THE INTERPRETATION OF DOCUMENTS:
SAYING WHAT THEY MEAN OR MEANING WHAT THEY SAY

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I. INTRODUCTION

1. Thank you for inviting me to deliver the 25th Singapore Law Review (“SLR”) Annual Lecture. When Professor Chesterman wrote to ask if I would deliver this Lecture, he sent me the list of those who had previously been privileged in this way. I noticed that the Annual Lecture had never been delivered by a serving Chief Justice from Singapore and thought it timely to put this right. It is a real pleasure for me to return to the law school where I received my education. Let me begin by congratulating the Board of Advisors and the Editorial Board of the SLR, both past and present, for their excellent work over the years, as the journal marks the 30th anniversary of its revival in 1983.† The SLR has played a key role in promoting legal awareness, thinking, writing and dialogue amongst students, academics and the wider legal community through its journals, newsletters, lectures and writing competitions. It is an achievement I applaud and a mission I warmly endorse.

2. I have chosen to speak on the topic “The Interpretation of Documents: Saying what they mean or meaning what they say?”*. The subject of interpretation has attracted considerable debate through the years, with judges, practitioners, academics and jurists each offering different perspectives. This ought not to be

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surprising, given that according to some English estimates\(^2\), as much as 90 per cent of a Judge’s work involves an element of interpretation. As students, many of you would have learnt and applied various maxims of interpretation, such as the “mischief” rule\(^3\) or the “contra proferentum” rule\(^4\). Even just from this, you would have discovered that interpretation involves so much more than the formulaic or mechanical application of maxims.

3. It is a fascinating subject that undergirds much of what you will ever do as lawyers. I propose to begin this tour of some selected highlights by defining interpretation. Next, I consider why so many disputes before the courts involve questions of interpretation. Against this background, I trace the way in which the law on interpretation has developed through the years, focusing specifically on the interpretation of statutes and contracts. I will then survey some of the difficult issues that arise in statutory and contractual interpretation. Finally, I touch on what the boundaries might be for a court faced with a question of interpretation.

II. WHAT IS THE PROCESS OF “INTERPRETATION”?\(^5\)

4. Interpretation refers to the process by which meaning is ascribed to the expressions found within a legal text. Such meaning can be ascertained from two

\(^2\) In E. Heward, *Lord Denning, A Biography*, 2nd ed. (London: Barry Rose Law Publishers Ltd, 1997) at p 62, it was estimated that over 90% of the reported cases of the UK Court of Appeal in 1989 related to the interpretation of statutes. Separately, Lord Steyn observed that interpretation “amounts to the preponderant part of the legal work of English judges, perhaps as high as 90 per cent” (J. Steyn, “The Intractable Problem of the Interpretation of Legal Texts” [2003] 25(5) Sydney Law Review 5).

\(^3\) See, *e.g.*, *Toh Teong Seng v Public Prosecutor* [1995] 1 Sing. L.R. (R.) 757, where the High Court considered the mischief targeted by the Environmental Public Health Act (Cap 95, 1988 Rev. Ed. Sing.) (viz, the health hazards arising from illegal dumping) in determining the meaning of a “public place”.

\(^4\) See, *e.g.*, *Kay Lim Construction & Trading Pte Ltd v Soon Douglas (Pte) Ltd and another* [2013] 1 Sing. L.R. 1, where the High Court applied the *contra proferentum* rule to interpret an indemnity clause.
possible perspectives. The first is to apply an objective test of interpretation to ascertain what a *reasonable* person would understand the legal text to mean. This, at least in theory, is the approach adopted under the common law. The subjective approach, on the other hand, requires the court to ascribe meaning to the text by having regard to what it perceives or discerns were the actual intentions of the drafters. This is prevalent in civil law systems and is also reflected in a number of international conventions on commercial transactions, for example, in the Vienna Convention\(^5\) and the UNIDROIT Principles of International Commercial Contracts 2010.\(^6\)

5. In contract law, the subjective test rests in part on the notion that the premise of the law of obligations can be traced “to the will of the individual as [a] self-governing agent”.\(^7\) For that reason, the *actual* intentions of the parties are treated as relevant, or even paramount. In contrast, the objective test is premised on the notion of certainty. It recognises that the courts have “no direct access to [the parties’] subjective mental states, no window into their minds”.\(^8\) The primary way to ascertain the parties’ subjective intentions would be to consider their oral evidence, but such a process is sub-optimal in an adversarial system of litigation. Disputes might only arise years after the contract had been entered into, by which time such evidence might not be available or reliable due to the passage of time. These uncertainties also incentivise opportunistic behaviour and in turn reduce the likelihood of the

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disputants reaching a settlement. There are other knock-on effects arising from such uncertainty, not least, its impact on commercial trade. As Lord Devlin observed more than half a century ago:9

... in the service of commerce the letter is in many ways more significant [than the spirit of the contract]. This is because in most commercial contracts many more than the original parties are concerned. The contract is embodied in a document which may pass from hand to hand when the goods it represents are sold over and over again to a string of buyers ... The spirit of the contract gets lost on these travels and the outward form is all that matters.

6. However, it would be overly simplistic and incorrect to conclude that the objective approach disregards the actual intentions of the parties. Rather, what the objective approach does is to shift the burden. Instead of requiring the courts to ascertain the parties’ subjective intentions after the fact, with all its concomitant difficulties, the burden is placed on the contracting parties to ensure at the outset that their respective subjective intentions are accurately encapsulated within the four corners of the legal text. The objective test facilitates this process by providing a somewhat well-developed and more or less predictable framework for interpreting the text. Although the international conventions or instruments which I have mentioned are rooted in the subjective approach, it has been observed that these are “often likely to achieve objective results in practice”.10

7. It is not uncommon to see the terms “interpretation” and “construction” being used interchangeably.11 However, there is a difference between the two. Whereas the process of interpretation is constrained by the specific words used in the legal

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text, the process of construction is broader and permits the court to ascertain the parties' intention, by reference to the contract as a whole. It consists of both interpretation (which is dependent on the specific words used) and implication (which concerns the “presumed intention” of the parties that has not actually been expressed in the text). I will return to this a little later, but in this light, let me turn to consider some of the reasons why interpretive disputes arise in the first place.

III WHY DO DISPUTES RELATING TO THE INTERPRETATION OF LEGAL TEXTS ARISE?

8. I think there are at least four such causes: the imprecision of language, imperfect information, the cost-benefit analysis and cognitive limitations.

