Ho Seek Yueng Novel and Another v J & V Development Pte Ltd
[2006] SGHC 63

Case Number : OS 1569/2004

Decision Date : 18 April 2006

Tribunal/Court : High Court

Coram : Andrew Phang Boon Leong J

Counsel Name(s) : Ronnie Tan Siew Bin and Noelle Seet Siok Lin (Central Chambers Law Corporation) for the plaintiffs; Hri Kumar, Gary Leonard Low and Benedict Teo Chun-Wei (Drew & Napier LLC) for the defendant

Parties : Ho Seek Yueng Novel; Ho Leong Yueng Jeffrey — J & V Development Pte Ltd

Contract – Formalities – Whether oral agreement for interest-free loan in respect of purchase and sale of land existing between plaintiffs and defendant – Whether oral loan unenforceable under s 6(d) Civil Law Act – Section 6(d) Civil Law Act (Cap 43, 1999 Rev Ed)

Contract – Formalities – Whether plaintiffs granting defendant right of first refusal for purchase of land – Whether right of first refusal granted orally unenforceable pursuant to s 6(d) Civil Law Act – Section 6(d) Civil Law Act (Cap 43, 1999 Rev Ed)

Land – Caveats – Wrongful lodgment – Defendant lodging caveat against land on basis of alleged oral agreement to grant plaintiffs interest-free loan – Whether defendant having right to lodge caveat – Whether interest-free loan granted for purchase of land constituting caveatable interest in land – Section 115 Land Titles Act (Cap 157, 2004 Rev Ed)

Land – Caveats – Wrongful lodgment – Defendant lodging caveat against land on basis of alleged right of first refusal for purchase of land granted to it by plaintiffs – Whether defendant having right to lodge caveat – Whether right of first refusal for purchase of land constituting caveatable interest in land – Section 115 Land Titles Act (Cap 157, 2004 Rev Ed)

18 April 2006

Andrew Phang Boon Leong J:

Introduction

1 The basic facts in the present case were exceedingly simple. This is in contrast to the raw emotions that constituted a central (and unpleasant) strand throughout the proceedings, which were (in many ways) the very antithesis of the objective nature of the present proceedings (see [3] below). More specifically, this case witnessed nephews being pitted against their uncle. As we shall see, the mother of the former was a key protagonist as well, although she was not a party to the present proceedings as such. Indeed, other members of the same family were aligned in her camp, so to speak. It was the case of "one versus the rest", although mere numbers alone are of course inconclusive, as the focus of the court was necessarily to be based on an objective analysis of the relevant facts and the law in order to arrive at a fair and just decision (see [3] below), ignoring the surrounding emotions (both express and implicit) in the process.

2 The "one" comprised one Mr Tan Hock Keng ("Mr Tan"). He is in fact the owner of the defendant company in the present proceedings. Indeed, throughout these proceedings as well as in all the pleadings and submissions, both were referred to interchangeably by all concerned. This is not surprising because, for all intents and purposes, Mr Tan and his companies were one and the same. No issue or objection was therefore taken by either party with regard to this mode of reference and I shall adopt this approach in this judgment as well. Amongst the "many", as I have just mentioned, are

the two nephews, who are the plaintiffs in the present proceedings. The first plaintiff is Mr Novel Ho. The second, Mr Jeffrey Ho, is his younger brother.

3 The task of this court is simple. It is to assess, objectively, the evidence (in particular, the credibility of the respective witnesses) in relation to the relevant law and arrive at a decision consistent with the justice and fairness of the case.

4 The background to this case begins with Mr Tan finding himself in financial difficulties. This much was not in dispute.

5 Mr Tan then approached the plaintiffs to ascertain whether they desired to purchase properties he owned. As it turned out, the plaintiffs purchased *twelve* properties from him and companies within his group (including the defendant) between December 2001 and June 2002.

6 Amongst the twelve properties are two properties ("the subject properties") located at 696 and 698 Geylang Road (and purchased in the name of the first plaintiff and the second plaintiff, respectively). Mr Tan had caused caveats to be lodged against the twelve properties (including the subject properties) on two grounds. Indeed, what in fact triggered the lodging of the said caveats was the fact that Mr Tan had discovered, by chance, that the first plaintiff had, in respect of 696 Geylang Road, entered into a sale and purchase agreement with third parties without first offering the same to either him or the defendant, or even notifying them of the sale.

7 Mr Tan claimed, first, that he had, via a private oral agreement entered into on behalf of himself and his companies (including the present defendant), granted the plaintiffs a loan in respect of the sale and purchase of the twelve properties, including the subject properties. More specifically, he alleged that the plaintiffs were not required to pay the deposit or the balance purchase price which was not financed by a bank loan with respect to each of the twelve properties; this was, in effect, treated as an interest-free loan to the plaintiffs. And this, he argued, conferred a caveatable interest over the subject properties. I pause here to note that it was not unreasonable for this agreement to have been made orally, especially if we take into account previous dealings which were also made in a family (and, on occasion, even non-family) context. I also note that the defendant had furnished satisfactory reasons as to why certain other specific transactions the plaintiffs referred to were, on the other hand, in writing.

8 Secondly, Mr Tan claimed that, pursuant to the same private oral agreement referred to in the preceding paragraph, the plaintiffs had also granted him and his companies a right of first refusal in respect of the twelve properties, including the subject properties. This, too (he argued), conferred a caveatable interest over the subject properties. More specifically, Mr Tan claimed that it was agreed that should the plaintiffs decide subsequently to sell any of the twelve properties, they were obliged to first offer the same to Mr Tan and/or his nominee. Mr Tan further claimed that in the event that he agreed to purchase the property concerned, the loan granted to the plaintiffs in respect of the said property would be set off against the sale price but if he did not desire to purchase the property and the property was sold to a third party, the loan concerned would then be repaid by the plaintiffs from the sale proceeds. Finally, Mr Tan claimed that it was further agreed between him and the plaintiffs that if he should call on the loans, the plaintiffs were obliged to repay the loans or, if they were unable to do so, they (the plaintiffs) were to sell the property concerned back to Mr Tan and/or his nominee at a price to be agreed or at the prevailing market price.

9 The present proceedings were originally commenced by the plaintiffs under an originating summons in order to compel the defendant to remove the caveats it had lodged, as well as for orders that the defendant and Mr Tan, respectively, be liable for the damage and/or losses allegedly caused

to the plaintiffs by the lodgement of the said caveats. This was later converted into a writ action, which comprise the present proceedings before this court.

10 The defendant also mounted, in these proceedings, a counterclaim against the plaintiffs, asking for recovery of the alleged amounts lent pursuant to the alleged loan arrangement mentioned above.

11 One more matter ought to be mentioned briefly.

12 There had been an earlier action involving the first plaintiff and Mr Tan. Mr Tan was the plaintiff in those proceedings. He was seeking to recover shares of a printing company held by Mr Novel Ho and a couple of other employees, which shares were transferred during a period when Mr Tan was himself critically ill with an acute liver ailment (ultimately requiring a liver transplant). Mr Novel Ho claimed, *inter alia*, that he was the owner of the company and, hence, the shares.

13 The matter referred to in the preceding paragraph was ultimately settled, with Mr Novel Ho and the other employees transferring the shares back to Mr Tan without consideration. In my view, the seeds of acrimony had already been sown. Indeed, from the relevant testimony as well as the overall tenor of the present proceedings, the claim by counsel for the defendant, Mr Hri Kumar, in his closing submissions, that the plaintiffs' conduct in the present action was part of a wider conspiracy to deprive Mr Tan of his business interests and assets had the ring of truth about them. However, to be fair to the plaintiffs, I did not rest my decision on this as the earlier action was not within the direct purview of this court.

The issues

14 There were, in essence, just a few simple issues in the present case. The main factual and legal issues were as follows.

15 First, did Mr Tan grant the plaintiffs, his nephews, an interest-free loan by not collecting the deposit as well as the balance of the purchase price that was due to his company as vendor of the subject properties? If so, did this loan involve an interest in land that was caveatable under s 115 of the Land Titles Act (Cap 157, 2004 Ed) ("LTA")? Further, does the fact that this loan was oral in nature render the entire transaction unenforceable pursuant to s 6(*d*) of the Civil Law Act (Cap 43, 1999 Ed) ("the Civil Law Act")? If so, what was the legal effect on the caveats lodged?

16 Secondly, was there a right of first refusal accorded to Mr Tan by the plaintiffs in so far as, *inter alia*, the purchase of the subject properties considered in this case were concerned? If so, did such a right constitute, in law, a caveatable interest, thus justifying the caveats caused by Mr Tan to be placed over the subject properties? A related issue is whether or not a right of first refusal given orally was unenforceable pursuant to s 6(*d*) of the Civil Law Act and, if so, what was the legal effect on the caveats lodged.

The first issue – the alleged loan

Was there a loan granted to the plaintiffs by the defendant?

17 Turning to the first main issue, this was primarily an issue of credibility. Both parties adopted diametrically opposed stands. The plaintiffs argued that they had – through their mother and her younger brother – paid Mr Tan in full. They argued, in particular, that cash had been paid to Mr Tan. This explains why there are no cheques made out in Mr Tan's name. However, there are receipts, all

signed (in the case of the subject properties in the instant proceedings at least) by Mr Tan himself. I find the existence of these receipts to be the most powerful argument in the plaintiffs' favour in so far as this first issue is concerned. In other words, why would Mr Tan issue receipts to the effect that the money had been received when he claimed that the very same sums had not been collected and had, as I have mentioned, been treated as a loan to the plaintiffs instead?

18 Had I stopped at this juncture, I would have found in favour of the plaintiffs on this particular issue. *However*, I found Mr Tan's explanation for the seemingly inconsistent conduct on his part to be persuasive. In essence, Mr Tan stated that he was told by the second plaintiff, Mr Jeffrey Ho, that the receipts were required for the completion of the respective sale and purchase agreements with regard to the subject properties. In other words, although he had received no money, he had signed the receipts acknowledging receipt of the money in order to enable there to be proper documentation of the sale and purchase agreements. He further stated that he had been given a stack of documents to sign, including the said receipts and that, given the second plaintiff's explanation as well as the fact that a number of persons were waiting to see him, he had not given the matter further thought. He had trusted the second plaintiff and therefore signed the receipts on the latter's instructions and assurance. He was also an extremely busy man, spending most of his time managing his business in Malaysia. I do not find this to be an unreasonable explanation, especially since he had trusted the second plaintiff and had been grooming him for higher positions within his (Mr Tan's) group of companies. Indeed, at this point in time at least, the second plaintiff was, for all intents and purposes, his right-hand man in Singapore. Significantly, the second plaintiff only left the defendant's employ after the latter discovered the first plaintiff's attempted sale of 696 Geylang Road and when the earlier action (see [12] and [13] above) had been commenced by Mr Tan; also of significance, in this regard, was the second plaintiff's apparent dissatisfaction with the fact that Mr Tan's own son was being moved into his businesses, also sometime towards the end of 2004. On a general level, an acknowledgement of payment is not necessarily conclusive if a reasonable explanation can (as in the present proceedings) be furnished (and see the Singapore High Court decision of *Sin Sai Peng v Soh Kim Lian Florence* [2002] 4 SLR 681).

