REPORT OF THE LAW REFORM COMMITTEE

ON

THE REVIEW OF THE PAROL EVIDENCE RULE

SINGAPORE ACADEMY OF LAW

LAW REFORM COMMITTEE

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About the Law Reform Committee

The Law Reform Committee (LRC) of the Singapore Academy of Law makes recommendations to the authorities on the need for legislation in any particular area or subject of the law. In addition, the Committee reviews any legislation before Parliament and makes recommendations for amendments to legislation (if any) and for carrying out law reform.

About the Report

In 2005, several difficulties relating to the parol evidence rule were raised by Judicial Commissioner Andrew Phang (now Judge of Appeal) to the attention of the Honourable the Chief Justice Yong Pung How. The Honourable Chief Justice considered there to be merit in supporting reform in this area and requested the LRC to undertake a review of the rule. A law reform sub-committee was thus set up for this purpose.

The sub-committee's recommendations, which were accepted by the LRC in November 2006, are consolidated in this publication.

The report reflects the authors' current thinking on the researched area of law and does not represent the official position of Singapore Academy of Law or any governmental agency. The report has no regulatory effect and does not confer any rights or remedies.

This report is the first part of a series of publications by the LRC concerning reforms in Evidence Law.

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3 A survey of the parol evidence rule in other common law jurisdictions (**Part V**) reveals, however, that the continuing usefulness of the rule has come into question in certain jurisdictions. Both the Law Commission of England and Wales and the Law Reform Commission in British Columbia have recommended the abolition of the rule. However, the Law Commission of India, which in 2003 completed a review of the Indian Evidence Act, did not make any recommendations to abolish the rule, but to merely refine certain provisions of the statutory rule. None of the jurisdictions surveyed appear to have taken any active steps to abolish the parol evidence rule.

4 The Sub-Committee takes the view that the statutory rule continues to serve a useful function and should be retained. But there are aspects of the statutory rule which could be refined. These include clarifying the scope of application of the rule, the relationship between sections 93 and 94, the applicability of exceptions under the common law, and the relationship between the provisions dealing with the construction of documents (section 94(*f*) and sections 95 to 100). It is also felt that extrinsic proof of collateral contracts should be allowed, even where they are inconsistent with the written agreement. The key issues for reform are discussed in **Part VI**, and the options for reform to the statutory rule are discussed in **Part VII**.

5 **Part VIII** discusses the proposed amendments to the statutory rule. A proposed redrafting of sections 93 to 102 of the Evidence Act, including a draft Explanatory Statement, is set out at **Annex C**.

II. Introduction

A. Reference to Law Reform Committee (LRC)

6 The parol evidence rule ("the rule") has its origins in the common law of England. The rule is uncodified in England and remains within the province of the common law. In Singapore the rule was codified in the Evidence Ordinance of 1893 and is now set out in sections 93 to 102 of the Evidence Act (Cap 97, 1997 Rev Ed) ("Evidence Act"). However, the rule is not exactly the same in England and Singapore. The "statutory rule" in Singapore has remained unchanged since its enactment, while the "common law rule" in England has been gradually developed.[1]

7 The codification of the rule in the Evidence Act has given rise to important issues in legal practice. One important issue is the relationship between the statutory provisions and the common law, specifically, whether the exceptions to the common law rule which have not been codified in the statute can apply as exceptions to the statutory rule.

8 Some of these issues were raised by the Honourable Judicial Commissioner Andrew Phang (now Judge of Appeal) in *China Insurance v Liberty Insurance*[2]. In a letter dated 2 March 2005 to the Honourable Chief Justice Yong Pung How, he proposed reforms to the statutory rule.

9 The Chief Justice, considering there to be merit in supporting reform in this area, requested the Law Reform Committee ("LRC")[3] to study the matter and to recommend a course of action. The reforms proposed by Phang JC are enclosed at **Annex A**.

10 A sub-committee of the LRC ("the Sub-Committee") was formed to review the statutory rule.

B. Scope of review

11 The Sub-Committee confined its study to the parol evidence rule under common law jurisdictions such as UK, Canada, USA and India.[4]

12 It is useful to point out at the outset that the parol evidence rule actually embodies three distinct rules. The Law Commission of England and Wales explained it in the following way:

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[1] In order to distinguish between the parol evidence rule in England and that in Singapore, the expression "common law rule" is used in this report to refer to the rule under the English common law, while the expression "statutory rule" is used to refer to the rule under ss 93 – 102 of the Evidence Act of Singapore.

[2] *China Insurance Co (Singapore) Pte Ltd v Liberty Insurance Pte Ltd (formerly known as Liberty Citystate Insurance Pte Ltd)* [2005] 2 SLR 509. See **Annex A**.

[3] The Law Reform Committee of the Singapore Academy of Law, chaired by the Honourable Justice Judith Prakash.

[4] No study was made of civil law jurisdictions, although it was noted in passing that certain jurisdictions such as Japan do not seem to have a parol evidence rule: *Kaufman, Gregory Laurence and Others v Datacraft Asia Ltd* [2005] SGHC 174, Judith Prakash J, at [34].

> We must start by explaining what we mean by 'the parol evidence rule'. When a transaction is recorded in a document, it is not generally permissible to adduce other evidence of (a) its terms or (b) other terms not included, expressly or by reference, in the document or (c) its writer's intended meaning. There are here three distinct rules which exclude what is known as extrinsic evidence, being evidence outside or extrinsic to the document. The evidence excluded is usually oral, but it may be other documentary evidence. The three rules, either separately or together, are sometimes known as the parol evidence rule.
>
> The first rule excludes a particular means of proof, namely secondary evidence of a document: where the rule applies it prevents the contents of the document being proved by any means other than the production of the document. This is more usually known as the 'best evidence rule'. By the second rule extrinsic evidence is inadmissible for the purpose of adding to, varying, contradicting or subtracting from the terms of the document: the writing is conclusive. The third rule deals with the admissibility of facts in aid of the interpretation or construction of documents. [5]

13 These three distinct rules are mirrored in ss 93 to 102 of the Evidence Act (reproduced at **Annex B**) which essentially provide as follows:

(a) *First rule*: The contents of certain documents must be proved by the production of the document, except in circumstances where secondary evidence is permitted (s 93).

(b) *Second rule*: Extrinsic evidence is not admissible between the parties for the purpose of contradicting, varying, adding to, or subtracting from the terms of a written document (s 94). This rule is subject to the provisos set out in sub-ss (*a*) to (*f*) of s 94 and also s 101.

(c) *Third rule*: Evidence of specific facts may be admitted in aid of the interpretation or construction of certain documents (ss 95 to 100, and 102).

14 This report considers the three rules with the view to possible reform:

(a) **Part III** discusses the common law rule in England today;

(b) **Part IV** discusses the statutory rule under the Evidence Act;

(c) **Part V** surveys the status of the rule in selected common law jurisdictions;

(d) **Part VI** considers the key issues relating to the statutory rule in the Evidence Act;

(e) **Part VII** sets out the options for the reform of the statutory rule; and

(f) **Part VIII** presents the proposals of the Sub-Committee to improve the statutory rule.

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[5] UK, Law Commission of England and Wales, *Law of Contract: The Parol Evidence Rule* (Working Paper No 70, 1976) at paras 4 and 5.

III. Parol Evidence Rule at Common Law

15 The parol evidence rule in Singapore has its roots in the common law of England. Prior to 1893, the law of evidence in Singapore was part of the common law of Singapore, which in turn was derived from the common law of England through the promulgation of the Second Charter of Justice in 1826. The law of evidence in Singapore was codified in statute with the coming into force of the Evidence Ordinance in 1893. The Ordinance was modelled on the Indian Evidence Act 1872 drafted by Sir James Stephen.[6]

A. English common law rule

16 Under the English common law, the parol evidence rule is a general rule applicable to all written instruments.[7] It is of particular importance to the law of contract. It can be regarded as an expression of the objective theory of contract. Under this theory, the court is concerned not with the parties' actual intentions but with their manifest intention.[8] Consistent with the objective test of agreement, the parol evidence rule seeks to promote certainty in the law by holding that parties who have reduced a contract to writing should be bound by the writing and by the writing alone.[9]

17 However, a strict application of the rule may sometimes promote certainty at the expense of justice when it precludes proof of the true intention of the parties. Where the parties have made a contract which is partly written and partly oral, the rejection of evidence of extrinsic terms that were actually agreed may cause injustice to the party relying on those terms. Again, where the parties have made a written contract of sale but intended the contract to be a mortgage, a strict application of the parol evidence rule may cause injustice to the other party, who is unable to plead the defence of clog on the equity of redemption.

18 Over time, the general rule at common law, which is that extrinsic evidence to "add to, vary or contradict" a written document is excluded, has narrowed considerably in favour of admitting proof of the true intention as far as possible. As Chitty says: "… the scope of the parol evidence rule is much narrower than at first sight appears. It has no application until it is first determined that the terms of the parties' agreement are wholly contained in the written document."[10]

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[6] *Halsbury's Laws of Singapore*, vol 10 (Butterworths Asia, 2000) at [120.002].

[7] Doubts, however, have been cast on whether the parol evidence rule could still be said to exist in the common law today: UK, Law Commission of England and Wales, *Law of Contract: The Parol Evidence Rule* (Report No 154, 1986), considered at paras 67 – 69 below.

[8] *Cheshire, Fifoot and Furmston's Law of Contract* (Andrew Phang Boon Leong, ed) (Butterworths Asia, 2nd Singapore and Malaysia Edition, 1998) at p 236.

[9] *The Law of Contract*, Sir Guenter Treitel (Sweet & Maxwell, 11th Ed, 2003) at p 192.

[10] *Chitty on Contracts* vol 1 (Sweet & Maxwell, 29th Ed, 2004) at para 12-098.

B. Exceptions to common law rule

19 The following is a summary of the categories of exceptions to the common law rule that exist today[11]:

(1) Vitiating factors

20 These are facts that vitiate or invalidate a contract. They relate to the validity of the contract rather than the contents of the contract. Thus, extrinsic evidence can be used to establish the presence or absence of consideration or of contractual intention, or some invalidating cause such as lack of capacity, fraud, misrepresentation, illegality, mistake or *non est factum*.

(2) Rectification

21 Evidence may be admitted to rectify a written document executed by the parties under a common mistake. Where a document is meant to record a previous oral agreement but fails to do so accurately, the document may be rectified to correct the mistakes and bring it in line with the oral agreement. In such a case, evidence of the previous oral agreement must inevitably be admitted. (In most cases in which the parol evidence rule is invoked, the parties make no mistake: they know perfectly well that the extrinsic term is not incorporated in the document, and so rectification is not available.)

(3) Independent oral agreement (including collateral agreement)

22 Even where extrinsic evidence cannot be used to vary, add to or contradict the terms of a written document, it may be possible to show that the parties made two related contracts, one written and the other oral. Evidence is admissible if it proves an "independent agreement". It is often hard to say whether the evidence has this effect or whether it varies, or adds to, the terms of the main contract. The test, according to Treitel[12], seems to be whether the evidence relates to a term which would go to the essence of the whole transaction: if so, it cannot be regarded as evidence of a collateral contract and will be inadmissible. Evidence of a collateral contract is inadmissible if it varies or contradicts a term actually set out in the written contract. The same would apply to express oral warranties given at the time of contract.

(4) Condition precedent

23 On its face a document may purport to record a valid and immediately enforceable contract, but extrinsic evidence may be admitted to show that it had been previously agreed to suspend the operation of the contract until the happening of a certain event, such as the approval of a third party, and that this event had not yet taken place. The happening of the event in question is a condition precedent to the contract's existence, and evidence of such an agreement may be given.

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[11] Treitel, *supra* n 9, at pp 193 – 201; Chitty, *supra* n 10, at paras 12-095 – 12-133; UK, Law Commission Working Paper No 70, *supra* n 5, at paras 10 – 21.

[12] Treitel, *supra* n 9.

(5) Subsequent oral agreement

24 Extrinsic evidence can be used to show that the contract has been varied or rescinded by subsequent oral agreement.

(6) Custom and implied terms

25 Evidence of custom can be used to add to, but not to contradict, the written contract. Evidence of custom is admissible to show the meaning of particular words in the contract, even where it differs from the ordinary meaning of those words. Similarly, extrinsic evidence may be admissible where it relates to terms that are implied. (The common law rule only prevents a party from relying on extrinsic evidence as to *express* terms of a contract.)

(7) Aid to construction

26 Where the words of the contract are clear, extrinsic evidence cannot be used to explain their meaning, unless they have a special meaning by custom. But extrinsic evidence can be used to explain words or phrases that are ambiguous, or that, if taken literally, make no sense or conflict with other words or phrases in the same document. It can also be used to explain specific terms. Accordingly, extrinsic evidence may be given to identify the parties, to identify the subject matter of a contract, and to show the consideration given under a written contract. Evidence of the factual background (or "matrix") to the negotiations is also admissible in so far as this sheds light on the meaning of the words used.

(8) Written agreement not constituting the whole agreement

27 An agreement may be partly in writing and partly oral. Extrinsic evidence may be admitted to show that the written document was not in fact intended to contain all the terms of the contract.

(9) Equitable remedies

28 This relates to the remedies of specific performance of a written agreement and rescission of an agreement on the ground of misrepresentation. Both specific performance and rescission are equitable remedies. In deciding whether to award an equitable remedy, the court is not confined to the terms of the agreement, even where the agreement is in writing. So where a plaintiff claims the specific performance of a written agreement, the court may refuse the remedy on equitable grounds because of the plaintiff's failure to carry out terms which were not in the written agreement but which were agreed orally. Similarly, where one party to a written agreement has induced the other party to sign by making a misrepresentation of some material fact, it may be a ground for allowing the rescission of the agreement. In either case evidence may be admitted of matters outside the written contract.

IV. Statutory Rule under Evidence Act

29 In Singapore, the statutory rule is embodied in ss 93 to 102 of the Evidence Act (reproduced at **Annex B**).

A. Section 93: Proof by documentary evidence

30 The principal rule in s 93 provides as follows, and is illustrated by illustration (*b*) of the section:

> **Evidence of terms of contracts, grants and other dispositions of property reduced to form of document**
>
> **93.** When the terms of a contract or of a grant or of any other disposition of property have been reduced by or by consent of the parties to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document[13], no evidence shall be given in proof of the terms of such contract, grant or other disposition of property or of such matter except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions of this Act.
>
> *Illustration*
>
> (*b*) If a contract is contained in a bill of exchange, the bill of exchange must be proved.

31 Section 93 relates to the exclusiveness of documentary evidence. It is an aspect of the "best evidence" rule.[14] Where a contract, grant or other disposition of property has been reduced to the form of a document, that document must be produced. It would be the best evidence of the agreement or intent of the parties. Secondary evidence (including oral evidence) is admissible only in very limited circumstances.[15]

32 Unlike the common law rule which applies to all written instruments, the application of s 93 is limited only to the types of documents specified, namely, contracts, grants, any other dispositions of property, and any matter required by law to be reduced to the form of a document.

33 Another point to be noted is that s 93 applies as between persons who are parties or even persons who are non-parties to the document, unlike s 94 which applies only in respect of parties to the document.

34 The principal rule in s 93 is subject to two exceptions:

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[13] The clause "any matter … required by law to be reduced to the form of a document" refers to bilateral instruments and dispositive documents only: *PP v Datuk Haji Harun bin Haji Idris & Ors* [1977] 1 MLJ 180, High Court, Malaysia.

[14] Sections 66 and 67 of the Evidence Act; Chin Tet Yung, "Evidence" (Malayan Law Journal Ltd, 1988) at pp 224 – 226; M Monir, *Principles and Digest of the Law of Evidence*, vol 1 (The University Book Agency, 7th Ed, 1989) at p 937; M C Sarkar *et al*, *Sarkar's Law of Evidence*, (Wadhwa and Company Law Publishers, 15th Ed, 1999) at pp 1265 – 1305.

[15] Section 67 of the Evidence Act.

> *Exception 1*.—When a public officer is required by law to be appointed in writing, and when it is shown that any particular person has acted as such officer, the writing by which he is appointed need not be proved.
>
> *Exception 2*.—Wills admitted to probate in Singapore may be proved by the probate.

35 The principal rule is also supplemented with three explanations. Explanation 1 provides as follows and is illustrated by illustration (*a*):

> *Explanation 1*.—This section applies equally to cases in which the contracts, grants or dispositions of property referred to are contained in one document, and to cases in which they are contained in more documents than one.
>
> *Illustration*
>
> (*a*) If a contract is contained in several letters, all the letters in which it is contained must be proved.

36 Explanation 2 provides as follows and is illustrated by illustration (*c*):

> *Explanation 2*.—Where there are more originals than one, one original only need be proved.
>
> *Illustration*
>
> (*c*) If a bill of exchange is drawn in a set of 3, one only need be proved.

37 Explanation 3 provides as follows and is illustrated by illustrations (*d*) and (*e*):

> *Explanation 3*.—The statement in any document whatever of a fact, other than the facts referred to in this section, shall not preclude the admission of oral evidence as to the same fact.[16]
>
> *Illustrations*
>
> (*d*) *A* contracts in writing with *B* for the delivery of pepper upon certain terms.
> The contract mentions the fact that *B* had paid *A* the price of other pepper contracted for verbally on another occasion.
> Oral evidence is offered that no payment was made for the other pepper.
> The evidence is admissible.
>
> (*e*) *A* gives *B* a receipt for money paid by *B*.
> Oral evidence is offered of the payment. The evidence is admissible.

