REDRAWING THE BOUNDARIES OF CONTRACTUAL INTERPRETATION: FROM TEXT TO CONTEXT TO PRE-TEXT AND BEYOND

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Introduction

The rules governing the interpretation of contracts are not generally considered by law schools and practitioners alike to be voguish or to merit close study. For those reasons it does not occupy a prominent position in law school curriculums; and few academic minds are animated by it. Less forgivably, many commercial lawyers seem unsure about how to approach the more ticklish points. This is disappointing, because disputes on the interpretation of contracts arise all too frequently in practice – contentions stand or fall depending on whether a particular interpretation prevails. Many more disputes never make it to the courts or to arbitration because the parties are satisfied on the basis of the already settled rules how a contract ought to be interpreted and acted on. It is therefore no great exaggeration to regard the subject as the "lifeblood of commercial law"[2]

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[2] Richard Calnan, "Construction of Commercial Contracts: A Practitioner's Perspective' in Andrew Burrows & Edwin Peel, eds, Contract Terms (Oxford University Press, 2007)

Given the obstinate frequency with which disputes on interpretation surface, it is somewhat surprising, and certainly not at all desirable, that experienced commercial judges and learned commentators continue to disagree quite vigorously as to what evidence can be relied on in aid of interpretation. The position was once governed by what is compendiously known as the *parol evidence rule*. The rule has been described as neither a rule of evidence, nor a rule only for things parol,[3] nor a single rule.[4] Broadly speaking, the rule initially excluded, subject to very limited exceptions, all extrinsic evidence in aid of interpretation. At the turn of the twentieth century it was said of the rule that "Few things are darker than this, or fuller of subtle difficulties."[5] Matters improved considerably over the course of the last century, so much so that in 1986 the UK Law Commission felt able to optimistically conclude that the rule "does not have the effect of excluding evidence which ought to be admitted if justice is to be done between the parties."[6] The Law Commission spoke prematurely– it was recently decided by the House of Lords in one of its last major decisions, *Chartbrook Ltd v Persimmon Homes Ltd*,[7] that prior negotiations are inadmissible for the purpose of interpretation. The position with regard to subsequent conduct also remains unsettled. The situation in Singapore and Malaysia is arguably riddled with even more difficulties. On top of the common

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[3] The term parol evidence, in its strict signification, referred to matters not made under seal, including unsealed writings. But it has become common to use the term interchangeably with extrinsic evidence, and that is generally the sense which I use the term in this article.

[4] John Henry Wigmore, *A Treatise on the Anglo-American System of Evidence in Trials at Common Law*, 3rd ed (Boston: Little Brown and Company, 1940), Vol IX at p 5.

[5] John Bradley Thayer, *A Preliminary Treatise on Evidence at the Common Law* (South Hackensack, New Jersey: Rothman Reprints, Inc, 1969 Reprint) at p 390.

[6] UK Law Commission, "Law of Contract: The Parol Evidence Rule" (1986) (Law Com No. 154) at para 2.45.

[7] [2009] 1 AC 1011 ("*Chartbrook*").

law position both jurisdictions have to come to grips with the provisions of their Evidence Acts.[8] These statutes are descended from the Indian Evidence Act 1872, which was intended by the celebrated draftsman, Sir James Fitzjames Stephen, to be a codification of the law of evidence as it then stood, including the parol evidence rule. Curiously, they have for the most part have been studiously ignored by our courts. In the light of this, it is worthwhile to revisit the subject.

The historical reasons for the rule

It is useful to begin with an examination of the historical reasons for the parol evidence rule. The exercise is instructive, because it reminds us that the parol evidence rule had its genesis in circumstances which no longer obtain, and the justifications advanced for it today have little to do with its origins.

First, there was 'the theory that a transaction of one "nature" cannot be overturned by *anything of an inferior "nature"*.'[9] This theory is mostly clearly illustrated in Lord Bacon LC's explanation of the distinction between patent and latent ambiguities in his *Maxims of the Law*, *regula* 25.[10] According to Bacon:

> There be two sorts of ambiguities of words, the one is *ambiguitas patens*, and the other *latens. Patens* is that which appears to be ambiguous upon the deed or instrument: *latens* is that which seemeth certain and without ambiguity, for any thing that appeareth upon the deed or instrument; but there is some collateral matter out of the deed that breedeth the ambiguity.
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> *Ambiguitas patens* is never holpen by averment, and the reason is, because the law will not couple and mingle matter of speciality, which is of the higher account, with matter of

[8] In Singapore, the Evidence Act (Cap 97, 1997 Rev Ed), ss 93–102; in Malaysia, the Evidence Act 1950 (Act 56) (Revised 1971) ("Malaysian Evidence Act"), ss 91–100.

[9] Wigmore, *supra* note 4 at p 88 (emphasis original).

[10] *The Works of Francis Bacon* (London: 1826), vol IV, at pp 78–79.

> averment, which is of inferior account in law; for that were to make all deeds hollow, and subject to averments, and so in effect, that to pass without deed, which the law appointeth shall not pass but by deed.
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> ...
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> But if it be *ambiguitas latens*, then otherwise it is...

The distinction between patent and latent ambiguities is clearly recognisable in sections 95 to 99 of the Evidence Act.[11]

However, the superior nature of the deed at common law, which in the past placed great importance on form, was eventually rejected in equity. A court of chancery would restrain a party from suing under a contract under seal which he later varied or rescinded by parol.[12] The position in equity now prevails.[13] This is, perhaps contradictorily, also recognised in the Evidence Act, where subsections (b), (c) and (d) to section 94[14] provide for the "separate agreement" exception to the exclusion of oral evidence.

Second, there was also the influence of doctrine of estoppel by deed, *ie* a party to a deed is estopped from denying its contents. Wigmore traces this doctrine to the reception and gradual extension, to ordinary persons, of the Germanic principle that the king's seal to a document makes the truth of the document indisputable.[15]

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[11] Malaysian Evidence Act, ss 93–97.

[12] See *Berry v Berry* [1929] 2 KB 316 and the authorities there collected.

[13] Civil Law Act (Cap 43, 1999 Rev Ed), s 4(13).

[14] Malaysian Evidence Act, s 92 (b), (c) and (d).

[15] Wigmore, *supra* note 4 at pp 83–84. The historical reason for the doctrine, *ie* the force attached to a person's seal, accounts for the fact that, even today, detrimental reliance is not needed to constitute an estoppel by deed.