A. The imprecision of language

9. Dictionaries supply the possible meanings of a particular word, but provide little or no assistance in determining the meaning that was actually intended by the drafter. Language is inherently imprecise, especially at the “penumbra” as Professor Hart described it. Words and phrases can bear multiple meanings. Indeed, the very same sentence could bear contradictory meanings, depending on whether it was expressed sincerely or sarcastically. As a result, the process of ascertaining meaning by relying on the dictionary alone can be iterative in nature and is liable to frustrate more than it might illuminate.

10. Let me illustrate the point with an example which Professor Hart put forward: a law that says “No vehicles shall be allowed in the park”. According to the Oxford dictionary, a vehicle is “a thing used for transporting people or goods, especially on land”. On this definition, cars, trains and Segways would all equally qualify as “vehicles”. Adopting a literal approach, one might conclude that prams were banned from the Botanic Gardens. But few would understand the rationale for such a rule. The purpose and context in which the words are found are therefore of paramount importance in assessing what meaning is to be ascribed to them. If, for example, the law was found in a statute dealing with motorised vehicles or pollution, the meaning of “vehicle” would be clearer. The simple point is that the inherent imprecision of language renders a written text liable to be interpreted in many different ways.

B. Imperfect Information

11. The second point ought not to be controversial. Drafters work without the benefit of hindsight and with imperfect foreknowledge. It is possible to classify information relating to the future into two categories made famous by the former US Secretary of Defence, Donald Rumsfeld, namely “known-unknowns” and “unknown-unknowns”. “Known-unknowns” refer to events for which the exact outcome is not known with certainty, but the likelihood and consequences of its occurrence are known in advance. For example, we could today determine the likelihood of it raining tomorrow even though we would not know for a fact whether it will rain. On the other

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13 Ibid.
15 Press Conference by US Secretary of Defence, Donald Rumsfeld, online: NATO <http://www.nato.int/docu/speech/2002/s020606q.htm> (last accessed: 23 August 2013). This distinction is similar to that drawn in F. H. Knight, *Risk, Uncertainty and Profit* (Boston: Houghton Mifflin Company, 1921) between what is commonly described as “Knightian risk” and “Knightian uncertainty”.


hand, “unknown-unknowns” refer to events which are not at all known to the drafter at the time of drafting. For example, the fact that information could be transmitted by “tweeting” would have been an “unknown-unknown” a decade ago, as Twitter was only founded in 2006.\textsuperscript{16} It follows that we can confidently expect legal texts, taken on their own, to be incomplete, especially where “unknown-unknowns” are concerned.

C. Cost-Benefit Analysis

12. Thirdly, even assuming an impressive degree of foresight, it would seldom make economic sense to draft a complete legal text to deal with every possible eventuality. Negotiating and drafting a legal text can frequently involve considerable cost. Economists often employ the concept of marginal cost, which suggests that a party should invest an additional dollar if the value of the benefits from that investment is likely to exceed its cost. In this regard, it is useful to compare the cost and benefit at two distinct periods of time, namely, at the time of drafting (“front-end cost”) and at the time of enforcing the contract (“back-end cost”).\textsuperscript{17} Where the back-end cost is prohibitive, for example, if protracted and expensive proceedings are anticipated, it might be worthwhile investing at the front-end by drafting a more complete legal text. Insofar as front-end cost is concerned, a further distinction can be drawn between drafting rules and standards\textsuperscript{18}, with rules being generally more costly to draft but cheaper to enforce than standards are. Given the variable ways in which these considerations might be balanced in a cost-benefit analysis, it is entirely rational to conclude that legal texts will often be imprecise or incomplete.

D. Cognitive Limitations

13. The last point relates to the limits of the human brain in handling information. I can illustrate this point with a familiar example. Because there is a finite limit to the storage and processing abilities of the human brain, no matter how diligently you might have prepared for the examinations, there remains a chance that you might not recall all that you thought you had memorised. In other words, try as we might, we are always liable to miss out on certain points that we would have included had we thought about it or remembered it at the time the text was being concluded.

E. Conclusion: Why the need for interpretation arises

14. When all four factors are considered together, it is easy to see why disputes over interpretation are bound to arise. The imperfect mind, bedevilled with imperfect foresight and knowledge, and subject to economic constraints, directs the drafting of a legal text using language that is inherently imprecise. At the time of the dispute, however, it is interpreted by judges who are blessed with the benefit of perfect hindsight. There is thus an inevitable mismatch between the circumstances in which the drafter says what he thinks he means, and those in which the court says what it thinks the drafter meant by what he had said.

15. Of course, the foregoing factors do not completely explain why disputes arise. Rather, this is often down to the fact that where the parties perceive a gap or ambiguous language that is not ideally suited to deal with the actual situation at hand, they have the incentive to behave opportunistically. This problem will be exacerbated where both parties are relatively optimistic about the merits of their
respective cases. While it is possible to constrain a party’s incentive to act opportunistically\(^\text{19}\), such methods are imperfect. Seen in this context, the volume of cases before the courts which involve the interpretation of legal texts is unsurprising.

IV. THE PRINCIPLES OF INTERPRETATION

16. In a perfect world, the court would have no difficulty saying what the legal text means because there would be equivalence between what the text said, and what its drafters meant. But this is the stuff of fantasy. In the imperfect world in which we live, should the court limit itself to saying what the meaning is of the text before it, or should it go further and say what it considers the drafters meant even if, occasionally, that does some violence to what they had, in fact, said? There are parallels in the way the law has developed its response to this question in statutory and contractual interpretation. Broadly speaking, the law has evolved from a literal approach, to what is commonly known as the purposive approach (in statutory interpretation) and the commercial or contextual approach (in contractual interpretation).

A. Principles of Statutory Interpretation

17. In the very early days in the UK, statutes were drafted by judges, who would rely on their prior knowledge in aid of interpretation.\(^\text{20}\) Subsequently, as the roles and powers of the executive, legislature and judiciary became more defined, the literal approach towards statutory interpretation came to dominate.\(^\text{21}\) The prevailing attitude


\(^{20}\) See, e.g., Ash v Abdy (1678) 3 Swans 664 (Lord Nottingham).