19 Importantly, I found Mr Tan to be basically a witness of truth. Unlike the second plaintiff, he did not, on the whole, attempt to evade counsel's questions. Nor did he seek to embellish his testimony. Although it was clear that he was disliked by the family as a whole, his testimony to the effect that he bore them no grudges and in fact had sought to help them had the ring of truth. And these were no mere words devoid of deeds. In particular, I note that both the plaintiffs had worked for him. Indeed, Mr Tan stated more than once that he had groomed the second plaintiff. He had in fact taken on both nephews in his companies at their mother's, Mdm Tan Ah Geok's ("Mdm Tan"), request. More than that, Mdm Tan herself had been working for Mr Tan since 1988 till last year. Inasmuch as the plaintiffs and their mother were the primary protagonists in these proceedings, this was, in my view, rather telling. It, indeed, also transpired during the proceedings that virtually the entire family had worked for Mr Tan at one time or another. I note in passing, however, that I did not find Ms Jenny Pang's evidence helpful (she was one of Mr Tan's "companions"); it was neutral, at best, and did not impact significantly on either party's case. In contrast, however, I found the evidence of Ms Tay Ai Khim, an independent witness called on behalf of the defendant, to be far more helpful. I deal with Ms Tay's evidence below (at [23]–[26]). At this juncture, I should also point out, on a more *general* level, that I will not be referring to the testimony of witnesses (whether for the plaintiffs or for the defendant) which I have not found to be helpful in aiding me in arriving at my decision.

20 On the other hand, I found the second plaintiff, Mr Jeffrey Ho, to be rather evasive and often tentative in his testimony. I took into account the fact that he might have been nervous initially. By the next day, however, it could not be said that he was nervous. He nonetheless remained evasive

and tentative, although he had adopted a much more steady approach in the form in which he gave his testimony (having, presumably, gotten used to the court atmosphere). He was obviously under his mother's influence, as was the first plaintiff. I shall return to his mother's testimony shortly.

21 I also found the first plaintiff, Mr Novel Ho, to be a rather evasive witness. Like his younger brother, Mr Jeffrey Ho, he constantly referred to his mother for the relevant explanations sought by counsel for the defendant with respect to various issues arising from the instant proceedings. I found this to be rather remarkable since it was the first and second plaintiffs who were not only parties to (and, more importantly, initiators of) these particular proceedings but also the purchasers of the subject properties as well as ten other properties. Like his brother, he was obviously under his mother's considerable influence.

22 Indeed, despite the deep-seated family animosity generally, I was *not* convinced that the plaintiffs themselves truly *hated* Mr Tan. As I shall elaborate upon in a moment, the animosity was to be found in the older generation of siblings. But the plaintiffs seemed to me to be acutely aware that the stance that cast negative aspersions on Mr Tan was one that their mother desired and therefore attempted their level (albeit unsuccessful) best to conduct their case accordingly. Even if this were not the case, it was clear that the plaintiffs had decided that such an approach was the best way (in their view) to win their case. As we shall see, this was not surprising in view of the overall tenor of the evidence that was to emerge subsequently – in particular, from the independent witness, to whose evidence I shall now in fact briefly turn.

23 As importantly, in my view, there was extremely convincing independent testimony corroborating Mr Tan's explanation. Ms Tay Ai Khim ("Ms Tay"), a vice-president for Margin Finance at Kim Eng Securities Pte Ltd ("Kim Eng Securities"), stated (both in her affidavit as well as during cross-examination and re-examination) emphatically that the second plaintiff, Mr Jeffrey Ho, had told her that there was an internal arrangement between the plaintiffs and Mr Tan to the effect that there had been a loan in the manner set out above. There was therefore a request that Kim Eng Securities waive payment of the amount concerned in satisfaction of the total loan amounts owed to Kim Eng Securities. As it turned out, the total sale proceeds with respect to the other five (Geylang) properties were sufficient to pay off these loan amounts and the waiver was therefore granted. What was most significant, however, was the fact that Mr Tan's claim was corroborated by a clearly independent witness (here, Ms Tay).

24 Counsel for the plaintiffs, Mr Ronnie Tan Siew Bin, sought valiantly to undermine Ms Tay's credibility, albeit (in my view) unsuccessfully. I found Ms Tay to be a reliable witness of truth befitting her professional status and (more importantly) calling. Despite the repeated insinuations that she was saying what the defendant had wanted her to say in order for her company to retain the business of the group of companies in Mr Tan's stable, I found her to be clear inasmuch as she stated, *inter alia*, that the business from Mr Tan (and his group of companies) was insignificant and that she would not sully her or her company's reputation by coming to court to, in effect, lie on behalf of the defendant. I believed her when she stated, unequivocally, that she was only concerned with speaking the truth and that that was more important than any crass material advantage that could be gained. Indeed, she was adamant that had the plaintiffs asked her to testify, and if she felt that the testimony was helpful, she would have testified on their behalf. So damaging was Ms Tay's testimony to the plaintiffs' case that they sought – desperately, in my view – to introduce fresh evidence well after the present proceedings had concluded. This only reinforced – in spades – the very positive view I had already taken of Ms Tay's testimony. I deal with this last-ditch attempt briefly later in this judgment (see [116]–[119] below).

25 Counsel for the plaintiffs also argued that Ms Tay had admitted that she would not have

accepted what the second plaintiff had told her if she had known of the receipts mentioned above. In particular, she stated that she would have questioned the second plaintiff further, although she was *not* prepared to state that the waiver would *not* have been given, especially since the total sale proceeds were more than sufficient to cover the overall loan amounts owed to Kim Eng Securities. This last-mentioned line of questioning, according to Ms Tay, would have applied equally to the letter of 4 April 2002 signed by Mr Tan and sent by the defendant to the law firm in charge of the sale and purchase transactions for the subject properties (M/s Lee & Lee) if she had in fact had sight of this letter; the letter stated that the defendant had received payments with regard to these transactions. However, Ms Tay clearly stated that she had *not* had sight of that particular letter. Counsel for the plaintiffs argued otherwise in his closing submissions, although he did not actually challenge Ms Tay's statement during cross-examination itself. Counsel for the defendant has sought to explain the scenario thus: As at 4 April 2002 (the date of the said letter), Mr Tan had not signed the said receipts, although M/s Lee & Lee had requested confirmation that the monies concerned had already been paid by the plaintiffs. It was thus necessary to prepare, on the second plaintiff's instructions, the said letter and send it on to M/s Lee & Lee. Thereafter, Mr Lee Chow Soon (of M/s Tan Lee & Partners, the law firm acting on behalf of the plaintiffs in the sale and purchase agreement) requested receipts as evidence that payment had been made. At that juncture, the second plaintiff gave instructions for the receipts to be prepared and for Mr Tan to sign the same. This attempted explanation is by no means conclusive. However, it is by no means unreasonable either, having, like Mr Tan's explanation with regard to the receipts, a functional basis. What is *lacking* is any explanation to the contrary on the part of the *plaintiffs*, apart from the mere assertion that the plaintiffs had in fact paid the relevant moneys to Mr Tan, which assertion also, regrettably, came rather late in the day. In particular, what was the *context* in which the letter was written? The defendant, as I have just pointed out, attempted to offer an explanation; unfortunately, the plaintiffs did not. This was unhelpful to the plaintiffs, to say the least, bearing in mind that they bore the overall burden of proof. What, however, was of the first importance in the final analysis, in my view, was this: It was clear to me that Ms Tay was telling the truth when she stated that she never had sight of either the receipts or the letter. If so, what we are left with is the conversation between Ms Tay and the second plaintiff, for which the plaintiffs have offered no explanation whatsoever, save for a bare denial that it had ever taken place. This was clearly insufficient, given my own views of Ms Tay's and the second plaintiff's credibility, respectively – which were, in my view, a study in contrasts.

26 Ms Tay, as I have noted in the preceding paragraph, may well have taken the course of action she stated (*ie*, questioning the second plaintiff further) had she known of the receipts and/or the letter. *However*, what is important (as I have already emphasised) is the fact that the *second plaintiff* had actually communicated *the existence of the internal loan arrangement* between the plaintiffs and Mr Tan to Ms Tay, an independent witness of truth. Besides, if Ms Tay had probed further had she had sight of the receipts, there was the explanation by Mr Tan as to why he had signed the receipts – an explanation which I have found reasonable and adequate. Much has been made by counsel for the plaintiffs of the letter of 4 April 2002 referred to in the preceding paragraph but, as I have pointed out, this letter does not really assist the plaintiffs' case either – particularly in the absence of any attempt to place this letter in the *context* of what had (or at least probably had) transpired. Indeed, what *does* require explanation is why the *second plaintiff* had told Ms Tay what he did if, in fact, there had been no loan in the first instance. Ms Tay, and I reiterate this point because it is a very important one, was crystal clear about not only the existence but also the contents of her conversation with the second plaintiff, Mr Jeffrey Ho.

27 In contrast to Ms Tay's testimony, there was (in so far as the plaintiffs were concerned) the testimony of Ms Lim Siak Nyng ("Ms Lim"). Ms Lim is the wife of Mr Tan's late brother. She testified, *inter alia*, that she had signed four similar receipts for other properties after checking with Mr Tan over the telephone. More specifically, Ms Lim claimed that Ms Neo Puay Lei ("Ms Neo"), another

employee of the company, had brought the receipts to her to sign in her capacity as a director. At that juncture, she asked Ms Neo to telephone Mr Tan and that he had told her to sign the receipts as the money concerned had been paid. I note, also, that Ms Lim also disliked Mr Tan intensely. This was evident as she suddenly broke down during cross-examination by counsel for the defendant. This was in fact a spontaneous response which demonstrated, however, that she clearly had a reason to ally herself with the plaintiffs and testify against Mr Tan.