Estoppel by deed, in turn, galvanised the development of the notion that written instruments, whether sealed or not, were conclusive.[16] Some trace of the influence of estoppel can still be detected today in section 101 of the Evidence Act, which confines the parol evidence rule to the parties to a document and their representatives in interest.[17]

At the same time, it must be pointed out that, as a matter of strict doctrine, there was never an estoppel attaching to writing as such. When Sir Edward Coke wrote his commentary on Littleton's treatise, he identified three kinds of estoppel: "by matter of record, by matter in writing, and by matter in *pais*."[18] By matter in writing Coke meant deeds: "by making an acquittance by deed indented or by deed poll, by defeasance by deed indented or by deed poll." More than three centuries later, Lord Denning MR declared that, from these simple origins, the law of estoppel had grown into a big house with many rooms.[19] But still there was no estoppel resulting from writing as such.

In my view, there are also considerable difficulties with the idea of estoppel as a modern rationale for the exclusion of extrinsic evidence, even though there is some attraction in the notion that parties who have agreed in writing are thereby estopped from denying its contents. The main difficulty lies with the concept of reliance which underlies estoppel generally. It can be said that reliance in the detrimental sense is not needed, consistently with the objective theory of contract, whose purpose is to enable parties to rely, in the general sense

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[16] Wigmore, *supra* note 4 at pp 85–87.

[17] Malaysian Evidence Act, s 99.

[18] *The First Part of the Institutes of the Laws of England*, 11th ed (London, 1719) at p 352a.

[19] *McIlkenny v Chief Constable of the West Midlands* [1980] 1 QB 283 at 317.

of the word, on the manifest intentions of another. But it remains that the degree of reliance placed by a party on the written contract must be assessed against all the circumstances of the case.

Third, there was the distrust of oral evidence. For example, in the *Countess of Rutland's Case*,[20] which Lord Hoffmann referred to in *Chartbrook*, Popham CJ opined that:

> For every contract or agreement ought to be dissolved by matter of as high a nature as the first deed. *Nihil tam conveniens est naturali aequitati, unumquodque dissolve eo ligamine quo ligatum est.* [Nothing is so agreeable to natural equity that, by the like means by which anything is bound, it may be loosed.] Also it would be inconvenient that matters in writing made by advice and on consideration, and which finally import the truth of the agreement of the parties, should be controlled by averment of the parties, to be proved by the uncertain testimony of slippery memory. And it would be dangerous to purchasers and farmers and all others in such cases if such nude averments against matters in writing should be admitted.

As can be seen, Popham CJ was speaking of deeds, which had a more sanctified status when he spoke, in 1604, than now.[21] It should also be made clear why oral evidence was distrusted. According to Sir William Holdsworth, such distrust was engendered by the rudimentary state of the law in this area and in relation to the control of the jury.[22] Wigmore expressed a similar view.[23] A detailed account of

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[20] (1604) 5 Co Rep 25b.

[21] See below.

[22] *History of English Law* (London: Methuen & Co Ltd, 1966 Reprint) Vol IX at pp 177–219.

[23] Wigmore, *supra* note 4at p 86; for a purely American perspective, see Charles T McCormick, "The Parol Evidence Rule as a Procedural Device for Control of the Jury" [1932] 41(3) Yale LJ 365.

the state of the law is provided by Holdsworth, but it is sufficient for present purposes to refer to the following passage from Thayer:[24]

> It must be remembered what such a fear at that period [*viz* the seventeenth century] meant. Not yet had any distinct system of rules for excluding come into existence. The power of judges to set aside verdicts as being against the evidence had begun to be exercised, but had not got far. The attaint was still the regular way of controlling the jury, and this had practically lost its hold. The jury still held its old character and function, might decide on its own knowledge alone, and, if it heard evidence, might reject it all.

Needless to say, such fears no longer have any relevance − certainly not in the Singapore and Malaysian contexts. It is also to be noted that the exclusion of oral evidence was not absolute even in this early period. For example, in *Lord Cheyney's Case*,[25] decided in 1591, there was *obiter* to the effect that resort may be had to oral evidence if the written words do not apply clearly to the facts. That case was the progenitor of the latent ambiguity exception to the parol evidence rule.

It should also be noticed that the position in chancery was different at one point. The first volume of *Equity Cases Abridged*, written in 1667 and considered by Arden MR to be "a very good book",[26] contains the following passage:[27]

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[24] Thayer, *supra* note 4 at p 429.

[25] (1591) 5 Co Rep 68a.

[26] *Chaworth v Beech* (1799) 4 Ves Jun 555 at 567.

[27] "Evidence, Witnesses and Proof" (1667–1744) 1 Eq Ca Abr 223 at 230–231; 21 ER 1005 at 1010–1011; see also *Strode v Falkland* (1708) 3 Rep Ch 169 at 176–177; 21 ER 758 at 760 ("where the Words stand in *equilibrio*, and are so doubtful, that they may be taken one Way or other, there 'tis proper to have Evidence read to explain them, and we will consider how it shall be allowed, and how far not, after 'tis read: And this is not like the Case of Evidence to a Jury, who are easily biass'd by it, which this Court is not").

> The constant Rule of Law has been, to reject all parol Proof brought to supply the Words of a Will, or to explain the Intent of the Testator, and that nothing *dehors* should be averred … but this Rule has received a Distinction which has greatly prevailed of late, *viz.* between Evidence offered to a Court, and Evidence offered to a Jury; for in the last Case, no parol Evidence is to be admitted, lest the Jury might be inveigled by it; but in the first Case it can do no Hurt, being to inform the Conscience of the Court, who cannot be biased or prejudiced by it.

This differentiated approach was acknowledged but repudiated in 1795 by Buller J, who held in *Goodlittle v Otway* that parol evidence is no more admissible by a court than by a jury.[28] Buller J appears to have founded his approach on the solemnity of a deed, which the case concerned, and which he contrasted to cases which depend on the surrounding circumstances.

From this brief survey it seems clear, as I mentioned earlier, that the development of the parol evidence rule was driven by considerations which have long ceased to be relevant. If the rule were purely a creature of common law I would say that this was a case of *cessat ratione legis, cessat lex ipsa* – when the reason for the law ceases, the law itself ceases. Certainly there has been a considerable relaxation of the rule in more modern times – Professor Gerard McMeel suggests that the nineteenth century cases exhibited a more permissive attitude towards the admission of extrinsic evidence than is commonly thought.[29] More importantly, in the second half of the twentieth century, the courts in England have sought to put the parol evidence rule on a more rational footing. Those efforts culminated in Lord Hoffmann's famous five-point restatement in

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[28] (1795) 2 H Bl 516 at 524; cited for this proposition in Matthew Bacon, *A New Abridgement of the Law*, 7th ed, Vol III (London: A Strahan, 1832) at p 308.

[29] Gerard McMeel, "The Objective Principle and the Construction of Contracts", Singapore Academy of Law Lecture, 6 July 2010.

Investors Compensation Scheme Ltd v West Bromwich Building Society,[30] to which I now turn.