\(^{21}\) Although, it should be noted, one could still find cases that applied other approaches: see, e.g., Bennion, supra note 11 at p 654.
in the 19th century is perhaps aptly summarised by Pollock, when he observed that “Parliament generally changes law for the worse, and ... the business of the judges is to keep the mischief of its interference within the narrowest bounds”. In particular, an exclusionary rule (which eschewed the use of Parliamentary materials to construe the language of an Act) developed out of a blend of constitutional and practical objections against the use of such extrinsic materials. However, the exclusionary rule was slowly but surely abrogated with the passage of time, and this can be illustrated by a series of Lord Denning’s judgments. In 1958, Lord Denning upheld the exclusionary rule, stating that “we do not refer to the legislative history of an enactment”. However, by 1971, Lord Denning took to Hansard to ascertain the mischief of the Act he was interpreting. And in 1983, Lord Denning took things a step further by relying on his own research of Hansard even though counsel had not been allowed to present their arguments on such material given the exclusionary rule. In his judgment, Lord Denning noted:

In most of the cases in the courts, it is undesirable for the Bar to cite Hansard or for the judges to read it. But in cases of extreme difficulty, I have often dared to do my own research. I have read Hansard just as if I had been present in the House during a debate on the Bill. And I am not the only one to do so.

18. Not infrequently, one begins by swimming against the tide and then finds that the tide has turned. The exclusionary rule was eventually relaxed in authoritative terms by the majority decision of the House of Lords in Pepper v Hart\(^2\)\(^6\). Lord Browne-Wilkinson, delivering the majority judgment, thought it would be artificial for

\(^{22}\) Sir Frederick Pollock, “Essays and Jurisprudence and Ethics” as reproduced in Steyn, supra note 2 at 11.

\(^{23}\) Escoigne Properties Ltd v Inland Revenue Commissioners [1958] 1 A.C. 549 at 566.

\(^{24}\) Sagnata Investments Ltd v Norwich Corporation [1971] 2 Q.B. 614 at 624.

\(^{25}\) Hadimor Productions Ltd and others v Hamilton and another [1983] 1 A.C. 191 at 201.

\(^{26}\) Pepper (Inspector of Taxes) v Hart [1993] A.C. 593 [Pepper v Hart].
the courts to apply “highly technical rules of construction” when faced with more than one possible meaning of a statutory provision, when Parliament could have considered the very question as it passed the legislation. Lord Browne-Wilkinson was putting, more formally, what Lord Denning had earlier said when he observed that judges should not “grop[e] about in the dark for the meaning of an Act without switching on the light[s]”.28

19. The position in Singapore is largely similar to that which obtains in the UK. Before s 9A of the Interpretation Act was introduced, there had been no principled way to determine whether the literal or purposive approach should be applied in a given case. Further, the courts were generally reluctant to rely on Parliamentary materials to aid the interpretation of statutes until s 9A was enacted in 1993, shortly after Pepper v Hart was decided. This now mandates the use of the purposive approach in statutory interpretation, which the courts have confirmed and applied in numerous subsequent cases.31

B. Principles of contractual interpretation

20. In contractual interpretation, the law has likewise shifted from a literal approach to a broader, contextual (or commercial) approach. In tracing the developments in this field, Lord Steyn aptly observed as follows:32

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27 Ibid at 634G-635B.
There has been a shift from strict construction of commercial instruments to what is sometimes called purposive construction of such documents … About the fact of the change in approach to construction there is no doubt … [As] Lord Diplock … observed:

... if detailed semantic and syntactical analysis of a word in a commercial contract is going to lead to a conclusion that flouts business common sense, it must be made to yield to business common sense.

21. As in the area of statutory interpretation, an analogous exclusionary principle, commonly referred to as the parol evidence rule, developed in the area of contractual interpretation to exclude extrinsic evidence in aid of interpretation, subject to various exceptions. In Singapore, the admissibility of extrinsic evidence is generally governed by the rules of evidence, which can be found first in the Evidence Act, and then in the common law.

22. The genesis of the modern contextual approach towards contractual interpretation can be traced to Prenn v Simmonds, where Lord Wilberforce observed that “[t]he time has long passed when agreements … were isolated from the matrix of facts in which they were set and interpreted purely on internal linguistic considerations”. Since Prenn v Simmonds, a large (and still growing) body of case law has developed to decipher what this “contextual”, “commercial”, “common sense” or “modern” approach involves. The leading decision in this regard is Investors Compensation Scheme, where Lord Hoffmann (in his oft-cited judgment) laid down five principles of contractual interpretation. In his view, interpretation is the

33 See V K Rajah JA, "Redrawing the Boundaries of Contractual Interpretation: From Text to Context to Pre-text and Beyond" (2010) 22 Sing. Ac. L.J. 513 at 514.
34 See, especially, ss 94-99 of the Evidence Act (Cap. 97, 1997 Rev. Ed. Sing.).
35 Sembcorp Marine Ltd v PPL Holdings Pte Ltd and another and another appeal [2013] SGCA 43 [Sembcorp Marine] at [65(b)].
37 McMeel, supra note 10 at para. 1.39.
38 Investors Compensation Scheme Ltd v West Bromwich Building Society [1998] 1 W.L.R. 896 [Investors Compensation].
“ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would have been available to the parties in the situation in which they were at the time of the contract”. The Singapore courts have likewise embraced the applicability of the “contextual” approach in contractual interpretation, although I should caution that there are some important differences in the way the law has developed in the UK and Singapore.

23. Against this background, I turn to survey some of the challenging issues inherent in the “purposive” and the “contextual” approaches.

V. WHAT ARE SOME OF THE CHALLENGES OF THE “PURPOSIVE” APPROACH AND THE “CONTEXTUAL” APPROACH?

A. The purposive approach considered

24. Section 9A of the Interpretation Act mandates the courts to prefer “an interpretation that would promote the purpose or object underlying the written law….”. In so doing, the courts are entitled to consider the extrinsic materials listed under s 9A(3), including any explanatory statements to the Bill or any relevant material in the Parliamentary debates. The Court of Appeal has held that reference to such materials is permitted even “if the words of the statutory provision are unambiguous or do not produce unreasonable or absurd results”. However, in deciding whether

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39 Ibid at 912. For reasons explained in Sembcorp Marine, supra note 35 at [33], Lord Hoffmann’s comments are perhaps more appropriately restated in terms that interpretation is “the ascertainment of the meaning which the expressions in a document would convey to a reasonable person” instead [emphasis added].

40 Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd [2008] 3 Sing L.R. (R.) 1029 [Zurich Insurance] at [132(c)] and Sembcorp Marine, supra note 35 at [34].

