lord Hoffmann in *Belize*. Put another way, a court will exercise its right to imply a term with care.\(^{52}\) Any criterion based wholly or mainly upon the concept of reasonableness is, at least in the Singapore context, avoided by the courts\(^{53}\) in this respect. They have stated time and again that they would not (and this is probably in accordance with the classical notion of freedom of contract) re-write contracts on behalf of the parties.

As may be perhaps well known to any law student, two very famous formulations\(^{54}\) are traditionally utilised in this area to give effect to the strict approach referred to above. The first (and earlier) test is the “business efficacy” test formulated in *The Moorcock*.\(^{55}\) According to this approach, a term will only be implied in fact if it is necessary to give “business efficacy” to the

---


53 Reasonableness is thus a necessary but not a sufficient condition for the successful implication of a term under this category: see e.g., Reigate v. Union Manufacturing Company (Ramsbottom), Ltd., [1918] 1 K.B. 592 (C.A.), Scrutton L.J. (‘… an implied term is not to be added because the Court thinks it would have been reasonable to have inserted it in the contract.” at 605). See also Chua Choon Cheng v. Allgreen Properties Ltd., [2009] 3 Sing. L.R. (R.) 724 (C.A.) at para. 63.

54 But see the Malaysian case of Chua Soong Kow & Anak-Anak Sdn. Bhd. v. Syarikat Soong Heng (sued as a firm), [1984] 1 Current Law Journal 364 at 365, where Shaik Daud J. stated thus: “A term will generally be implied if it is necessary, in the business sense, to give efficacy to the contract but even if a particular term is not necessary to give efficacy to the contract, it may nevertheless be implied if it was so obviously a stipulation in the agreement that it was idle to express it by specific words.” It might be questioned if this is yet another formulation or an amalgamation of the other two, or simply yet another re-statement of the “business efficacy” test considered below.

55 (1889), 14 P.D. 64 (C.A.).
contract. The second is the “officious bystander” test formulated by MacKinnon L.J. in *Shirlaw v. Southern Foundries (1926) Ltd.* According to this test, if a term is so obvious that it goes without saying, it ought to be implied as a matter of fact; the test is whether the parties would suppress the suggested term by an officious bystander with a common “Oh, of course!”. The officious bystander only asks the question and does not respond.

The relationship between the two tests has been variously understood in Singapore. Broadly speaking, there have been two lines of cases with regard to understanding the relationship between the two tests. In the first line of cases, both tests have been utilised interchangeably, therefore signalling that there is no real difference in substance between the two tests. For example, in the Court of Appeal decision of *Bank of America National Trust and Savings Association v. Herman Iskandar*, the plaintiffs sought to imply a term that the defendant bank was under a duty of care to contact the account-holders (the plaintiffs) for instructions on the maturity of the fixed deposit account. In allowing such a term to be implied (but only to the extent that the bank ought to take reasonable steps to so inform the account-holders concerned), the court held that the general test (as enunciated in the previous Court of Appeal decision in *Energy Shipping Co. Ltd. v. UDL Shipping (Singapore) Pte. Ltd.* is “whether a term must be implied must be a necessary term irrespective of whether one accepts the ‘business efficacy test’ propounded by Bowen L.J. in *The Moorcock… or the ‘officious bystander test’ enunciated by MacKinnon LJ in *Shirlaw v. Southern Foundries (1926) Ltd.*” This clearly suggests that the tests are alternatives despite not being phrased identically. Similarly, Chan Seng Onn J.C. (as he then was) in the High Court decision of *Loh Siok Wah v. American International Assurance Co. Ltd.* referred to the formulation in *BP Refinery (Westernport) Pty. Ltd. v. Hastings Shire Council,* and took the view that although the “business efficacy” and “officious bystander” tests “do overlap to a large extent”, this need not always be the case. According to Chan J.C.:

---

56 Supra note 52 at 227.
59 Two of the joint account-holders had in fact passed away and were represented by the executors of the respective estates.
60 See generally supra note 58 at paras. 42-61. The court held that the defendant bank had not discharged its contractual duty in taking reasonable steps to contact the account-holders concerned.
62 Supra note 58 at para. 45 [emphasis added].
63 [1998] 2 Sing. L.R. (R.) 245; the plaintiff’s appeal was heard and dismissed by the Court of Appeal without written grounds of judgment.
65 See supra note 63 at para. 32.
“There are certainly many terms which are so plainly and obviously necessary to be implied to make the contract workable. However, there can be occasions where a term must necessarily be implied for the contract to be workable but that term may not be so plain and obvious that it goes without saying. It is only after problems have arisen that with hindsight, one can say it is obvious that the term should have been part of the contract. On the other hand, there may be terms which are so plain and obvious that parties must obviously have intended those terms to be part of their contract but these terms may not be absolutely necessary for the contract to be workable. There is much to be said for the view that [the ‘business efficacy’ and ‘officious bystander’ tests] should not necessarily be cumulative but may be in the alternative.”\(^66\)

The italicised portion of the learned judge’s judgment above clearly shows that he was inclined towards the view that the two tests are alternatives, such that satisfaction of one is the satisfaction of the other.

A second line of cases has regarded the two tests as being cumulative in nature. In the Malaysian case of Sababumi (Sandakan) Sdn. Bhd. v. Datuk Yap Pak Leong,\(^67\) the Federal Court held, inter alia, that “[b]oth tests [viz., the “business efficacy” and “officious bystander” tests] must be satisfied before the court infers an implied term”.\(^68\) This suggests that both tests are cumulative. On this approach, each test would be applied separately and the term sought to be implied has to pass the criteria laid down in both tests in order for it to be implied. One possible reason for the approach adopted in may lie in the citation of the observations of Lord Simon of Glaisdale (delivering the judgment of the majority of the Board) in the Privy Council decision of BP Refinery (Westernport) Pty. Ltd. v. Hastings Shire Council,\(^69\) where both the “business efficacy” and “officious bystander” tests were cited as part of a whole list of principles.\(^70\) However, the better view might be that the


\(^{67}\) [1998] 3 M.L.J. 151 (Federal Court).

\(^{68}\) Ibid. at 170 [emphasis added].

\(^{69}\) Supra note 64.

\(^{70}\) See ibid. at 376, as follows: “Their Lordships do not think it necessary to review exhaustively the authorities on the implication of a term in a contract which the parties have not thought fit to express. In their view, for a term to be implied, the following conditions (which may overlap) must be satisfied: (1) it must be reasonable and equitable; (2) it must be necessary to give business efficacy to the contract so that no term
mere fact that the tests were cited together is not support for their cumulative relationship.

Fortunately, at least in Singapore’s context, the uncertainty relating to the relationship between the two tests has been laid to rest. This was done by the High Court in *Forefront Medical Technology (Pte.) Ltd. v. Modern-Pak Pte. Ltd.* The court explained that the two tests are complementary to each other, and that the “officious bystander” test is the practical mode by which the “business efficacy” test is implemented. This thereby resolves the conflict between the two lines of cases discussed above. In explaining its approach, the court pointed out that it was in fact Scrutton L.J. who had first formulated the “officious bystander” test, and not MacKinnon L.J., although it was the latter who had made the formulation famous. Indeed, Scrutton L.J. himself had made the following observations in *Reigate v. Union Manufacturing Company (Ramsbottom), Limited,* that preceded MacKinnon L.J.’s formulation in the *Shirlaw* case by approximately two decades, as follows:

“A term can only be implied if it is necessary in the *business sense* to give *efficacy* to the contract; *that is, if* it is such a term that it can confidently be said that *if at the time the contract was being negotiated some one had said to the parties, ‘What will happen in such a case,’ they would both have replied, ‘Of course, so and so will happen; we did not trouble to say that; it is too clear: ‘Unless the Court comes to some such conclusion as that, it ought not to imply a term which the parties themselves have not expressed.”* 

The court held that the formulation of Scrutton L.J., as quoted in the preceding paragraph, shows that the “business efficacy” and “officious bystander” tests are *complementary* in nature. In this respect, it is important that Scrutton L.J. had used the phrase “that is” in the passage cited above. This provides the important linkage between the two tests such that the court was able to explain that they are complementary in nature. In any event, the court in *Forefront* also noted

---

71 Supra note 51.

72 Ibid. at para. 35. See also Andrew Phang, “Implied Terms, Business Efficacy and the Officious Bystander – A Modern History” (1998) J. Bus. L. 1 at 17. This was also pointed out by Cross J. in *Gardner v. Coutts & Co.*, [1968] 1 W.L.R. 173 (Ch.) at 176.