The modern approach: generally

In *ICS*, Lord Hoffmann restated the modern approach to interpretation in the following passages, which have now become canonical:[31]

> (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.
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> (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.
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> (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.
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> (4) The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meanings of words which are

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[30] [1998] 1 WLR 896 ("*ICS*").

[31] *Id* at 912–913.

> ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax: see *Mannai Investments Co. Ltd. v. Eagle Star Life Assurance Co. Ltd.* [1997] A.C. 749.
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> (5) The "rule" that words should be given their "natural and ordinary meaning" reflects the common sense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had. Lord Diplock made this point more vigorously when he said in Antaios *Compania Naviera S.A. v. Salen Rederierna A.B.* [1985] A.C. 191, 201:
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> > "if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business commonsense, it must be made to yield to business commonsense."

In Singapore, the *ICS* restatement has been broadly adopted in *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd*,[32] where I delivered the judgment of the Court of Appeal. In addition to following *ICS*, *Zurich Insurance* cautiously suggested that prior negotiations and even subsequent conduct may be admissible for the purpose of interpretation. *Zurich Insurance* represents the current position in Singapore.

Underlying the modern approach are two important, and rather belated, insights. The first is that the admissibility of extrinsic evidence for the purposes of contractual interpretation is a substantive question, despite *inter alia* the parol evidence rule's misleading location in the scheme of the Evidence Act.[33] The main area of substantive law controlling the subject is the law of contract: how

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[32] [2008] 3 SLR(R) 1029 ("*Zurich Insurance*").

[33] The substantive nature of the subject is impliedly recognised in s 102 of the Evidence Act, which excludes wills from the ambit of the parol evidence rule.

we interpret contracts depends on our conception of contracts. For example, since we now universally adhere to an objective theory of contract, the aim of contractual interpretation is likewise to identify the objective common intention of the parties – the subjective intention of a party[34] is therefore irrelevant and evidence to prove the same is not admissible.[35] Similarly, the requirement that the evidence of the context must be reasonably available to both parties reflects the position that only the objective, common context is relevant. No one violently disagrees with these propositions, but it is necessary to reiterate the substantive nature of the subject because evidential concerns, such as the frailty of oral evidence, have been canvassed in support of the exclusionary rule. It is not immediately apparent why there are special evidential concerns "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", to use the words defining the ambit of the rule in the Evidence Act.[36] But such justifications have been advanced by high authority, and therefore merit careful consideration.

The second insight was the rejection of the fallacy that a court in interpreting a contract could:[37]

> … retire into that lawyer's Paradise where all words have a fixed, precisely ascertained meaning; where men may express their purposes, not only with accuracy, but with fullness; and where, if the writer has been careful, a lawyer, having a document

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[34] As opposed to a subjective or unilateral declaration of intent made by one party to another, which may be relevant, depending on the context.

[35] There could be an exception to the objective approach where one party's subjective intentions are known to the other, or where there is a common subjective intention. But once again these are questions of substantive law.

[36] Evidence Act, ss 93–94.

[37] Thayer, *supra* note 4 at pp 428–429.

> referred to him, may sit in his chair, inspect the text, and answer all questions without raising his eyes.

It is now better appreciated that words, even in the hands of skilled practitioners, are not always capable of transmitting the precise meaning which their authors intended. In order to ascertain the precise meaning of words, resort must be had to the exact context which they were used. An important consequence of this insight is the rejection of textual ambiguity as a condition for resorting to contextual aids – the process of interpreting the text is necessarily incomplete until the entire relevant context has been considered. The so-called plain meaning rule has been abandoned in favour of a commonsense inference, which may be confirmed or displaced by the context, that words are used in their natural, ordinary or common signification.[38] In the same vein, the court can only *conclude* that contracting parties have perfectly and entirely reduced their agreement into writing *after* considering the context to ascertain that this is indeed the case (which it might not be). Once this is understood, it will also be realised, as the UK Law Commission pointed out,[39] that it is circular to say that extrinsic evidence cannot be admitted to vary, add to, subtract from, or contradict the terms of a contract which have been reduced to a document. It should be emphasised that all this is not to say that a written document, by itself, is meaningless. This would be antithetical to the very notion of a shared language, and in practice we know that skilled solicitors are able to achieve a very high degree of precision in the documents they draft. But, to emphasise, we can only be sure that the meaning of the document read alone is the meaning the parties truly intended if we consider all the objective circumstances, and, once again, the exercise might

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[38] David W MacLauchlan, "Contract Formation Contract Interpretation, And Subsequent Conduct" [2006] 25(1) Qld LJ 77 at p 92.

[39] UK Law Com, *supra* note 5 at para 2.7.

reveal that the words used were unequal to expressing the parties' true intention. As Lord Hoffmann astutely pointed out, we must not "confuse the meaning of words with the question of what meaning the use of the words was intended to convey."[40]

These two insights are mainly responsible for defining most of the extent and limit of the range of evidence now admissible for the purpose of contractual interpretation. They do not account, however, for the exclusion of prior negotiations, which is therefore an exception properly so called, to be justified by reasons external to the law of contract and the nature of language. In *ICS*, Lord Hoffmann remarked that the boundaries of this exception remained unclear, and left room for further exploration in a future case. The opportunity to do so arose in *Chartbrook*.[41] Lord Hoffmann gave the leading speech, which was also his last. Suffice at this point to set out Lord Hoffmann's conclusion:[42]

> … there is no clearly established case for departing from the exclusionary rule. The rule may well mean, as Lord Nicholls has argued, that parties are sometimes held bound by a contract in terms which, upon a full investigation of the course of negotiations, a reasonable observer would not have taken them to have intended. But a system which sometimes allows this to happen may be justified in the more general interest of economy and predictability in obtaining advice and adjudicating disputes. It is, after all, usually possible to avoid surprises by carefully reading the documents before signing them and there are the safety nets of rectification and estoppel by convention. Your Lordships do not have the material on which to form a view. It is possible that empirical study (for example, by the Law Commission) may show that the alleged disadvantages of admissibility are not in practice very significant or that they are outweighed by the advantages of doing more precise justice in

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[40] *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] AC 749 at 778.

[41] [2009] 1 AC 1011 ("*Chartbrook*").

[42] *Id.* at [41].

> exceptional cases or falling into line with international conventions. But the determination of where the balance of advantage lies is not in my opinion suitable for judicial decision. Your Lordships are being asked to depart from a rule which has been in existence for many years and several times affirmed by the House. There is power to do so under the Practice Statement (Judicial Precedent) [1966] 1 WLR 1234. But that power was intended, as Lord Reid said in *R v National Insurance Comrs, Ex p Hudson* [1972] AC 944, 966 , to be applied only in a small number of cases in which previous decisions of the House were "thought to be impeding the proper development of the law or to have led to results which were unjust or contrary to public policy". I do not think that anyone can be confident that this is true of the exclusionary rule.