B. Section 94: Exclusion of oral evidence

38 The principal rule in s 94 provides as follows and is illustrated by illustrations (*a*), (*b*) and (*c*) of the section:

[16] This may also be regarded as a third exception to the principal rule in s 93: India, Law Commission of India, *Review of the Indian Evidence Act, 1872* (185th Report, March 2003) at pp 431 – 432, available at: http://lawcommissionofindia.nic.in/reports.htm.

Exclusion of evidence of oral agreement

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

Illustrations

(*a*) A policy of insurance is effected on goods 'in ships from Singapore to London'. The goods are shipped in a particular ship, which is lost. The fact that that particular ship was orally excepted from the policy cannot be proved.

(*b*) *A* agrees absolutely in writing to pay *B* $1,000 on 1st March 1893. The fact that at the same time an oral agreement was made that the money should not be paid till 31st March cannot be proved.

(*c*) An estate called 'the Kranji Estate' is sold by a deed which contains a map of the property sold. The fact that land not included in the map had always been regarded as part of the estate and was meant to pass by the deed cannot be proved.

39 Section 94 is closely related with s 93, and deals with the conclusiveness of documentary evidence.[17] It is based on the same principle, that documentary evidence is superior to oral evidence.[18] When any document has been proved under s 93 (by the production of the document or by admissible secondary evidence), no oral evidence is admissible for the purpose of "contradicting, varying, adding to, or subtracting" from its terms.

40 Section 94 makes reference to s 93, and deals with exactly the same types of documents specified in s 93. Section 94 is operative only if the written document has been admitted under s 93. It does not operate independently of s 93. It has been said that s 93 deals with the proof of matters specified in it, and s 94 deals with what may be regarded as disproof of such matters.[19]

41 The restrictions in s 94 apply to the admission of evidence "as between the parties" only and it is thus narrower in application than s 93.

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[17] Sarkar, *supra* n 14, at pp 1305 – 1405.

[18] Monir, *supra* n 14, at p 969.

[19] *Ibid.* See also Halsbury's Laws of Singapore, *supra* n 6, at [120.328]. Another way to distinguish between ss 93 and 94 is as follows: "Under [section 93], when the terms of any transaction have been reduced to writing, they must be proved by the production of the document unless grounds are made out for reception of secondary evidence. In other words 'no substitution' of the terms of a transaction is permitted under [section 93]. Under [section 94], no variation of the terms shall be allowed. Thus [section 94] is a logical corollary to [section 93]." (Law Commission of India 185th Report, *supra* n 16, at p 435).

C. Section 94(a) to (f): Provisos

42 The principal rule in s 94 is subject to six provisos.[20]

43 Proviso (*a*) provides as follows and is illustrated by illustrations (*d*) and (*e*) of s 94:

> (*a*) any fact may be proved which would invalidate any document or which would entitle any person to any decree or order relating thereto; such as fraud, intimidation, illegality, want of due execution, want of capacity in any contracting party, the fact that it is wrongly dated, want or failure of consideration[21], or mistake in fact or law[22];
>
> *Illustrations*
>
> (*d*) *A* enters into a written contract with *B* to work certain mines, the property of *B*, upon certain terms. *A* was induced to do so by a misrepresentation of *B* as to their value. This fact may be proved.
>
> (*e*) *A* institutes a suit against *B* for the specific performance of a contract, and also prays that the contract may be performed [*sic.*] as to one of its provisions on the ground that that provision was inserted in it by mistake. *A* may prove that such a mistake was made as would by law entitle him to have the contract performed [*sic.*].[23]

44 Proviso (*b*) provides as follows and is illustrated by illustrations (*f*), (*g*) and (*h*):

> (*b*) the existence of any separate oral agreement, as to any matter on which a document is silent and which is not inconsistent with its terms, may be proved; in considering whether or not this proviso applies, the court shall have regard to the degree of formality of the document; [24]
>
> *Illustrations*
>
> (*f*) *A* orders goods of *B* by a letter in which nothing is said as to the time of payment, and accepts the goods on delivery. *B* sues *A* for the price. *A* may show that the goods were supplied on credit for a term still unexpired.
>
> (*g*) *A* sells *B* a horse and verbally warrants him sound. *A* gives *B* a paper in these words: 'Bought of *A* a horse for $300.' *B* may prove the verbal warranty.

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[20] Discussed in Cheshire, Fifoot and Furmston, *supra* n 8, at pp 239 – 247; Rafiah Salim, *Evidence in Malaysia and Singapore: Cases, Materials and Commentary* (Matthew Bender & Co, 1994) at pp 372 – 397.

[21] Oral evidence of a failure of consideration in a contract is admissible: *Tang Siew Hee v Hii Sii Ung* [1964] MLJ 385, High Court, Borneo.

[22] Unilateral mistake (not amounting to fraud, legal or equitable) is not a ground for rectification. It does not entitle the party alleging it to a decree or order rectifying or cancelling the document: *United States v Motor Trucks Ltd* [1924] AC 196 at 200. But when a mistake is common to all parties, evidence would be admissible to found a claim for the rectification of the document: *Janardan v Venkatesh* [1939] AIR Bom 151. Where either mutual mistake or fraud is alleged, oral evidence will be received: *Rikhiram v Ghasiram*, [1978] AIR MP 189. Discussed in Law Commission of India 185th Report, *supra* n 16, at pp 441 – 442.

[23] The word "performed" appears to be an editorial error. Both the Indian and Malaysian Evidence Acts use the word "reformed". In Stephen's Digest (Sir James Fitzjames Stephen, *A Digest of the Law of Evidence* (MacMillan & Co, 12th Ed, 1936)), the word used for the same illustration is "rectified" (p 114, illustration (*d*)).

[24] It has been held that proviso (*b*) is limited only to a separate *oral* agreement: *Syarikat Bunga Raya Timor Jauh Sdn Bhd v Tractors Malaysia Bhd* [1980] 2 MLJ 127, Federal Court, Malaysia (a letter to prove a separate agreement was ruled not admissible).

> (*h*) *A* hires lodgings of *B* and gives *B* a card on which is written: 'Rooms $80 a month.' *A* may prove a verbal agreement that these terms were to include partial board.
> *A* hires lodgings of *B* for a year, and a regularly stamped agreement drawn up by an attorney is made between them. It is silent on the subject of board. *A* may not prove that board was included in the terms verbally.

45 Proviso (*c*) provides as follows and is illustrated by illustrations (*i*) and (*j*):

> (*c*) the existence of any separate oral agreement constituting a condition precedent to the attaching of any obligation under any such contract, grant or disposition of property, may be proved;
>
> *Illustrations*
>
> (*i*) *A* applies to *B* for a debt due to *A* by sending a receipt for the money. *B* keeps the receipt and does not send the money. In a suit for the amount *A* may prove this.
>
> (*j*) *A* and *B* make a contract in writing to take effect upon the happening of a certain contingency. The writing is left with *B*, who sues *A* upon it. *A* may show the circumstances under which it was delivered.

46 Proviso (*d*) provides as follows:

> (*d*) the existence of any distinct subsequent oral agreement, to rescind or modify any such contract, grant or disposition of property, may be proved except in cases in which such contract, grant or disposition of property is by law required to be in writing, or has been registered according to the law in force for the time being as to the registration of documents; [25]

47 Proviso (*e*) provides as follows:

> (*e*) any usage or custom by which incidents not expressly mentioned in any contract are usually annexed to contracts of that description may be proved; except that the annexing of such incident would not be repugnant to or inconsistent with the express terms of the contract; [26]

48 Proviso (*f*) provides as follows:

> (*f*) any fact may be proved which shows in what manner the language of a document is related to existing facts.[27]

49 Proviso (*f*) is noteworthy. While appearing as an exception to the principal rule in s 94, it in fact provides for the proof of facts as aids to the construction of the document.

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[25] When the terms of an instrument are required by law to be reduced into writing, then no evidence of any oral agreement can be admitted in evidence: *Teo Siew Peng v Guok Sing Ong & Anor* [1982–1983] SLR 128, Court of Appeal. Parol evidence is admissible as evidence of waiver of rights, although inadmissible as evidence of a variation of the terms: *Wong Juat Eng v Then Thaw Eu & Anor* [1965] 2 MLJ 213, Federal Court, Malaysia.

[26] Oral evidence is admissible to establish a trade usage if such usage is consistent with the terms and tenor of the written contract: *Cheng Keng Hong v Government of the Federation of Malaya* [1966] 2 MLJ 33, High Court, Malaysia.

[27] Evidence may be adduced to explain any latent ambiguity in an agreement, and may not be adduced under proviso (*f*) unless there is such latent ambiguity: *Tan Suan Sim v Chang Fook Shen* [1980] 2 MLJ 66, Federal Court, Malaysia; *Faber Merlin (M) Sdn Bhd & Ors v Lye Thai Sang & Anor* [1985] 2 MLJ 380, Supreme Court, Malaysia; *Citicorp Investment Bank (Singapore) Ltd v Wee Ah Kee* [1997] 2 SLR 759, Court of Appeal.

Proviso (*f*) is therefore more closely related with ss 95 to 100, which deal with matters of construction, than with provisos (*a*) to (*e*) of s 94.[28]

50 It is evident from the case law on ss 93 and 94 that there are significant differences between the common law and these sections. Whereas the common law rule has been judicially relaxed to favour permitting proof of the true intention as far as possible, the statutory rule has remained unchanged since its enactment in 1893 and has not been amended to keep up with subsequent developments in the English common law. The statutory provisions resemble but are not an exact mirror of the English common law.[29]

D. Sections 95 to 100: Aids to construction

51 After the terms of a document have been proved under ss 93 and 94, the meaning of the terms must be given a proper construction. Sections 95 to 100 provide specific rules to aid this process.

(1) Section 95: Patent ambiguity

52 Section 95 provides as follows:

> **Exclusion of evidence to explain or amend ambiguous document**
>
> **95.** When the language used in a document is on its face ambiguous or defective, evidence may not be given of facts which would show its meaning or supply its defects.
>
> *Illustrations*
>
> (*a*) *A* agrees in writing to sell a horse to *B* for $500 or $600. Evidence cannot be given to show which price was to be given.
>
> (*b*) A deed contains blanks. Evidence cannot be given of facts which would show how they were meant to be filled.

53 Section 95 relates to ambiguity or defect of a document "on its face". This can be categorised as a patent ambiguity, as distinct from a latent ambiguity (referred to in ss 97 to 99).

54 Patent ambiguity may arise in the sense that language is intelligible but is obviously uncertain (illustration (*a*)), or in the sense that it is so defective that it conveys no meaning (illustration (*b*)). In either case, extrinsic evidence may not be given to explain the intended meaning.

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[28] The Law Commission of India, in their 69th and 185th Reports, divided their discussion into "(a) the first five provisos and (b) the sixth proviso": see Law Commission of India 185th Report, *supra* n 16, at p 441.

[29] "The provisos to section 94 are said to embody the common law, or to mirror it, but it would be more exact to say that they emulate the common law in essentials. There are important departures from the common law in their formulation. At common law, facts showing the true nature of the written transaction and the true relationship between the parties may be proved. The Evidence Act, however, does not permit proof that a transfer of land is in fact a loan and a charge, that a sale and purchase agreement is in fact a loan agreement. A signatory to a promissory note may not show that he is in fact only a surety, an attesting witness that he is in fact a principal, a principal that he is in fact an agent. But, as at the common law, if there is no description of the character of a party as principal, it may be shown by an undisclosed principal that the party to the contract contracted as agent for the undisclosed principal." Halsbury's Laws of Singapore, *supra* n 6, at [120.329], and related footnotes.

(2) Section 96: Plain language applicable to existing facts

55 Section 96 provides as follows:

> **Exclusion of evidence against application of document to existing facts**
>
> **96.** When language used in a document is plain in itself and when it applies accurately to existing facts, evidence may not be given to show that it was not meant to apply to such facts.
>
> *Illustration*
>
> *A* conveys to *B* by deed 'my estate at Kranji containing 100 hectares'. *A* has an estate at Kranji containing 100 hectares. Evidence may not be given of the fact that the estate meant was one situated at a different place and of a different size.

56 This section does not refer to any patent or latent ambiguity. When the language in a document is plain, and applies accurately to existing facts, evidence is not to be allowed to show that the parties intended to mean something else.

(3) Sections 97, 98 and 99: Latent ambiguity

57 Sections 97 to 99 provide as follows:

> **Evidence as to document meaningless in reference to existing facts**
>
> **97.** When language used in a document is plain in itself, but is meaningless in reference to existing facts, evidence may be given to show that it was used in a peculiar sense.
>
> *Illustration*
>
> *A* conveys to *B* by deed 'my plantation in Penang'.
> *A* had no plantation in Penang, but it appears that he had a plantation in Province Wellesley, of which *B* had been in possession since the execution of the deed.
> These facts may be proved to show that the deed related to the plantation in Province Wellesley.
>
> **Evidence as to application of language which can apply to one only of several persons**
>
> **98.** When the facts are such that the language used might have been meant to apply to any one, and could not have been meant to apply to more than one of several persons or things, evidence may be given of facts which show to which of those persons or things it was intended to apply.
>
> *Illustrations*
>
> (*a*) *A* agrees to sell to *B* for $500 'my white horse'. *A* has 2 white horses. Evidence may be given of facts which show which of them was meant.
>
> (*b*) *A* agrees to accompany *B* to Halifax. Evidence may be given of facts showing whether Halifax in Yorkshire or Halifax in Nova Scotia was meant.

> **Evidence as to application of language to one of two sets of facts to neither of which the whole correctly applies**
>
> **99.** When the language used applies partly to one set of existing facts and partly to another set of existing facts, but the whole of it does not apply correctly to either, evidence may be given to show to which of the 2 it was meant to apply.
>
> *Illustration*
>
> *A* agrees to sell to *B* 'my land at *X* in the occupation of *Y*'. *A* has land at *X*, but not in the occupation of *Y*, and he has land in the occupation of *Y*, but it is not at *X*. Evidence may be given of facts showing which he meant to sell.

58 These three sections relate to cases of latent ambiguity:

(a) Section 97 refers to documents plain in themselves but are meaningless in relation to existing facts. When the language of a document applies in part correctly and in part incorrectly to an existing fact, extrinsic evidence is admissible to show whether it was intended to apply to it.[30]

(b) Section 98 relates to a form of ambiguity known as "equivocation" – where the language of a document is perfectly clear and intelligible, yet when intended to apply to one person or thing, it may apply equally well to two or more persons or things. Extrinsic evidence (including declarations of the intention of the author of the document) is admissible to show to which person or thing the words were intended to apply.[31]

(c) Section 99 is related to s 97, and can be considered an application of the rule in s 97. It refers to documents, the words of which apply partly to one set of existing facts and partly to another, but correctly to neither. In such a case, extrinsic evidence is admissible to show which of the two were intended.[32]

59 In general it can therefore be said that extrinsic evidence is admissible in cases of latent ambiguity, but not in cases of patent ambiguity.

(4) Section 100: Illegible characters, technical terms, etc.

60 Section 100 provides as follows:

> **Evidence as to meaning of illegible characters, etc**
>
> **100.** Evidence may be given to show the meaning of illegible or not commonly intelligible characters, of foreign, obsolete, technical, local and

[30] Sarkar, *supra* n 14, at pp 1420 – 1426.

[31] *Id*, at pp 1426 – 1430. At common law, the only instance where the intention of the writer can be admitted is where there is an equivocation in the language of the document. An equivocation is "a description which seems equally applicable to more than one person or thing, or class of persons or things, where only one is intended." (Robert F Norton, *A Treatise on Deeds* (Sweet & Maxwell, 2nd Ed, 1928) at p 107).

[32] *Id*, at pp 1430 – 1434.

provincial expressions, of abbreviations and of words used in a peculiar sense.

Illustration

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

61 This provision allows the admission of evidence from experts and other persons to help decipher illegible writing, shorthand, symbols, abbreviations, technical terms, legal terms, trade terms, foreign expressions and the like in a document.[33]

E. Section 101: Persons who may give evidence varying terms of document

62 Section 101 provides as follows:

Who may give evidence of agreement varying terms of document

101. Persons who are not parties to a document or their representatives in interest may give evidence of any fact tending to show a contemporaneous agreement varying the terms of the document.

Illustration

A and *B* make a contract in writing that *B* shall sell *A* certain tin to be paid for on delivery. At the same time they make an oral agreement that 3 months' credit shall be given to *A*. This could not be shown as between *A* and *B*, but it might be shown by *C* if it affected his interests.

63 This provision should be read with s 94. The words "as between the parties to any such instrument or their representatives in interest" in s 94 restrict the operation of that section to the parties or their privies, and it does not apply to strangers. Section 94 therefore does not debar persons other than parties from giving extrinsic evidence to vary a document. Section 101 therefore "merely emphasises or repeats this aspect of [s 94] by making it the subject-matter of a separate section, although it seems that was not strictly necessary".[34]

F. Section 102: Non-application to construction of wills

64 Section 102 provides that ss 93 to 101 do not apply to the construction of wills.

Construction of wills not affected by sections 93 to 101

102. Nothing in sections 93 to 101 shall affect the construction of wills.

65 As this section speaks of "construction", the provisions of those sections not referring to matters of construction apply equally to all wills and other instruments.[35]

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[33] *Id*, at pp 1434 – 1441.