41 Dorsey, supra note 31 at [19].
or not to consider such extrinsic materials, or the weight to be accorded to them, the courts should have regard to “the desirability of persons being able to rely on the ordinary meaning ... taking into account its context ... and the purpose or object underlying the written law”, and also, “the need to avoid prolonging legal or other proceedings without compensating advantage”.42

25. The reasons for preferring the purposive approach are simple. Given the inherent inadequacies of the draftsman’s foresight and the imprecision of the linguistic tools at his disposal, a rule that allows the court in some way and to some degree to bridge the gulf in time and to have an insight into what the draftsman was hoping to achieve seems entirely reasonable. Lord Steyn put it thus:43

No explanation for resorting to purposive interpretation of a statute is necessary. One can confidently assume that Parliament intends its legislation to be interpreted not in the way of a black letter lawyer, but in a meaningful and purposive way giving effect to the basic objectives of the legislation.

26. But the purposive approach is not without its critics. Lord Steyn himself had been fairly robust in voicing some objections in his extra-judicial analysis of Pepper v Hart, resting these on both constitutional and practical grounds. The principal objections can be summarised thus:

(a) The constitutional objections: Under the constitutional framework, it is Parliament’s role to legislate and the courts’ role to interpret the words enacted.44 The intention of Parliament is in truth nothing more than a “chimera” or a “mythical beast” and can be manipulated by judges to enable

42 Section 9A(4), Interpretation Act (Cap. 1, 2002 Rev. Ed. Sing.).
44 Pepper v Hart, supra note 26 at 633A-B.
them to reach their desired ends. Furthermore, care should be taken not to cast what are in fact the views of members of the Executive, as Parliament’s intention. In any event, those subject to the law should be able to ascertain the scope and effect of the legislation easily, and by reference to sources that are publicly available, authoritative and final.

(b) The practical objections: Allowing Parliamentary debates to be cited before the courts would “add greatly to the time and expense involved in preparing cases involving the construction of a statute”. In most cases, such a search “would throw no light on the question before the court”. Further, it might not always be practicable for counsel to obtain access to older reports of Parliamentary debates.

27. It is noteworthy that Lord Mackey’s dissent in *Pepper v Hart* was grounded on practical rather than on constitutional grounds. His Lordship was concerned about the possibility of an “immense increase in the cost of litigation” and felt it prudent to study whether the relaxation of the exclusionary rule would result in a substantial increase in cost before acting. Experience has shown that Lord Mackay’s concerns have not been borne out. The purpose of a statute is often easily ascertained, especially when compared to contracts, and this is facilitated by the availability of a

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45 *Singapore Parliamentary Debates, Official Report* (1993), vol 60 at col 517-518 (per Associate Professor Walter Woon).
49 Ibid.
50 Ibid.
51 *Pepper v Hart*, supra note 26 at 614G-615F.
reliable and official record of Parliamentary proceedings in the form of Hansard. Moreover, the technological advancements post-

*Pepper v Hart* have mitigated most practical objections as our Parliamentary reports are now available and searchable online. The difficulties relating to some of the older reports might remain but these are likely to become less acute with time as statutes are amended to maintain their relevance. Insofar as the problem involves the introduction of irrelevant material before the courts, this is a practical problem that infects all proceedings, not just those involving statutory interpretation. Its remedy lies elsewhere, perhaps through the use of appropriate costs orders, rather than in pre-emptively ordering the exclusion of such material entirely.

28. Turning to the constitutional objections, it may be noted that Lord Browne-Wilkinson, in *Pepper v Hart*, did take these into account. These are certainly not to be viewed lightly, as they call into question the constitutional role of the courts. However, as I have already noted, one has also to consider the constraints that drafters face when drafting a statute, in particular, the imprecision of language and imperfect knowledge. As statutes are durable pieces of legal text that can only be amended by Parliament, it is unsurprising that they are typically drafted at a high level of generality, with greater reliance on the use of standards rather than rules to

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52 See, for example, the recent reforms to the Evidence Act (Cap. 97, 1997 Rev. Ed. Sing.) (in relation to the use of, *inter alia*, hearsay evidence and opinion evidence, see Evidence (Amendment) Bill (Bill No 2/2012)) and the comprehensive review of the Penal Code (Cap. 224, 2008 Rev. Ed. Sing.) in 2007 (“so that it remains effective in a dynamic and changing environment …, reflect[s] present realities, address[es] the changing nature of crime and ensure[s] that there is adequate protection for the more vulnerable members of our society ….” (Singapore Parliamentary Debates, Official Report (2007), vol 83 at col 2175 (per Senior Minister of State for Home Affairs, Associate Professor Ho Peng Kee)).

53 See *Pepper v Hart*, supra note 26 at 634C-D, where Lord Browne-Wilkinson noted “I have come to the conclusion that, as a matter of law, there are sound reasons for making a limited modification to the existing rule (subject to strict safeguards) unless there are constitutional or practical reasons which outweigh them.” [emphasis added]
enhance their prospect of passing the test of time. In this light, it is evident that in some cases at least, confining oneself to the four corners of the text to discern the legislative aim would be a futile exercise because the words, in and of themselves, would not suffice to answer the question. Forcing the courts to work with blinkers could actually result in decisions that are contrary to what Parliament had intended and this could give rise to even greater constitutional concerns.

29. Another strand of the constitutional objections relates to the way that proceedings in Parliament are conducted, leading to questions as to whether the Legislature’s “intentions” can truly be isolated or defined. Singapore has a unicameral legislature, unlike the UK: to that extent, some of the objections raised there would not apply here. In substance, the constitutional objections reflect the tension between the risk of judicial legislation on the one hand and the need to ensure that justice is actually done on the facts of each case, where the standards have to be applied to the actual situations that arise before the courts.

30. I can illustrate how we have resolved this tension by reference to two cases. First, in *Dorsey James Michael*, the respondent commenced an action to administer pre-action interrogatories on the appellant. The High Court Judge granted the order in part and the appellant appealed. Under the Supreme Court of Judicature Act, any judgment or order of the High Court is ordinarily appealable as of right. This is subject to certain exceptions including where a Judge makes an order specified in the Fourth Schedule to the SCJA,\(^{54}\) one provision of which states “No appeal shall

\(^{54}\) Section 29A, read with section 34(1)(a), of the Supreme Court of Judicature Act (Cap. 322, 2007 Rev. Ed. Sing.) [SCJA].
be brought … where a Judge makes an order giving or refusing interrogatories”. The respondent argued that the plain and ordinary meaning of the term “interrogatories” encompassed pre-action interrogatories and therefore applied to strike out the appeal.