It must immediately be noticed that the English position after *ICS* and *Chartbrook* was anything but long established. The parol evidence rule of old was an exclusionary rule with inclusionary exceptions. The modern position, as it stands after the *ICS* restatement and the gloss on it in *Chartbrook*, is an inclusionary rule with exclusionary exceptions. The net effect may or may not be the same, but – critically in my view – the conceptual commitment to *prima facie* exclusion which undergirded the old rule has now been decisively abandoned. Lord Hoffmann himself seems to be of the same view when he prefaced his restatement in *ICS* with the admonition:[43]

> I do not think that the fundamental change which has overtaken this branch of the law, particularly as a result of the speeches of Lord Wilberforce in *Prenn v. Simmonds* [1971] 1 W.L.R. 1381, 1384-1386 and *Reardon Smith Line Ltd. v. Yngvar Hansen-Tangen* [1976] 1 W.L.R. 989, is always sufficiently appreciated.

In the same vein, prior negotiations were never excluded as a distinct category of evidence. They could not have been, in a generally exclusionary regime. If support is needed for this proposition it can be found in the very provisions of the Evidence Act, which follow the codifying Indian Evidence Act

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[43] *ICS, supra* note 30 at 912.

of 1872[44] and which make no reference to prior negotiations as such. Similarly, prior negotiations were not treated distinctly in the discussion of the parol evidence rule in the leading textbooks published at the turn of the century.[45] So, all in all, it is rather puzzling that Lord Hoffmann considered the exclusion of prior negotiations, as a distinct category of extrinsic evidence, to be so long and well established that the power recognised in the Practice Statement of 1966[46] had to be invoked in order to disturb it.[47]

The courts in Singapore have not committed themselves to the position taken in *Chartbrook* − there have been some references to the English position but *Chartbrook* itself has yet to be judicially considered. In any case, fidelity to precedent, while unquestionably important, cannot be the sole concern of an apex court, which has the duty of ensuring the principled development of the law. It is therefore necessary to examine the substantive reasons advanced by Lord Hoffmann for unequivocally admitting, on the one hand, "absolutely anything which would have affected the way in which the language of the [contractual] document would have been understood by a reasonable man", but paradoxically excluding, on the other hand, all prior negotiations. This task is somewhat complicated by the fact that Lord Hoffmann only considered the

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[44] See the Indian Evidence Act 1872, Ch VI, ss 91–100, reproduced in James Fitzjames Stephen QC, *The Indian Evidence Act (I of 1872): With an Introduction on the Principles of Judicial Evidence* (Calcutta, Thacker, Spink & Co, 1872) at pp 188–193.

[45] See *eg* Taylor, *A Treatise on the Law of Evidence as administered in England and Ireland*, 10th ed (London: Sweet and Maxwell Ltd, 1906), Ch IV, "Admissibility of Parol Evidence to Affect Written Instruments" at pp 807–883, and the entry on parol evidence at pp 147–149 of the index.

[46] *Practice Statement (Judicial Precedent)* [1966] 1 WLR 1234.

[47] It is also to be observed that the cases cited by Lord Hoffmann in support of the pedigree of the rule, *viz Bank of Scotland v Dunedin Property Investment Co Ltd* 1998 SC 657 and *Alexiou v Campbell* [2007] UKPC 11 referred mainly to *ICS* and *Prenn v Simmonds*, *infra* note 48.

arguments *pro* and *contra* and simply concluded holistically that there was no clearly established case for departing from what he considered to be the well established rule against admitting prior negotiations. But, as one might expect, Lord Hoffmann comprehensively surveyed the field, and it is sufficient for present purposes to retrace his steps. These fall under three broad heads: (1) the unreliability or unhelpfulness of prior negotiations, (2) the availability of rectification and estoppel by convention as safety valves to alleviate any injustice that the exclusionary rule may cause, and (3) the need to ascertain contractual obligations swiftly and accurately, for the purposes of taking advice, litigation, and dealings with third parties. Each will be considered in turn.

The unreliability or unhelpfulness of extrinsic evidence

As mentioned, Lord Hoffmann referred to the *Countess of Rutland Case*, where Popham CJ spoke of the "uncertain testimony of slippery memory". I have already suggested that that case was decided against the background of the undeveloped state of the law on evidence. It is therefore not quite correct to say that the same concerns about the reliability of extrinsic evidence have long underpinned the exclusionary rule. In any case, concerns about the slipperiness of memory do not justify the exclusion of prior negotiations in the form of documents.

It has also been said, by none other than Lord Wilberforce, that evidence of prior negotiations is unhelpful. The case is, of course, *Prenn v Simmonds*,[48] where Lord Wilberforce's speech was notable for its emphatic and seminal recognition that:

[48] [1971] 1 WLR 1381 at 1384–1385.

> The time has long passed when agreements, even those under seal, were isolated from the matrix of facts in which they were set and interpreted purely on internal linguistic considerations.

and its equally emphatic rejection, at the same time, that the law has, or should, "allow prior negotiations to be looked at in aid of the construction of a written document." Lord Wilberforce explained this approach as follows:

> There were prolonged negotiations between solicitors, with exchanges of draft clauses, ultimately emerging in clause 2 of the agreement [in issue]. The reason for not admitting evidence of these exchanges is not a technical one or even mainly one of convenience, (though the attempt to admit it did greatly prolong the case and add to its expense). It is simply that such evidence is unhelpful. By the nature of things, where negotiations are difficult, the parties' positions, with each passing letter, are changing and until the final agreement, though converging, still divergent. It is only the final document which records a consensus. If the previous documents use different expressions, how does construction of those expressions, itself a doubtful process, help on the construction of the contractual words? If the same expressions are used, nothing is gained by looking back: indeed, something may be lost since the relevant surrounding circumstances may be different. And at this stage there is no consensus of the parties to appeal to. It may be said that previous documents may be looked at to explain the aims of the parties. In a limited sense this is true: the commercial, or business object, of the transaction, objectively ascertained, may be a surrounding fact... And if it can be shown that one interpretation completely frustrates that object, to the extent of rendering the contract futile, that may be a strong argument for an alternative interpretation, if that can reasonably be found. But beyond that it may be difficult to go: it may be a matter of degree, or of judgment, how far one interpretation, or another, gives effect to a common intention: the parties, indeed, may be pursuing that intention with differing emphasis, and hoping to achieve it to an extent which may differ, and in different ways. The words used may, and often do, represent a formula which means different things to each side, yet may be accepted because that is the only way to get "agreement" and in the hope that disputes will not arise. The only course then can be to try to ascertain the "natural" meaning. Far more, and indeed totally, dangerous is it to admit evidence of one party's objective – even if this is known to the other party. However strongly pursued this may be, the other party may only be willing to give it partial recognition, and in a world of give and take, men often have to be satisfied with less than they want. So, again, it would be a

> matter of speculation how far the common intention was that the particular objective should be realised.