[34] *Id*, at p 1441.

[35] *Id*, at p 1443.

V. Other Common Law Jurisdictions

66 In the past 30 years, the parol evidence rule has come under review in various common law jurisdictions. The following is a survey of the reviews done in the UK, Canada, USA and India.

A. United Kingdom

67 The Law Commission of England and Wales recommended, in 1976, that the parol evidence rule be abolished.[36] After surveying the rule under the English common law, their conclusions were as follows:

(a) The scope of the rule had been so greatly reduced by exceptions as to lead to uncertainty in the existing law;

(b) The advantages that the rule may once have had of achieving certainty and finality had largely gone;

(c) The disadvantage of the rule, that it prevents the parties from proving the terms of their agreement, might still have existed in some cases;

(d) Where there is a written agreement, the rejection of evidence to add to, vary, contradict or subtract from its terms should be justified not by the parol evidence rule but by the fact that the parties have agreed upon the writing as a record of all they wish to be bound by;

(e) The abolition of the rule would produce the same result in many cases, but in some cases it might lead to a different and more just result.

68 The Law Commission subsequently issued its report in 1986.[37] They commented that the parol evidence rule was a proposition of law that was no more than a circular statement: when it is proved or admitted that the parties to a contract intended that all the express terms of their agreement should be recorded in a particular document, evidence will be inadmissible (because irrelevant) if it is tendered only for the purpose of adding to, varying, subtracting from or contradicting the express terms of that contract. The Law Commission had considerable doubts whether such a proposition should properly be characterised as a 'rule' at all, or whether such a rule continued to exist in English law:

> [T]he parol evidence rule, in so far as any such rule of law can be said to have an independent existence, does not have the effect of excluding evidence which ought to be admitted if justice is to be done between the parties. … Evidence will only be excluded when its reception would be inconsistent with the intention of the parties. While a wider parol evidence rule seems to have existed at one time, no such wider rule could, in our view, properly be said to exist in English law today.[38]

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[36] UK, Law Commission Working Paper No 70, *supra* n 5.

[37] UK, Law Commission Report No 154, *supra* n 7, at 2.45.

[38] *Id*, at paras 2.7 and 2.45.

69 Accordingly, it was not necessary for the Law Commission to recommend abolishing the rule. It had, in their view, ceased to exist.[39]

B. Canada

70 In British Columbia, the Law Reform Commission, in a 1979 report[40], was also in favour of abrogating the parol evidence rule. They observed that the rule had become "riddled with exceptions" and its scope and application were uncertain. When the rule did apply, it could yield unfair results. The Commission felt that most of the difficulty and injustice created by the parol evidence rule could be met by a straightforward provision that addresses the rule primarily as one of evidence as opposed to substance. Written evidence of an agreement was not invariably to be preferred to oral evidence, and ultimately it was a question of weight of evidence. Accordingly, it was recommended that British Columbia's Evidence Act be amended by adding a provision comparable to the following:

> If an agreement or provision thereof is disputed, neither the parol evidence rule, nor any agreement or provision thereof, shall result in the exclusion of evidence which would otherwise be admissible, and if such evidence is admitted, it shall be accorded such weight, if any, as is appropriate in the circumstances.[41]

71 The Commission also noted that parol evidence is not excluded and is admissible in consumer dispute cases. For the purpose of preventing consumer protection legislation from being subverted by the operation of the parol evidence rule, it was provided in British Columbia's Trade Practices Act, at s 27, that:

> In a proceeding in respect of a consumer transaction, no rule of law respecting parol or extrinsic evidence, nor any term or provision in a consumer transaction, shall operate to exclude or limit the admissibility of evidence relating to the understanding of the parties as to the consumer transaction or a particular term or provision of the consumer transaction.

72 The Ontario Law Reform Commission also advocated the abolition of the parol evidence rule.[42] It recommended a provision similar to s 17 of the Canadian Uniform Sale of Goods Act, but which was applicable to all types of contracts. Section 17 reads:

> No rule of law or equity respecting parol or extrinsic evidence and no provision in a writing prevents or limits the admissibility of evidence to prove the true terms of the agreement, including evidence of any collateral agreement or representation or evidence as to the true identity of the parties.

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[39] Treitel submits, however, that "the admissibility of extrinsic evidence, where it is proved that the document was not in fact intended to contain all the terms of the contract, does not turn the rule into a merely 'circular statement' " (Treitel, *supra* n 9, at p 194).

[40] Canada, Law Reform Commission of British Columbia, *Report on Parol Evidence Rule* (Report No 44, 1979), available at http://www.bcli.org/pages/publications/lrcreports/reports(html)/Lrc44text.html.

[41] It is unclear whether this recommendation has been made into law.

[42] Canada, Ontario Law Reform Commission, *Report on Amendment of the Law of Contract* (Report No 85, 1987), at ch 8.

C. USA

73 In the United States[43] too, proposals for the reform of the parol evidence rule have been advanced. Commentators have criticised the rule stating that it "confuses attorneys in counselling clients about contracts that the rule may affect if the case goes to court" and that "[t]he danger of incorrect verdicts because of the absence of the parol evidence rule would be no greater than the danger of incorrect verdicts with the rule." In 1977 the California Law Revision Commission made tentative recommendations to codify the exceptions to the parol evidence rule.[44]

74 The purpose behind the parol evidence rule is to "prevent deception and to protect against convenient memories"[45]. Simply put, the rule states that "[I]f parties have reduced their entire agreement to writing, they are not allowed to introduce testimony of prior oral understandings that are at variance with the written agreement".[46] An unambiguous written document may not be contradicted, added to or explained by evidence of a prior agreement or contemporaneous oral agreement, absent fraud or mistake. The written document must purport to be complete, unambiguous and unconditional.

75 Section 2-202 of the UCC[47], which provides a codified version of the rule, states that although parol evidence may not be used to contradict an integrated agreement, evidence of the course of dealing, usage of trade, or course of performance is admissible to explain or supplement the written agreement.

> **UCC §2-202**
>
> **(1) Final Written Expression: Parol or Extrinsic Evidence**
>
> (a) Terms with respect to which the confirmatory memoranda of the parties agree or which are otherwise set forth in a writing intended by the parties as a final expression of their agreement with respect to such terms as are included therein may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement but may be explained or supplemented
>
> (i) By course of dealing or usage of trade or by course of performance and
>
> (ii) By evidence of consistent additional terms unless the court finds the writing to have been intended also as a complete and exclusive statement of the terms of the agreement.

[43] See Justin Sweet, "Contract Making and Parol Evidence: Diagnosis and Treatment of a Sick Rule" (1968) 53 Corn LR 1036; George E Palmer, "Reformation and the Parol Evidence Rule" (1967) 65(5) Mich LR 833; "Parol Evidence Rule: Is It Necessary?" (1969) 44 NYULR 972; "Contracts – Warranties, Unconscionability and the Parol Evidence Rule" (1978) 27 Buffalo LR 521.

[44] USA, California Law Revision Commission, *Tentative Recommendation Relating to the Parol Evidence Rule* (Study No 79, 1977). It is not clear whether the recommendations were implemented.

[45] Howard O Hunter, *Modern Law of Contracts* (Westgroup, 2nd Rev Ed, 1999) §7:6.

[46] *Ibid*.

[47] Uniform Commercial Code Art 2 (The American Law Institute and the National Conference of Commissioners on Uniform State Laws).

76 Apart from the statutory exceptions provided in the UCC, other exceptions to the rule exist where the agreement may be explained by:

(a) course of dealing, usage or trade, or performance;

(b) evidence of consistent additional terms, unless the agreement establishes that it is complete and exclusive (*eg*, contains a merger clause or an incorporation of all prior dealings clause);

(c) the writing on its face shows that other terms may be introduced, but not if those terms conflict with the written terms (*ie*, the partial integration rule);

(d) evidence defining the terms used in previous negotiations (*eg*, the terms "equally divided" or "reasonable rates");

(e) explanations of ambiguous terms;

(f) evidence of surrounding circumstances or subject matter of agreement or intention of parties where ambiguity exists (not as an exception but as a negative restatement of the rule);

(g) disclosure of the status of certain parties (*eg*, to disclose a principal where status is in question);

(h) demonstration of collateral facts of transaction (*eg*, use of term "f.o.b." without designation of geographical location of delivery); or

(i) demonstration of the actual recital of facts or consideration not affecting the validity of the document.

77 The rule has been applied in arbitration agreements, assignments, bonds, construction contracts, deeds, insurance contracts, leases, letters, notes, records, releases, stocks, subscriptions, and titles.

D. India

78 The Law Commission of India completed, in 2003, a review of the Indian Evidence Act, 1872.[48] It is one of the Commission's most comprehensive reports on the Act.[49] In relation to ss 91 to 100 of the Act, the Law Commission recommended amendments to two provisions.

[48] Law Commission of India 185th Report, *supra* n 16. Sections 91 – 100 of the Indian Evidence Act 1872 (Act No 1 of 1872), which relate to the parol evidence rule, are *in pari materia* with ss 93 – 102 of the Singapore Evidence Act.

[49] *Id*, at Part I.

(1) Section 92 – application to unilateral documents

79 In respect of s 92 of the Indian Evidence Act (which is *in pari materia* with s 94 of the Singapore Evidence Act), the Law Commission considered the difference between the earlier part and the latter part of the principal rule.[50]

(a) The earlier part refers to "contract, grant or other disposition of property" which are between one or more parties. The prohibition relating to "no evidence of any oral agreement or statement" at variance with the document refers to transactions between parties to any such instrument or their representative.

(b) The latter part refers to "any matter required by law to be reduced to the form of a document".

80 The Law Commission observed that it has been held that the latter part is also confined to bilateral documents and does not apply to unilateral documents such as: (i) confessional statements of accused persons; (ii) statements of witnesses; (iii) other court proceedings (apart from decrees); and (iv) resolutions of companies when required to be in writing.[51] Section 92 does not apply and hence oral evidence to vary such unilateral documents is permissible.

81 The Law Commission took the view that such documents, though unilateral, cannot be allowed to be varied or modified by oral evidence. It observed that in England, the same rule of exclusion of extrinsic evidence applies to the statutory deposition of a witness in a civil or criminal proceeding, and the statutory examination of a prisoner, neither of which can be contradicted or varied by extrinsic evidence.[52]

82 Accordingly, the Law Commission was of the view that s 92 required some redrafting: (a) to clarify its application in respect of bilateral transactions and (b) to prohibit oral evidence to vary unilateral transactions. It recommended the following amendment in the opening paragraph of s 92 and the insertion of a new s 92A to deal with the respective issues.

> **Exclusion of evidence of oral agreement**
>
> **92.** When the terms of any such contract, grant or other disposition of property as is referred to in section 91 or any matter required by law to be reduced to the form of a document and constituting a transaction between two or more parties, have been proved according to section 91, no evidence of any oral agreement or statement shall be admitted–
>
> (a) as between the parties to any such contract, grant or other disposition of property or their representatives in interest, for the purpose of contradicting, varying, adding to, or subtracting from, the terms of the document, or

[50] *Id*, at pp 436 – 440.

[51] Citing the Indian Supreme Court decision of *Bai Hira Devi v The Official Assignee of Bombay*, [1958] AIR SC 448.

[52] Sarkar, *supra* n 14, at p 1312, citing *Phipson on Evidence* (Sweet & Maxwell, 11th Ed, 1970) at p 788 and *Phipson on Evidence* (Sweet & Maxwell, 15th Ed, 2000) at para 42.17.

> (b) as between the parties to such transaction, or their representatives in interest, for the purpose of contradicting, varying, adding to, or subtracting from the terms of the document in which the matter required by law to be reduced to the form of a document is recorded, as the case may be.
>
> **Exclusion of oral evidence in the case of certain unilateral documents**
>
> **92A.** When any matter required by law to be reduced to the form of a document, and not constituting a transaction between parties, such as a confession of an accused, the statement of a witness, a court proceeding (other than judgments, decree or order), a resolution of a company required to be in writing, has been so reduced to writing and proved according to section 91, no evidence of any oral statement shall be admitted for the purpose of contradicting, varying, adding to, or subtracting from the contents of the document.

(2) Section 99

83 In respect of s 99 (which is *in pari materia* with s 101 of the Singapore Evidence Act), the Law Commission felt that three aspects of the rule should be considered:

> The first one is that the section enabling extrinsic evidence must apply where both parties in a case are strangers to a document or one party is a stranger. Secondly, the section permits evidence to 'vary'. The word, 'contradict, add to or subtract', which are used in other sections must also be added. Thirdly, so far as where third parties to the document are involved, there must be an exception, as in England. The Commission accepted the suggestion in Cross on Evidence, 1974, page 540, that 'contradiction by oral evidence should not be permitted, even between strangers', if the matter is required by law to be reduced to writing.[53]

84 Accordingly, it recommended that the provision be redrafted as follows:

> **Who may give evidence of agreement varying the terms of a document**
>
> **99.** Evidence of any fact tending to show a contemporaneous agreement contradicting, varying, adding to, or subtracting from the terms of a document may be given –
>
> > (a) as between persons who are not parties to the document or their representatives in interest; or
> >
> > (b) as between a person who is a party to the document or his representative in interest and a person who is not such party or representative in interest:
>
> Provided that no such evidence shall be given where the matter is required by law to be reduced to writing.

[53] Law Commission of India 185th Report, *supra* n 16, at pp 452 – 453.

VII. Review of Statutory Rule

85 This Part considers various significant issues concerning the statutory rule.

A. Whether statutory rule should be preserved

86 It would appear from the survey of the selected common law jurisdictions in the **Part VI** that some doubts have been cast about the continuing usefulness of the parol evidence rule. This is particularly so in jurisdictions where the rule is uncodified. The many exceptions to the rule developed by the courts over the years to mitigate the possible injustice caused by the rule have greatly diminished the rule itself. The Law Commission of England and Wales, in particular, doubted whether the rule continued to exist.[54]

87 The case for abolition has been argued on the basis that the rule is circular and given to technicality, which may lead to the exclusion of relevant evidence and result in injustice in particular cases. Abolishing the rule would unfetter the courts and enable the courts to examine all the evidence, including the relevant documents, oral and other extrinsic evidence, as well as evidence of the surrounding circumstances, and give whatever weight was appropriate to the total evidence in each case.

88 Mention should also be made of the view that the rule is actually a substantive and not evidential rule.[55] This is because "Parol proof is excluded, not because it is lacking in evidentiary value, but because the law for some substantive reason declares that what is sought to be proved by it … shall not be shown".[56]

89 On the face of it, it appears an attractive option to abolish the statutory parol evidence rule in Singapore and to allow all manner of extrinsic evidence to be admitted for the purposes of contradicting or supplementing the written document. This is the model used in arbitration, where all evidence is admissible and everything hinges on the weight the arbitrator assigns to that particular piece of evidence. In some countries such as Japan there appears to be no equivalent of a parol evidence rule, and a Japanese court is entitled to consider not only the form and language of the contract but also the testimony of the parties as to what their intentions were when they entered into the contract and what they intended its language should mean.[57]

90 The counter-argument, however, is that allowing all such evidence in court proceedings would run the risk of the proceedings being sidetracked by peripheral evidential issues. This would prolong the proceedings and significantly escalate the costs of litigation.

91 More importantly, there are many important cases where the parties wish to minimise the incidence of disputes over what is or is not part of the contract and the parol evidence rule can serve this legitimate and important purpose of promoting a more certain

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[54] Discussed at para 68 above.

[55] See John Jenry Wigmore, *Wigmore on Evidence* vol 9 §2400 (Little, Brown & Co, Chadbourn Rev Ed, 1981).

[56] *Pitcairn v Philip Hiss Co* 125 F 110 (3rd Cir, 1903).

[57] *Kaufman, Gregory Laurence v Datacraft Asia Ltd*, *supra* n 4 at [34].

administration of the written contract which the parties intend to be a complete expression of their willingness to be bound.

92 It is also noteworthy that none of the other jurisdictions appear to have taken any active steps to abolish the parol evidence rule. The rule continues to be discussed in modern legal textbooks on the assumption that it continues to exist and serve a useful purpose, although somewhat diminished in ambit compared with the past. The provisions on parol evidence in the Indian Evidence Act 1872 are substantially the same as the Singapore Act, and the Indian provisions have not been amended. In their review of the Indian Act in 2003, no recommendation was made by the Law Commission of India to abolish the parol evidence rule.[58]

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

B. Application of statutory rule

(1) Whether entire contract must be in writing

94 There is authority that the best evidence rule as codified in s 93 does not prevent proof of the oral terms of partly written and partly oral contracts.

95 It was held by the Federal Court of Malaysia that the requirement to prove a written contract by production of the document applies only where all – as opposed to only some – of the terms of the contract are written into the agreement: *Tan Chong & Sons Motor Co (Sdn) Bhd v Alan McKnight* [1983] 1 MLJ 220, Federal Court, Malaysia.