73 Supra note 53.

74 Ibid. at 605 [emphasis added].

75 Supra note 51 at para. 36. See also Andrew Phang, supra note 72 at 24–29.

76 Supra note 51 at para. 36 [emphasis in the original text]. See Andrew Phang, supra note 72 at 21.
that there was case law to support the approach from complementarity.\textsuperscript{77} These views of the High Court in \textit{Forefront} have since been endorsed by the Court of Appeal in \textit{Panwah Steel Pte. Ltd. v. Koh Brothers Building & Civil Engineering Contractor (Pte.) Ltd.},\textsuperscript{78} \textit{Golden Harvest Films Distribution (Pte.) Ltd. v. Golden Village Multiplex Pte. Ltd.}\textsuperscript{79} and \textit{Chua Choon Cheng v. Allgreen Properties Ltd.}\textsuperscript{80} This is quite evidently the established law in Singapore, at least before \textit{Belize} was decided.

3. \textit{Continued distinctions between interpretation and implication}

It is submitted that even though many of the cases mentioned above with regard to implication in Singapore were decided before \textit{Belize}, it is unlikely that the local approach would change. Indeed, in the first place, there are local Court of Appeal cases that have distinguished interpretation from implication, albeit before \textit{Belize} was decided. For example, in \textit{Panwah Steel Pte. Ltd. v. Koh Brothers Building & Civil Engineering Contractor (Pte.) Ltd.},\textsuperscript{81} the appellant faced the procedural question of whether it was effectively raising the same argument rejected by the court below (\textit{i.e.}, the implication of a term) packaged in a different way (\textit{i.e.}, a purposive interpretation of the contract). The Court of Appeal held that the two arguments were different. In particular, it drew a distinction between the \textit{interpretation} of express terms and the \textit{implication} of non-express terms.\textsuperscript{82} This is therefore a clear distinction between implication and interpretation.

Secondly, and more to the point, the Court of Appeal has in \textit{MFM Restaurants Pte. Ltd. v. Fish & Co Restaurants Pte. Ltd.},\textsuperscript{83} albeit in \textit{obiter}, directly responded to Lord Hoffmann’s characterisation of interpretation in \textit{Belize}. The Court of Appeal was critical of the unnecessarily high level of abstraction which the characterisation of interpretation has engendered.\textsuperscript{84} In its view, this would result in a lack of concrete rules (and consequent normative guidance) as well as uncertainty.\textsuperscript{85} These determinative views of the Court of Appeal, coupled with a lineage of Singapore cases that have applied the traditional tests towards implication (as distinguished from interpretation), constitute strong reasons why the Singapore courts will maintain the distinction between interpretation and implication.


\textsuperscript{78} \textit{Supra} note 51 at para. 11.

\textsuperscript{79} [2007] 1 Sing. L.R. (R.) 940 at para. 46.

\textsuperscript{80} \textit{Supra} note 53 at para. 63.

\textsuperscript{81} \textit{Supra} note 51.

\textsuperscript{82} \textit{Ibid.} at para. 13.

\textsuperscript{83} [2011] 1 Sing. L.R. 150 [\textit{MFM Restaurants}].

\textsuperscript{84} \textit{Ibid.} at para. 98.