28 Mr Tan vehemently denied that such a telephone conversation had taken place. I have already stated that I found Mr Tan to be a reliable witness. In addition, it was clear that Ms Lim was in Mdm Tan's (and, hence, the plaintiffs') camp, if I may put it that way. Mdm Tan is obviously a formidable and even charismatic woman. Her considerable dominance of her sons has already been touched on. Indeed, even Ms Neo, who was not a relative, was also very close to her, although she (Ms Neo) sought to distance herself from allegations of a close relationship with Mdm Tan, albeit unsuccessfully, in my view. In fact, I generally found Ms Neo to be extremely defensive and evasive and her evidence generally unreliable. In addition, the evidence of Mr Lee Chow Soon, an independent witness called by the *plaintiffs* and who dealt with the conveyance of the properties in the present proceedings (and see [25] above), contradicted Ms Neo's position that she played an important role in the sale of the properties. More generally, in fact, I am of the view that, if at all, Mr Lee's testimony generally supported the *defendant's* case.

29 Indeed, there is one central or common thread in the present case: It is that Mdm Tan was a formidable and even overwhelming personality. Even her younger brother, Mr Tan Hock Guan, kept referring to her. That he claimed that he would lend her as large an amount as $850,000 tends to support this view. This is a specific point which I will be considering below.

30 This would in fact be an appropriate juncture at which to turn to the *principal weakness in the plaintiffs' case*. I refer to an issue only briefly alluded to thus far. This was the claim by the plaintiffs that both their mother (Mdm Tan) and her younger brother (Mr Tan Hock Guan) paid Mr Tan the requisite moneys, in return for which the receipts were given. I found the claim to be rather improbable. Put simply, the plaintiffs claimed that both Mdm Tan and her younger brother had paid Mr Tan in cold hard cash. If they are to be believed, Mdm Tan had kept slightly over $600,000 in savings in her safe at home, whilst Mr Tan Hock Guan claimed that he had kept approximately $400,000 in his safes both at home and at work. I found this most improbable. But it was the only way they could claim that payment had been made to Mr Tan in the absence of documentary evidence. I pause here to point out that Mdm Tan had in fact paid Mr Tan a *total* sum of some *$1.7m*. Given her evidence that she had $600,000 in savings as at December 2001, this would mean that she had raised a further $1.1m within the six months between December 2001 and June 2002, which (it will be recalled) was the period during which the twelve properties were purchased by the plaintiffs and, if they are to be believed, the respective deposits paid for. I also found this most improbable, although Mdm Tan attributed the ability to raise so much money in such a short time to winnings from wagering and gambling – a point which I deal with in the next paragraph.

31 Mdm Tan claimed to have accumulated her money through saving over the last ten years. Yet, she had worked for Mr Tan since 1988 for a sum of some $2,000 per month. She also claimed that in addition to selling food and clothes over the years, she had owned a racehorse and had frequently won large sums at the horse races, through lottery and gambling at Genting Highlands. In point of fact, contrary to her claim that she had owned a horse from 1999 to 2002, the documentary evidence revealed that she had in fact ceased to own her horse in 1999. Her claim to have won such enormous sums of money in basically games of chance seemed to me to be improbable. To have succeeded at that level, Mdm Tan would, instead, have logically been a multi-millionaire by now and would have had to have luck that was supernatural. It just did not seem probable to me. Neither was

Mdm Tan's rather nonchalant claim that she had no problems keeping hundreds of thousands of dollars of cash at home, albeit in a safe.

32 Indeed, Mdm Tan proceeded to claim that she had, through her marvellous good fortune, won enough over two years to repay her younger brother, Mr Tan Hock Guan, in full. That would, as we shall see, work out to approximately $400,000 of winnings garnered over two years. This was, in my view, also highly improbable.

33 Turning to Mr Tan Hock Guan's testimony, he claimed to have lent Mdm Tan $850,000, slightly over half of which ($450,000) had come from trade debtors. Yet, as counsel for the defendant pertinently pointed out, the contact numbers for four out of five trade debtors given to the defendant turned out to be dead ends. Only one was contactable and did not turn up in court. Further, the documentation over the relevant period, centring on Mr Tan Hock Guan's firm's accounts, did not bear this out at all. The trade debts were relatively small and so (it might be added) were the profits of the business itself.

34 He also claimed, as I have mentioned, to have furnished the remaining $400,000 from some half a million dollars in cash which he claimed he kept at home and at work. Although he did, unlike Mdm Tan, run his own enterprise, what accounts there were did not (as alluded to above) suggest enormous profits. I was also, with respect, unimpressed by Mr Tan Hock Guan's claim that he had no problems keeping hundreds of thousands of dollars of cash at home and at work, albeit (again) in safes. His nonchalant attitude in this regard was almost a mirror image of that demonstrated by his sister, and which I have had occasion to refer to above.

35 In summary, although Mr Tan's conduct with regard to the receipts was highly unusual, his explanation was not so improbable as were Mdm Tan's and Mr Tan Hock Guan's explanations with regard to their claim that they had paid Mr Tan with cash amounting to a total of $2.5m.

36 If, as has been repeatedly argued, at least on the plaintiffs' side, Mr Tan was so disliked by the rest of the family members, what conceivable reason would there be for the plaintiffs (under the apparent behest of their mother, Mdm Tan) to aid Mr Tan by purchasing his properties (including the subject properties involved in the present proceedings)? Why, in other words, would one aid one's alleged mortal enemy? Human nature has by no means been transformed for the better over the past centuries.

37 There appear to me to be at least two probable (and related) reasons. The first is that, as we shall see once more, the properties concerned had good prospects as investments. Indeed, it is Mr Tan Hock Guan's evidence that this was the case. This might, in and of itself, not appear to be sufficient reason. This appears, therefore, to lend support to a second (and related) reason, which is that Mr Tan had in fact made the transactions concerned even more attractive by granting a loan and thus alleviating the immediate financial burden that would otherwise have fallen on the plaintiffs as purchasers. One has, at this point, to bear in mind the fact that the plaintiffs had purchased not just one or two, but *twelve*, properties from Mr Tan.

Legal issues

38 As already alluded to above, the first legal issue is whether or not the loan extended by the defendant to the plaintiffs gave rise to an interest in land that was caveatable under the LTA.

39 The defendant's interest in this regard would be in the sale proceeds and this is clearly an interest in land that is caveatable under the LTA. This is in fact *expressly provided for* under s 115(3)

(*a*) of the LTA, which was also referred to by counsel for the defendant in his closing submissions. This provision reads as follows (I have included the material part of s 115(1) for context):

> (1) Any person claiming an interest in land (whether or not the land has been brought under the provisions of this Act), or any person otherwise authorised by this Act or any other written law to do so, may lodge with the Registrar a caveat in the approved form which shall include the following particulars …
>
> …
>
> (3) For the purposes of this Part, and without limiting its generality, a reference to a person claiming an interest in land shall include a reference to any of the following persons:
>
> > (*a*) any person who has an interest in the proceeds of sale of land, not being an interest arising from a judgment or order for the payment of money; …

In so far as "an interest in land" is concerned, this is defined in s 4 of the LTA as follows:

> "interest", in relation to land, means any interest in land recognised as such by law, and includes an estate in land [.]

40 It was also argued by counsel for the plaintiffs that even if there had been a loan from the defendant to the plaintiffs (which I have found was in fact the situation), the loan was oral and thus fell afoul of the provisions of s 6 of the Civil Law Act. The provision itself reads as follows:

> No action shall be brought against —
>
> …
>
> > (*d*) any person upon any contract for *the sale or other disposition of* immovable property, or any interest in such property;
>
> …
>
> unless the promise or agreement upon which such action is brought, or some memorandum or note thereof, is in writing and signed by the party to be charged therewith or some other person lawfully authorised by him.
>
> [emphasis added]

41 The simple answer to the issue that counsel for the plaintiffs has posed is that s 6(*d*) of the Civil Law Act deals with contracts that relate to "*the sale or other disposition* of immovable property, or any interest in such property". The loan in the present proceedings clearly does *not* relate to the "sale or other disposition" of the two subject properties. The provision was therefore inapplicable in the first instance. However, *even if* the provision were applicable, this would not preclude the lodging of a caveat simply because non-compliance with s 6(*d*) of the Civil Law Act merely renders the contract concerned unenforceable, not void. This would not, in and of itself, impact adversely on the right to lodge a caveat as such. In any event, as I have just mentioned, I am of the view that the transaction does not run afoul of s 6(*d*) in any event.

The second issue – the alleged right of first refusal

Was there a right of first refusal granted to Mr Tan in respect of the subject properties?

42 I turn, next, to the right of first refusal or pre-emption (hereafter, "a right of first refusal") claimed by Mr Tan. The terms "right of first refusal" and "right of pre-emption" are often used interchangeably. In so far as there might be any distinction, the authors of a leading textbook put it thus (see Kevin Gray & Susan Francis Gray, *Elements of Land Law* (Oxford University Press, 4th Ed, 2005) ("Gray & Gray") at para 9.83, n 2):

> In so far as there is any distinction, a 'right of first refusal' describes a preferential right to refuse an offer of sale at the price at which the grantor is willing to sell, whereas a 'right of pre-emption' commonly denotes a preferential right to refuse to purchase at a fixed price (see *Bircham & Co Nominees (2) Ltd v Worrell Holdings Ltd* (2001) 82 P & CR 427 at [31] per Chadwick LJ).

43 I find, taking all the relevant evidence into account, that Mr Tan was indeed granted such a right, albeit orally. I further find that Mr Tan's claim that he also had the right to call on the loan he had given the plaintiffs at any time was, in my view, established on a balance of probabilities.

44 More specifically, I believe that Mr Tan, as a businessman not unschooled in the ways of the world, would have been shrewd enough not to grant, as I have found, the plaintiffs a loan without more. I also find his statement to the effect that although he had spent – and was spending – much of his time in Malaysia, he nevertheless desired to reserve the right to reconstitute his stable of properties in Singapore at an appropriate time in the future to be true.

45 At this juncture, I pause to consider counsel for the plaintiffs' argument that it was unfair – and, by implication, unlikely – that even the right of first refusal could have been granted by the plaintiffs to the defendant. In particular, he argued that this would give Mr Tan a right in virtual perpetuity.