96 In Singapore, it has been held that the expression "When the terms of any such contract" in s 93 must be read to mean "When *all* the terms of any such contract": *Damu Jadhao v Paras Nath Singh* [1965] 2 MLJ 38, *per* Ambrose J. In our view, this is correct and no amendment is necessary save that it may be considered useful to introduce words to s 93 to remove any doubts on the matter.

97 The important question is whether when a contract is partly written and partly oral, the written part may be contradicted, varied, added to or subtracted from. On this point, the Federal Court in *Tindok Besar Estate Sdn Bhd v Tinjar Co* [1979] 2 MLJ 229 held that the written part cannot be contradicted, varied, added to or subtracted from. In other words, s 94 applies to the written part.

98 In contrast, at common law, where a contract is partly oral and partly written, the parol evidence rule (in the second sense) does not apply and the written part can be

[58] Discussed at paras 78 – 84 above.

contradicted. Thus, a party can show that a written term was subsequently superseded by an oral term.

99 This is a better result than that produced by s 94 since it is in keeping with the narrower purpose that the parol evidence rule ought to serve. Unless the parties have made a contract which is wholly in writing, they should be free to admit extrinsic evidence to contradict or supplement any written term of their contract.

(2) Unilateral documents

100 The Law Commission of India in its 185th report dealt with unilateral documents, such as a confession of an accused, the statement of a witness, a court proceeding (other than a judgment, decree or order), and a resolution of a company required to be in writing. They recommended that s 92 (s 94 of the Singapore Evidence Act) be amended to include such documents as well, so that they cannot be varied or modified by oral evidence.

101 In our view, it is not necessary to make a similar amendment to s 94. Section 94 should be directed towards giving effect to the parties' intention to make their written contract the complete expression of their willingness to be bound. It would go beyond this purpose to confer the same effect to matters in which the promotion of certainty in the resolution of possible disputes is not required.

C. Relationship between sections 93 and 94

102 In *China Insurance v Liberty Insurance*, Phang JC considered, in *obiter*, the relationship between ss 93 and 94.

103 The facts of that case illustrate a potential issue that might arise. A company ("the insured") took up an insurance policy with the defendant insurance company to cover general industrial risks. Subsequently, the insured also took up a separate, more specific insurance policy with the plaintiff insurance company to cover work done on board two vessels at a shipyard. An employee of the insured was injured while working on board one of the vessels. A claim was made against the plaintiff under its insurance policy. The plaintiff sought to claim against the defendant insurance company for contribution under the doctrine of double insurance.

104 The issue that the court had to decide was whether the plaintiff's policy covered the same subject matter and risk as the defendant's policy. The defendant sought, among other things, to introduce as evidence three affidavits made by officers of the insured to clarify the scope of coverage of the defendant's insurance policy. The affidavits would have made it clear that the insured took up insurance with the plaintiffs in order to cover risks not already covered by their insurance policy with the defendant. This would have supported the defendant's case against their liability to contribute under double insurance.

105 Phang JC was able to dispose of the case in the defendant's favour on the plain construction of the documentary evidence alone. But he also went on to consider, in *obiter*, whether extrinsic evidence in the form of the affidavits could be admitted to aid the construction of the documentary evidence. He opined that the phrase "as between the parties" in s 94 clearly precluded its application to the present fact situation. Section 94

does not apply to fact situations such as the present where both parties are essentially strangers to each other's contracts.[59]

106 He then considered whether the affidavit evidence could be admitted under s 93. He observed that unlike s 94, s 93 is of more general application or coverage. Section 93 deals with the exclusiveness of documentary evidence, whilst s 94 deals with the conclusiveness of documentary evidence. The following comments from the Malaysian High Court decision of *Datuk Tan Leng Teck v Sarjana Sdn Bhd*[60] were cited with approval[61]:

> [Section 91] means what it says. It applies to any matter which is required by law to be reduced to the form of a document. Consequently, there can be absolutely no dispute that it applies to both bilateral and unilateral and dispositive and non-dispositive documents. On the other hand [s 94] having described the documents to which it applies including the documents encapsulated by the phrase in question [*viz* "when the terms … have been proved according to [s 93] …"], goes on to say, in its operative part, that '… no evidence of any oral agreement or statement shall be admitted *as between the parties to any such instrument or their representatives in interest* …'. (Emphasis added.) Thus the phrase, as it appears in [s 94], is explicitly qualified by the words emphasized. The words '… as between the parties to any such instrument or their representatives in interest …' clearly and crisply connote in crystalline terms that the documents contemplated by [s 94] are bilateral and dispositive in nature.

107 The affidavits in question would come within the ambit of s 93. But the question then arises whether they are precluded from being admitted under s 93:

> If, however, s 93 applies in the present fact situation, does it then preclude the admission of the evidence from the above-mentioned affidavits? … The issue which arises here is one that raises, simultaneously, a much broader issue – what is the precise relationship between ss 93 and 94 of the Evidence Act on the one hand and the common law on the other? This issue, put in relation to the more specific perspective of the facts in the instant case, raises the question: Are there one or more common law exceptions which apply in order to permit admission of the affidavit evidence in spite of the presence of s 93 of the Evidence Act?[62]

108 The question remains open. But if extrinsic evidence (such as the affidavits in the case of *China Insurance v Liberty Insurance*) which may aid in the interpretation of a contract or other document is excluded, it may defeat the commercial expectations of the parties. In so far as a strict application of the statutory rule may have that effect, amendments could be made to the statutory rule to remove this technicality.

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[59] *China Insurance v Liberty Insurance*, *supra* n 2, at [31].

[60] [1997] 4 MLJ 329 at 344, *per* Augustine Paul JC (as he then was).

[61] *China Insurance v Liberty Insurance*, *supra* n 2, at [33] – [35].

[62] *China Insurance v Liberty Insurance*, *supra* n 2, at [37]. "Superficially, the relationship between the two sections may be put as follows: the first makes the document exclusive evidence and section 94 makes it conclusive evidence, by refusing the admission of evidence of any oral agreement or statement varying, contradicting, adding to or subtracting from the terms of the contract. In fact, however, there are so many qualifications to section 94 that the instances in which such evidence is effectively barred are not many." (Halsbury's Laws of Singapore, *supra* n 6 at [120.328])

109 In this regard it may be noteworthy that in Stephen's Digest, the two rules are combined as one, and provide as follows[63]:

> EVIDENCE OF TERMS OF JUDGMENTS, CONTRACTS, GRANTS AND OTHER DISPOSITIONS OF PROPERTY REDUCED TO A DOCUMENTARY FORM
>
> WHEN any judgment of any Court or any other judicial or official proceeding, or any contract, or any grant or other disposition of property has been reduced to the form of a document or series of documents, no evidence may be given of such judgment or proceedings, or of the terms of such contract, grant or disposition of property except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions hereinbefore contained. Nor may the contents of any such document be contradicted, altered, added to or varied by oral evidence:
>
> Provided that any of the following matters may be proved:
>
> … [the exceptions to the rule]

D. Applicability of exceptions under the common law

110 The exceptions to the rule in s 94 are set out in provisos (*a*) to (*f*) of the section.

111 What is the precise relationship between the statutory rule and the common law?

(a) Are the statutory provisions and the list of provisos exhaustive? Does the fact of codification prohibit the introduction of the common law exceptions?

(b) Or, can the common law exceptions to the rule apply in order to permit admission of evidence in spite of the statutory provisions?

112 Phang JC, at para 39 of his judgment in *China Insurance v Liberty Insurance*, expressed the issue as follows:

> That many exceptions to the parol evidence rule exist at common law is undoubtedly the case. As we have already seen, it is equally clear that the parol evidence rule in the Singapore context is embodied, in the main at least, within ss 93 and 94 of the Evidence Act (and compare *Tan Hock Keng v L & M Group Investments Ltd* [2001] 4 SLR 428, especially at [11], *per* Rajendran J, reversed in part in [2002] 2 SLR 213, but not on this particular point). This being the case, one has to bear in mind that the general starting point is that established principles pertaining to codes, of which the Evidence Act is an illustration, generally prohibit the introduction of common law rules: see the oft-cited decisions of *The Governor and Company of The Bank of England v Vagliano Brothers* [1891] AC 107 and *Jayasena v R* [1970] AC 618. However, it appears to be the case that where the code concerned is itself silent with regard to the specific issue(s) or point(s) in question, the common law rules do continue

[63] Stephen's Digest, *supra* n 23, Art 97, p 111.

> to be relevant and even applicable: see *PP v Yuvaraj* [1969] 2 MLJ 89 and *Shaaban v Chong Fook Kam* [1969] 2 MLJ 219. [64]

113 Section 2(2) of the Evidence Act arguably supports the position that common law rules do continue to be of relevance where the code itself is silent with regard to the points concerned. It provides that:

> All rules of evidence not contained in any written law, so far as such rules are inconsistent with any of the provisions of this Act, are repealed.

114 By implication, the common law exceptions, so far as they are consistent with the provisions of the Evidence Act, continue to be applicable in Singapore. This is a view that has found favour and, in our view, reflects the correct and desirable position at law.[65]

115 In order to clarify the continuing applicability of the common law exceptions to the parol evidence rule, general words could be added to s 94 to make it clear that the list of statutory provisos are not closed. Exceptions at common law could apply, except where they are in conflict with any of the provisos in s 94. The courts would then have power to develop the common law exceptions according to modern needs and circumstances, rather than being bound by overly technical statutory rules that may have reflected the state of the law more than a century ago.[66]

E. Collateral contracts

116 What if a common law exception is not consistent with the provisos to the statutory rule? This issue arises in relation to collateral contracts.

117 The proof of collateral contracts is currently allowed under proviso (*b*) of s 94. Such separate oral agreements can only be admitted on a matter on which a document is silent and which is not inconsistent with its terms.

118 But there have been cases at common law where evidence relating to collateral contracts have been admitted even where the terms are inconsistent with those contained in the main agreement to override the terms contained in the main agreement. As Phang JC observed in *China Insurance v Liberty Insurance* (at [43]):

> [T]he common law exception relating to collateral contracts allows terms in the collateral contract which are *inconsistent* with those contained in the main agreement to override terms contained in the main agreement itself. While there are divergences within the English case law itself, the fact remains that cases which embody this principle do exist and are widely cited and applied: see, for example, the oft-cited English High Court

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[64] See also Cheshire, Fifoot and Furmston, *supra* n 8, at p 244.

[65] *Soon Peck Wah v Woon Che Chye* [1998] 1 SLR 234, Court of Appeal; Halsbury's Laws of Singapore, *supra* n 6, at [120.004]. Phang JC was in favour of this view: see *China Insurance v Liberty Insurance* at [45]. See also Cheshire, Fifoot and Furmston, *supra* n 8 at p 244: "It is submitted that [section 2(2)] supports the view that common law exceptions, in so far as they are *consistent* with the provisions of the Evidence Act, continue to be *applicable* in the local context."

[66] For example, courts in Australia have shown a liberalising trend in the application of the parol evidence rule with respect to prior negotiations (*eg Codelfa Construction Pty Ltd v State Rail Authority of NSW* 149 CLR 337) and subsequent conduct (*eg Hide & Skin Trading Pty Ltd v Oceanic Meat Traders Ltd* (1990) 20 NSWLR 310).

> decision of *City and Westminster Properties (1934) Ltd v Mudd* [1959] Ch 129 (though compare the Australian position: see J W Carter and D J Harland, *Contract Law in Australia* (LexisNexis Butterworths, 4th Ed, 2002) at para 613, where reference is made, *inter alia*, to the leading Australian High Court decision of *Hoyt's Proprietary Limited v Spencer* (1919) 27 CLR 133).

119 In Malaysia, it has been held that a collateral contract does not offend the parol evidence rule because it is separate from the main contract: *Tan Swee Hoe Co Ltd v Ali Hussain Bros* [1980] 2 MLJ 17, Federal Court, Malaysia. Similarly it was also stated by the Malaysian High Court in *Industrial & Agricultural Distribution Sdn Bhd v Golden Sands Construction Sdn Bhd* [1993] 3 MLJ 433 that a collateral contract may contradict the main contract itself:

> In our view those cases are strong authority for the proposition that an oral promise, given at the time of contracting which induces a party to enter into the contract, overrides any inconsistent written agreement. This device of collateral contract does not offend the extrinsic evidence rule because the oral promise is not imported into the main agreement. Instead it constitutes a separate contract which exists side by side with the main agreement.

120 Such an approach, however, has not been accepted by courts in Singapore. It remains the position in Singapore that evidence of collateral contracts can be admitted only where it is not inconsistent with the written agreement, as is expressly stated in proviso (*b*). The Court of Appeal in *Latham v Credit Suisse First Boston* held as follows[67]:

> In our judgment, [section 94(*b*)] could not operate to admit evidence of the verbal agreement either as a collateral contract or as forming part of the terms of a part oral, part written contract. Section 94(*b*) only allows the admission of evidence of a collateral contract on matters which are not inconsistent with the written agreement. Where the alleged terms of the oral agreement are in addition to and therefore inconsistent with the written contract, that evidence is inadmissible: *Ng Lay Choo Marion v Lok Lai Oi* [1995] 3 SLR 221. The position taken in the Malaysian case of *Tindok Besar Estate Sdn Bhd v Tinjar Co* [1979] 2 MLJ 229 also favours a literal interpretation of ss 93 and 94 of the Evidence Act. However, the court in *Tan Swee Hoe Co Ltd v Ali Hussain Bros* [1980] 2 MLJ 16, a Malaysian authority cited by Latham, came to a result which was not in line with this approach as it stated that, in accordance with the English authority of *Mendelssohn v Normand Ltd* [1970] 1 QB 177, an oral promise given at the time of contracting which induces a party to enter into the contract, overrides any inconsistent written agreement.

121 The prevailing position under the common law in England is more flexible.[68] In our view, this more flexible position better promotes giving effect to the true intention of the parties. We are in favour of allowing extrinsic proof of collateral contracts, even where they are inconsistent with the written agreement. It is recommended that amendments be made to proviso (*b*) to provide accordingly.

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[67] *Latham v Credit Suisse First Boston* [2000] 2 SLR 693, Court of Appeal (Yong Pung How CJ, Chao Hick Tin JA, L P Thean JA), at [21].

[68] See Treitel, *supra* n 9, at p 199 – 200.

F. Relationship between section 94(f) and sections 95 to 100

(1) Section 94(f)

122 Section 94(*f*) is a provision that is expressed in very general terms. Although appearing as a proviso to s 94, it is in fact a rule relating to the construction of documents. Section 94(*f*) therefore has to be read together with ss 95 to 100 which provide for rules relating to construction.

123 The provision itself is very broadly worded: "any fact may be proved which shows in what manner the language of a document is related to existing facts". But it has given rise to the issue of whether ambiguity is a prerequisite before extrinsic facts may be introduced under s 94(*f*) to aid in the construction of a document.

124 In *Citicorp Investment Bank (Singapore) Ltd v Wee Ah Kee* [1997] 2 SLR 759, the Court of Appeal held that s 94(*f*) will only come into play when there is some latent ambiguity in the contractual document itself. But it has been argued that extrinsic evidence should be admissible even where the document appears clear and unambiguous, for the purpose of ascertaining the intended meaning of the parties and whether there is in fact an ambiguity.[69]

125 On balance, a broader and more permissive application of s 94(*f*) is to be preferred. It accords with the modern approach to construction of contracts. In *MAE Engineering Ltd v Fire-Stop Marketing Services Pte Ltd* [2005] 1 SLR 379, the Court of Appeal stated (at [23]) that:

> … [I]t is trite law that when construing a contract, the court must also look at the factual matrix in which the agreement was made, as the surrounding circumstances including 'the "genesis" and "aim" of the transaction' are relevant: *Prenn v Simmonds* [1971] 1 WLR 1381 at 1385. As Lord Wilberforce explained in *Reardon Smith Line Ltd v Hansen-Tangen* [1976] 1 WLR 989 at 995–996 (approved by the Court of Appeal in *Mt Elizabeth Hospital Ltd v Allan Ng Clinic for Women* [1994] 3 SLR 639 at 652, [35]):
>
> > No contracts are made in a vacuum: there is always a setting in which they have to be placed. The nature of what is legitimate to have regard to is usually described as "the surrounding circumstances" but this phrase is imprecise: it can be illustrated but hardly defined. In a commercial contract it is certainly right that the court should know the commercial purpose of the contract and this in turn presupposes knowledge of the genesis of the transaction, the background, the context, the market in which the parties are operating.
>
> and at 997:
>
> > [W]hat the court must do must be to place itself in thought in the same factual matrix as that in which the parties were.

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[69] Daniel Seng, "Another Clog on the Construction of Contracts? The Parol Evidence Rule and the Use of Extrinsic Evidence" [1997] SJLS 457 – 498. In *China Insurance v Liberty Insurance*, *supra* n 2, Phang JC was of the view that it should not be necessary to restrict extrinsic evidence only when the contract is ambiguous. Any aid to construction which does not add to, vary or contradict the relevant documents ought to be permitted: at [51].