\textsuperscript{85} \textit{Ibid.}.
However, some possible counter-arguments must be considered. As opposed to these otherwise clear decisions, there have been cases that seem to follow (at least not overtly) Lord Hoffmann’s approach in Belize. First of all, the High Court in Kim Eng Securities Pte. Ltd. v. Goh Teng Poh Karen\(^86\) appeared to accept, without question, counsel’s submission that the test for implication was whether “the instrument, read as a whole against the relevant background, would reasonably be understood to mean”,\(^87\) as stated by Lord Hoffmann in Belize. This may be taken as an implicit acceptance of Belize. However, this first case can now be laid to rest as the High Court has in Sembcorp Marine Ltd. v. PPL Holdings Pte. Ltd.\(^88\) clarified that the court in Kim Eng intended no such consequence. Secondly, although, as mentioned above, the Court of Appeal in MFM Restaurants expressly rejected Lord Hoffmann’s test as being unnecessarily abstract, the same court has in Fong Song Mee v. Ho Kiat Seng\(^89\) noted that the implication of terms (generally) “should always be a matter of construction in the light of the precise circumstances of the case, in particular, the objective intention of the parties”.\(^90\) While one should not ascribe too great an importance to a single sentence in the court’s judgment, this allusion to construction (which is here assumed to be identical with interpretation) does raise slightly the question of whether the court’s fundamental understanding of the implication of terms may be premised on interpretation, even if the test it chooses to apply is not as such. However, given the clear rejection of Lord Hoffmann’s test in MFM Restaurants, the Court of Appeal’s statement in Fong Song Mee may be explained on the basis that the court was referring to a consideration of the facts of the case when implying a term in fact. There is certainly nothing amiss about this since the nature of the enquiry is, it bears repeating, factual in nature.\(^91\) Thus, the presence of these two apparently contradictory cases are not strong reasons why the Singapore courts will follow Belize.

A third and very recent case, Sembcorp, deserves further consideration because the High Court in that case purported to accept Lord Hoffmann’s approach in Belize. This, coupled with the status of the Court of Appeal’s remarks in MFM Restaurants in relation to Belize being only obiter, could mean that Singapore law currently accepts the approach taken in Belize. However, it is suggested that despite the High Court’s overt approval of Lord Hoffmann’s approach in Belize, the reality is that it ended up affirming the traditional approach towards implication and recognised nothing new. This may well have been consciously intended by the court and flowed primarily from a narrow reading of Belize, which recast Lord Hoffmann’s test of interpretation as a threshold step before that of implication, rather than as an overarching test that subsumes implication. Indeed, the

86 [2011] SGHC 201 [Kim Eng].
87 Ibid. at para. 66–67.
88 [2012] SGHC 118 [Sembcorp].
89 [2011] SGCA 45 [Fong Song Mee].
90 Ibid. at para. 15.
91 Also, the High Court in Premium Automobiles Pte. Ltd. v. Song Gin Puay Ronnie, [2009] SGHC 254 at para. 10 referred to Lord Hoffmann’s statement of his test but without comment as to its correctness.
court in *Sembcorp* appears to have read *Belize* narrowly so as to preserve the traditional distinction between implication and interpretation. For example, it stated that the *Belize* approach was not “an overhaul of the process of implication of terms” and that “[t]he process of implication is closer to the process of interpretation that might have been explicitly stated before *Belize*”.92 Moreover, the court said that “[w]hen implying terms into a contract, the court must necessarily interpret the contract to ascertain the parties’ presumed common intention before the court can determine what term to imply … to give effect to such intention”.93 Finally, and most expressly, the court said no less than three times that implication and interpretation were “separate” and “distinct”.94

While these statements would not be out of place in a judgment criticising *Belize*, the court in *Sembcorp* was actually very much in agreement with that case. In particular, the court noted that “[t]he value of *Belize* lies in its clear elucidation of the relationship between interpretation and implication” and that it has “made explicit a process which must have been impliedly carried out in all previous instances where terms were implied in fact”.95 It is respectfully submitted that the court’s approval of *Belize* flowed from too narrow a reading of *Belize*. Although English cases decided after *Belize* do not speak with one voice, the vast majority have considered the process of implication as being subsumed within that of interpretation following *Belize*.96