31. The Court of Appeal rejected the respondent’s contention that the “plain meaning” was correct or applicable in this instance. It examined the purpose of the amendments introducing the relevant provision into the Fourth Schedule. From the Minister’s Second Reading speech, it was clear that the amendments restricting appeals to the Court of Appeal were intended to apply only to orders that were made at the hearing of interlocutory applications. 55 An application for pre-action interrogatories is not an interlocutory application as leave to administer the pre-action interrogatories constitutes the only relief sought in the entire action. Once the application has been ruled upon by the court, the proceedings conclude and would not be followed by any other steps leading to any trial or further disposal of that matter.56 This case brings to life the dangers of trying to construe the purpose(s) of a statute by relying only on the words used, without regard to any extrinsic material.

32. Next, in Kok Chong Weng57, the court had to consider the provisions in the Land Titles (Strata) Act58 relating to the collective sale of strata developments. The percentage of homeowners that had to consent to enable a sale to proceed over the objections of the minority differed according to the age of the development. This, in

55 Dorsey, supra note 31 at [52].
56 Ibid at [60].
57 Kok Chong Weng and others v Wiener Robert Lorenz and others (Ankerite Pte Ltd, intervener) [2009] 2 Sing. L.R.(R.) 709 [Kok Chong Weng].
58 Cap. 158, 1999 Rev. Ed Sing.
turn, was measured by reference to the date of obtaining the Temporary Occupation Permit ("TOP") or the Certificate of Statutory Completion ("CSC"). Gillman Heights was a development completed in 1984 but did not, under the then-applicable legislation, need to obtain any TOP or CSC (or its equivalent). However, a CSC was issued in 2002, but only in respect of certain work relating to its common property that was carried out at that time. In or around 2007, an agreement for the collective sale of the development was reached by 87% of the owners, which would be sufficient if the development was assessed to be more than 10 years old, but not if it was under 10 years old. The dissenting owners argued that the Act did not apply as the development did not have any TOP or CSC; alternatively, that the requisite majority had not been obtained as the latest CSC was obtained in 2002.

33. The Court of Appeal first found, by reference to the relevant Parliamentary debates, that the collective sale regime was meant to apply to strata developments, including Gillman Heights. On the issue of assessing the age of the development, the court recognised that the draftsman probably had not realised that there were estates such as Gillman Heights which were not issued a TOP or CSC on completion. Nonetheless, the court held that this oversight should not be allowed to frustrate the primary legislative purpose or intent of the Act and proceeded to consider the age of the development by reference to the "date when the building authority would have regarded the development as being completed and fit or ready for occupation".

59 Kok Chong Weng, supra note 57 at [32].
60 Ibid at [58].
34. It will be seen that in both these cases, the court did not confine itself to saying what the legal text meant; but went into what the drafters of the text in each case had intended to achieve and concluded that this would be given effect even if the text was not entirely apposite.

B. The contextual approach considered

35. Turning to contracts, as mentioned earlier, the contextual approach has been adopted by the courts in both the UK and in Singapore. The key debate here lies in the manner in which the contextual approach is to be applied.

36. Contracts are drafted for a wide range of transactions. At one end of the spectrum, there are episodic transactions, for example where one purchases a pencil from a stationery shop. Such contracts will tend to be brief and confined to the bare essentials. At the other end of the spectrum, contracts can govern long-term transactions involving large sums of money. In such cases, one can expect the contracts to be long and heavily-negotiated between the parties. In negotiating a contract, one should be mindful that the drafters often negotiate the terms setting out the bargain struck based on commercial considerations and seldom on principles of interpretation. To put it in another way, the negotiations take place over dollars and cents, not words and phrases; and when they choose particular words and phrases, they might do so recognising that these are not quite what they may have wished for but they then price the risk that is carried in these textual compromises and imperfections. These factors suggest that many contracts are inherently incapable of being construed by the court solely within their four corners, and this is what has given rise to the contextual approach.
37. In the UK, generally, “all the background knowledge” that is relevant and reasonably available to the parties at the time of the contract is admissible.\textsuperscript{61} The two key exceptions under English law are evidence of previous negotiations and declarations of subjective intent. In Singapore, however, the admissibility of extrinsic evidence is governed by the provisions of the Evidence Act. This is unlike the position in the UK (and other jurisdictions) where the admissibility of such extrinsic evidence is not governed by statute. How does the Evidence Act affect the admissibility of extrinsic evidence in contractual interpretation?

38. This issue has been quite comprehensively discussed and explained in the Court of Appeal’s decision in *Zurich Insurance*. In the interest of time, I will summarise the court’s key holdings in the following propositions:\textsuperscript{62}

(a) A court will consider the essential attributes of the document being examined, and will generally be more reluctant to allow extrinsic evidence to affect standard form contracts and commercial documents, or where the contract is complete on its face.

(b) These situations aside, the modern contextual approach to interpretation is the appropriate one and ambiguity is not a prerequisite to the admissibility of extrinsic evidence.


\textsuperscript{62} *Zurich Insurance*, supra note 40 at [132].
(c) The extrinsic evidence is admissible if it is relevant, reasonably available to all contracting parties, and relates to a clear or obvious context. However, it must go towards proof of what the parties, from an objective viewpoint, ultimately agreed to.

(d) Although there is no absolute or rigid prohibition against evidence of previous negotiations or subsequent conduct, such evidence will likely be inadmissible in the normal case.

(e) Declarations of subjective intent are generally inadmissible.

(f) Extrinsic evidence may explain and illuminate the written words, not contradict or vary them. If the wrong words have been used, rectification may be a more appropriate remedy.

39. At first glance, the first proposition appears to be at odds with the purposive approach, as it suggests that the scope of the contextual approach is dependent on the attributes of the documents being considered. After all, s 9A of the Interpretation Act does not make any express distinctions based on the type of the Act being interpreted. I can explain this by referring to the decision of the Court of Appeal in *Master Marine*, which concerned a first-demand performance bond. It was held there that a “restrained … examination of the external context and extrinsic evidence” was called for.\(^\text{63}\) There were two key reasons for this. First, it was observed that the primary role of a performance bond is to “ensure expediency in payment” and the

\(^{63}\) *Master Marine AS v Labroy Offshore Ltd and others* [2012] 3 Sing. L.R. 125 [*Master Marine*].
parties had to be able “to determine quickly if the demand [was] valid simply by looking at the bond instrument itself” ⁶⁴. Second, the court observed that such performance bonds were most commonly used in the commercial context, where the parties would be able to appreciate that the underlying contract and the bond are independent contracts, and it was thus reasonable to expect that parties would intend for each contract to be self-contained and complete.⁶⁵

40. The proposition, that the contextual approach may be affected by the attributes of the agreement in question, rests on the fact that contracts are entered into for many differing reasons and purposes. Other things being equal, one would expect contracts that are time-sensitive, which are traded in the market and/or involve the use of standard form contracts to be complete (or more complete) as there would be little opportunity or need for the relevant parties to ascertain and make decisions based on a supposed “matrix of facts”. This approach in fact does no more than give effect to the reasonable expectations of the parties.