46 I did not find this argument convincing. First, this right was one that could be exercised by Mr Tan only if the plaintiffs had decided to sell the subject properties. If they did so, at whatever time, they were only obliged to offer the properties concerned to Mr Tan. In other words, even if this right were to crystallise some years down the road, this would be due to the plaintiffs' decision as to when they would want to sell and, more importantly, was framed in such a manner that they (the plaintiffs) would not, in any event, lose out in any material sense. If Mr Tan declined to exercise his right of first refusal, the plaintiffs would then be free to sell to someone else, provided they paid back the relevant loan amount. If Mr Tan decided to call on the loans, the plaintiffs could either repay the loans or sell the properties concerned back to him and/or his nominee at a price to be agreed or at the then prevailing market price. This was, in my view, both sensible and fair and did not prejudice any of the parties in question.

47 I also note that Mr Tan had, more than once, stated that, in any event, the subject properties were purchased by the plaintiffs at a time when the price was really, in his words, "rock-bottom". It would also appear that the plaintiffs had struck an excellent bargain with the twelve properties, enjoying good rental income in the process. I am also of the view that counsel for the defendant put it well when he stated that all investments (especially with regard to so many properties) are not risk-free. To all intents and purposes, however, and as I have just mentioned, the plaintiffs appear to have struck an excellent deal indeed.

What is the legal effect of a right of first refusal?

Introduction and contrasting approaches

48 Having found that Mr Tan was indeed conferred a right of first refusal over the subject properties by the plaintiffs, what is the legal effect of that right? In particular, did it create an interest in land that could therefore be the subject of a caveat under the LTA in the first instance?

49 Surprisingly, perhaps, there is no real consensus with respect to the second (and key) question posed in the preceding paragraph – at least across Commonwealth courts. The relevant case law is, in fact, succinctly summarised in P Butt & L Hughes, *Woodman and Nettle – The Torrens System in New South Wales* (Thomson Lawbook Co, Looseleaf Ed, 1984, September 2005 release) at para 74F.140. I will, nevertheless, be referring to a few of what I feel are the more salient decisions in a little more detail below.

50 A preliminary point, however, might be usefully – and briefly – dealt with at this juncture. It is my view that a right of first refusal to purchase real property does *not* fall within the purview of s 6(*d*) of the Civil Law Act. Hence, the fact that the relevant right accorded to the defendant by the plaintiffs in the present proceedings was not in writing does not render it unenforceable pursuant to the statutory provision just referred to. Reasoning already canvassed earlier in this judgment with regard to the loan by the defendant to the plaintiffs applies generally to this particular situation as well. In particular, it is clear that this situation did *not* involve a "contract for *the sale or other disposition of* immovable property, or any interest in such property" [emphasis added]. It would, of course, have been a somewhat different matter if the right of first refusal had in fact been exercised. At that particular point, the requirements pursuant to s 6(*d*) of the Civil Law Act would have had to be satisfied in order for an enforceable contract to come into being. It is acknowledged, however, that it could be argued that s 6(*d*) of the Civil Law Act is applicable if, as I argue below, a right of first refusal creates an interest in land right from the outset (see generally Martin Dray & Adam Rosenthal, *Barnsley's Land Options* (Sweet & Maxwell, 4th Ed, 2004) ("*Barnsley's Land Options*") at pp 213–223, albeit with the caveat that the current English provision and position is somewhat *different*). *However*, I am of the view that the preferable view is that a right of first refusal is *not* subject to s 6(*d*) of the Civil Law Act for that provision (as I have just alluded to in an earlier part of this paragraph) contemplates an *actual* contract for the sale or disposition of an interest in immovable property (*cf Barnsley's Land Options* at p 215). Just because a right of first refusal is, like an option, an interest in land, this does not lead to the inexorable conclusion that s 6(*d*) of the Civil Law Act applies to the former, although it clearly applies to the latter. Indeed, in my view, *only* in *this* particular respect (dealing with the applicability of s 6(*d*) of the Civil Law Act) does the distinction between a right of first refusal and an option make eminently good sense (but *cf* [73] below). As with the situation with regard to an interest in the proceeds of sale, however, it is clear that *even if* a right of first refusal fell within the purview of s 6(*d*) of the Civil Law Act, the contract concerned would merely be unenforceable (as opposed to being void) and hence would not, in my view, prevent the lodging of a caveat. However, as I have just mentioned, I am of the view that the transaction does not, in any event, run afoul of s 6(*d*) of the Civil Law Act.

51 Turning to the absence of consensus with regard to the issue as to whether or not a right of first refusal created an interest in land that could be the subject of a caveat under the LTA, the initial view was that such an interest was *not* one that could be the subject matter of a caveat. This was – so the reasoning goes – because it was merely a contractual interest that arose from an agreement between the parties (see, for example, the oft-cited Australian decisions of *Eudunda Farmers' Co-operative Society Limited v Mattiske* [1920] SALR 309 ("the *Eudunda* case") as well as *Mackay v Wilson* (1947) 47 SR (NSW) 315 ("the *Mackay* case")). If this view represents the present law in the Singapore context, the defendant, despite the clear agreement between it and the plaintiffs *and* despite the fact (as I have held) that such an agreement need not be in writing pursuant to s 6(*d*) of the Civil Law Act, will fail simply because it had lodged a caveat pursuant to an interest that simply is not recognised in law as an interest in land.

5 2 *However*, there has, in more recent times, been a *shift* in approach. It has been held that a right of first refusal, whilst not constituting an interest in land sufficient to permit the lodging of a caveat under the LTA *when first granted*, does become an interest in land when the rights thereunder *crystallise* when the owner of the property decides to sell. This would, simply put, appear to be the analysis proffered by the majority of the English Court of Appeal in the much-criticised (albeit very important) decision of *Pritchard v Briggs* [1980] Ch 338 ("*Pritchard v Briggs*"), to which I shall return a little later on in this judgment. Presumably, at this point, there comes into being an enforceable option to purchase the property concerned, and it has been well-established that the grant of such an option constitutes an (equitable) interest in land (see, for example, the Singapore High Court decision of *Eng Bee Properties Pte Ltd v Lee Foong Fatt* [1993] 3 SLR 837 at 844, [26]; the English Court of Appeal decision of *Mountford v Scott* [1975] Ch 258; the Australian High Court decision of *Laybutt v Amoco Australia Pty Limited* (1974) 132 CLR 57 at 75–76; the New Zealand Court of Appeal decisions of *Morland v Hales* (1910) 30 NZLR 201 and *Bevin v Smith* [1994] 3 NZLR 648; as well as the New South Wales Supreme Court decisions of *Walker Corporation Pty Ltd v WR Pateman Pty Ltd* (1990) 20 NSWLR 624 at 627 and *Sahade v BP Australia Pty Limited* [2004] NSWSC 512 at [43]). However, I should observe that *even if* this shift in approach is accepted, it would *still* be of *no* avail to the defendant in the present proceedings in so far as *one* of the properties is concerned (*viz*, 698 Geylang Road). This is because although a right of first refusal clearly exists between the defendant on the one hand and the plaintiffs on the other, the plaintiffs have not decided, as yet, to sell this property which is subject to this right. In other words, the right to caveat its interest has not yet crystallised as it has not been triggered by the decision of the plaintiffs to sell the property concerned.

53 There does not appear to be clear judicial consensus as to which approach is to be preferred, although it appears that the latter approach is favoured, on balance, "at single judge level" in New South Wales, "though no Court of Appeal judgment has finally settled the issue" (*per* Santow J in the New South Wales Supreme Court decision of *Jonns v Tan* (1999) 9 BPR 17,113; [1999] NSWSC 648 at [13]). Indeed, one may usefully contrast, in this regard, the Supreme Court of New South Wales decisions of *Transfield Properties (Kent Street) Pty Ltd v Amos Aked Swift Pty Ltd* (1994) 36 NSWLR 321 (incidentally, also decided by Santow J) as well as *Beneficial Finance Corporation Ltd v Multiplex Constructions Pty Ltd* (1995) 36 NSWLR 510 on the one hand and *Walker Corporation Pty Ltd v WR Pateman Pty Ltd* ([52] *supra*) on the other.

54 More recently, Campbell J had occasion to revisit the relevant authorities in the New South Wales Supreme Court decision of *Sahade v BP Australia Pty Limited* ([52] *supra*). Indeed, an extremely succinct and informative survey of the said authorities can be found at [41]–[42], and the learned judge did in fact ultimately endorse *Pritchard v Briggs* (at [43]; see also [100] below). Undoubtedly, however, the last word has yet to be pronounced not only in New South Wales but in other jurisdictions as well (including Singapore).

55 In a similar vein, Blanchard J, who delivered the judgment of the New Zealand Court of Appeal in *Bruce v Edwards* [2003] 1 NZLR 515, observed thus (at [54]):

> The prevailing judicial opinion is that a right of first refusal does not give rise to an interest in land before the occurrence of a triggering event – in this case a decision to alienate. Accounts of differing views are given in *Butterworths Land Law in New Zealand* (1997), para 2.148(k), Megarry and Wade's *The Law of Real Property* (6th ed, 2000), para 12-061 and Professor Wade's case note on *Pritchard v Briggs* [1980] Ch 338 at (1980) 96 LQR 488. *But the question is not finally settled* and was not the subject of argument [in the present case]. [emphasis added]

56 Indeed, earlier decisions in the New Zealand context appeared, in fact, to endorse the former approach to the effect that a right of first refusal did *not* create an interest in land (see, for example, the New Zealand High Court decision of *Re Rutherford* [1977] 1 NZLR 504, although even in this case, Roper J did acknowledge (at 510) that "the matter is certainly not free from doubt"). However, the latter approach to the effect that a right of first refusal could create an interest in land when triggered in appropriate circumstances appeared to be endorsed in later cases (see, for example, the New Zealand High Court decision of *Motor Works Ltd v Westminster Auto Services Ltd* [1997] 1 NZLR 762): hence the view expressed by Blanchard J in *Bruce v Edwards*, as quoted in the preceding paragraph.