126 In statutory interpretation, the modern approach is that a purposive approach to interpretation prevails over a strict and literal approach. Consideration may be given to extrinsic materials for the purpose of confirming or ascertaining the meaning of a provision of written law.[70] There is no prerequisite that the provision be ambiguous before such reference may be made to extrinsic materials.[71] By analogy, the approach to construction of documents, like the construction of statutes, should be the purposive approach, so as to best give effect to the purpose and intention of the parties.[72]

127 Section 94(*f*), which is essentially an interpretive provision, must be read with the other interpretive provisions of ss 95 to 100. These sections distinguish between situations where the language of the document is plain and accurately applies to existing facts (s 96), situations of patent ambiguity (s 95), situations of latent ambiguity (ss 97 to 99) and situations where expert or special knowledge may be required to show the meaning of a document (s 100). These provisions can all be regarded as specific applications or illustrations of the broad principle of interpretation contained in s 94(*f*).

128 Section 94(*f*) should, logically, stand on its own as a separate provision, rather than being a proviso of s 94. It can be combined with ss 95 to 100 into one section dealing with construction of documents.[73] The application of the provision can also be made simpler by removing existing distinctions between patent ambiguity and latent ambiguity, which are outmoded and overly technical:

> [T]he distinctions between patent ambiguities, latent ambiguities and equivocations as regards admissibility of extrinsic evidence are based on outmoded and highly technical and artificial rules and introduce absurd refinements.[74]

129 The new provision can be broadly worded to allow extrinsic evidence to be adduced for the following purposes:

(a) to show in what manner the language of a document is related to existing facts and to confirm that the language of the document applies accurately to existing facts; or

(b) to ascertain the meaning of the document when the language of the document is ambiguous or obscure in relation to existing facts.

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[70] Section 9A of the Interpretation Act (Cap 1, 2002 Rev Ed): Purposive interpretation of written law and use of extrinsic materials.

[71] *Planmarine AG v Maritime and Port Authority of Singapore* [1999] 2 SLR 1, Court of Appeal (Yong Pung How CJ, Karthigesu JA, Lai Kew Chai J), at [22].

[72] It has been suggested that the types of extrinsic evidence which can be consulted under s 94(*f*) include: "the parties to the instrument and their legal relations to each other, the nature, identity and extent of the subject-matter, the circumstances surrounding the instrument such as its genesis, as well as the knowledge, treatment and habits of speech of the writer or writers.": Daniel Seng, *supra* n 69, at p 482.

[73] See, for example, Art 98 of Stephen's Digest, *supra* n 23, at p 115 – 121.

[74] Lord Simon of Glaisdale in *L Schuler A G v Wickman Machine Tool Sales Ltd* [1974] AC 235, [1973] 2 All ER 39, House of Lords.

(2) Section 96

130 The question whether to retain the plain language rule contained in s 96 is more controversial. Section 96 is helpful in denying any opportunity to a party to adduce evidence of clerical errors or solicitor's errors where the language used applies clearly to the existing facts. These errors will not be allowed to affect the other party to the contract or third parties who have relied on the instrument, and the aggrieved party will have to look elsewhere for redress. (He may, for example, sue his solicitor for negligence, if any).

131 Abrogating s 96 may create the wrong impression that such evidence is now admissible as aids in construction, even though they are inadmissible for the purposes of contradicting, varying, adding to or subtracting from the contract.

132 However, s 96 has already created the erroneous impression that extrinsic evidence is inadmissible to show that the language is not plain but that the question whether it is so must be decided by reference to the document alone.

133 On the whole, it would be advantageous to abrogate the section, adding the clarification that the use of extrinsic evidence in interpretation must not be allowed to open a back door to the rule in s 94 against contradicting, varying, adding to or subtracting from a wholly written contract by relying on extrinsic evidence.

G. Construction of wills

134 Formerly, s 102 required the courts to construe wills as an English court would. The present s 102 deleted the reference to English courts[75] probably in order to avoid the effects of ss 20 and 21 of the Administration of Justice Act 1982 (c 53) (UK) which give to the court extended powers to admit extrinsic evidence. Inadvertently, it left out any reference to the common law. An amendment could be considered to plug the gap and to make it clear that the common law continues to apply.

[75] The words ", but they shall be construed according to the rules of construction which would be applicable thereto if they were being construed in a court of justice in England" were deleted via the Statutes (Miscellaneous Amendments) Act 1997 (Act 7 of 1997).

VII. Options for Reform

A. First option: Maintain status quo – no legislative amendments

135 The first option is to maintain the existing statutory provisions and make no amendments. This, however, leaves unresolved the various issues and uncertainties relating to the statutory rule, as highlighted in the previous Part. Such lack of clarity in the law is undesirable. Also, keeping our evidence laws in the form they were drafted in the 19th century renders it much more difficult to accommodate modern developments, and leaves an important part of our legal infrastructure potentially out of date and lagging behind the legal systems of developed countries. Maintaining the status quo is therefore a possible but undesirable option.

B. Second option: Abolish parol evidence rule by statute

136 The second option is to abolish, by statute, the parol evidence rule. As has been discussed in **Part VI**, however, this is not a desirable option.[76]

C. Third option: Abolish statutory rule and rely on the common law

137 The third option is to delete ss 93 to 102 of the Evidence Act without abolishing the parol evidence rule, leaving it to be applied under the common law. The main advantage of this approach is that the rule could become far more dynamic and match more closely the developments in other common law jurisdictions.

138 Questions could arise, however, about the precise scope of the "common law". There would be no body of common law in Singapore, since our cases on the parol evidence rule had been decided in relation to the statutory provisions in the Evidence Act, and would technically be irrelevant if the provisions were removed. Our common law on the parol evidence rule would have to start afresh. Until a body of local case law is developed, it will be necessary in the interim to import and continue to receive a developed body of case law, probably from England and Wales. A cut-off date may have to be considered for the reception of the English law on parol evidence, so that developments in English law on account of the entry of the UK into the European Union, and which may not be relevant in the local context, are not inadvertently imported as well. All this could mean that our parol evidence rule may be substantially different from that of the current statutory rule.

139 But there might be an even more significant difficulty. The Law Commission of England and Wales came to the conclusion, in 1986, that:

> [T]here is no *rule of law* that evidence is rendered inadmissible or is to be ignored solely because a document exists which looks like a complete

[76] Paras 86 – 93 above.

> contract. Whether it is a complete contract depends upon the intention of the parties, objectively judged, and not on any rule of law.[77]

140 If the view of the Law Commission is correct, then there may well be no common law parol evidence rule to fall back on if the statutory rule is removed. This would throw into disarray an entire body of legal practice based on the existence of the statutory rule for over more than a century.

141 Accordingly, for these reasons and the reasons set out in **Part VI**, abolishing the statutory rule is not a favourable option. The statutory rule remains fundamentally sound. It has served the litigation process reasonably well. Local lawyers are familiar with the broad principles of the statutory rule and there are local and Indian cases that expound on it. To abolish the statutory rule would remove an important pillar of our evidence laws and would be counter-productive.

D. Fourth option: Retain and improve statutory rule

142 The fourth option is to amend the statutory provisions to improve the statutory rule. Amendments could be made to clarify the various issues relating to the rule, as highlighted in **Part VI**. On balance, this is the preferred option. Details of the proposed improvements are discussed in the next Part.

[77] UK, Law Commission Report No 154, *supra* n 7, at para 2.17, emphasis in the original text. See also generally at paras 2.45 and 3.1 – 3.8 of the same report.

VIII. Proposed Amendments

A. Redrafting of sections 93 to 102

143 A proposed redrafting of ss 93 to 102, including a draft Explanatory Statement, is set out at **Annex C**.

144 The various provisions have been divided into subsections, with each subsection making a specific point and with the use of paragraphs and sub-paragraphs, in accordance with the prevailing legislative drafting style.

B. Broad structure of provisions

145 The proposed draft is structured to bring out more clearly the three distinct rules that constitute the parol evidence rule[78]:

(a) The new s 93 corresponds to the existing s 93 and relates to the best evidence rule.

(b) The new s 94 combines the existing ss 94 and 101. It relates to the second rule on exclusion of oral evidence and the exceptions to that rule (other than proviso (*f*) to s 94).

(c) The new s 95 combines the existing ss 94(*f*) and 100, with additional provisions. It relates to the third rule on the admission of evidence in aid of the construction of documents. The fine distinctions between patent ambiguity and latent ambiguity in the existing ss 95 and 97 to 99 have been omitted, as well as the plain meaning rule in s 96.[79]

(d) With the provisions on construction combined under s 95, ss 96 to 101 will not be in use.

(e) Section 102 has been amended to clarify that the common law will apply to the interpretation of wills.[80]

146 The illustrations to the current provisions, which are generally outdated, have been omitted. The illustrations have been found to be of limited use in illustrating the applicable principles. In their brevity, the illustrations also have the potential to over-generalise and hence to be confusing. It ought to be sufficient to state the statutory rule as clearly as possible, and leave illustrations on its application to case law. No real advantage is achieved in drafting the illustrations into the statute.

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[78] The three rules were explained in paras 12 – 13 above.

[79] See discussion at paras 122 – 133, and also paras 51 – 61.

[80] See discussion at para 134 above.

C. Application of statutory rule

147 The proposed new s 93(1) makes it clear that the statutory rule will apply to a contract only where *all* the terms of the contract have been reduced to the form of a document (or more than one document). It will not apply where the contract is partly written and partly oral.[81]

D. Applicability of common law exceptions

148 The new s 94(2) makes it clear that the statutory parol evidence rule will not exclude evidence if that evidence is relevant under substantive law. It provides a clearer statutory basis for the courts to apply common law exceptions that may evolve in the future.[82]

149 In particular, the new s 94(3)(*b*) provides for the admission of evidence relating to collateral contracts even where they are inconsistent with the principal agreement.[83]

E. Extrinsic evidence to be allowed to confirm whether ambiguity exists

150 The proposed new s 95 provides, among other things, that extrinsic evidence may be admitted to confirm that the language of the document applies accurately to existing facts, and that where the document is ambiguous or obscure in relation to existing facts, extrinsic evidence may be adduced to ascertain the meaning of the document.[84] The new provision would allow the admission of extrinsic evidence such as the affidavit evidence in question in *China Insurance v Liberty Insurance*.[85]

F. Other refinements

151 Various other refinements to the statutory provisions have been proposed, and these are explained in greater detail in the draft Explanatory Statement.

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[81] See discussion at paras 94 – 99.

[82] See discussion at paras 110 – 115.

[83] See discussion at paras 116 – 121.

[84] See discussion at paras 122 – 129.

[85] See discussion at paras 102 – 109.

ANNEX A:

REFERENCE FROM

CHIEF JUSTICE YONG PUNG HOW

TO THE LAW REFORM COMMITTEE

(a) Phang JC's grounds of decision in the case of *China Insurance v Liberty Insurance* [2005] SGHC 40; and

(b) Phang JC's note dated 2 March 2005 outlining possible approaches toward legislative reform.

IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2005] SGHC 40

Originating Summons No 1272 of 2004/S

Between

CHINA INSURANCE CO (SINGAPORE) PTE LTD
(RC No 200208384E)

… *Plaintiff*

And

LIBERTY INSURANCE PTE LTD (FORMERLY KNOWN AS LIBERTY CITYSTATE INSURANCE PTE LTD)
(RC No 199002791D)

… *Defendant*

GROUNDS OF DECISION

China Insurance Co (Singapore) Pte Ltd
v
Liberty Insurance Pte Ltd (formerly known as Liberty Citystate Insurance Pte Ltd)

[2005] SGHC 40

High Court — Originating Summons No 1272 of 2004
Andrew Phang Boon Leong JC
11, 12 January 2005; 22 February 2005

28 February 2005

Andrew Phang Boon Leong JC:

Introduction and facts

1 These proceedings involve two insurance companies. The plaintiff claims against the defendant for contribution under the doctrine of double insurance.

2 The factual background is relatively straightforward.

3 BT Engineering Pte Ltd ("BT") procured a Workmen's Compensation – Industrial Risks Policy from the defendant for the period 1 April 2002 to 31 March 2003. This policy was later extended to include Keppel Shipyard ("Keppel") as well.

4 BT subsequently obtained a Workmen's Compensation Policy from the plaintiff for the period 19 April 2002 to 19 July 2002. This particular policy was intended to cover work to be done on board two vessels situated at Keppel (the *FPSO Falcon* and *FPSO Brasil*, respectively). It also embraced both BT and Keppel as the insured.

5 On or about 22 June 2002, one of BT's employees, Sim Cheng Soon ("the employee"), was involved in an accident whilst working on board one of the two vessels referred to in the preceding paragraph – the *FPSO Falcon*. The employee subsequently commenced proceedings against both BT and Keppel for damages arising from his personal injury.

6 The plaintiff does not dispute that it is liable under its policy to indemnify both BT and Keppel in the personal injury claim should the employee succeed in his action. The claim has yet to be resolved. Not content with awaiting the outcome of the claim, the plaintiff initiated these proceedings to obtain a declaration that the defendant is legally liable to indemnify the plaintiff to the extent of 50% of any amount which the plaintiff is liable to pay BT and Keppel apropos their potential liability to the employee in the personal injury claim. The plaintiff based its claim to such contribution under the doctrine of double insurance.

A preliminary point

7 As the personal injury claim was still in progress, I queried counsel about the pressing need for the present action. Counsel for the plaintiff replied that the present proceedings had been initiated in order to preclude any assertion that it had waived its right of contribution *vis-à-vis* the defendant. Counsel for the defendant, in turn, accepted that there were no procedural impediments to adjudicating on the contribution claim before the personal injury claim had been resolved.

8 In the circumstances, I proceeded to hear arguments with regard to the relevant legal issues.

The legal issues

9 As adverted to at the outset, the main issue in these proceedings was whether or not there was a situation of double insurance, which would entail a legal obligation on the part of the defendant to contribute towards any payment made by the plaintiff to BT and Keppel.

10 The broad principles underlying double insurance in general and the requirement for contribution thereunder in particular are not controversial.

11 In *Insurance Law in Singapore* (Butterworths Asia, 2nd Ed, 1997), Professor (now Justice) Tan Lee Meng observes at p 488, as follows:

> An insurer cannot look towards another insurer for contribution towards a loss unless the latter has covered the same insured against the same risk which has materialised.

12 And, in *Principles of Insurance Law* (Butterworths, 5th Ed, 2000), Assoc Prof Poh Chu Chai observes at p 805, as follows:

> To constitute double insurance, the second or subsequent insurance policies taken out by an insured must cover substantially the same risk as the first policy. The mere fact that there is an incidental or some overlap between two or more insurance policies taken out by an insured will not by itself constitute double insurance.

13 Again, it is observed by the same author (at p 1177):

> An insurer's right to seek contribution from another insurer only arises if there is double insurance, namely, where the risk insured and the person insuring are the same.

14 Counsel also helpfully cited a number of cases illustrative of these general principles, for example, the oft-cited English Court of Appeal decision of *North*

British and Mercantile Insurance Company v London, Liverpool, and Globe Insurance Company (1876) 5 Ch D 569.

15 It bears mentioning at this juncture that counsel for both parties accepted the fact that there was no "non-contribution clause" involved on the facts of the present case. Where there is such a clause, it will operate to exclude or limit, as the case may be, the amount of contribution otherwise claimable, assuming that a situation of double insurance can be established in the first instance: see, for example, the Singapore High Court decision in *Liberty Citystate Insurance Pte Ltd v AXA Insurance Singapore Pte Ltd* [2001] 2 SLR 593.

16 Turning to the facts of the present case, it should be noted at the outset that it was assumed throughout by both parties' counsel that the plaintiff's and the defendant's policies covered the same insured.

17 What was at issue in the present case, however, was the question whether the plaintiff's policy covered the *same* subject matter and risk as the defendant's policy. This was, in fact, common ground between counsel.

Counsel's arguments

The plaintiff's arguments

18 Counsel for the plaintiff, Ms Fan, argued that the plaintiff's policy indeed covered the same subject matter and risk as the defendant's policy. She premised her case on a construction of the relevant documents themselves. In particular, she argued that the defendant's policy was broad enough to cover the same subject matter and risk as that contained in the plaintiff's policy. She pointed to the defendant's policy where there was a reference to "any other place in Singapore" as part of the description of the place or location of the insured which

was covered under the policy. Hence, counsel argued, the coverage under the defendant's policy could not be confined to BT's fabrication yard but must also have covered the vessel on which the employee had been injured.

19 Ms Fan also contended that the defendant's policy did not contain a clause which excluded work on board ships. Hence, the defendant's policy must have concurrently covered the more specific risk which also constituted the subject matter of the plaintiff's policy.

20 However, counsel for the plaintiff did have one major difficulty. The defendant denied that the coverage was similar. This was expanded upon in all three affidavits filed by Low Hwee Huan, Gay Siew Fong and Margaret Tan, who were, respectively, the Assistant General Manager (Underwriting) of the defendant, a director of BT, and a senior broking executive with Newstate Stenhouse, the insurance brokers/agents for BT. The general thrust of these affidavits was as follows. The defendant's policy, it was asserted, only covered industrial – as opposed to marine-related – risks. In particular, the defendant's policy excluded risk relating to work upon vessels – specifically, with respect to the project to fabricate modules on the two vessels mentioned in [4] above from 19 April 2002 to 19 July 2002 ("the specific project"). The defendant, in fact, communicated this to BT who duly sought additional coverage for the specific project by way of another insurance policy. Margaret Tan sourced for quotations from two other insurers, American International Group and the plaintiff, respectively. The plaintiff's quotation was found more attractive and upon BT's instructions, additional coverage solely for the specific project was obtained from the plaintiff.