More specifically, it appears that while the court in *Sembcorp* accepted the role of interpretation, it did not regard it being determinative, in and of itself, to ascertain whether a term could be implied. Rather, the court viewed the process of interpretation as a threshold step to be satisfied before a term could be implied. Thus, what the court in *Sembcorp* did was really to acknowledge the very established rule that an implied term must not be inconsistent with an express term. Thus, the court’s statement that “the interpretation of the contract is often a preliminary step in the implication of a term”97 and that “*Belize* demands that the term implied must be checked for consonance with a reasonable interpretation of the contract”.98 These statements imply a limited scope for interpretation. Rather than being determinative of whether a term can be implied, interpretation acts as a negative test: is the term to be implied consistent with the express terms as objectively interpreted, failing which, it will not be implied. Indeed, this is illustrated by the court’s application of its statement of the law to the facts of *Sembcorp*:

---

92  *Supra* note 88 at para. 49.
95  *Ibid.* at para. 60.
97  *Supra* note 88 at para. 56.
“The court has to ascertain whether the particular factual matrix of the case (see Ng Giap Hon at [89]) gives rise to circumstances that would make it necessary to imply the Second Implied Term into the JVA and the SA, with reference to the business efficacy, officious bystander, and Belize requirements. Satisfaction of either the business efficacy or officious bystander tests would suffice for the implication of the term and the Belize statement requires that the term implied be checked for consonance with a reasonable interpretation of the JVA and the SA.”

The statement that the implied term be “checked for consonance with a reasonable interpretation” of the various agreement simply restates the basic principle that the implied terms must not be inconsistent with a reasonable interpretation of the express terms of the contract. This is not controversial and has been recognised in many local decisions. This is also consistent with the court’s view in Sembcorp that implication and interpretation are wholly distinct doctrines. However, such a limited scope for interpretation in the implication of terms may not be what Lord Hoffmann had in mind in Belize.

Therefore, despite its apparent agreement with Belize, the approach in Sembcorp may actually be to disagree with Belize, based on a broader (and, it is submitted, better) reading of that case. In preserving a limited (and distinct) role for interpretation in implication, the court in Sembcorp may actually be agreeing with the Court of Appeal’s critique against the Belize approach in MFM Restaurants that that approach involved an unnecessarily high level of abstraction engendered by a broad test of interpretation. Viewed this way, and taking the Court of Appeal’s criticisms of Belize in mind, the court’s approach in Sembcorp cannot be regarded as being substantively wrong. If there is anything that requires reconsideration, then it is respectfully submitted that it would be the court’s rather narrow reading of Belize.

In any event, it is suggested that there are strong, independent reasons not to follow Lord Hoffmann’s test in Belize. Specifically, as the present author has suggested elsewhere, Lord Hoffmann’s characterisation of the implication of terms in fact as being an issue of “interpretation” is open to two main criticisms. First, and as has been pointed out, the test of “interpreta-

---

99 With respect, this assumes that the traditional tests are alternatives, contrary to established Court of Appeal authority that the two are complementary.
100 Supra note 88 at para. 65.
102 Supra note 83 at para. 98.
tion” broadens the traditional requirement of “necessity” in relation to the implication of terms in fact to one of “reasonableness”. While Lord Hoffmann said that “necessity” in the “business efficacy” test meant that it is insufficient for a court to consider that the implied term expresses what would have been “reasonable” for the parties to agree to,105 the truth is that the test of “interpretation” brings with it the broader requirement of “reasonableness”. According to Investors Compensation,106 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”.107 Thus, the restriction which Lord Hoffmann placed on the word “necessity” in the context of the “business efficacy” test is no longer whether the implication is necessary to give effect to business efficacy, but whether the implication is necessary to convey the meaning as understood by a reasonable person. Therefore, the criterion of “reasonableness” has become the governing test over that of “necessity”. While “reasonableness” itself is not an objectionable criterion, it is the potential uncertainty which it engenders that is open to criticism.108