As the quintessential counsel of caution, this passage from Lord Wilberforce's speech should always be borne in mind by every judge and lawyer faced with extrinsic evidence of the parties' contractual intentions. But, with respect, the reasons given by Lord Wilberforce are rather too reliant on specific factual premises to form a firm theoretical foundation for a general rule that prior negotiations may not be referred to in aid of contractual interpretation. It is also not clear how a satisfactory distinction can always be drawn between the "matrix of facts" and prior negotiations. However, in fairness to Lord Wilberforce, it is not at all clear from the passage just cited that he meant to lay down such a general and inflexible rule, though he no doubt envisaged a large degree of exclusion.

It should also be pointed out, as Lord Hoffmann himself held in *Chartbrook*, that there is no need for a special rule to exclude irrelevant evidence just for contractual interpretation. The inadmissibility of irrelevant evidence is a general rule.[49] Similarly, there is no need for a special rule to exclude unreliable or unhelpful evidence just for contractual interpretation. In fact, such a rule confuses admissibility with weight.

Certainly, it cannot be said that prior negotiations are always unhelpful. In *Chartbrook* itself,[50] Baroness Hale of Richmond confessed that she would not have found it so easy to agree with the other Law Lords had she not been made aware of the agreement which the parties had reached on the relevant aspect of

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[49] This is codified in the Evidence Act, s 5, and the Malaysian Evidence Act, also s 5.

[50] *Chartbrook*, *supra* note 6 at [99].

their bargain during the negotiations which led up to the formal contract. An instructive example can also be found in *A & J Inglis v John Buttery & Co*,[51] which was cited by Lord Hoffmann in *Chartbrook* to demonstrate the pedigree of the rule against admitting prior negotiations. In that case there was a contract between a shipbuilders and ship-owners for works on a ship for a fixed sum of £17,250. The draft contract read in relevant part:

> Iron work. – The plating of the hull to be carefully overhauled and repaired [*but if any new plating is required the same to be paid for extra.*] Deck beams, ties, diagonal ties, main and spar deck stringers, and all iron work, to be in accordance with Lloyds' rules for classification.

The negotiations between the parties included the following exchange. On 25 March 1875, the ship-owner's agent wrote to the shipbuilder:

> Dear Sirs, We have your favour of yesterday handing us agreement and specification for the repair of the 'United Service.' We have gone carefully over the documents and send them on to Glasgow to Mr Gilchrist, who holds the procuration of our firm, and who will sign the contract when in order. He will call on you to-morrow. The memo. of agreement appears all in order, but in the specification, under the heading 'iron work,' we must ask you to erase all the stipulations after the word 'repaired.' [The stipulation is emphasised in the preceding quotation.] We have all throughout understood, and your memo. of agreement before us clearly stipulates, that the sum of £17,250 covers lengthening, new engines, &c., and all repairs and alterations necessary to class the steamer A1 100 at Lloyds.

On 26 March the shipbuilder replied:

> Dear Sirs, We are in receipt of yours of yesterday, and have just seen your Mr Gilchrist, and expect to get the clause arranged as you desire it. The papers have not reached Mr Gilchrist yet, but if they arrive to-day, or at least to-morrow morning, he will call here.

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[51] (1878) 3 App Cas 552 ("*Inglis v Buttery*"). The judgment of the Court of Sessions is reported at (1877) 5 R (4th Ser) 58.

After some further oral negotiations, the contract was signed on 27 March. Before the contract was signed, the stipulation was deleted by an ink line across it, which left the words still visible. The ink line was authenticated by a marginal note: "fourteen words deleted". The marginal note was signed by both parties. A dispute then arose. It turned out that the ship required a substantial part of its plating to be renewed before it could be classed. It appears that the bargain, which as mentioned was for a fixed sum of £17,250, would be a hard one for the shipbuilder if it was interpreted to include the plating work required.

If prior negotiations were admissible, the dispute in *Inglis v Buttery* could have been very easily resolved. The stipulation which was deleted with the parties' consent made abundantly clear that the parties understood "new plating" to fall within the compass of "overhauling and repair". There was nothing unreliable about it – it was formally deleted by consent from the document which, a short while after, became the formal document recording the agreement between the parties. It was fortified, if indeed fortification was needed, by the exchange, quoted above, between the parties a few days before the contract was signed. The case, in my view, is one which clearly demonstrates the usefulness of prior negotiations.

As things turned out, only Lord Justice Clerk Moncrieff in the Court of Sessions took this approach, laying down the following principle:

> … it is trite law – so trite that I do not think it necessary to quote authority on the subject – that in all such mercantile contracts, whether they be ambiguous or unambiguous, whether they be clear and distinct or the reverse, the Court are entitled to be placed in the position in which the parties stood before they signed. If it were in the slightest degree necessary to go into that matter the rule extends a great deal further than anything which is pleaded here.

Lord Gifford disagreed, and stated what he considered to be the conventional position in the following passage, which was cited with apparent approval by Lord Hoffmann in *Chartbrook*:

> Now, I think it is quite fixed, and no more wholesome or salutary rule relative to written contracts can be devised, that where parties agree to embody, and do actually embody, their contract in a formal written deed, then in determining what the contract really was and really meant, a court must look to the formal deed and to that deed alone. This is only carrying out the will of the parties. The only meaning of adjusting a formal contract is, that the formal contract shall supersede all loose and preliminary negotiations, that there shall be no room for misunderstandings which may often arise, and which do constantly arise, in the course of long, and it may be desultory conversations, or in the course of correspondence or negotiations during which the parties are often widely at issue as to what they will insist on and what they will concede. The very purpose of a formal contract is to put an end to the disputes which would inevitably arise if the matter were left upon verbal negotiations or upon mixed communings partly consisting of letters and partly of conversations. The written contract is that which is to be appealed to by both parties, however different it may be from their previous demands or stipulations, whether contained in letters or in verbal conversation. There can be no doubt that this is the general rule, and I think the general rule, strictly and with peculiar appropriateness applies to the present case."

Lord Gifford went on to say that this general rule excludes from consideration (1) previous correspondence between the parties and their agents, (2) preliminary verbal communications or alleged understandings, and (3) letters or conversations subsequent to the contract. I pause to say that it was clear that Lord Gifford considered these to be examples typifying the general rule against admitting extrinsic evidence in aid of interpretation – he was not laying down a rule specifically prohibiting the admission of prior negotiations. That general rule has now been put to rest: as Professor David McLauchlan scathingly observed recently, the reliance on old cases such as *Inglis v Buttery* in *Chartbrook* "almost

beggars belief given the very substantial inroads into [the parol evidence rule] over the last 130 years".[52]

Applying the general rule, Lord Gifford found that "overhauling and repair" did not include replating. In my respectful opinion, this conclusion was possible only because the evidence of prior negotiations was excluded from consideration. The third judge, Lord Ormidale, took a legal position somewhere between Lords Moncrieff and Gifford, and in the result concurred with Lord Moncrieff that replating fell within the ambit of the contract.