41. Let me also touch on the fourth proposition, relating to the admissibility of prior negotiations and extrinsic evidence. Whereas there exists in the UK a rule against the admissibility of prior negotiations, no such express prohibition is to be found within the Evidence Act. The prohibition in the UK is founded on the consideration that statements made in pre-contractual negotiations are often “drenched in subjectivity”⁶⁶ and are likely to involve oral evidence that would be disputed. It is not always possible to differentiate between statements reflecting the

⁶⁴ Ibid at [35]. Emphasis original.
⁶⁵ Ibid.
⁶⁶ Chartbrook Ltd and another v Persimmon Homes Ltd and another [2009] 1 A.C. 1101 [Chartbrook] at [38].
subjective aspirations of a party, and those which “embody a provisional consensus”. Against this backdrop of uncertainty and increased costs, Lord Hoffmann (delivering the judgment of the House of Lords in Chartbrook) declined to depart from the exclusionary principle as there was “no clearly established case” for it. In Lord Hoffmann’s view:

The rule may well mean … that parties are sometimes held bound by a contract in terms which, upon a full investigation of the course of negotiations, a reasonable observer would not have taken them to have intended. But a system which sometimes allows this to happen may be justified in the more general interest of economy and predictability in obtaining advice and adjudicating disputes. It is, after all, usually possible to avoid surprises by carefully reading the documents before signing them and there are the safety nets of rectification and estoppel by convention.

42. Should this approach be adopted in Singapore? The Singapore courts have not definitively ruled on this issue and for that reason it would be prudent for me not to express an opinion. But I will offer some observations.

43. Whether or not Chartbrook should be followed might depend, in part, on a cost-benefit analysis of allowing evidence of prior negotiations. Lord Hoffmann has already raised some of the pertinent factors. But in Singapore, there are at least two additional considerations that should weigh in on this analysis. The first is, of course, the additional requirement in Zurich Insurance that extrinsic evidence must, on top of being relevant and reasonably available to all the contracting parties, relate to a “clear or obvious context”. This requirement was highlighted in Zurich Insurance as one that was designed to act as a brake on the mounting cost of litigation by limiting the exploration of the surrounding matrix of fact to what could genuinely be said to

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67 Ibid.
68 Ibid at [41].
69 Ibid.
be clear and obvious. Hence, any attempt to bring in evidence of prior negotiations would have to surmount this threshold requirement.

44. The second point is that in *Sembcorp Marine*, recognising the need to balance the quest for certainty and to contain the cost of enforcement on the one hand, and the desire to give effect to the actual intentions of the contracting parties on the other, the Court of Appeal imposed four procedural requirements.70

(a) first, parties who contend that the factual matrix is relevant to the construction of the contract must plead with specificity each fact of the factual matrix that they wish to rely on in support of their construction of the contract;

(b) second, the circumstances in which these facts were known to all the parties must also be pleaded with sufficient particularity;

(c) third, parties should plead the effect which such facts would have on their contended construction of the text; and

(d) fourth, the obligation of parties to offer discovery of evidence would be limited by the extent to which that evidence was relevant to the facts pleaded under the first and second requirements.

45. In my view, this “cards-up approach” attracts the following advantages:

70 *Sembcorp Marine, supra* note 35 at [73].
(a) First, it serves to inform the opponent of the precise case they need to meet on the factual matrix. No one, including the court, should be taken by surprise at the trial. It is also likely to assist the parties to reach a settlement of their dispute because they would know the scope of one another’s case from the start.

(b) Second, it limits the scope of the materials that would be discoverable. Where the factual matrix is not required to be particularly pleaded, it puts the courts and the parties in the invidious position of having to discern what the context is without any express mention of this in the pleadings. With these pleading requirements, it should result in fewer documents being discovered.

(c) Third, requiring the context to be pleaded will also reduce the number of interlocutory disputes. Where the context is pleaded, it should be much easier for the parties to determine, for example, whether a request for particular documents is relevant or necessary without resorting to the court.

(d) Fourth, with fewer irrelevant documents distracting the parties, fewer interlocutory disputes and more focused preparation, the trial is likely to progress more quickly, and at less cost.

(e) Finally, more often than not, the truly “clear and obvious” context will prove to be uncontroversial. This too should reduce the cost of litigation.
46. The approach taken in *Sembcorp Marine* is not especially novel. There already exists a long list of causes which have to be pleaded with specificity under the Rules of Court\(^\text{71}\), such as fraud, defamation, misrepresentation or illegality.\(^\text{72}\) Whether these safeguards will be sufficient to tilt the balance in favour of admitting prior negotiations (or, for that matter, subsequent conduct) remains to be considered.

C. *Proving “the matrix of facts”*

47. Before leaving this point, let me make a few observations about proving the context. As already observed, a contract can arise in a multitude of circumstances. A contract might govern the relationship between parties embarking upon a technical project, and it might then set out various technical specifications or requirements.

48. Such contracts can present a different set of problems for the courts. Even if we accept that the contextual approach is meant to equip the court with all the background knowledge the parties would have had, how is this to apply in relation to technical specifications written by experts, for experts?

49. An example of this can be found in the recent litigation in England relating to the ISDA Master Agreement. ISDA refers to the International Swaps and Derivatives Association, a not-for-profit company which developed the Master Agreement to provide an overall framework that would govern derivatives transactions. ISDA comprises 800 member institutes from 60 countries.\(^\text{73}\) The notional amount of

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\(^{71}\) Cap. 322, R 5, at Order 18 rule 8.


\(^{73}\) International Swap and Derivatives Association website, online: <http://www2.isda.org/about-isda/> (last accessed 30 June 2013).
derivatives that remain outstanding at the end of each month, over the past five years, has averaged approximately $600 trillion.\textsuperscript{74} Many of these transactions, perhaps as high as 90%, are governed by the ISDA Master Agreement, giving you a sense of just how important this document is, especially to financial centres. In \textit{Lomas}, Justice Briggs observed that\textsuperscript{75}:

The ISDA Master Agreement is one of the most widely used forms of agreement in the world. It is probably the most important standard market agreement used in the financial world. English law is one of the two systems of law most commonly chosen for the interpretation of the Master Agreement, the other being New York law. It is axiomatic that it should, as far as possible, be interpreted in a way that serves the objectives of clarity, certainty and predictability, so that the very large number of parties using it should know where they stand.