General thesis and analysis

57 At this juncture, I must state, as an *initial* point of departure (*only*), that I prefer the latter approach (*viz*, the approach of the majority in *Pritchard v Briggs*: see [52] above). There appears to me no reason in principle why a right of first refusal over a piece of real property ought not to be considered an interest in land for the purpose of lodging a caveat under the LTA. Indeed, I would, in fact, go *further* than even the approach advocated by the majority in *Pritchard v Briggs*. Even as this ostensibly more liberal approach (of the majority in *Pritchard v Briggs*) now stands, the right to lodge a caveat only arises when the owner or owners decide to sell the property or properties concerned. In other words, such a right does not arise, *ipso facto*, from the very contract between the parties as such. Although I was much attracted by the approach of the majority in *Pritchard v Briggs* at first blush, it now seems to me *not* to go far enough and may, to some extent at least, be even somewhat inconsistent with the *rationale and spirit* underlying the lodging of a caveat under the LTA in the first instance. Let me elaborate.

58 The rationale and spirit underlying the lodging of a caveat under the LTA is not to create a new interest in land where one did not exist before (see the Singapore Court of Appeal decision of *The Asiatic Enterprises (Pte) Ltd v United Overseas Bank Ltd* [2000] 1 SLR 300), although it has been argued that there might still be scope for the creation of an interest in land contemporaneous with the lodging of a caveat under certain circumstances (see Victor C S Yeo, "No Security for the Unsecured Creditor — *The Asiatic Enterprises (Pte) Ltd v United Overseas Bank Ltd*" (2000) 12 SacLJ 218, especially at 228–230). Instead, "[t]he primary function of the caveat is to prevent the registration of dealings which would adversely affect the right of the caveator without first giving him a chance to prove his claim" (see Tan Sook Yee, *Principles of Singapore Land Law* (Butterworths Asia, 2nd Ed, 2001) at p 284, citing the Singapore Court of Appeal decision of *Cathay Theatres Pte Ltd v LKM Investments Holdings Pte Ltd* [1998] 1 SLR 917 at [31]–[32]). Despite some controversy, it would appear that a caveat in the Singapore context has done away with the broader equitable doctrine of notice (see Tan Sook Yee, *supra*, especially at p 285). *However*, this does not in any way detract from the fact (just noted at the outset of this paragraph) that, as a matter of justice and fairness, a person who feels that he or she has a legitimate interest ought to be given the opportunity to make out his or her case *vis-à-vis* the proposed registration of other dealings which would otherwise adversely affect such an interest, with the first logical step being the lodging of a caveat. To put it another way, the lodging of a caveat serves as notice to such other persons of the claim to such a right. By "notice", I do not of course refer to the concept in its broader incarnation in the context of equity for, as we have just seen, that is not the purpose of the caveat system – at least as it has been conceived in the local context. I would add, at this juncture, that it is not all one-sided, as justice and fairness would also, in my view, result to other parties who wish to register their respective dealings as well inasmuch as they would be cognizant of the caveated interest. Warren L H Khoo J, delivering the judgment of the Singapore Court of Appeal in *Alrich Development Pte Ltd v Rafiq Jumabhoy* [1993] 2 SLR 446, summarised the position well, as follows (at 453, [41]):

> The scheme of the Act is thus designed to strike a balance between the interests of the caveator and those of the caveatee. On the one hand, it enables a person who claims to have an equitable interest in land on the register to notify his claim by the simple and inexpensive process of lodging an instrument in the prescribed form without having to prove his claim. On the other hand, it allows the caveatee, if he disputes the right of the caveator to lodge a caveat, to take steps to have the caveat removed. It provides a mechanism for the resolution of any such disputes. If the caveatee has suffered any damage as a result of a wrongful lodgment of a caveat, he has a statutory right of compensation.

59 Nor is it a prerequisite to the successful lodging of a caveat that the person seeking to lodge it can *establish* its claim. Indeed, it has been observed, by Tritschler J in the Manitoba Queen's Bench decision of *CPR v District Registrar of Dauphin Land Titles Office* (1956) 4 DLR (2d) 518 at 521, that "[a] caveat is merely a notice of a *claim* which may or may not be a valid one" [emphasis in original] and that "[t]he validity of the claim must be determined after and not before the filing of the caveat". The learned judge proceeded to observe thus (*ibid*):

> The purpose of caveats is to warn the registered owner and, what is more important, all persons who might deal on the faith of the certificate of title, that the caveator claims an interest which is not disclosed on the certificate of title. … It is trite law that caveats are to be used for the protection of alleged as well as of proved interests and that a caveat is merely a warning which creates no new rights but protects existing rights, if any. … A caveator filing or continuing a caveat wrongfully and without reasonable cause is liable to make compensation to any person who sustains damage thereby …

Reference may also be made, in this regard, to the Singapore High court decision of *Tan Soo Leng David v Wee, Saktu & Kumar Pte Ltd* [1993] 3 SLR 569 at 575.

60 However, there are, it might be mentioned in passing, safeguards inasmuch as a caveat can (in appropriate circumstances) be removed (see, for example, the Malaysian Privy Council decision of *Eng Mee Yong v V Letchumanan s/o Velayutham* [1980] AC 331) *and* compensation may be awarded as a result of the inappropriate lodging of a caveat (see generally s 128 of the LTA and Tan Sook Yee ([58] *supra* at pp 294–303)).

61 But, it might be asked, does my argument from justice and fairness not, to some extent at least, *presuppose* that there is a legitimate interest (here, in land) in the first instance? That is not an invalid question by any means. To this question, at least two responses can be made – the former being more general in nature (with its focus on the idea of justice and fairness), with the latter encompassing a clutch of more specific reasons. Indeed, in so far as the latter response is concerned, if it can be demonstrated that there are specific reasons as to why a right of first refusal constitutes an interest in land, that would, in my view, be automatically consistent with the attainment of justice and fairness, particularly when looked at in the light of the nature and functions of the system of caveats under the LTA as briefly set out above.

62 Turning now to the first (and more general) response, if the courts (adopting the majority view in *Pritchard v Briggs*) are prepared, in principle, to acknowledge that a right of first refusal can constitute an interest in land for the purposes of lodging such a caveat only after the owner decides to sell the property concerned (thus resulting in the crystallisation that was referred to above), what, then, is the reason for not going *further* and holding that such a right constitutes an interest in land even *prior* to the point in time just mentioned? Why, in other words, is the line drawn at that particular point in time only? If, indeed, a caveat can only be lodged at that particular point in time, there is the distinct possibility that the party who possesses a right of first refusal might lodge his or

her caveat too late. To take one obvious example, the owner (and grantor of the right of first refusal) could have simply sold the property to a third party, who would probably be ignorant of this right *simply because it had not been the subject of a caveat yet*. Of course everything would depend, in the final analysis, on the relative speed of each transaction. However, I am uncomfortable leaving the issue of protection (or otherwise) via a caveat under the LTA to *the vagaries of circumstances*. If the courts are prepared to acknowledge that a right of first refusal can constitute an interest in land for the purposes of lodging a caveat, considerations of fairness, logic and commonsense would appear to suggest that there be no need for the owner to decide to sell the property first. To be sure, if the owner breaches the contract between him or her and the holder of the right of first refusal, this would clearly be the subject matter of a *contractual* claim by the latter against the former. But, at this juncture, the holder of this right is, in *substance*, in *no better a situation than he or she would have been under the first approach, which holds that a right of first refusal is merely a contractual right and which is therefore not capable of forming the subject matter of a caveat under the LTA*. It must also be emphasised at this juncture that the subject matter involved is *land or real property* and, given the uniqueness of land, the holder of a right of first refusal might well consider a contractual remedy in damages to be inadequate – hence, the possible remedy of an injunction or even specific performance, points to which I shall have occasion to return to later in this judgment (see [63] and, especially, [71] below), which possible remedy itself (as we shall see) suggests that a right of first refusal is in fact *more* than just a mere contractual right.

63 We have already seen (at [52] above) that an option to purchase property *does* constitute an interest in land. Indeed, in *Laybutt v Amoco Australia Pty Limited* ([52] *supra*), Gibbs J was of the view (at 76) that "[an] equitable interest cannot be created by a mere offer; it is necessary to find a contract which gives the grantee *a right to call* for a conveyance of the land" [emphasis added]. It is true that the grantee of an option to purchase property can generally obtain specific performance should the grantor resile from the contract. However, as we shall see, the grantee of a right of first refusal does generally have the right to obtain an injunction against the grantor if he or she resiles from the contract. I shall have occasion to return to this distinction that has been drawn between the grant of an option to purchase property and the grant of a right of first refusal (see generally [73] below). It suffices for the moment to observe that the distinction is not as clear-cut as it might appear at first blush.

64 Further, the adoption of the position I have proposed in the present proceedings (to the effect that a right of first refusal should be recognised, without more, as an interest in land for the purpose of lodging a caveat under the LTA) is further reinforced, in the Singapore context, by the fact that land is a scarce (and, therefore, expensive) item. As the Singapore Court of Appeal put it in *RSP Architects Planners & Engineers (Raglan Squire & Partners FE) v MCST Plan No 1075* [1999] 2 SLR 449 at [43], albeit in a somewhat different context (in endorsing, contrary to the English position, recovery in negligence for pure economic loss in the building context):

> Firstly, the investment in real property is likely to represent a significant, if not the most significant, investment in an individual's lifetime (as opposed to the purchase of a mere chattel). The scale of the investment in money terms is far greater than what is involved in the acquisition of a chattel. Secondly, the permanence of the structure may give rise to a greater expectation than a chattel. We think those arguments apply a fortiori in Singapore, where land is not only scarce but expensive. We think that to treat houses and consumer goods alike would be to ignore simple realities, realities which, to our mind, are instrumental in dictating the expectations and degree of reliance placed upon the persons developing, building or designing the structure which stands upon it.

65 *Secondly*, and as mentioned above, having set out the *general* reasons of principle and logic

that justify the approach which I have suggested above, it is, in my view, nonetheless necessary to consider in somewhat more detail the *specific* reasons supporting such an approach through an analysis of some of the more salient decisions. There are a number of related reasons for the adoption of such an approach.

66 First, it will be seen that even cases which advocate the view that a right of first refusal does *not* create an interest in land but only a personal contractual right do nevertheless acknowledge that there remain problems of justice and fairness and do in fact allude to reasoning and doctrines that (at least indirectly) buttress the approach that I have proffered above.