21 It may now be seen why counsel for the plaintiff sought vigorously to exclude these affidavits from evidence. If those facts were accepted, it would follow that the subject matter and risk covered by the defendant's and plaintiff's policies were quite different. Indeed, according to this affidavit evidence, the sole purpose for obtaining the plaintiff's policy was due to the fact that insurance coverage for the specific project was not covered under the existing policy with the defendant.

22 Counsel for the plaintiff sought to rely upon s 94 of the Evidence Act (Cap 97, 1997 Rev Ed) to argue that evidence from the above-mentioned affidavits was inadmissible. Section 94 is, of course, one of the provisions in the Evidence Act which embodies, in statutory form, the parol evidence rule, and reads as follows (illustrations omitted):

> When the terms of any such contract, grant or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to section 93, no evidence of any oral agreement or statement shall be admitted as between the parties to any such instrument or their representatives in interest for the purpose of contradicting, varying, adding to, or subtracting from its terms subject to the following provisions:
>
> > (a) any fact may be proved which would invalidate any document or which would entitle any person to any decree or order relating thereto; such as fraud, intimidation, illegality, want of due execution, want of capacity in any contracting party, the fact that it is wrongly dated, want or failure of consideration, or mistake in fact or law;
> >
> > (b) the existence of any separate oral agreement, as to any matter on which a document is silent and which is not inconsistent with its terms, may be proved; in considering whether or not this proviso applies, the court shall have regard to the degree of formality of the document;
> >
> > (c) the existence of any separate oral agreement constituting a condition precedent to the attaching of any obligation under any such contract, grant or disposition of property, may be proved;

> (d) the existence of any distinct subsequent oral agreement, to rescind or modify any such contract, grant or disposition of property, may be proved except in cases in which such contract, grant or disposition of property is by law required to be in writing, or has been registered according to the law in force for the time being as to the registration of documents;
>
> (e) any usage or custom by which incidents not expressly mentioned in any contract are usually annexed to contracts of that description may be proved; except that the annexing of such incident would not be repugnant to or inconsistent with the express terms of the contract;
>
> (f) any fact may be proved which shows in what manner the language of a document is related to existing facts.

23 Although counsel's arguments appeared persuasive at first blush, I was not persuaded, upon closer analysis, that the affidavit evidence was inadmissible. In particular, I was not persuaded that s 94 of the Evidence Act applied to the facts of the instant case.

The defendant's arguments

24 Counsel for the defendant, Mr Ramasamy, adopted an altogether different tack. Not surprisingly, his focus was on the relevance and admissibility of the affidavit evidence. However, it is important to note that this was not the only plank of his argument. He also dealt with the documents as well. Like counsel for the plaintiff, he also compared the language utilised in the plaintiff's as well as the defendant's policies – arriving (again, not surprisingly) at a diametrically opposite conclusion instead.

25 In particular, counsel for the defendant argued that the defendant's policy was an annual policy whilst the plaintiff's policy was a specific policy intended to cover solely the specific project. In further support of this argument, counsel pointed to the fact that the defendant's policy was described as "Workmen's

Compensation – Industrial Risks" and did not cover marine-related risks. This, he further argued, met the argument of plaintiff's counsel to the effect that the defendant's policy did not contain a clause which excluded work on board ships.

26 I should pause here to note that I was also shown a sample policy which had been issued by the defendant, where marine-related risks were also incorporated and which ineluctably demonstrated the fact that the defendant did describe policies pertaining to marine-related risks differently. It is significant that counsel for the plaintiff did not object to the tendering of this sample policy which, whilst by no means conclusive, was positively helpful in illuminating the defendant's argument with respect to this particular point. I note, however, that this particular sample policy was issued more recently, although it did not appear to be the case that this specific policy only represented a more recent development in so far as the defendant was concerned; nor did counsel for the plaintiff contend otherwise.

27 Counsel for the defendant further argued that the premium rates charged by the defendant for its policy were based on 3% of the estimated wage roll. This, he stated, was the normal premium rate for workmen's compensation industrial risks; where, on the contrary, if the policy was also intended to cover marine-related risks (which included work on board ships), the rate, Mr Ramasamy argued, would have been higher, constituting some 5% of the estimated wage roll. To support this, he referred to assertions in Low Hwee Huan's affidavit.

28 Mr Ramasamy argued further that the affidavit evidence supported his argument that the insured had to procure a policy from the plaintiff simply because the defendant's policy did not cover marine-related risks.

The court's findings

The main issue

29 Were the subject matter and risk covered by the plaintiff's and the defendant's policies the same? If so, there will be a situation of double insurance, under which the defendant will come under a legal obligation to contribute to the plaintiff, assuming that the latter has, in fact, to indemnify the insured. If not, there would of course be no such obligation to contribute.

30 I have already set out both counsel's arguments in some detail. Looking, first and foremost, at the documentary evidence, it is amply clear that, on a plain and reasonable construction of the documents themselves, the risks covered in, respectively, the defendant's and the plaintiff's policies were different. Although counsel for the plaintiff did attempt to point to some general language in the defendant's policy (see [18] above), I agree with counsel for the defendant that there were more persuasive factors which supported his arguments. These included the different headings of the respective policies (see [25] above). More importantly, the coverage of the plaintiff's policy was extremely specific. Indeed, the coverage was for the very project in which the employee was injured (see [25] above). This lends support to the defendant's argument to the effect that there was a need for the insured to take out an *additional* policy from the plaintiff simply because the existing policy (issued by the defendant) did not cover the risk entailed within the specific project in which the employee was injured.

31 Although a plain construction of the documentary evidence alone adequately supports the defendant's case, the affidavit evidence referred to at [20], [27] and [28] above conclusively determined, in my view, the case in the defendant's favour as it was relevant, admissible and persuasive. Further, even

assuming that a comparison of the policies alone was insufficient to determine the case in the defendant's favour, the admission of the affidavit evidence would have clearly done so. This is why, as already noted, counsel for the plaintiff was at pains to argue that such evidence ought to be excluded as extrinsic evidence under the parol evidence rule in general, and s 94 of the Evidence Act in particular. Section 94 of the Evidence Act, however, did not apply to the fact situation here. The phrase "as between the parties" in s 94 clearly precluded its application to the present fact situation. That this is so is acknowledged in all the leading textbooks: see, for example, *Sarkar's Law of Evidence*, (Wadhwa and Company, 15th Ed, 1999), vol 1 at pp 1273, 1309–1312 as well as 1319, and *Sir John Woodroffe & Syed Amir Ali's Law of Evidence* (LexisNexis Butterworths, 17th Ed, 2002), vol 3 at pp 3230, 3247–3248, 3333–3334, 3339–3340 and 3381–3382. Indeed, a literal, albeit reasonable, reading of s 94 itself will demonstrate amply that the provision does not apply to fact situations such as the present where both parties are essentially strangers to each other's contracts/policies.

32 However, it did not follow that counsel for the defendant could then admit the abovementioned affidavits without further let or hindrance. Indeed, in my view, although s 94 of the Evidence Act was inapplicable to the instant facts, s 93 was relevant. The material part of s 93 itself reads as follows:

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

33 Unlike s 94, s 93 is of more general application or coverage. Indeed, before s 94 can be invoked, the fact situation must necessarily fall within the more general ambit of s 93 in the first instance.

34 As the leading textbooks point out, s 93 deals with the *exclusiveness* of documentary evidence, whilst s 94 deals with the *conclusiveness* of documentary evidence: see, for example, *Sarkar's Law of Evidence*, ([31] *supra*) at pp 1267 and 1309. In the Malaysian High Court decision of *Datuk Tan Leng Teck v Sarjana Sdn Bhd* [1997] 4 MLJ 329, Augustine Paul JC (as he then was) elaborated (at 344) thus:

> [Section 93] means what it says. It applies to any matter which is required by law to be reduced to the form of a document. Consequently, there can be absolutely no dispute that it applies to both bilateral and unilateral and dispositive and non-dispositive documents. On the other hand section 94, having described the documents to which it applies including the documents encapsulated by the phrase in question [*viz* "when the terms … have been proved according to section 93 …"], goes on to say, in its operative part, that '… no evidence of any oral agreement or statement shall be admitted *as between the parties to any such instrument or their representatives in interest* …'. (Emphasis added.) Thus the phrase, as it appears in [s 94], is explicitly qualified by the words emphasized. The words '… as between the parties to any such instrument or their representatives in interest …' clearly and crisply connote in crystalline terms that the documents contemplated by [s 94] are bilateral and dispositive in nature.

35 This view is, in fact, not only consistent with the language of ss 93 and 94 but is also embodied within the leading textbooks which the learned judge indeed also refers to in some detail (and see, in so far as the latest editions are concerned, *Sarkar's Law of Evidence*, [31] *supra* at pp 1309–1315 and *Sir John Woodroffe & Syed Amir Ali's Law of Evidence*, [31] *supra* at pp 3333–3334 and 3338–3340).

36 The insurance policies in the present case are clearly non-dispositive documents and do not, as I have already held, come within the purview of s 94 of the Evidence Act. However, having regard to the principles briefly set out above, they do come within the ambit of s 93 of the same Act which, as we have already seen, is much broader in scope.

37 If, however, s 93 applies in the present fact situation, does it then preclude the admission of the evidence from the above-mentioned affidavits? As I have already held above, a construction of the documentary evidence alone would lead me to rule in favour of the defendant, although admission of the affidavit evidence would seal the case, as it were, for the defendant. The issue which arises here is one that raises, simultaneously, a much broader issue – what is the precise relationship between ss 93 and 94 of the Evidence Act on the one hand and the common law on the other? This issue, put in relation to the more specific perspective of the facts in the instant case, raises the question: Are there one or more common law exceptions which apply in order to permit admission of the affidavit evidence in spite of the presence of s 93 of the Evidence Act?

38 It is necessary to deal with the general issue first. If, on construction and principle, ss 93 and 94 of the Evidence Act are exhaustive inasmuch as they preclude any introduction of the common law whatsoever, that is an end to the matter in so far as the facts of the present case are concerned. This would, indeed, be *a fortiori* the situation here simply because s 93 itself does not (unlike s 94, which is inapplicable on the present facts) contain the more significant exceptions as such.

39 That many exceptions to the parol evidence rule exist at common law is undoubtedly the case. As we have already seen, it is equally clear that the parol

evidence rule in the Singapore context is embodied, in the main at least, within ss 93 and 94 of the Evidence Act (and compare *Tan Hock Keng v L & M Group Investments Ltd* [2001] 4 SLR 428, especially at [11], *per* Rajendran J, reversed in part in [2002] 2 SLR 213, but not on this particular point). This being the case, one has to bear in mind that the general starting point is that established principles pertaining to codes, of which the Evidence Act is an illustration, generally prohibit the introduction of common law rules: see the oft-cited decisions of *The Governor and Company of The Bank of England v Vagliano Brothers* [1891] AC 107 and *Jayasena v R* [1970] AC 618. However, it appears to be the case that where the code concerned is itself silent with regard to the specific issue(s) or point(s) in question, the common law rules do continue to be relevant and even applicable: see *PP v Yuvaraj* [1969] 2 MLJ 89 and *Shaaban v Chong Fook Kam* [1969] 2 MLJ 219.

40 More importantly, in the specific context of the Evidence Act itself, s 2(2) should be noted, which reads as follows:

> All rules of evidence not contained in any written law, so far as such rules are inconsistent with any of the provisions of this Act, are repealed.

41 It would appear, therefore, that the common law exceptions to the parol evidence rule, in so far as they are *consistent* with the provisions of the Evidence Act, continue to be applicable. This leads, however, to a second – and related – difficulty.

42 The exceptions, particularly the provisos to s 94 of the Evidence Act, are, on closer analysis, in fact *inconsistent* with a few of the common law exceptions.

43 To take but one example, the common law exception relating to collateral contracts allows terms in the collateral contract which are *inconsistent* with those contained in the main agreement to override terms contained in the main agreement itself. While there are divergences within the English case law itself, the fact remains that cases which embody this principle do exist and are widely cited and applied: see, for example, the oft-cited English High Court decision of *City and Westminster Properties (1934) Ltd v Mudd* [1959] Ch 129 (though compare the Australian position: see J W Carter and D J Harland, *Contract Law in Australia* (LexisNexis Butterworths, 4th Ed, 2002) at para 613, where reference is made, *inter alia*, to the leading Australian High Court decision of *Hoyt's Proprietary Limited v Spencer* (1919) 27 CLR 133).

44 However, s 94(b) is clearly at variance with the common law rule stated in the preceding paragraph and would therefore appear to prevail over it (though compare that with s 94(d)). Nevertheless, this proposition does not appear to be clearly established within the local case law: compare, for example, the Malaysian decisions of *Tan Swee Hoe Co Ltd v Ali Hussain Bros* [1980] 2 MLJ 16, especially at 19, and *Tindok Besar Estate Sdn Bhd v Tinjar Co* [1979] 2 MLJ 229, especially at 233. Yet another possible approach was adopted in the (also Malaysian) decision of *Tan Chong & Sons Motor Company (Sdn) Berhad v Alan McKnight* [1983] 1 MLJ 220 (especially at 229). It would appear that the situation is still not settled, although, in this regard, the Singapore Court of Appeal decision of *Latham v Credit Suisse First Boston* [2000] 2 SLR 693 at [21] acknowledged the basic controversy and, whilst not expressly stating that the position adopted in *Tan Swee Hoe Co Ltd v Ali Hussain Bros*, which endorsed the more liberal common law position, was wrong, tended, in the final analysis, to endorse the literal language in s 94(b) to the contrary (see also the Singapore Court of Appeal decision of *Ng Lay Choo Marion v Lok Lai Oi* [1995] 3 SLR 221

especially at 226 and *per* Belinda Ang Saw Ean JC (as she then was) in the Singapore High Court decision of *Lemon Grass Pte Ltd v Peranakan Place Complex Pte Ltd* [2002] 4 SLR 439, especially at [126] to [131]). However, as we shall see in a moment, this particular issue, arising from inconsistency between the common law position and ss 93 and/or 94 of the Evidence Act, does not arise on the facts of the present case. I therefore refrain from expressing any concluded opinion. This is, in my view, all the more advisable as the expression of a view is best effected – and more easily understood – where the explication is done in relation to an actual fact situation, rather than in an abstract vacuum. However, as I shall point out below, this may be but one symptom suggesting *overall legislative* reform. Be it as it may, what *is* clear is that any legislative reform will not only have to take into account the general relationship between ss 93 and 94 of the Evidence Act and the common law, but also set out the precise details of any such reform where there is a difference between these two spheres in particular situations, such as that just considered.

45 Returning to the facts of the present case, I am of the view that having regard to the reasoning set out in [39] to [41] above, there is no reason in principle why one or more common law exceptions should be excluded if they do, in fact, otherwise apply to the present facts *and* are *not inconsistent* with ss 93 and 94 of the Evidence Act.

46 I have in mind, in particular, the well-established common law principle to the effect that extrinsic evidence is admissible to aid the court in establishing the factual matrix which, in turn, would help the court in construing the contract(s) concerned. This is embodied, *inter alia*, in the following oft-cited statement of Lord Wilberforce in the House of Lords decision of *Reardon Smith Line Ltd v Yngvar Hansen-Tangen* [1976] 1 WLR 989 at 997:

> I think that all of their Lordships are saying, in different words, the same thing – what the court must do must be to place itself in thought in the same factual matrix as that in which the parties were. All of these opinions seem to me implicitly to recognise that, in the search for the relevant background, there may be facts which form part of the circumstances in which the parties contract in which one, or both, may take no particular interest, their minds being addressed to or concentrated on other facts so that if asked they would assert that they did not have these facts in the forefront of their mind, but that will not prevent those facts from forming part of an objective setting in which the contract is to be construed.

47 The following observations by Staughton LJ in the English Court of Appeal decision of *Youell v Bland Welch & Co Ltd* [1992] 2 Lloyd's Rep 127 at 133 are also apposite:

> It is now, in my view, somewhat old-fashioned to approach such a problem [here, as to whether or not it was permissible to refer to a slip as an aid to interpretation of the reinsurance contract] armed with the parol evidence rule, that evidence is not admissible to vary or contradict the words of a written contract. The modern approach of the House of Lords is that, on the positive side, evidence should be admitted of the background to the contract, the surrounding circumstances, the matrix, the genesis and aim. Almost every day in these Courts there is a contest as to what comes within that description. As Lord Wilberforce said in *Reardon Smith Line Ltd v Hansen-Tangen* … the expression "surrounding circumstances" is imprecise. But so to some extent is "matrix", if I may say so, although it is a picturesque metaphor. It may well be that no greater precision is possible. The notion is what the parties had in mind, and the Court is entitled to know, what was going on around them at the time when they were making the contract. This applies to circumstances which were known to both parties, and to what each might reasonably have expected the other to know.