50. The “clarity” of the ISDA Master Agreement was put to the test after the global financial crisis in 2008, as a consequence of the collapse of Lehman Brothers. One issue related to the meaning of cl 2(a)(iii) of the ISDA Master Agreement. Due to the collapse of Lehman Brothers, an Event of Default was triggered. Under cl 2(a)(i) of the Master Agreement, each party was required to make certain payments, but this was subject to a condition precedent in cl 2(a)(iii) that no Event of Default had occurred and was continuing. Certain amounts were notionally due to Lehman Brothers in respect of profits on some interest rate swap transactions; but the counterparties sought to rely on cl 2(a)(iii) to say that it was not required to pay these profits to Lehman Brothers by reason of the Event of Default. There were a number of issues before the courts. What had happened to the payment obligation? Had it

\textsuperscript{74} Bank of International Settlement website, online: <http://www.bis.org/publ/otc_hy1305.pdf> (last accessed 30 June 2013).
\textsuperscript{75} \textit{Antony Victor Lomas and others v JFB Firth Rixson Inc and others (The International Swaps and Derivatives Association Inc intervening)} [2010] EWHC 3372 (Ch) at [53].
been extinguished or just suspended? If it had been suspended, until when? Was it suspended indefinitely, or until a fixed point?

51. If all this is unclear, it only serves to illustrate the complexity of these arrangements. Moreover, the courts were required to construe what the parties intended by reference to the intricacies of a trading environment that was likely to have been quite unfamiliar. The English courts have thus far taken a number of different positions on the interpretation of this clause. However, the point I wish to draw attention to relates to the manner in which the contextual approach could be applied. The ISDA Master Agreement is unique as it is drafted, not by either contracting party, but by ISDA. ISDA, in turn, publishes a number of legal opinions relating to various provisions of the Master Agreement. In such a context, it may be permissible, perhaps even essential, for the parties and the court to call on experts in such transactions, to assist in understanding the context of the transaction in question and indeed even to have regard to what has been said in any relevant opinions on the Master Agreement.

52. Another area in which the use of expert evidence in aid of interpretation might arise stems from the UK Supreme Court’s decision in *Rainy Sky*.76 The court held that where a term in a contract is open to more than one interpretation, it is generally appropriate “to adopt the interpretation which is most consistent with business common sense” instead of the “most natural meaning of the words”.77 What exactly does “business common sense” entail? As one commentator has noted, it “is an

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77 *Ibid* at [18] and [30].
abstract concept which may be hard to pin down” and it has been suggested that this is an area in which expert evidence could be necessary.\textsuperscript{78} I will leave this open for another day.

VI. LIMITS INHERENT IN THE PROCESS OF INTERPRETATION

53. As will by now be apparent, interpretation ultimately entails a tension between two competing considerations. On the one hand, there is the need to ensure certainty of terms; on the other hand, the various factors that underlie interpretative disputes are such that more often than not, the courts cannot sensibly ascribe meaning simply by reference to the text alone. The courts have developed the purposive and the contextual approaches as means to achieve a balance between these tensions. But are there limits to their efficacy?

A. The limits of the purposive approach

54. One of the most noted critics of the purposive approach is Justice Antonin Scalia of the Supreme Court of the United States. Justice Scalia’s key objection to the purposive approach lies in its perceived manipulability\textsuperscript{79} and instead, he advocates a “fair reading” method of interpretation which, \textit{inter alia}, requires the purpose to be gathered from the text itself.\textsuperscript{80} Justice Scalia’s observations are moot in the context of Singapore law, as s 9A of the Interpretation Act clearly mandates the courts to apply the purposive approach.


\textsuperscript{80} \textit{Ibid}, at pp 33-35.
55. Nonetheless, one may rightfully wonder whether there is any justification for there to be material differences between the interpretational approaches in the USA and in Singapore. This is a complex issue, and I will only touch on it briefly. Justice Scalia’s comments have to be viewed in the context of the US Constitution, a document small in size but immense in intent and aspiration. It was drafted more than 200 years ago with heavy reliance on standards rather than rules. And it exists in a framework where the nine Justices of the Supreme Court are left to say what it means at the point where the rubber meets the road. The answer to the question whether this is a correct or appropriate way to resolve what are often intensely emotional and divisive issues is perhaps more ideological and political than it is legal or principled. The on-going debate about gun control laws and the Second Amendment highlights the possible and seemingly conflicting purposes that one could discern from the US Constitution. Inevitably, difficult questions will arise as to the boundaries between judicial interpretation and judicial legislation. The unique position occupied by judges means that in general, they have the last word as to what the law is; and because that is so, every judge will say that they must and do exercise an appropriate measure of self-restraint. At the end of the day, perhaps the key question is do they in fact do so?

56. In Singapore, Dorsey illustrates the boundaries between the legitimate and the illegitimate use of the purposive approach to interpret and give effect to the statute on the one hand and to judicially amend it altogether on the other. The court interpreted the words “an order” in the Fifth Schedule to the SCJA as meaning “an interlocutory order”, given the purpose of the amendments that had introduced those
terms. This gave effect to rather than undermined Parliament’s intent. In contrast, the court also touched on a separate issue – the anomaly that a party to an ex parte application is entitled to two tiers of hearings (including one before the Court of Appeal) as of right, whereas a party to an inter partes application is only entitled to one. Since this position was clearly reflected in the SCJA, it would not have been constitutionally appropriate for the court to implement its desired reading of the legislation based on what it felt was fair and desirable in the circumstances, even if it could be said that this was within the ambit of a generous reading of the legislative purpose. The court therefore held that legislative intervention would be required to correct this and called for it.

B. The limits of the contextual approach

57. Likewise, under the contextual approach, the limits are represented by the line between interpreting a contract and re-writing the bargain reached. This line is, perhaps, most clearly illustrated in the distinction between interpreting and implying a contractual term. For many decades, the tests for interpretation and implication of a term were separate and distinct. The former was based on the objective test of reasonableness whereas the latter was grounded on proof of necessity. This distinction was blurred by Lord Hoffmann in his judgment in Belize, where he suggested that the only question in deciding the implication of a term was “what the instrument, read as a whole against the relevant background, would reasonably be

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81 Dorsey, supra note 31 at [85].
82 Ibid at [97].
understood to mean”\textsuperscript{83}. In Lord Hoffmann’s view, “the implication of the term is not an addition to the instrument. It only spells out what the instrument means”\textsuperscript{84}.