On appeal to the House of Lords, Lord Moncrieff's approach was rejected in favour of Lord Gifford's. Interestingly, however, the House nevertheless agreed with the result reached by Lords Moncrieff and Ormidale, though after involved textual analyses which would not have been necessary had the Law Lords permitted themselves to look beyond the text of the final contract. For present purposes, the case is highly instructive because it illustrates the very wide ambit of the *Chartbrook* exclusion of prior negotiations, and how it may result in the exclusion of highly probative evidence of the parties' objective intentions. In *Inglis v Buttery* it made arguable a case which was open-and-shut. In other cases its effect might not be so benign.

The need to be able to interpret contractual obligations swiftly and with certainty

In *Chartbrook*, Lord Hoffmann also considered the argument:

> that the admission of pre-contractual negotiations would create greater uncertainty of outcome in disputes over interpretation

[52] "*Chartbrook Ltd v Persimmon Homes Ltd:* Commonsense principles of interpretation and rectification?" [2010] 126 LQR 8 at p 10.

> and add to the cost of advice, litigation or arbitration. Everyone engaged in the exercise would have to read the correspondence and statements would have to be taken from those who took part in oral negotiations. Not only would this be time-consuming and expensive but the scope for disagreement over whether the material affected the construction of the agreement … would be considerably increased.
>
> There is certainly a view in the profession that the less one has to resort to any form of background in aid of interpretation, the better…
>
> It reflects what may be a sound practical intuition that the law of contract is an institution designed to enforce promises with a high degree of predictability and that the more one allows conventional meanings or syntax to be displaced by inferences drawn from background, the less predictable the outcome is likely to be.

An insightful elaboration of such a viewpoint is to be found in Mr Alan Berg's note on *ICS*:[53]

> A client who asks his lawyer to advise on the meaning on a particular clause is asking how a court would be likely to interpret it. Therefore, applying *ICS* 1…the lawyer must first obtain *all* the relevant background knowledge which was reasonably available to the parties in the situation in which they were at the time of the contract. This presents little difficulty if the transaction was a straightforward one, the lawyer was personally involved in the drafting and the transaction is fairly recent. However, in the writer's experience, it is extremely difficult for a lawyer to comply, even approximately, with *ICS* 1 if the contract formed part of a deal in which he was not personally involved, particularly if the deal was done several years previously…
>
> If the contract is before a court, each side has a team of counsel and solicitors who can investigate the background information required by *ICS* 1. But parties to a contract do not usually expect that it will lead to litigation. The main contingency which they have in mind is that at some point it may become necessary to ask a lawyer about the meaning of a particular clause. And they usually assume that it will be enough to provide the lawyer with

[53] "Thrashing through the Undergrowth" [2006] 122 LQR 354.

> the text of the contract plus a summary of the factual or commercial background – but nothing more detailed than that.
>
> For many contracts, therefore, the *ICS* 1 definition of interpretation calls for a considerably more detailed investigation of the factual background than a contracting party would expect to be necessary in order to obtain legal advice about its meaning. Is this indicative of some basic problem in the *ICS* principles which their repeated citation has tended to obscure? The *ICS* principles were premised on the proposition that the way in which contractual documents are interpreted should be assimilated to the way in which any serious utterance would be interpreted in ordinary life; and the same assumption is made in Lord Nicholls's article ["My Kingdom for a Horse: The Meaning of Words" [2005] 121 LQR 577]. Serious utterances in ordinary life are addressed directly to the other party, who possesses the relevant background knowledge. But if two companies enter into a complicated transaction, one of the main purposes in instructing lawyers is to ensure that its terms will be clear to those who have to deal with the contract in the future, and to the lawyers advising them, after the management who negotiated the contract have retired or moved on. The contract is therefore drafted so that it can be used by – it is addressed to – people who will have little of the background knowledge of the original management. In *The Starsin* [2003] UKHL 12; [2004] 1 A.C. 715, Lord Hoffmann stated (at [73]) that "The interpretation of a legal document involves ascertaining what meaning it would convey to a reasonable person having all the background knowledge which is reasonably available to the person or class of persons to whom the document is addressed. A written contract is addressed to the parties." That does not reflect the present writer's experience. A lawyer does not do the job he is retained to do if he drafts the contract so that it is intelligible only to the original parties, and then only for so long as they can recall all the background knowledge that they had at the time of the signing.

Lord Hoffmann also referred to the argument that:

> admitting evidence of pre-contractual negotiations … would be unfair to a third party who took an assignment of the contract or advanced money on its security. Such a person would not have been privy to the negotiations and may have taken the terms of the contract at face value.

Such concerns are not new. For example, similar concerns were expressed almost 200 years ago in *Attorney-General v Shore* by Lord Tindal CJ:[54]

> If it were otherwise, no lawyer would be safe in advising upon the construction of a written instrument, nor any party in taking under it; for the ablest advice might be controlled, and the clearest title undermined, if, at some future period, parol evidence of the particular meaning which the party affixed to his words, or of his secret intention in making the instrument or of the objects he meant to take benefit under it, might be set up to contradict or vary the plain language of the instrument itself.

But, notwithstanding such concerns, the contextual approach to interpretation has taken root, without any apparent disruption to commercial life.

With regard to Mr Berg's note, I do not understand him to disagree with the proposition that, as a matter of substantive law, the goal of contractual interpretation is the identification of the objective agreement between the parties at the time of contract. Any other understanding at any other time is legally irrelevant. This must be so, since the contract is by definition fully formed at the time of contract. Mr Berg's concern, like that of many other commentators, is practical in nature: given the wide range of admissible material, how can a lawyer advise his client on the meaning of a contract with speed and accuracy?