48 Finally, reference ought to be made briefly to the views of Lord Hoffmann in the leading House of Lords decision of *Investors Compensation Scheme Ltd v West Bromwich Building Society*, somewhat curiously, perhaps, reported in the first volume of the *Weekly Law Reports* (at [1998] 1 WLR 896), where the learned law lord observed, *inter alia*, at 912–913 as follows:

> (1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.
>
> (2) The background was famously referred to by Lord Wilberforce as the "matrix of fact," but this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to the exception to be mentioned next, it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.
>
> (3) The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification. The law makes this distinction for reasons of practical policy and, in this respect only, legal interpretation differs from the way we would interpret utterances in ordinary life. The boundaries of this exception are in some respects unclear. But this is not the occasion on which to explore them.

49 Indeed, both the last-mentioned decisions were cited by Cresswell J in the relatively recent English High Court decision of *BP Plc v GE Frankona Reinsurance Ltd* [2003] 1 Lloyd's Rep 537 at 548–549. The position is also well-summarised in secondary literature by, for example, *MacGillivray on Insurance Law* (Sweet & Maxwell, 10th Ed, 2003) at para 11-27, where it is observed thus:

> In gathering the intention of the parties from the words in the policy and incorporated documents, the wording is not to be construed in isolation. Evidence may be adduced of the background to the contract, so that the court can appreciate its genesis and purpose, and the facts of which the parties were both aware when making it.

50 Reference may also be made, generally, in the local context, to the Singapore Court of Appeal decisions of *Pacific Century Regional Development Ltd v Canadian Imperial Investment Pte Ltd* [2001] 2 SLR 443 and *MAE Engineering Ltd v Fire-Stop Marketing Services Pte Ltd* [2005] 1 SLR 379.

51 Returning to the present case, it is clear that the affidavit evidence in the present case does, in fact, aid in establishing what the factual matrix is. It might be argued by counsel for the plaintiff that the principle presently considered is only applicable in situations where the relevant contract(s) are ambiguous. I do not think that this is necessarily the case, for any aid to construction which does not add to, vary or contradict the relevant documents ought to be permitted. But, even assuming that ambiguity is a pre-requisite and that it does not exist in the present case, then assuming, *ex hypothesi*, that the documents are in fact clear, that clarity, as I have already held, favours the *defendant* instead of the plaintiff. If, however, it is assumed that ambiguity exists, then it is clear that the affidavit evidence in question ought, in my view, to be admitted in order to clarify the factual matrix and aid the court in construing the insurance policies concerned – in particular the scope and purpose of the plaintiff's policy. Looked at in this light, it is clear that the affidavit evidence (as counsel for the plaintiff in fact appeared to acknowledge) points clearly in favour of the defendant.

52 I have hitherto proceeded on the assumption that the common law principle presently being considered as well as applied is one of the *exceptions* to the parol evidence rule. It might, however, be equally well argued, in my view, that this principle is not really an exception to the parol evidence rule as such, but is, rather, simply a logical and commonsensical legal principle that courts ought to apply as a matter of course – if nothing else, because in the real world, one cannot divorce the application of the relevant legal principles from the context in which they must necessarily operate. However, the case law does seem to indicate that this principle is more an exception rather than an independent rule (see, for example, *per* Lord Wilberforce himself in another House of Lords decision in *L Schuler AG v Wickman Machine Tool Sales Ltd* [1974] AC 235 at 261). Nevertheless, as the Law Commission of England and Wales ("the Law

Commission") itself pointed out, there is a difference between utilising parol evidence to *interpret* documents, as opposed to using such evidence for the purpose of contradicting, varying, adding to or subtracting from the terms of a written contract (see The Law Commission*, Law of Contract – The Parol Evidence Rule* (Law Com No 154, 1986) ("the 1986 Report on parol evidence") at para 1.2, and noted, *inter alia*, by Beldam LJ in the English Court of Appeal decision of *Youell v Bland Welch & Co Ltd* ([47] *supra*). More importantly, the Law Commission was of the view – and adopting an approach even more ostensibly radical than that explored in the present paragraph – that all the exceptions to the parol evidence rule "are, in reality, examples of situations in which the parol evidence rule, as we believe it to be, could never apply", as "[t]he issues raised in such cases are issues of general contractual validity and enforceability, to which the parol evidence rule has no application" (see the 1986 Report on parol evidence at para 2.31). To drive home the point, the Law Commission concluded its views on the issue thus (*ibid*):

> Viewed more broadly, … we see the cases which are said to be exceptions to the parol evidence rule as being independent of that rule. They are instances of the application of other rules of law which are to be applied to contracts, whatever form those contracts may take.

53 It might be appropriate to note at this juncture that s 94(f) of the Evidence Act (see [22] above) might, arguably at least, be a possible analogue of the common law principle just considered (compare, for example, the Singapore High Court decision of *United Lifestyle Holdings Pte Ltd v Oakwell Engineering Ltd* [2002] 2 SLR 308, especially at [3]–[7], *per* Lee Seiu Kin JC (as he then was); though compare, in turn, the Singapore Court of Appeal decision of *Mt Elizabeth Hospital Ltd v Allan Ng Clinic for Women* [1994] 3 SLR 639 at 651–653). It is clear, however, that s 94(f) will only come into play when there is some latent ambiguity in the contractual document itself: see the Singapore Court of

Appeal decisions in *Citicorp Investment Bank (Singapore) Ltd v Wee Ah Kee* [1997] 2 SLR 759 ("*Citicorp Investment*") and *Tan Hock Keng v L & M Group Investments Ltd* [2002] 2 SLR 213. This may cause possible problems in correlating the provision with the existing common law principles: see, in particular, *Citicorp Investment*, especially at [56]–[68] and Daniel Seng Kiat Boon, "Another Clog on the Construction of Contracts? The Parol Evidence Rule and the Use of Extrinsic Evidence" [1997] Sing JLS 457, especially at 471–473 and 481–482. What is clear, however, is that s 94(f) is not applicable to the present fact situation (see [31] and [36] above).

54 Another possible – and closely related – exception to the parol evidence rule at common law relates to the admissibility of extrinsic evidence to identify the subject matter of an agreement: see, for example, *L Schuler AG v Wickman Machine Tool Sales Ltd* ([52] *supra*) *per* Lord Wilberforce at 261, as well as the Australian Privy Council decision of *Bank of New Zealand v Simpson* [1900] AC 182. In the present case, there was much debate as to what subject matter and risk the plaintiff's and the defendant's policies covered. Looked at in this light, the extrinsic affidavit evidence was more than enlightening.

55 In summary, having regard both to the construction of the plaintiff's and the defendant's policies as well as to the admissible affidavit evidence, I find that the subject matter and risk covered by both these policies were not the same and that there was therefore no situation of double insurance and, consequently, no legal obligation on the part of the defendant to contribute to the plaintiff should the plaintiff have to indemnify both BT and Keppel in the event that the former's employee succeeds in his action against them. In other words, the defendant succeeds with regard to the main – indeed, only substantive – issue before this court in the present case.

56 However, the present case did raise in the process difficulties with respect to the parol evidence rule in general and ss 93 and 94 of the Evidence Act in particular. These difficulties are symptomatic of a broader problem – and it is to this problem that I now turn.

Difficulties with the parol evidence rule

57 Although it was possible (fortunately, in my view) to decide the present case without being *unduly* hampered by any excessive constraints of the parol evidence rule, the direction and content of argument in the present case with regard to ss 93 and 94 of the Evidence Act more than hint at more general difficulties. These difficulties are not only inherent within the provisions themselves and in their relationship with each other, but also relate to the precise relationship (if any) between the aforementioned provisions on the one hand and the common law on the other. Indeed, issues in both these areas were considered in the present case. But this is just the tip of the proverbial iceberg. Indeed, the broader question that has been raised centres on whether or not these provisions ought to be reconsidered and amended – or, on a more radical approach, even abrogated – in the light of the many other potential difficulties that might arise in the practical sphere. At the most general level, it is wise to bear in mind that it is necessary for the Singapore legal system to aspire constantly to even greater heights in so far as the administration of justice is concerned.

58 Whilst it is true that the distinction between procedural and substantive law ought not to be drawn too starkly, the above-mentioned provisions do clearly fall within the former category. Looked at in this light, any inherent quality within the sphere of procedural law that hinders the attainment of substantive justice is, in my view, the very antithesis of the enterprise of the law itself. Rules of procedure and evidence are, in other words, necessary in order to furnish an

orderly structure that aids the court in its quest for truth, and a just, as well as fair, result. To the extent, therefore, that the parol evidence rule (as embodied in the local context within ss 93 and 94 of the Evidence Act) may be utilised as instruments to exclude what, on a commonsensical view, ought to be admissible and relevant evidence, and thereby hinder the attainment of a fair and just result, a measure of reform may be necessary. Such reform must, of course, be effected by the Legislature, although, as we have seen in relation to the facts of the present case, there is the further issue as to whether or not – and, if so, to what extent – the common law exceptions to the parol evidence rule continue to be applicable in any event. This last-mentioned issue is itself a substantive one that might also be amenable to possible legislative reform.

59 I must pause at this juncture, however, to re-emphasise the point made earlier to the effect that rules of procedure and evidence are necessary in order to provide an orderly structure for all concerned in the administration of justice. In other words, I must not be taken as advocating the total absence of rules and principles – here, with regard to the parol evidence rule. It is clear that the rule does serve a practical function – and an important one at that. To take but one illustration of a number of similar observations, Chang Min Tat FJ, in the Malaysian Federal Court decision of *Tindok Besar Estate Sdn Bhd v Tinjar Co* ([44] *supra*) observed at 233, with regard to the respondent's contention that parol evidence ought to be admitted because "not all the terms had been incorporated in the agreement", thus:

> If this contention so generally stated and understood had any foundation at law, then it would be open to any party to a litigation concerning an agreement to say that the agreement which is the subject matter of the dispute, did not contain all the terms thereof and to seek to introduce such terms or even terms which might not even have been within the contemplation of the other party. No agreement would then be safe from being re-written by one party in a court of law.

60 Prof M P Furmston also pertinently observes, in *Cheshire, Fifoot and Furmston's Law of Contract* (Butterworths LexisNexis, 14th Ed, 2001) at p 135 that:

> [T]he 'parol evidence' rule … can, within its proper limitations, be regarded as an expression of the objective theory of contract, that is, that the court is usually concerned not with the parties' actual intentions, but with their manifested intention.

61 In so far as the future is concerned, the main concern is whether, and if so, how, the parol evidence rule within the Singapore context might be amended in a way that would make it an even more effective legal tool, whilst simultaneously eschewing any applications of the rule that would produce a contrary result, *viz*, injustice owing to legalistic technicality. To this end, and in order to achieve a balance between realising the aims as well as ideals of the parol evidence rule on the one hand, and to avoid unnecessary pitfalls from its application on the other, there already exist a number of developments in other jurisdictions which could aid the local Legislature should it be minded to consider the issue of possible reform.

62 To take but a few examples, both the Ontario Law Commission (in its *Report on Amendment of the Law of Contract* (Toronto, Ministry of the Attorney General, 1987) at ch 8) and the British Columbia Law Reform Commission (in its *Report on Parol Evidence Rule* (LRC 44, December 1979), <http://www.bcli.org/pages/publications/lrcreports/reports(html)/Lrc44text.html> (accessed 21 February 2005)) recommended abolition of the parol evidence rule. So did the Law Commission of England and Wales in its earlier working paper in 1976 (see *Law of Contract – The Parol Evidence Rule* (Working Paper No 70, 1976)), although it later recommended that the rule be neither amended nor abolished (see the 1986 Report on parol evidence ([52] *supra*)). Another

extremely specific variation, or modification, rather, can be seen in s 4 of the New Zealand Contractual Remedies Act 1979. The local position is, as we have seen, further complicated by the fact that the parol evidence rule is statutorily embodied – in the main, at least – in ss 93 and 94 of the Evidence Act.

63 As already mentioned, however, the task of reform is outside the remit of the courts. It is, nonetheless, hoped that some clarification might be forthcoming by way of reform in the foreseeable future.

Conclusion

64 I should like to conclude by commending both counsel for the lucid and persuasive presentation of their respective arguments. Although we operate within an adversarial system which, by its very nature, mandates counsel on each side advocating, as persuasively and as fearlessly as possible, their arguments on behalf of their respective clients, this can – indeed, ought – to be achieved within a framework of what, for want of a better term, I would classify as professional courtesy and common decency. Put in simpler terms, one can disagree and yet not be disagreeable. The clash of arguments that is supposed to result in the emergence of the light of truth must not degenerate so that more heat than light issues. Looked at in a practical light, where there is the (hopefully, merely occasional) descent into a less than agreeable situation, not only is the legal system in general sullied by such unseemly conduct but the court is also hindered in ascertaining what the true facts are and, hence, in arriving at a fair and just decision. I am therefore pleased to note that counsel in the present case conducted themselves in a manner that was both exemplary as well as helpful to the court.

65 Despite the enthusiasm and rigour with which counsel for the plaintiff presented her arguments, I was, unfortunately, unable to accept her arguments for

the reasons set out above. In the circumstances, I dismissed the plaintiff's application with costs.

66 The present case also raised weightier issues of much broader import and significance. More specifically, the various issues and difficulties raised with respect to the parol evidence rule in general, and the interpretation as well as application of ss 93 and 94 of the Evidence Act in particular, have, in turn, raised the more general question as to whether or not the time is now appropriate for a re-examination of these provisions with a view to possible reform. I have indicated a sample of the specific difficulties as well as the possible need for legislative reform. I can do no more than this. As I have already mentioned, reform of these provisions is outside the purview of the courts. However, it is legitimate, in my view, to raise these various issues for a number of reasons. First, the parol evidence rule originated from the common law. Secondly, the courts must interpret and/or apply ss 93 and 94 of the Evidence Act. Thirdly, the difficulties lie not just within the provisions themselves and in the relationship between them but also in the relationship between these provisions and the common law (the last-mentioned branch of law being one which is administered by the courts). It is therefore hoped that the appropriate bodies might consider reform of this very problematic rule as embodied within equally problematic statutory provisions in the not too distant future.

Plaintiff's application dismissed.

Andrew Phang Boon Leong
Judicial Commissioner

China Insurance Co (Singapore) Pte Ltd v
Liberty Insurance Pte Ltd [2005] SGHC 40

Edwina Fan (Kelvin Chia Partnership) for the plaintiff;
M Ramasamy and Hema Hemalatha Silwaraju (William Chai & Rama) for the defendant.

POSSIBLE APPROACHES TOWARD LEGISLATIVE REFORM OF SECTIONS 93 AND 94 OF THE EVIDENCE ACT

1 There would appear to be ***at least four*** ways forward insofar as possible legislative reform is concerned.

(1) RETENTION OF THE *STATUS QUO*

2 The ***first*** approach is one of the most straightforward – and that is to retain the *status quo.*

3 However, the drawback with this approach is that the general situation with respect to sections 93 and 93 of the Evidence Act will continue to be vague at best, confusing at worst. This is, in my view, a legitimate observation to make simply because it is precisely because of the difficulties with these provisions that there is a need to canvass at least the possibility of legislative reform in the first instance.

(2) ABOLITION OF THE PAROL EVIDENCE RULE

4 The ***second*** approach is equally straightforward. It is to *abolish* the parol evidence rule altogether. This is in fact not as radical an approach as might appear at first blush. Serious consideration was given to this option when the **Law Commission of England and Wales** considered the parol evidence rule (see generally its *prior* Working Paper, where it did indeed recommend *abolition* (Working Paper No 70, 1976)), although it ultimately recommended that the rule be neither amended nor abolished (see generally *Law of Contract – The Parol Evidence Rule* (Law Com No 154, 1986)).

5 It has also been argued that the exceptions to the rule at common law have been so numerous as to result in an intense dilution of the rule itself (see, for example, the Law Commission Working Paper referred to in the preceding paragraph at paragraph 21).

6 The **British Columbia Law Reform Commission** also recommended abolition of the parol evidence rule (see generally the British Columbia Law Reform Commission, *Report on Parol Evidence Rule* (LRC 44, December 1979, available online at the time of writing at http://www.bcli.org/pages/publications/lrcreports/reports(html)/Lrc44text.html). In that particular Report, it was thought that the parol evidence rule was given to technicality and that if it were abolished, the courts would, on balance, be more likely to arrive at a just result if it were permitted to examine all the evidence and give it whatever weight was appropriate in the circumstances of the case. It was recommended that the Evidence Act be amended by adding a provision that was comparable to the following:

> If an agreement or provision thereof is disputed, neither the parol evidence rule, nor any agreement or provision hereof, shall result in the exclusion of evidence which would otherwise be admissible, and if such evidence is admitted, it shall be accorded such weight, if any, as is appropriate in the circumstances.

7 The approach advocating abolition was also advocated by the **Ontario Law Reform Commission** (see generally its *Report on Amendment of the Law of Contract* (1987) at Ch 8). It recommended a provision similar to section 17 of the Canadian Uniform Sale of Goods Act, but which was applicable to all types of contracts. Section 17 itself reads as follows:

> No rule of law or equity respecting parol or extrinsic evidence and no provision in a writing prevents or limits the admissibility of evidence to prove the true terms of the agreement, including evidence of any collateral agreement or representation or evidence as to the true identity of the parties.