67 Next, it will be seen that cases which advocate the *alternative* view that a right of first refusal does create an interest in land, *albeit only when a triggering (or crystallising) event occurs*, not only go *some* (although *not* the *entire*) way of justifying the approach that I have proffered above but also (and more importantly) illustrate why the approach I prefer at least indirectly follows from the logic of this particular approach. Indeed, I hope to demonstrate that many of the *criticisms* levelled against *this* particular approach *actually compel a shift towards the approach that I have suggested.*

68 Thirdly, and on a more general (as well as related) level, it is important (as it is in every area of the law where difficult issues arise) not to be overly concerned with the case law for its own sake; at bottom, the case law must be consistent with first principles which are based, by their very nature, on considerations of justice and fairness. A balance is required. There must, in other words, be respect for the existing case law, albeit within the boundaries of justice and fairness. As we shall see, however, the two do not always conflict with each other. On the contrary, one ought, in my view, to regard the entire process as one of gradual development, as opposed to sharp departure. I have, in fact, already dealt with the relevant arguments of principle in the context of the need to achieve a just and fair result. I hope to demonstrate, through an analysis of some of the more relevant decisions, that the approach I have advocated is more consistent with principles premised on justice and fairness than both the existing approaches.

Specific analysis of the case law

69 Turning, then, to a more detailed analysis of some of the more salient decisions, and to the *Eudunda* case in particular, although the decision (from the Supreme Court of South Australia) is (as I have already mentioned) often cited for the proposition that a right of first refusal is merely a contractual right and confers no interest in land, Murray CJ did observe, towards the end of his judgment in that very case itself, as follows ([51] *supra* at 319):

> I do not say that the defendant could not have obtained the assistance of the Court to prevent the sale to the plaintiffs, if he had taken action while the matter was still *in fieri* (see *Manchester Ship Canal Company* v. *Manchester Racecourse*, [1900], 2 Ch. at p. 366; [1901], 2 Ch. at pp. 50-51). *He might have entered a caveat in the Land Titles Office, or applied for an injunction before the transfer was registered* … Now he is too late. The registered title of the plaintiff [to whom the property was sold in disregard of the right of pre-emption residing in the defendant] is absolute and indefeasible in the absence of fraud … [emphasis added]

70 The observations of Murray CJ quoted in the preceding paragraph are, in my view, instructive. It is true that they appear to be more consistent with the other (and alternative) view to the effect that a right of first refusal is one that is only triggered or catalysed when the owner of the property decides to sell it (see [52] above). More importantly, however, it is clear that the learned judge did *not* unambiguously endorse a blanket rule to the effect that merely personal rights (and *no*

more) would ensue in the context of a right of first refusal. On the contrary, there is (as we have seen) an express reference to the right to lodge a *caveat*, albeit in the more limited situation that I have just described.

71 There is, in fact, an even earlier (English) decision, which is (not surprisingly) cited and relied upon in the *Eudunda* case itself. This is the English Court of Appeal decision of *Manchester Ship Canal Company v Manchester Racecourse Company* [1901] 2 Ch 37 (followed in the more recent English High Court decision of *Murray v Two Strokes Ltd* [1973] 1 WLR 823). Although the court disagreed with the trial judge, Farwell J (whose decision is reported at [1900] 2 Ch 352), that a right of first refusal created an interest in land, Vaughan Williams LJ, who delivered the judgment of the court, was of the view that there could (applying the principles embodied in the oft-cited decision of *Lumley v Wagner* (1852) 1 De G M & G 604; 42 ER 687) nevertheless have been the grant of an *injunction* in favour of the holder of a right of first refusal against both the owner of the subject property *as well as* against the intending purchaser. However, it is noted that the court did not mention the possibility of such a holder lodging a caveat as well. There is, nevertheless, more than passing significance in this particular holding inasmuch as it demonstrates the underlying spirit recognising that, as a matter of fairness and justice, the right of first refusal ought not to be rendered nugatory. However, as I have already mentioned, I would be prepared to go further and recognise that such a right constitutes an interest in land for the purposes of lodging a caveat under the LTA. I should add that Farwell J's decision at first instance (briefly alluded to earlier in this paragraph) does, with respect, appear to me to be more persuasive; it does (consistently with the observations of the Court of Appeal) recognise the possibility of the grant of an injunction but the learned judge did also express the view that the intention of the parties *vis-à-vis* the grant of the right of first refusal in that particular case was indeed to create an interest in land, so that the holder of that right in fact had the *right* to the property concerned in the appropriate circumstances (see [1900] 2 Ch 352 at 366; *cf* also *London and South Western Railway Company v Gomm* (1881) 20 Ch D 562).

72 I turn now to the *Mackay* case. That was a decision of the Full Court of New South Wales. The judgment invariably referred to is that of Street J – in particular, the observations set out as follows ([51] *supra* at 325):

> Speaking generally, the giving of an option to purchase land *prima facie* implies that the giver of the option is to be taken to as making a continuing offer to sell the land, which may at any moment be converted into a contract by the optionee notifying his acceptance of that offer. The agreement to give the option imposes a positive obligation on the prospective vendor to keep the offer open during the agreed period so that it remains available for acceptance by the optionee at any moment within that period. It has more than a mere contractual operation and confers upon the optionee an equitable interest in the land, the subject of the agreement …
>
> But an agreement to give "the first refusal" or "a right of pre-emption" confers no immediate right upon the prospective purchaser. It imposes a negative obligation on the possible vendor requiring him to refrain from selling the land to any other person without giving to the holder of the right of first refusal the opportunity of purchasing in preference to any other buyer. It is not an offer and in itself it imposes no obligation on the owner of the land to sell the same. He may do so or not as he wishes. But if he does decide to sell, then the holder of the right of first refusal has the right to receive the first offer, which he may accept or not as he wishes. The right is merely contractual and no equitable interest in the land is created by the agreement.

73 We encounter, once again, the distinction between an option on the one hand and a right of first refusal on the other. It should be noted, at this juncture, that this distinction is not particularly convincing. Why, in other words, should the right of first refusal be "the option's poor relation"? (See

Charles Harpum, "Rights of Pre-Emption: Ugly Ducklings into Swans" [1978] CLJ 213 at 214.) After all, the option has itself been described variously as "a colloquial term, and indeed a somewhat inept term" (*per* Fullagar and Kitto JJ in the Australian High Court decision of *Woodroffe v Box* (1954) 92 CLR 245 at 257) and as an "academic riddle" (*per* Cooke J in the New Zealand Supreme Court decision of *Murray v Scott* [1976] 1 NZLR 643 at 655; see also generally Donald J Farrands, *The Law of Options* (The Law Book Company Limited, 1992) at ch 1). Indeed, in the decision at first instance in *Pritchard v Briggs*, Walton J held that "there would appear to be no essential difference, from the point of view of creating an interest in land, between an option on the one hand and a right of pre-emption on the other" (([52] *supra* at 361–362); see also Charles Harpum, "Contracts to Contract — Some Answers; Some Questions" [1979] CLJ 31 at 33 as well as, by the same author, "Rights of Pre-Emption: Monsters Not Ugly Ducklings" [1980] CLJ 35, especially at 40). Not surprisingly, the same commentator was of the view that Walton J had adopted a "pragmatic and robust view" (see Charles Harpum, "Rights of Pre-Emption: Ugly Ducklings into Swans", *supra* at 219). In a similar vein, another learned author has expressed the view that "rights of first refusal and complex rights of repurchase closely resemble options in their structure and commercial function and arguably these rights merit the same treatment in law" (see Paul M Perell, "Options, Rights of Repurchase and Rights of First Refusal as Contracts and as Interests in Land" (1991) 70 Can Bar Rev 1 ("Perell") at 26).

74 As already mentioned (see, especially, [52] above), there is *another* strand of authority that does indeed recognise that a right of first refusal can constitute an interest in land, *albeit only when it is triggered or crystallised by the decision of the grantor of that right to sell the property concerned.* As also referred to above, the leading decision embodying this approach is that of the English Court of Appeal in *Pritchard v Briggs*. In this case, the court had to decide which of two registered interests had priority. At the risk of excessive oversimplification, one interest, which was prior in time, comprised a right of first refusal. The other interest comprised an option. In the circumstances, the court held that the latter took priority over the former, simply because the former (a right of first refusal) did not, *ipso facto*, give rise to an interest in land. Up to this point, the view expressed in *Pritchard v Briggs* is in fact coincident with the former approach to the effect that a right of first refusal is a mere personal contractual right. However, the majority of the court (comprising Templeman and Stephenson LJJ) proceeded to hold that a right of first refusal could, nevertheless, be *converted into an interest in land* if the right was triggered or catalysed by the owner's decision to sell the property. This would of course be, *a fortiori*, the case if the owner actually offered or agreed to sell, or actually conveyed the property concerned to another, in breach of the agreement with the grantee or holder of the right of first refusal. This particular holding by the majority of the court was unnecessary on the actual facts of the case since the option in that case was granted *prior to* the triggering of the right of first refusal. Although the right of first refusal was granted before the option, it only created (as already noted above) a mere personal contractual right and not an interest in land and, hence, the option took priority. To that extent, therefore, the holding of the majority with respect to the conversion or transformation of a right of first refusal by the owner's decision to sell the property was *obiter dicta*. It is also interesting to note, though, that the remaining judge, Goff LJ, disagreed with this particular holding in any event. The learned Lord Justice emphasised a point, which I will deal with below and which centres on the apparent primacy of decision on the part of the *grantor* of the right of first refusal, as follows ([52] *supra* at 389):

> [A] right of pre-emption gives no present right, even contingent, to call for a conveyance of the legal estate. So far as the parties are concerned, whatever economic or other pressures may come to affect the grantor, he is still absolutely free to sell or not. The grantee cannot require him to do so, or demand that an offer be made to him. Moreover, even if the grantor decides to sell and makes an offer it seems to me that so long as he does not sell to anyone else he can withdraw that offer at any time before acceptance.

75 As alluded to above, the point from the primacy of decision on the part of the grantor is by no means an irrefutable one and the argument meeting it is considered below (at [88]–[90]). On the other hand, Templeman LJ (as he then was, and with whom Stephenson LJ agreed) expressed a different view in the following seminal passage ([52] *supra* at 418):

> Rights of option and rights of pre-emption share one feature in common; each prescribes circumstances in which the relationship between the owner of the property which is the subject of the right and the holder of the right will become the relationship of vendor and purchaser. In the case of an option, the evolution of the relationship of vendor and purchaser may depend on the fulfilment of certain specified conditions and will depend on the volition of the option holder. If the option applies to land, the grant of the option creates a contingent equitable interest which, if registered as an estate contract, is binding on successors in title of the grantor and takes priority from the date of its registration. In the case of a right of pre-emption, the evolution of the relationship of vendor and purchaser depends on the grantor, of his own volition, choosing to fulfil certain specified conditions and thus converting the pre-emption into an option. The grant of the right of pre-emption creates a mere spes which the grantor of the right may either frustrate by choosing not to fulfil the necessary conditions or may convert into an option and thus into equitable interest by fulfilling the conditions. An equitable interest thus created is protected by prior registration of the right of pre-emption as an estate contract but takes its priority from the date when the right of pre-emption becomes exercisable and the right is converted into an option and the equitable interest is then created. The holder of a right of pre-emption is in much the same position as a beneficiary under a will of a testator who is still alive, save that the holder of the right of pre-emption must hope for some future positive action by the grantor which will elevate his hope into an interest. It does not seem to me that the property legislation of 1925 was intended to create, or operated to create an equitable interest in land where none existed.