Admittedly, the contextual approach to interpretation means that a lawyer may sometimes never be able to definitely advise on the true interpretation of a contract unless he is apprised of the entire objective context. There will always remain the possibility of some extrinsic fact which will affect the interpretive process. But, in my view, a lawyer today is still able to advise with a high degree of confidence on plausible outcomes, and that will be all that is required and

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[54] (1833-1843) 11 Sim 592 at 615.

expected of him. Here it must be pointed out that the conceptually wide range of *admissible* evidence says nothing about the *weight* of that evidence. In many cases where contracts are written the centre of gravity will, naturally, be the written contract. And a lawyer can advise on the weight the written contract is likely to carry without wandering too far into the entire possible range of interpretive material: for the more formal a written contract, the more apparently complete and internally consistent its terms, the more the terms apply with ease to the facts, the more the result coheres with the parties' broad purposes and their attitude towards the allocation of risk, the less likely it is that any extrinsic evidence will affect the interpretation of the contract. In this regard, Mr Berg's experience that commercial contracts are written to be read on their own will, of course, be an argument to be made, and will no doubt carry very great weight in appropriate cases. In other words, parties who have meticulously planned and striven for certainty will most assuredly get it. On the other hand, parties who have adopted slipshod drafting cannot be taken to have valued certainty very much, and I think a lawyer would not be remiss if he advises them that their written contract read by itself may mean such and such a thing, but as it is not clearly drafted he cannot say with confidence that that meaning will not be disturbed on a full consideration of the context. I should also note the possibility of using a properly negotiated and drafted entire agreement clause to exclude references to the context in aid of interpretation.

The same analysis can be applied to any concern, such as those expressed by Spigelman CJ,[55] that the volume of evidence in litigation will go up. From my experience, the fear of floodgates and uncertainty has been greatly overstated. The court in most cases will be able to decide that the written contract and the

[55] "From text to context: Contemporary contractual interpretation" [2007] 81 ALJ 322

broad background militate so strongly in favour of one interpretation that a rival interpretation said to be founded on the broader context can be rejected summarily. And, in the exceptional cases where there is a deluge of allegedly relevant documents, why should the court be thereby deterred from its search for the true agreement between the parties? The administration of justice should not meekly bow down to considerations of convenience. I should also point out that Lords Bingham and Hoffmann have not observed any increase in the amount of evidence introduced in English courts as a result of *ICS*.[56] As far as I can tell the Singapore experience is the same. I should also add that the courts in Singapore are both ready and willing to respond robustly to parties' attempts to inundate them with irrelevant evidence.

Likewise for the concerns about the rights of third parties. It may well be reasonable to take the view that a third party who takes an assignment of a poorly drafted contract should not be surprised that the true construction of the instrument turns out to be something other than what he expected. Separately, there are other doctrines, most significantly that of estoppel, which can in appropriate cases be invoked to prevent a party to a contract from setting up a contextual interpretation against a third party who has acted on the faith of the text.

The availability of rectification and estoppel

Lord Hoffmann considered that there are two safety devices, rectification and estoppel by convention, which will in most cases prevent the exclusion of prior negotiations from causing injustice. Significantly, Lord Hoffmann also

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[56] "A New Thing Under the Sun? The Interpretation of Contracts and the ICS Decision" [2008] 12 Edin LR 374; *Chartbrook*, *supra* note 6 at [38].

acknowledged, without any apparent disapproval, the practice of bringing in evidence of prior negotiations via pleading rectification and/or estoppel, in the hope of thereby influencing the court.

This position is not easy to understand. Estoppel by convention seems more relevant for subsequent conduct – in respect of prior negotiations it does not seem to do anything more than what is already permissible under the doctrine of rectification. In fact, it is somewhat strained to say that parties are estopped from denying the true agreement between them – it is the law of contract which binds them to the agreement, not the law of estoppel. As for rectification, its very availability gives the lie to the argument that prior negotiations are necessarily unhelpful or unreliable. Also, if judges can be relied upon to evaluate evidence of prior negotiations in considering a rectification claim and then to banish such evidence from their minds when considering a concurrent interpretation argument, then surely they can perform the much simpler task of separating the wheat from the chaff in evaluating evidence of prior negotiations for the purpose of interpretation. In the same vein, if the exclusion of prior negotiations is indeed a rule worth preserving, then a court should almost invariably take a very dim view of parties who try to circumvent the rule by pleading rectification concurrently. Here a comparison can be made with the inadmissibility of settlement negotiations – the cases are replete with exhortations on the need to protect the sanctity of the exclusionary rule against collateral attack. No similar protestation has been made in respect of the exclusion of prior negotiations. In fact, the decisions which have noticed the practice of concurrently pleading rectification seem to nod and wink at it.

Further, I am not at all sure that a bright line can always be drawn between rectification and interpretation. Here it is appropriate to consider more closely the terminology which we use to describe the subject, which in my view,

bears significant responsibility for the present confused state of the law. We often refer to the interpretation of contracts and the rectification of contracts as distinct concepts. Underlying this taxonomy is one fundamental assumption – the contract is constituted by the written document which the parties signed, no less, and certainly no more. Everything else is referred to, rather disdainfully, as extrinsic material. And once this assumption is made, it quite naturally follows that attempts to identify the parties' agreement by reference to extrinsic material is viewed with similar distaste; for it is almost tantamount to the court rewriting the bargain made between the parties. But the assumption is fallacious. A contract is not the written document as such. It is a juridical concept defined by the law of contract, and the law of contract does not make any assumption or presumption as to where a contract may be found. It only looks to the true, objective agreement between the parties, which may be evidenced by documents,[57] or by oral communications, or indeed by a combination of the two. The intuitive association between the contract and the written document arises from the commonsensical inference that the parties intended what they signed or wrote down. It carries very great weight in many cases, but ultimately it is only a factual inference whose strength depends on the circumstances, and not a rule of law which applies equally to every case. To elevate the factual inference to the status of a rule confuses the analysis by placing unnecessary legal barriers in the path of identifying the parties' true agreement. Put in another way, a court can give due weight to the written document without being compelled to do so by artificial rules which hamper the reference to context when it is necessary to do so.

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[57] Many solicitors may not realise this, but they too affirm this theory when they apply the formula "Now This Agreement *Witnesseth*…" or suchlike to the agreements they draft. The document witnesses the contract – it is not the contract.

Once this point is fully appreciated, it will also be realised that interpretation and rectification are not distinct concepts.[58] They are just different sides of the same coin which has as its only goal the identification of the true agreement between the parties. The main difference resulting in the employment of these tools is one of degree, specifically that of the evidential weight to be given to the written document. In a successful case of rectification, the context entirely displaces the text, which is rectified; in interpretation, the context has a lesser effect, ranging from confirming the text, to explaining, supplementing or, in limited cases, varying it.

All this may well have been recognised in some of the cases, albeit inarticulately, for there is in the final analysis no practical difference between the objectives of rectification and interpretation. It is sometimes said that the burden of proof is higher when a claim for rectification is made, but this is loose language. The standard of proof is the same for all civil litigation, and what is really meant is that the party claiming rectification has an inherently uphill task – for he is by definition saying that he did not mean what he clearly said, and as Lord Hoffmann said in *ICS*, we do not easily accept that people have made linguistic mistakes, particularly in formal documents. There is also no difference in the precision of pleading required – a party must plead the interpretation he urges as clearly and precisely as the rectification which he wants the court to make.