8 However, such an approach (from abolition) may suggest, at first blush at least, that there are no safeguards against abuse by contracting parties of bad faith. It might, nevertheless, be argued that the ultimate safeguard lies in the wisdom exercised by the court in interpreting all the evidence, including the relevant documents as well as surrounding circumstances (this appears to be the central thrust of the approaches of the British Columbia and Ontario Law Reform Commissions, above). Whilst this is a not

unpersuasive argument, it might appear preferable to retain a *basic structure* in the form of the parol evidence rule (whether in the form of statute or the common law or both) since, *ex hypothesi*, the assumption is that the court will, in any event, exercise that wisdom mentioned above in any event. The basic difficulty – to reiterate – is to avoid the technical or legalistic application of the rule which will result in precisely the contrary result that the rule was intended originally to achieve.

(3) ABOLITION OF SECTIONS 93 AND 94 OF THE EVIDENCE ACT AND UTILIZATION OF THE COMMON LAW INSTEAD

9 The ***third*** approach is to abrogate sections 93 and 94 of the Evidence Act and utilize the common law in its stead. Such an approach would mean that the resultant Singapore position would be the ***same*** as that in **England and Wales**, where the L**aw Commission** (in considering whether the parol evidence rule should be abolished or amended by statute) arrived at the conclusion that the prevailing situation should remain, on the assumption (*inter alia*) that "there is no *rule of law* that evidence is rendered inadmissible or is to be ignored solely because a document exists which looks like a complete contract (See *Law of Contract – The Parol Evidence Rule* (Law Com No 154, 1986) at paragraph 2.17; emphasis in the original text); indeed, "[w]hether it is a complete contract depends on the intention of the parties, objectively judged, and not on any rule of law (see ibid; and see also generally at paragraphs 2.45 as well as 3.1 to 3.8).

10 It might, however, be argued that such an approach would be rather drastic, or even radical, although the advantage is that the legal position would become far more fluid and Singapore courts would be accorded far more flexibility in the application of the parol evidence rule in its quest to ensure both a fair procedure as well as a just result. There might be a possible argument that such flexibility would accord too much discretion to the judges. I do not myself consider this argument to be persuasive. Judicial discretion is, by its very nature, a bounded one and must be exercised consistently with the relevant legal rules and principles.

(4) AMENDMENT OF SECTIONS 93 AND 94 OF THE EVIDENCE ACT

11 The ***fourth*** approach is to effect amendments to sections 93 and/or 94 themselves. Presumably, such an approach would also entail clarifying the precise relationship between these provision(s) and the common law. To this end, a number of variations or sub-approaches are possible, depending upon the exact end(s) desired. For example, the legislature could amend the provision(s), whilst stating which common law rules continue to apply alongside the statutory rules. On the other hand, the legislature could amend the provision(s) and state that the statutory position would be exhaustive – with no room for application of the common law rules. An even more specific variation (or modification, rather) is to be found in s 4 of the New Zealand Contractual Remedies Act 1979. All these are, of course matters of detail which are matters of policy for the Legislature.

CONCLUSION

12 Whichever approach is adopted, it is hoped that some clarification would be forthcoming in the foreseeable future – even if it is merely to endorse the existing position. However, as I have mentioned above, endorsement of the *status quo* is probably a less satisfactory approach, not least because the relationship between sections 93 and 94 of the Evidence Act and the common law will then continue to be an uneasy one, generating possible vagueness and/or confusion.

ANDREW PHANG

2 March 2005

ANNEX B:

EVIDENCE ACT (CAP 97, 1997 REV ED)

SECTIONS 93 TO 102

Extract from Evidence Act (Cap 97, 1991 Rev Ed): Sections 93 – 102

Exclusion of oral by documentary evidence

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

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

Exception 1.—When a public officer is required by law to be appointed in writing, and when it is shown that any particular person has acted as such officer, the writing by which he is appointed need not be proved.

Exception 2.—Wills admitted to probate in Singapore may be proved by the probate.

Explanation 1.—This section applies equally to cases in which the contracts, grants or dispositions of property referred to are contained in one document, and to cases in which they are contained in more documents than one.

Explanation 2.—Where there are more originals than one, one original only need be proved.

Explanation 3.—The statement in any document whatever of a fact, other than the facts referred to in this section, shall not preclude the admission of oral evidence as to the same fact.

Illustrations

(*a*) If a contract is contained in several letters, all the letters in which it is contained must be proved.

(*b*) If a contract is contained in a bill of exchange, the bill of exchange must be proved.

(*c*) If a bill of exchange is drawn in a set of 3, one only need be proved.

(*d*) *A* contracts in writing with *B* for the delivery of pepper upon certain terms. The contract mentions the fact that *B* had paid *A* the price of other pepper contracted for verbally on another occasion.

Oral evidence is offered that no payment was made for the other pepper. The evidence is admissible.

(*e*) *A* gives *B* a receipt for money paid by *B*.

Oral evidence is offered of the payment. The evidence is admissible.

Exclusion of evidence of oral agreement

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

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

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

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

(*d*) the existence of any distinct subsequent oral agreement, to rescind or modify any such contract, grant or disposition of property, may be proved except in cases in which such contract, grant or disposition of property is by law required to be in writing, or has been registered according to the law in force for the time being as to the registration of documents;

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

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

Illustrations

(*a*) A policy of insurance is effected on goods “in ships from Singapore to London”. The goods are shipped in a particular ship, which is lost. The fact that that particular ship was orally excepted from the policy cannot be proved.

(*b*) *A* agrees absolutely in writing to pay *B* $1,000 on 1st March 1893. The fact that at the same time an oral agreement was made that the money should not be paid till 31st March cannot be proved.

(*c*) An estate called "the Kranji Estate" is sold by a deed which contains a map of the property sold. The fact that land not included in the map had always been regarded as part of the estate and was meant to pass by the deed cannot be proved.

(*d*) *A* enters into a written contract with *B* to work certain mines, the property of *B*, upon certain terms. *A* was induced to do so by a misrepresentation of *B* as to their value. This fact may be proved.

(*e*) *A* institutes a suit against *B* for the specific performance of a contract, and also prays that the contract may be performed as to one of its provisions on the ground that that provision was inserted in it by mistake. *A* may prove that such a mistake was made as would by law entitle him to have the contract performed.

(*f*) *A* orders goods of *B* by a letter in which nothing is said as to the time of payment, and accepts the goods on delivery. *B* sues *A* for the price. *A* may show that the goods were supplied on credit for a term still unexpired.

(*g*) *A* sells *B* a horse and verbally warrants him sound. *A* gives *B* a paper in these words: "Bought of *A* a horse for $300." *B* may prove the verbal warranty.

(*h*) *A* hires lodgings of *B* and gives *B* a card on which is written: "Rooms $80 a month." *A* may prove a verbal agreement that these terms were to include partial board.

A hires lodgings of *B* for a year, and a regularly stamped agreement drawn up by an attorney is made between them. It is silent on the subject of board. *A* may not prove that board was included in the terms verbally.

(*i*) *A* applies to *B* for a debt due to *A* by sending a receipt for the money. *B* keeps the receipt and does not send the money. In a suit for the amount *A* may prove this.

(*j*) *A* and *B* make a contract in writing to take effect upon the happening of a certain contingency. The writing is left with *B*, who sues *A* upon it. *A* may show the circumstances under which it was delivered.

Exclusion of evidence to explain or amend ambiguous document

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

Illustrations

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

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

Exclusion of evidence against application of document to existing facts

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

Illustration

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

Evidence as to document meaningless in reference to existing facts

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

Illustration

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

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

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

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

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

Illustrations

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

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

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

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

Illustration

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

Evidence as to meaning of illegible characters, etc

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

Illustration

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

Who may give evidence of agreement varying terms of document

101. Persons who are not parties to a document or their representatives in interest may give evidence of any fact tending to show a contemporaneous agreement varying the terms of the document.

Illustration

A and *B* make a contract in writing that *B* shall sell *A* certain tin to be paid for on delivery. At the same time they make an oral agreement that 3 months' credit shall be given to *A*. This could not be shown as between *A* and *B*, but it might be shown by *C* if it affected his interests.

Construction of wills not affected by sections 93 to 101

102. Nothing in sections 93 to 101 shall affect the construction of wills.

ANNEX C:

PROPOSED REDRAFTING OF

SECTIONS 93 TO 102

Repeal of sections 93 to 102 and re-enactment of sections 93 to 95 and section 102

NN. Sections 93 to 102 of the Evidence Act are repealed and the following sections substituted therefor:

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

93.—(1) Where —

(*a*) *all*[*] the terms of a contract or of a grant or of any other disposition of property have been reduced by or by consent of the parties to the form of a document; or

(*b*) any matter is required by law to be reduced to the form of a document,

no evidence shall be given in proof of the terms of such contract, grant or other disposition of property or of such matter except the document itself, or secondary evidence of its contents where secondary evidence is admissible under the provisions of this Act.

(2) Notwithstanding subsection (1) —

(*a*) where a public officer is required by law to be appointed in writing, and where it is shown that any particular person has acted as such officer, the writing by which he is appointed need not be proved;

(*b*) wills admitted to probate in Singapore may be proved by the probate.

(3) This section shall apply equally where the contract, grant or disposition of property is contained in one document, and where it is contained in more documents than one.

(4) Where there are more originals than one, one original only need be proved.

(5) The statement in any document whatever of a fact, other than the facts referred to in this section, shall not preclude the admission of oral evidence as to the same fact.

Exclusion of evidence of oral agreement

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

(2) *Notwithstanding subsection (1), any fact may be proved if —*

(*a*) *it is a relevant fact under the substantive law applicable to any term of such contract, grant or other disposition of property, or any matter required by law to be reduced to the form of a document; or*

[*] The more salient variations from the wording of the existing statutory provisions are *italicized*, for ease of comparison.

(*b*) *it is a relevant fact showing the true agreement or relationship between the parties.*

(3) Without prejudice to the generality of subsection (2) —

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

(*b*) the existence of any oral collateral contract may be proved, *notwithstanding that it may be inconsistent with any term of the document*;

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

(*d*) the existence of any distinct subsequent oral agreement to rescind or modify any such contract, grant or disposition of property may be proved except where the contract, grant or disposition of property is by law required to be in writing, or has been registered according to the law in force for the time being as to the registration of documents;

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

(*f*) *any fact may be proved for the purpose of identifying the true subject matter of a contract or the true identity of the contractual parties*.

(4) Persons who are not parties to a document or their representatives in interest may give evidence of any fact tending to show a contemporaneous agreement varying the terms of the document.

Construction of documents

95.—(1) *In the construction of any document,* evidence may be given —

(*a*) to show the meaning of illegible or not commonly intelligible characters;

(*b*) to show the meaning of foreign, obsolete, technical, local and provincial expressions, of abbreviations and of words used in a peculiar sense;

(*c*) to show in what manner the language of a document is related to existing facts *and to confirm that the language of the document applies accurately to existing facts;*

(*d*) *to ascertain the meaning of the document when the language of the document is ambiguous or obscure in relation to existing facts.*

(2) *In the construction of any contract to which section 94(1) applies, proof may be made of existing facts under subsection (1)(*c*) only where* such facts are *known or reasonably expected to be known to the parties to the contract*.

(3) *In the construction of any document to which section 94(1) applies, no fact may be proved which would have the effect of contradicting, varying, adding to, or*

subtracting from the terms of the document, except where the proof of such fact is provided for under section 94.

[*Sections 96 to 101 not in use*]

Construction of wills not affected by sections 93 to 95

102. Nothing in sections 93 to 95 shall affect the construction of wills *under the common law*.

EXPLANATORY STATEMENT

Clause NN repeals sections 93 to 102 of the Evidence Act and enacts new sections 93 to 95 and section 102 in place of the repealed provisions. These provisions relate to what is commonly referred to as the "parol evidence rule". The parol evidence rule itself comprises three rules, and the new provisions are drafted and organised with reference to these three rules. The first rule relates to proof by documentary evidence and is provided in the new section 93. The second rule relates to the exclusion of oral evidence, subject to exceptions, and is provided in the new section 94. The third rule relates to the admission of evidence in aid of the construction of documents, and is provided in the new section 95. These rules do not apply to the construction of wills, which is governed by the common law, and the new section 102 clarifies this point. The new provisions retain the core concepts of the existing sections 93 to 102, with some important modifications.

(*a*) The new section 93(1) re-enacts the principal rule in the existing section 93, with modification. It provides that where (a) all the terms of a contract or of a grant or of any other disposition of property have been reduced by or by consent of the parties to the form of a document; or (b) any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of such contract, grant or other disposition of property or of such matter except the document itself, or secondary evidence of its contents where secondary evidence is admissible under the provisions of the Evidence Act.

The new paragraph (1)(*a*) clarifies that the provision would apply to contracts only where all the terms of a contract are reduced to the form of a document. This has particular significance for the new section 94. It clarifies that the rule of exclusion of oral evidence under the new section 94 would only apply to contracts where all the terms are reduced in writing. Thus, where a contract is partly oral and partly written, oral evidence is not excluded under the new section 94 from contradicting, varying, adding to, or subtracting from the written part of the contract.

(*b*) The new section 93(2) re-enacts Exceptions 1 and 2 to the existing section 93, with minor modification.

(*c*) The new section 93(3) re-enacts Explanation 1 of the existing section 93, with minor modification.

(*d*) The new section 93(4) re-enacts Explanation 2 of the existing section 93.

(*e*) The new section 93(5) re-enacts Explanation 3 of the existing section 93.

(*f*) The new section 94(1) re-enacts the principal rule of the existing section 94, with minor modification. It provides that where the terms of any such contract, grant or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to the new section 93, no evidence of any oral agreement or statement shall be admitted as between the parties to any such instrument or their representatives in interest for the purpose of contradicting, varying, adding to, or subtracting from its terms.

(*g*) The new section 94(2) provides that the principal rule under the new section 94(1) does not exclude the admission of oral evidence of any fact if (a) it is a relevant fact under the substantive law applicable to any term of the document; or (b) it is a relevant fact showing the true agreement or relationship

between the parties (whether or not that agreement or relationship is reflected anywhere in the document).

(*h*) The new section 94(3) sets out some of the circumstances under which oral evidence may be admissible despite the rule in the new section 94(1). They are illustrations of the specific application of the general provision in the new section 94(2).

(i) The new section 94(3)(*a*) re-enacts proviso (*a*) to the existing section 94, with modification. It clarifies that equitable remedies such as rectification, specific performance, estoppel and part performance come within the scope of the proviso.

(ii) The new section 94(3)(*b*) re-enacts proviso (*b*) to the existing section 94, with substantial modification. It incorporates modern developments in the law relating to collateral contracts under the English common law. The terms of a collateral contract may be admitted even where they are inconsistent with the terms of the principal written contract. There will no longer be any requirement for the oral agreement to relate only to "any matter on which a document is silent and which is not inconsistent with its terms", as is provided under the existing proviso (*b*).

(iii) The new section 94(3)(*c*) re-enacts proviso (*c*) to the existing section 94.

(iv) The new section 94(3)(*d*) re-enacts proviso (*d*) to the existing section 94, with minor modification.

(v) The new section 94(3)(*e*) re-enacts proviso (*e*) to the existing section 94.

(vi) The new section 94(3)(*f*) provides that oral evidence is admissible for the purpose of identifying the true subject matter of a contract or the true identity of the contractual parties. This is consistent with the position under the English common law. It is a specific application of the general provision in the new section 94(2)(*b*).

(Proviso (*f*) of the existing section 94 has been re-enacted as a rule of construction under the new section 95(1)(*c*).)

(*i*) The new section 94(4) re-enacts the existing section 101, and places it alongside the other provisions of the new section 94 to which it logically relates.

(*j*) The new section 95(1) groups together the broad rules applicable in the construction of documents.

(i) The new section 95(1)(*a*) and (*b*) re-enact, in two paragraphs, the existing section 100, with minor modifications.

(ii) The new section 95(1)(*c*) and (*d*) are based on proviso (*f*) of the existing section 94 and section 9A(2) of the Interpretation Act (Cap 1, 2002 Rev Ed). They provide that evidence may be given to show in what manner the language of the document is related to existing facts and to confirm that the language of the document applies accurately to existing facts. Where the language of a document is ambiguous or obscure in relation to existing facts, evidence may be given to ascertain the meaning of the document. With these new provisions, it would no longer be necessary to make fine distinctions between patent ambiguities (existing section 95), latent ambiguities (existing sections 97 to 99), and the plain meaning rule

(existing section 96). Any evidence that may assist in ascertaining the meaning of a document would be admissible.

(*k*) The new section 95(2) provides that in the construction of a contract to which the new section 94(1) applies, proof may be made of "existing facts" under the new section 95(1)(*c*) only where the facts are known or reasonably expected to be known to the parties to the contract.

(*l*) The new section 95(3) provides that in the construction of any document to which the new section 94(1) applies, no fact may be proved which would have the effect of contradicting, varying, adding to, or subtracting from the terms of the document, except where the proof of such fact is provided for under the new section 94. This is to ensure that the rules of construction under the new section 95 do not have the effect of circumventing and undermining the provisions of the new section 94.

(*m*) The new section 102 re-enacts the existing section 102, with modifications. For avoidance of doubt, it provides that sections 93 to 95 do not affect the construction of wills *under the common law*.