76 It is not inappropriate, in my view, to also note that, at first instance, Walton J held that a right of first refusal gave rise to an interest in land *without more*. In other words, there was no need for a subsequent trigger (as the majority of the Court of Appeal had held). As can be seen in the passages just quoted (at [74] and [75] above), such an approach was diametrically opposed to that adopted by Goff LJ and also different from that adopted by both Templeman and Stephenson LJJ. Interestingly, however, this is precisely the approach which I have endorsed in the present case.

77 One salient issue that arises from the views of the majority in *Pritchard v Briggs* is *precisely when* the triggering or catalysing or fructifying event occurs. In that case, Templeman LJ observed thus ([52] *supra* at 418–419):

> Thus the relationship of vendor and purchaser could not be established unless the Lockwoods chose to offer the retained lands to the holder of the right of pre-emption or, in breach of covenant, contracted to sell the retained lands to a third party without first offering the lands to the option holder for £3,000. If and when these conditions were fulfilled, the holder of the right of pre-emption would be entitled to buy and therefore entitled to an equitable interest.

78 Stephenson LJ spoke of the grant of the right of pre-emption being, "on the true construction of the grant", "only properly called an option when the will of the grantor turns it into an option by deciding to sell and thereby binding the grantor to offer it for sale to the grantee" ([52] *supra* at 423).

79 The following observations by Chadwick LJ in the English Court of Appeal decision of *Bircham & Co, Nominees (2) Ltd v Worrell Holdings Ltd* (2001) 82 P & CR 34 at [33] might, in this regard, be

usefully noted:

> It is, I think, implicit in those observations [by Templeman LJ in *Pritchard v Briggs* (and quoted at [77] above)] that an equitable interest would arise *as soon as the grantors chose to offer the land to the grantees*; that is to say, an equitable interest analogous to — and (to my mind) indistinguishable from — an interest under an option would arise when the offer was made, whether or not the offer was accepted. But, of course, the interest would lapse if the offer were not accepted within the twenty one day period for which the offer was to remain open. [emphasis in original]

80 As already alluded to above, the holding of the majority in *Pritchard v Briggs* to the effect that a right of first refusal could give rise to an interest in land if it is in fact triggered by one or more of the events mentioned (but not before) has engendered a not insignificant amount of criticism and controversy, although there is at least one particular comment that is both erudite as well as moderate in its tenor (see Jill Martin, "The Right of Pre-emption: A Potential Proprietary Interest?" [1980] Conv 433), whilst another textbook, while listing the various criticisms levelled against *Pritchard v Briggs*, adopted a rather neutral stance (see *Barnsley's Land Options* ([50] *supra* at pp 202–205, especially at p 205)).

81 Foremost amongst the critics of *Pritchard v Briggs* is Prof William Wade. I should pause to observe that this is no ordinary critic. Prof Wade's scholarship is widely acknowledged and, more specifically, he is one of the authors of the highly regarded work, Megarry & Wade, *The Law of Real Property* (Sweet & Maxwell, 6th Ed, 2000) ("Megarry & Wade") (which edition is by Charles Harpum, and the seventh edition is currently in press). The piece by the learned writer that has almost invariably been cited whenever this particular issue arises is a comment on *Pritchard v Briggs* itself: see "Rights of Pre-Emption: Interests in Land?" (1980) 96 LQR 488. In this perceptive and incisive comment, Prof Wade commences (at 488) by stating that the decision "has the appearance of a hard case which makes bad law". As it turned out, this was an understatement of sorts, for in the very same paragraph, the learned author observes thus (see *ibid*):

> Still more unfortunately, all their answers [the answers from the learned Lord Justices in *Pritchard v Briggs*] seem productive of results which are first, inequitable; secondly, contrary to the legislation of 1925; and thirdly, at variance with general principles of land law. The original decision of Walton J. … , which was reversed, had avoided all these dire consequences admirably.

82 This was harsh criticism, indeed. But it was not based on mere academic conjecture or speculation. This would explain why this piece has, as already alluded to above, been cited extensively in both judicial as well as academic contexts. If I may say so, I find the commentary therein very persuasive. Indeed, it not only supports but also clinches, so to speak, the approach that I have proffered in the present case. Significantly, that particular approach is, as I have already mentioned, also supported by the judgment of Walton J, delivered at first instance in *Pritchard v Briggs* itself – a judgment which is also (and not surprisingly, perhaps) endorsed by Prof Wade, as can be seen in the quotation in the preceding paragraph.

83 Turning to Prof Wade's comment in more detail, what seems to me to be not only the first substantive point but also one which I have already referred to above is encapsulated in the following words ([81] *supra* at 489):

> It [the result of the decision of the Court of Appeal in *Pritchard v Briggs*] belongs to the class of disasters which a sound system of property law ought to strive at all costs to avoid: the defeat of a prior interest by a later purchaser taking with notice of the conflicting prior interest.

84 The authors of a leading textbook have also observed, in a similar vein, thus (see Gray & Gray ([42] *supra* at para 9.85)):

> Over the years there has been an extended debate as to the proprietary status of rights of pre-emption. On one view a right of pre-emption remains a purely personal contractual right unless and until it becomes exercisable by reason of the estate owner's election to sell. It is only at this point – and not before – that the grantee's entitlement is transformed into an equitable interest in the land. Until then, it was widely believed, a right of first refusal confers insufficient 'property' in the land to qualify its recipient as the owner of any equitable entitlement capable of protection by register entry. *This analysis although probably a correct reflection of the highly contingent nature of the unfructified right of pre-emption, attracted much criticism, not least because there remains a strong argument that potential disponees of land deserve, in fairness, to be forewarned of all sale arrangements affecting the estate which they propose to buy.* [emphasis added]

85 Indeed, the reasoning embodied in the preceding two quotations is not merely legal: it goes to the very heart of the concept of fairness, albeit viewed against the particular canvass of the system of caveats under the LTA. In this last-mentioned respect, the position in Singapore appears to be somewhat different, at least in so far as the reference to the concept of notice is concerned. As I have already noted (at [58] above), the concept of notice operates, in the context of the LTA, in the narrower sense of not only notifying persons seeking to register interests over the subject property of the caveator's claim but also (as a correlative) allowing the caveator the opportunity of vindicating his or her claim. All this comports with basic ideas of justice and fairness. This is why I have advocated recognising a right of first refusal or pre-emption as an interest in land for the purposes of lodging a caveat under the LTA.

86 Prof Wade also pointed to the fact that "no authority" was given for "this strange doctrine of delayed effectiveness" (advocated by the majority in *Prtichard v Briggs*) and that "it was simply stated as if self-evident" ([81] *supra* at 489).

87 The learned author then proceeded to point out (pertinently, in my view) that "highly respected judges appeared to favour" rights of first refusal as interests in land, "including Fry J., Kay J., Jessel M.R., Lindley L.J. and Farwell J." (see *id* at 490).

88 As we have seen, however, the main reason underlying the decision to reject a right of first refusal as an interest in land, at least before it has been triggered, is the fact that, unlike an option, such a right was *governed by the volition of the grantor* of the right (*viz*, the owner of the property in question), rather than that of the grantee. This argument has, in my view, been met as well as refuted more than adequately by Walton J at first instance in *Pritchard v Briggs* thus ([52] *supra* at 362):

> It is, however, difficult to see why in theory the fact that the condition is one which may be controllable by the owner of the land should make any difference. It obviously may make a difference to the possibility of the interest in the land coming to fruition; but an option granted on equally unlikely conditions not under the control of the owner of the land would not on the account of the unlikelihood of the conditions ever being satisfied, be denied the cachet of an interest in land.

89 I also note another learned writer's argument to the effect that a right of first refusal entails, compared to an option, just *one* further contingency that the owner of the property should desire to sell it and that "[a]n enforceable right subject to two contingencies creates a contingent interest in

land, as much as an enforceable right subject to a single contingency" (see Michael Albery in (1973) 89 LQR 462 at 463; see also Megarry & Wade at p 683).

90 In a similar vein, Prof Wade has observed thus ([81] *supra* at 490):

> The one and only judicial argument for rejecting this species of interest [*viz*, a right of first refusal] is that the condition which makes it exercisable (the owner's decision to sell) is one that is governed by the volition of the owner rather than by that of the other party, as contrasted with an option where the option-holder himself possesses the initiative once the conditions of the contract are fulfilled. *But why should that make so much difference? An option to purchase might easily be granted on terms that it should be exercisable only if the owner discontinued a certain use of the land: would that be any the less an interest in land because the initiative remained with the owner? The law is not normally fussy about conditions governing interests in land, and why the owner's initiative should be thought so objectionable is a mystery. … A right of pre-emption imposes a genuine obligation which ought to be enforceable by an order of specific performance. Those are the necessary elements of an interest in land, and the "owner's volition" element seems an irrelevance*. [emphasis added]

91 In addition to the main reasoning contained in the above quotation (which is both logical and persuasive), I note the learned author's reference to a right to specific performance. Indeed, the fact that an *option* is subject to the doctrine of specific performance is one major reason why it is recognised as an interest in land. It is true that, in so far as a *right of first refusal* is concerned, the doctrine of specific performance may *not* be *clearly* applicable – at least not at first blush. However, as we have already seen, a right of first refusal might well be protected by the grant of an *injunction* (see [71] above). In this regard, it has been argued that if the grantee of a right of first refusal "can seek a mandatory injunction requiring the grantor to make him an offer, then it seems his right is *not purely personal, because he can ultimately ensure that he acquires the land*" [emphasis added] (see Ann R Everton, "Towards A Concept of 'Quasi-Property'? – II" [1982] Conv 177 at 181). Elaborating, the learned author observes thus (at 181–182):

> He [the holder or grantee of the right of first refusal] can, *by accepting the offer made in pursuance of the injunction, bring into existence a complete contract, and then if need be, like the grantee of an option, call for the conveyance of the land via the remedy of specific performance*. [emphasis added]

92 The important (and related) issue was whether or not a *mandatory injunction* could in fact be obtained by the grantee in the manner just mentioned. The learned author argues (at 182) that "there is sound support for such a view", although she does cite, *inter alia*, the views of Prof Wade (at [90] above). It should be noted, though, that this particular author would rather classify such a right as "a right of quasi-property", as opposed to a full proprietary right. To this end, she would prefer viewing such a right as one in transition, rather than in transformation (see *ibid*).