But this is not to say that the exclusion of prior negotiations may not cause substantial injustice, and that the issue is simply that the law achieves by a

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[58] It would also follow that the implication of terms should not subject to a more stringent bar. Interestingly, this was the approach taken by Lord Hoffmann in delivering the advice of the Privy Council in *AG of Belize v Belize Telecom Ltd* [2009] 1 WLR 1988.

circuitous route what it could do directly. Under *Chartbrook*, a party can introduce prior negotiations only if he also claims rectification, *ie* that the true agreement between the parties is not reflected in any available meaning of the words used in the written document. But in many cases the party will not be able to do so plausibly, and probative evidence of the parties' intentions will therefore be excluded. This was the case in *Inglis v Buttery*, and if Lord Gifford's textual analysis had prevailed, the result would surely be contrary to the parties' clear intentions as evinced from their correspondence and amendment of the draft contract. In the final analysis, I must say that it is not at all clear that *Chartbrook* represents the right way forward in this area of the law. To me, the better approach is to continue the along the liberalising road taken in *ICS*. Anything – absolutely anything – which is relevant to establishing the objective agreement between the parties as defined by the law contract, ought to be admissible. Any infirmity in the evidence admitted can be considered when assessing its weight.

I note that *ICS* has not received an unequivocal welcome in its jurisdiction of origin. As Lord Steyn colourfully puts it, it "upset the horses in the commercial paddock".[59] It is not for me to comment on the English bar, but as far as equine metaphors are concerned I should say that I very much prefer the attitude of Lord Denning MR.[60] With skilled riders, unruly horses can be kept in control. They can be made to jump over obstacles. They can leap the fences put up by fiction and come down on the side of justice. Lord Denning was speaking of public policy, but his words are equally appropriate when applied to the vestiges of the parol evidence rule, or to the lawyers who continue to espouse them.

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[59] Johan Steyn, "The Intractable Problem of the Interpretation of Legal Texts" (2003)25 Sydney L Rev 5 at p 9.

[60] *Enderby Town Football Club v Football Association Ltd* [1971] 1 All ER 215 at 219.

Subsequent conduct

I turn now to subsequent conduct. The admissibility of subsequent conduct has not received as much recent judicial attention. The last major English decision was in 1973, where the House of Lords firmly closed the door on this category of evidence in *L Schuler AG v Wickman Machine Tool Sales Ltd*.[61] How much of *Schuler* can continue to co-exist with the more liberal attitude evinced in the *ICS* restatement remains to be seen. In any case, the arguments for and against admitting extrinsic evidence generally are equally applicable to subsequent conduct, and only a few things need be said with regard to this category of evidence. *Legally*, the meaning of the contract is, of course, fully and finally established at the time of the contract, and not subsequently. *Evidentially*, however, the considerations which drove the parties to enter into a contract do not evaporate when the contract is concluded, and so long as the parties remain animated by those considerations their conduct can be valuable evidence of what they meant when they concluded the contract, and, once again there is no reason in principle why the court should be prevented from considering probative evidence in its search for the true agreement between the parties.

The Evidence Act

What, then, is the proper role of the Evidence Act in these continuing controversies? The courts have not shown themselves to be greatly exercised by the relevant provisions, but if the provisions demand the exclusion of extrinsic evidence then they should be upheld. But I believe that a purposive reading of the provisions with the benefit of the modern insights on interpretation does not compel such a conclusion.A detailed legal analysis was undertaken in *Zurich*

[61] [1974] 1 AC 235 ("*Schuler*").

Insurance, and I will leave the judgment to speak for itself. It suffices to make a few key points here.

As said, a finding that a contract has been perfectly reduced into writing can only be reached after considering the context, so the relevant context must be considered to locate the contract and its terms before section 93[62] even applies. This alone takes much of the bite out of the parol evidence rule. Similarly, section 94(f)[63] permits the use of extrinsic evidence to show the relation between the language of a document and existing facts – it is not subject to the presence of ambiguity in the language of the document, and *Zurich Insurance* took the view that it could form the statutory basis for the modern contextual approach to interpretation. Speaking for myself, I would add that section 94(f) also does not exclude any particular class of extrinsic evidence, including prior negotiations and subsequent conduct. Section 95[64] ought to be restricted to cases where there is incurable uncertainty. Section 96[65] only applies when the language used in the document is plain in itself and applies accurately to existing facts, in which case the language is highly likely to reflect the parties' true intentions anyway. In any case, it only applies to exclude evidence to show that the language of the document does not apply to the facts which it plainly refers to; it does not prevent evidence from being adduced to show that the parties' true agreement laid elsewhere.

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[62] Malaysian Evidence Act, s 91.

[63] *Id*, s 92(f).

[64] *Id*, s 93.

[65] *Id*, s 94.

In summary, I do not think that I am saying anything wildly controversial when I suggest that as a matter of principle the relevant provisions of the Evidence Act should not be interpreted to exclude relevant evidence from the consideration of the court as it seeks to identify the true agreement between the parties.

Conclusion

Sir John Salmond tells us that the early law tended to make the relation between evidence and proof of a matter not of sound discretion but of strict law.[66]This inflexible approach has engendered the veritable Gordian knot that is the parol evidence rule, whose exposition typically commanded a formidable platform within the leading texts on evidence. Codification and respect for precedent meant that the Gordian knot could not be severed at once. But, fortunately, a patient though lengthy unravelling has taken place − culminating in the *ICS* restatement at the turn of the millennium. Those parts of the rule founded on undue evidential concerns have now been gradually shed in favour of the sound discretion of judges, guided by a handful of commonsensical guidelines. Those parts of the rule arising from the substantive law have been identified as such and elucidated. As a result the relevant rules have become easier to understand and easier to apply – which is something I think we can all be thankful for. Nevertheless, there are significant controversies which remain to be resolved. The direction of the law, however, has been clearly set, and from that we can draw broad guidance and some measure of comfort as we address these controversies.

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[66] "The Superiority of Written Evidence" [1890] 21 LQR 75 at p 75.

Each jurisdiction will eventually settle on its own approach. Speaking for myself the answer is plain. What is required is both certainty in the rules and the right rules.[67]The courts ought to embrace a consistently commonsensical approach in relation to the admissibility of evidence in contractual disputes. All relevant material which assists in revealing the parties objective intentions should be considered. It can be forcefully said that it is the legal entitlement of the parties to have their objective intentions and the "gold of a genuine consensus" ascertained through such a process. Fairness should trump convenience. Such an intuitive approach better coheres with the idea that contract law is a facilitative body of principles.

[67] Catherine Mitchell, "Contract Interpretation: Pragmatism, Principle and the Prior Negotiations Rule" [2010] 26 JCL 134 at p 144.