The second criticism of Lord Hoffmann’s test of “interpretation” is its vagueness. English law has until now distinguished the process of implication from interpretation. For example, in Equitable Life Assurance Society v. Hyman,109 Lord Steyn said that “[t]he purpose of interpretation is to assign to the language of the text the most appropriate meaning which the words can legitimately bear”.110 Thus, while specific tests underpinned by the requirement of “necessity” govern the process of implication, a broader test of “reasonableness” informs the (contextual) interpretation of contracts. Collapsing both these hitherto disparate tests could give rise to confusion. How is the court to decide what a reasonable person would have interpreted the non-express words of a contract to mean? Unlike interpreting express terms, which naturally bind the court to a discernible spectrum of meanings, the “interpretation” of non-express terms is perhaps not as clear.111

For all of the above reasons, it is suggested that the Singapore courts are unlikely to follow Lord Hoffmann’s characterisation of the implication of terms in fact as interpretation. Thus, contractual interpretation in Singapore remains a distinct concept from implication of terms.

105 Supra note 1 at para. 22.
106 Supra note 18.
107 Ibid at 912 [emphasis added].
109 Supra note 98.
110 Ibid. at 458.
B. Interpretation and Rectification

In discussing any possible distinctions between interpretation and rectification in the Singapore context, it is first necessary to consider the applicability of the different types of rectification (as discussed above) in Singapore. In common law rectification, as mentioned above, courts are permitted in limited situations to depart from the plain meaning of the contractual words and yet still remain within the realm of interpretation. For example, in *Investors Compensation*, Lord Hoffmann said that if the context leads a court to conclude that something must have gone wrong with the language used by the parties, the law does not require the courts to attribute to the parties an intention which they plainly could not have had.\(^{112}\) Similarly, in the Singapore context, the Court of Appeal in *Zurich Insurance* has likewise acknowledged the existence of this type of rectification.\(^{113}\) In short, “common law rectification” (as distinguished from the equitable doctrine of rectification) is the “deployment of construction as a tool for remedying obvious drafting errors”.\(^{114}\)

Such a technique does not exist for statutory interpretation, perhaps because courts are more reluctant to “correct” Parliament’s express words as compared to the contractual words reached between two private\(^{115}\) entities. Thus, the courts are sometimes able to depart from the plain meaning of the words via “common law rectification”.

However, in Singapore, it is unlikely that “common law rectification” applies in light of certain provisions in the Evidence Act. In particular, the English cases must be read in their proper context. The parol evidence rule in English law – which may potentially bar the court from correcting any obvious errors – is a common law construct and not statutorily enshrined. As such, it could – and was – largely ignored by the English courts, in all of its various manifestations.\(^{116}\) The situation is different in Singapore. The presence of the parol evidence rule in the Evidence Act – interpreted by the Court of Appeal in *Zurich Insurance* as encompassing the “thin” version – means that the scope for “common law rectification” in Singapore may be narrower than in England. Whereas the English courts may not be bound by the “plain” meaning of the contractual words, the presupposition of such a concept in the parol evidence rule as embodied in the Evidence Act may mean that the Singapore courts are so bound, at least to some extent. More specifically, section 95 of the Evidence Act provides that:

---

112 *Supra* note 18 at 913.
113 *Supra* note 40 at para. 130.
114 *Supra* note 31 at 484.
115 Though sometimes “public” as well, of course.
116 See the valuable analysis in McMeel, *supra* note 31 at 411–14.
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.

As is evident, this provision provides that where the language concerned is ambiguous (that is, erroneous), no evidence may be admitted to show what it otherwise should have meant. And if evidence is not to be given, then there would be no way of showing what the correct position might be. Therefore, in the instances where patent ambiguity arises – either by the language used being obviously uncertain (though intelligible), or so defective as to be meaningless – no evidence may be given to cure the ambiguity. This provision is based on the old cases of _Clayton v. Lord Nugent_117 and _Baylis v. Attorney General_,118 which each correspond to the illustrations accompanying the provision. In _Clayton_, a card which supplied meaning to initials appearing in a will was ruled inadmissible, whereas in _Baylis_, evidence as to the testator’s intention to fill in a blank was similarly held inadmissible.119 This has been explained on the basis that, in an instance of patent ambiguity, the intention of the maker of the contract becomes a matter of speculation and so the contract fails.120 If this is the case, then “common law rectification” may well be unavailable in the Singapore context. This is because where there is an obvious clerical error, section 95 appears to require the court to abide by the language so expressed, instead of correcting it. This may be why the Court of Appeal in _Zurich Insurance_ cautioned that:

“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…), the alternative of rectification exists and may be the more appropriate remedy.”121

The Court of Appeal’s reference to rectification (and by this, it more than likely meant the equitable doctrine) as being the “more appropriate remedy” strongly suggests that “common law rectification” must not be taken too far in Singapore law. This is especially so since the Court of Appeal draws a contrast with Lord Hoffmann’s views on “common law rectification” in _Investors_ 117  (1844), 13 M. & W. 200, 153 E.R. 83.
118  (1741), 2 Atk. 239, 26 E.R. 548.
121  _Supra_ note 40 at para. 123 [emphasis added].
Compensation. The Singapore courts’ power to depart from the otherwise plain meaning of the words must be subject to the meaning that the contractual words can bear. Further, the Court of Appeal’s reference to equitable rectification must be taken to show that that remedy exists as an alternative (and a clear one at that) in Singapore law. This has been recognised in many local cases. \(^{122}\) All of these show that equitable rectification remains as a distinct concept from interpretation and implication here.

IV. REFLECTIONS ON THE SINGAPORE APPROACH

Is the Singapore approach of drawing clear distinctions better than the English approach of (apparently) merging the different concepts together under an umbrella concept of “interpretation”? One possible critique against the Singapore approach might be that it overly focuses on specific tests at the expense of some overarching theoretical explanation for the law. However, such a critique, if advanced, would not be persuasive. The Singapore approach does not forsake a possibly relevant theory to explain the state of the law. What it does is not to extend that theory to become the applicable test. Instead, it acknowledges the operation of the theory in the background, and expresses it in the form of practically applicable tests.

The desirability of the Singapore approach can be examined through a prominent, and recent, example. This is the approach of the Court of Appeal in the area of contractual remoteness. As the present author has written elsewhere, \(^{123}\) the Court of Appeal has in *MFM Restaurants* rejected Lord Hoffmann’s assumption of responsibility test (articulated in *The Achilleas*\(^{124}\)) to determine whether damages are too remote in a contractual claim. The Court of Appeal, however, retained assumption of responsibility as a concept to explain the orthodox test for remoteness as embodied in *Hadley v. Baxendale*.\(^ {125}\) To that extent, it expressly accepted Lord Hoffmann’s approach in *The Achilleas* in so far as the concept of assumption of responsibility is already incorporated or embodied in both limbs of the *Hadley* test.\(^ {126}\) Indeed, the Court of Appeal’s approach and Lord Hoffmann’s approach are not fundamentally distinct. Rather, the difference seems to be in the way through which the concept of assumption of responsibility is given effect. A few points may be

---


126 Supra note 83 at para. 140.
made to support this proposition. The first point is that assumption of responsibility as a concept is still relevant in Singapore for the determination of remoteness in contract law. It is important to be clear as to what was rejected in MFM Restaurants: assumption of responsibility as an independent criterion for ascertaining remoteness was rejected, not assumption of responsibility as a concept. Thus, in so far as assumption of responsibility – as a concept – is embodied within the two limbs of Hadley, that is still good law in Singapore. The difference between the Court of Appeal’s approach and Lord Hoffmann’s approach is not in the acceptance or non-acceptance of this concept in explaining remoteness, but in how to give effect to it. Whereas Lord Hoffmann in The Achilleas would give effect to this concept by elevating it to the status of an independent legal criterion (to be determined by interpreting the contract), the Court of Appeal merely acknowledged assumption of responsibility as a concept embodied within the two limbs of Hadley. For the Court of Appeal, therefore, when either limb of the Hadley test is satisfied, the parties are taken to have assumed responsibility for the losses suffered and the losses are thus not too remote. However, for Lord Hoffmann, the Hadley test may be necessary but is otherwise insufficient to determine whether the parties had assumed responsibility for the losses suffered. Assumption of responsibility ceased to be merely justificatory for Lord Hoffmann in The Achilleas; it had also become the test to determine remoteness.