58. Should \textit{Belize} be followed in Singapore? The Court of Appeal recently considered this in \textit{Sembcorp Marine}. We declined to follow \textit{Belize} in so far as the Privy Council had held that the process of implication was governed by the test of reasonableness\textsuperscript{85}. Interpretation and implication are very different processes. In the former, the court seeks to ascertain the meaning of the text, but in the latter, the court goes further by \textit{filling} a gap that persists within the contract. In filling that gap, the court must be mindful not to rewrite the terms of the contract based on its assessment of what is fair, just or reasonable\textsuperscript{86}, as this might result in considerable uncertainty for the parties and would be contrary to their expectations. Seen in this light, it is not difficult to understand why we retained the higher threshold of “necessity” as the test for implication. There are at least three other possible consequences if this threshold was lowered. First, to avoid the imposition of seemingly reasonable terms, parties would have to expressly denounce such terms in the contract, thus increasing the cost of contracting and compounding the problem of imperfect knowledge. Second, by making it easier for terms to be implied, it would encourage parties to behave opportunistically, thus producing uncertainty and again driving up the cost of enforcing a contract. Third, the factual matrix relevant to the test of reasonableness is likely to be broader than that for the test of necessity. This too, would increase the cost of enforcing a contract.

\textsuperscript{84} Ibid at [18].
\textsuperscript{85} Sembcorp Marine, supra note 35 at [82].
\textsuperscript{86} Panwah Steel Pte Ltd v Koh Brothers Building & Civil Engineering Contractor (Pte) Ltd [2006] 4 Sing. L.R. (R.) 571 at [8].
59. I should, in passing, mention that the English courts, in a series of judgments mainly delivered by Lord Hoffmann, have extended the contextual approach to other areas of contract law, such as in the area of remoteness of damage (in place of the traditional Hadley v Baxendale test). The contextual approach has also, arguably, superseded the doctrine of rectification in England. For the purposes of today’s lecture, it is sufficient for me to say that we have not responded with the same enthusiasm to extending the contextual approach. The once-clear dividing lines between the doctrines of interpretation, implication, rectification and remoteness have been somewhat blurred in English law. The underlying theory is that to address all these issues, the court should attempt to reconstruct the contract by reference to what the parties intended. But this may not be a suitable unifying theory for contract law as the purpose behind each rule is arguably different. Indeed, Lord Hoffmann himself recognised some of the limits of the reconstructionist approach, when he declined to allow evidence of prior negotiations in Chartbrook.

60. But what about statutory implication? I have mentioned Kok Chong Weng, which is the case involving the collective sale of Gillman Heights, where the Court of Appeal recognised that there was a “drafting flaw”, in the form of an omission, in the relevant legislation. However, the Court of Appeal applied the purposive approach to rectify that flaw by reading in the necessary test or words to enable the age of

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87 Transfield Shipping Inc v Mercator Shipping Inc (The Achilleas) [2009] 1 A.C. 61
88 Oceanbulk Shipping & Trading SA v TMT Asia Limited and others [2010] UKSC 44
89 See Out of the Box Pte Ltd v Wanin Industries Pte Ltd [2013] 2 Sing. L.R. 363, MFM Restaurants Pte Ltd v Fish & Co Restaurants Pte Ltd [2011] 1 Sing. L.R. 150 and Robertson Quay Investment Pte Ltd v Steen Consultants Pte Ltd [2008] 2 Sing. L.R. (R.) 623 on the law of remoteness, where the Court of Appeal held that the test in Hadley v Baxendale remains applicable. See also Sembcorp Marine, supra note 35 at [96]-[97] for the interaction between the contextual approach to interpretation and rectification.
Gillman Heights to be determined by reference to the date that the development was in fact completed and fit or ready for occupation. In arriving at its decision, the Court of Appeal applied the three-stage test in *Wentworth Securities*\(^90\), that: \(^91\)

(a) it must be possible to determine precisely what the mischief was that Parliament sought to remedy with the Act;

(b) it must be apparent that the draftsman and Parliament had, by inadvertence, overlooked and so omitted to deal with the eventuality that was required to be dealt with so that the purpose of the Act could be achieved; and

(c) it must be possible to state with certainty what additional words Parliament would have approved had their attention been drawn to the omission.

61. The test applied by the Court of Appeal and its holding might seem to come very close to the process of implication, given that there was an ostensible gap which the court filled. I leave for another time the question whether and how the case fits in with the foregoing considerations and analysis of these issues, though, given the obvious purpose of the legislation and the age of the development, the outcome is one that I think we can collectively agree was correct.


\(^{91}\) *Kok Chong Weng*, supra note 57 at [57].
VII. CONCLUSION

62. In the ideal world, the process of interpretation should begin and end with the legal text alone. Such a process would obviate concerns over uncertainty or cost, because the text would always mean what it said and say just what the drafter meant. Unfortunately, the world in which we construct and interpret legal texts is far from ideal. There will inevitably be a mismatch between the position of a drafter, who operates afflicted with imperfect knowledge and endowed with limited linguistic tools, and the position of an interpreter, who operates blessed with perfect hindsight. Unsurprisingly then, the interpreters will find from time to time that legal texts do not say what they were meant to say.

63. The purposive and contextual approaches have gained currency with the courts in recent years. They reflect a genuine endeavour by the courts to arrive at the closest approximation of what the drafters in fact meant to say. These attempts to bridge the mismatch have seen a reduced emphasis on exclusionary rules and a greater willingness to look at materials beyond the text. However, they entail a difficult balancing exercise, between the need for the courts to act within its constitutional bounds, the need for justice, the need for certainty and the need to contain the cost of litigation within reasonable bounds.

64. Although the law on the interpretation of statutes and contracts has converged in important ways, some important differences remain. The materials available in respect of statutes, such as Hansard and Law Reform reports, are generally more reliable and accurate than those available for contracts which are often subjective or self-serving. This makes it somewhat easier for the judge to bridge the gap with the
drafter of a statute. This does not mean that the courts ignore extrinsic materials when interpreting contracts. But we have developed rules to reduce the scope for excessive subjectivity while trying at the same time to curtail costs.

65. On any basis, the imperfections will persist. And as long as this remains so, we can fully expect interpretive disputes to continue to form the main staple for judicial and litigious work. Thank you.