Seen in this light, both the Court of Appeal and Lord Hoffmann are actually in agreement as to the theoretical understanding of remoteness: damages are not too remote where parties have assumed responsibility for them.127 The difference, as already mentioned, is in the way through which this explanation is given effect. However, in practical terms, the continued retention of assumption of responsibility as a concept by the Court of Appeal is unlikely to cause much disquiet. At the end of the day, the applicable test in Singapore used to determine whether damages are too remote in contract remains, quite firmly, the two-limb test in Hadley. The practical means of satisfying the two limbs will remain the state of knowledge on the part of the defendant. “Assumption of responsibility” remains in the background as a theoretical justification for the continued retention of the two limbs, and does not operate as a practical means of satisfying either of the limbs. In essence, the Court of Appeal’s approach, while grounded in orthodoxy, may be seen as a deliberately incremental approach towards a more coherent understanding of remoteness principles. The Court of Appeal’s approach, in the form of a justification for the existing rule rather than a new rule derived from such a justification, is preferable to the assumption of responsibility test in The Achilleas. As was already pointed out by the Court of Appeal, this, first and foremost, avoids the uncertainty that is generated by the assumption of responsibility test. This is important in commercial matters. Moreover, in so doing, the Court of Appeal has not sacrificed conceptual

coherence for convenience in so far as it related remoteness with implicit agreement as to risk and responsibility. This thereby achieves what Lord Hoffmann sought to do in The Achilleas, but with more certainty. More broadly, this example illustrates the suggestion that the Singapore courts prefer specific tests without forsaking the underlying conceptual justifications.

It is suggested that this is the hallmark of the Singapore approach in rationalising various areas in Singapore contract law in the face of grand, unifying theories that may also be simultaneously elevated to the status of legal tests. As demonstrated by the Court of Appeal’s approach in MFM Restaurants in relation to contractual remoteness, such an approach balances the need for conceptual coherence with specific, applicable tests. Returning to the present distinctions between interpretation, implication and rectification, it may well be that the “interpretation” justifies all three concepts. However, to have “interpretation” as the test governing all three concepts might make for difficult application in practice. As has been pointed out above, it is difficult to speak of “interpreting” terms when the terms are non-existent and have to be implied. Present case law does not provide a good guide as to when such “interpretation to lead to implication” may be pursued. Instead, the need for easily applicable tests is real and cannot be easily ignored. There is much truth to the critique that “interpretation” as a test that governs interpretation, implication and rectification is somewhat vague and uncertain. Nonetheless, the challenge is of course to recognise when those tests no longer support the prevailing (or new) justifications for the concept. When that happens, the courts must also be ready to formulate new tests. In short, tests must never be formulated or used for their own sake; they must balance both an underlying justification, as well as easy applicability in practice. The Singapore approach in contract law shows an appropriate balance between these various concerns.

V. CONCLUSION

In conclusion, this paper has first shown that the distinctions between interpretation, implication and rectification have weakened in English law. In Singapore, however, the distinctions have continued to be maintained by the courts, either out of judicial preference for clear tests or because statute arguably mandates it. This is desirable because it maintains certainty and clarity in the applicable tests that govern each of these concepts. A broad test based on “interpretation” is not easy to apply in practice, particularly when applied to previously distinct (in English law) fields of implication and rectification. While broad, unifying concepts are desirable, it is not necessary

128 Supra note 125 at 289–90.
129 Although this paper, within its limited confines, does not make a conclusion on this issue.
that they manifest themselves as the test in order to determine whether a particular doctrine is invoked or not. The same purpose can be achieved through the invocation of more specific and practically applicable tests that are grounded in and reflect that broad, unifying concept that justifies them. More broadly, it is also suggested that the Singapore approach to contract law – that is, the preference for clear tests supported by broad, unifying concepts – is to be preferred over an elevation of the unifying concepts to the test itself. This can be demonstrated most specifically in the area of contractual remoteness. Ultimately, it is suggested that the Singapore approach remains theoretically sound, while also maintaining a sense of practical balance. This may perhaps be aptly described as a uniquely Singaporean approach.131