93 However, *even if* such a right is not amenable (directly, at least) to the grant of an order for specific performance (which is probably not the case as we have just seen), the very fact that it is amenable to the grant of an injunction may *itself* be indicative of the *proprietary nature* of a right of first refusal; as another learned writer put it, "[l]ike specific performance, an injunction is a proprietary remedy" (see Perell ([73] *supra* at 24)).

94 Prof Wade also endorses the view (adopted by Walton J at first instance in *Pritchard v Briggs*) to the effect that "it is abundantly clear that the legislators of 1925 intended that their catalogue of estates and interests should include rights of pre-emption" ([81] *supra* at 490). As the

learned author succinctly and persuasively put it (at 491):

> Again one cannot avoid asking, why not let the interest operate as the Acts of 1925 intended, thereby both preserving the sovereign principle that a later purchaser with notice ought to be bound *and*, at the same time, *doing justice*? The sovereign principle, however, was not mentioned. [emphasis added]

95 The "sovereign principle" may need to be viewed differently in the Singapore context (see [58] above), but the emphasis on justice and fairness remains and is, indeed, both universal as well as universally desirable. Returning to the 1925 UK legislation, Walton J in *Pritchard v Briggs* did note (perceptively and pertinently, if I may say so) that "in general there can be no question but that the framers of the 1925 legislation knew their land law to perfection" ([52] *supra* at 362). In this regard, I do not, with respect, agree with the views expressed by the English Court of Appeal in the same case to the contrary.

96 Finally, the learned author also cited the decision by Browne-Wilkinson J (as he then was) in the English High Court decision of *Swiss Bank Corporation v Lloyd's Bank Ltd* [1979] Ch 548 (reversed, but not on this particular point in [1982] AC 584) – a decision which, in his view, was the analogue of the present situation in the context of personal property. He was of the view that there ought to be no difference in so far as the point of general principle was concerned – "that one who attempts to buy *with full knowledge of* another person's prior contractual rights, whether or not creating an interest in land, *is obliged to respect them*" [emphasis added] ([81] *supra* at 492). Although the position in the Singapore context may be different, the general point centring on justice and fairness ought to be noted.

97 Despite the severe criticisms it has been subjected to on the academic front, it is nevertheless noted that *Pritchard v Briggs* has in fact been applied, judicially, in the English context (see, for example, the English Court of Appeal decision of *Bircham & Co, Nominees (2) Ltd v Worrell Holdings Ltd* ([79] *supra*) and the English High Court decision of *Kling v Keston Properties Ltd* (1983) 49 P & CR 212; see also the (also) English High Court decisions of *London & Blenheim Estates Ltd v Ladbroke Retail Parks Ltd* [1992] 1 WLR 1278 and the English Court of Appeal decision of *Homsy v Murphy* (1996) 73 P & CR 26). The principle has also received further elaboration in the English High Court decision of *Specialty Shops v Yorkshire and Metropolitan Estates Limited* [2003] 2 P & CR 31. Park J's analysis in that case is especially helpful and merits extended quotation as follows (at [25]–[29]):

> 25 The cases (particularly the judgment of Chadwick L.J. in *Bircham & Co (Nominees) (2) Ltd v Worrell Holdings Ltd …)* stress that there can be substantial variations between the terms of different agreements all of which might be described generically as pre-emption agreements or first refusal agreements. It is necessary to consider carefully the precise terms of the agreement which is in issue in any particular case. One feature which they all tend to have in common is that they provide for a period during which the landowner's obligations are negative and the other party's rights are, in a sense, inchoate but then they provide that, upon an event occurring which triggers the rights of the other party, those rights assume a different content. In the present case the triggering event under the terms of the comfort letter is SSL attracting an offer for its interest in the St Anne's Wharf project and being minded to accept it: see lines two and three of the letter. Until the triggering event (however it may be expressed) occurs the other party to a pre-emption contract does not have an interest, legal or equitable, in the land: *Pritchard v Briggs* … The other party may or may not acquire such an interest when the triggering event occurs, depending on the precise terms in which the agreement is cast.

26 I will mention three possibilities. More possibilities may exist, but three will do for the purposes of this judgment. One possibility is that, upon the occurrence of the triggering event, the owner is obliged to offer to sell the property to the other party (the pre-emption holder), and the owner also must leave the offer outstanding and capable of acceptance for a specified period. In that case, during the period when the offer cannot be revoked, the pre-emption holder does have an interest in the land. He is in a position equivalent to an option holder: *Pritchard v Briggs* … (in which the offer could not be revoked or altered for 21 days). (What I have just said is subject to s.2 of the Law of Property (Miscellaneous Provisions) Act 1989, which may mean that the pre-emption holder does not have an interest in the land after all. I shall refer more specifically to that Act later.)

27 A second possibility is that, upon the triggering event, the landowner must offer to sell the land to the pre-emption holder, but is not obliged to leave the offer open for any period. So he can revoke it at any time, as long as he does so before the pre-emption holder accepts it. That it is possible for an agreement to be of this nature was confirmed by the Court of Appeal in *Tuck v Baker* … In such a case the effect of the Court of Appeal decision in the *Bircham* case … is that the pre-emption holder does not, on the triggering event, acquire an equitable interest in the land. Chadwick L.J. did, however, leave open the possibility that it might be different if the landowner did still want to dispose of the land.

28 A third possibility is where, upon the triggering event, the landowner is not obliged positively to offer to sell the land to the pre-emption holder, but rather he is obliged to notify the pre-emption holder of the situation, leaving it for the pre-emption holder to make his own offer to purchase the land if he chooses. If the pre-emption holder does choose to make an offer, only a very unusually worded agreement would provide that the landowner was bound to accept it. In all normal cases one would expect the landowner to be free to accept or refuse the pre-emption holder's offer. Of course the landowner would not be entitled (as between himself and the pre-emption holder) to refuse the pre-emption holder's offer and then go ahead with a sale to a third party on the same or worse terms. But it seems to me that, if the landowner actually did that, the pre-emption holder's remedy would be a claim for damages against the landowner for acting in breach of his contractual obligations under the pre-emption agreement. I cannot see how the pre-emption holder could assert any sort of proprietary interest in the land.

29 In cases of the third type which I have just described, I do not think that the pre-emption holder at any stage acquires an equitable interest in the land as such, unless and until he makes an offer to purchase the land and the landowner accepts it. But in my opinion he does not have an interest in the land at any of the following earlier times: (1) when the triggering event has occurred but the landowner has not yet informed the pre-emption holder about it; (2) when the landowner has informed the pre-emption holder but the pre-emption holder has not made an offer to purchase the land; (3) when the pre-emption holder has made an offer to purchase the land but the landowner has not accepted it.

98 The quotation in the preceding paragraph merely serves, in my view, to underscore the numerous and potential difficulties as well as the uncertainty that would be engendered by the adoption of the approach suggested by the majority of the court in *Pritchard v Briggs*.

99 However, I do also note that the approach of the majority in *Pritchard v Briggs* also appears to have found *favour* in other Commonwealth jurisdictions as well.

100 In the New South Wales Supreme Court decision of *Sahade v BP Australia Pty Limited* ([52] *supra*), for example, Campbell J elaborated thus (at [43]):

> In my view *Pritchard v Briggs and Others* [1980] Ch 338 is *right* in deciding that a right of first refusal can transmute from a merely contractual right to a right which confers an equitable interest in land, when the conditions for exercise of the right of first refusal have all been satisfied. An *equitable interest arises* in land which is the subject of *an option to purchase* because the grantor of the option can, in at least some circumstances, be *deprived of that land without there being any further action or decision on his part*. In that situation, he cannot in conscience regard the land as being completely his own. *When the conditions for exercise of a right of pre-emption have arisen, the grantor of that right of pre-emption can likewise be deprived of his land without any further action or decision on his part.* Further, such a situation is one where specific performance is capable of being awarded, to require the grantor of the right of first refusal to perform his agreement. While the availability of specific performance might not be the only test for whether one person has an equitable interest in land of another, it provides one test for when such an equitable interest exits. [emphasis added]

101 The approach adopted by the majority in *Pritchard v Briggs* has also apparently found favour in the *Canadian* context as well: see, for example, the Supreme Court of Canada decision of *McFarland v Hauser* (1978) 88 DLR (3d) 449 (which elaborated upon its views in its earlier decision in *Canadian Long Island Petroleums Ltd v Irving Industries (Irving Wire Products Division) Ltd* (1974) 50 DLR (3d) 265, with (significantly) Martland J delivering the judgment of the court on both occasions) and the Saskatchewan Court of Appeal decision of *Powers v Walter* (1981) 124 DLR (3d) 417. Indeed, in the Saskatchewan Court of Queen's Bench decision of *Kopec v Pyret* (1983) 146 DLR (3d) 242 (varied, but not on this particular point, in (1987) 36 DLR (4th) 1, which point is in fact confirmed), Scheibel J observed thus (at 252):

> The question of whether a right of first refusal creates an interest in land depends upon *the point in time* at which the question falls to be considered. Up to the time the subject-matter is offered for sale by the vendor, a right of first refusal is necessarily a mere contractual right. During that time the party having the right of first refusal is powerless to compel a sale of the subject-matter except upon the concurrence of the vendor to sell.
>
> However, where the vendor has signified his intention to sell upon certain terms and holds himself ready to sell in the event those terms are met, the position of the preferential purchaser is *transformed into* that of *a virtual optionholder*. By exercising his right of first refusal, he can insist on a sale of the subject-matter to him in preference to all other potential buyers and thereby control the destination of the ownership of the subject-matter. At this stage in the relations between the parties, the interest of the purchaser becomes *transformed into* an interest in the land in the same way that an option is presumed to create such an interest.
>
> [emphasis added]

102 Needless to say, however, all the arguments canvassed above (in the context of the analysis of *Pritchard v Briggs*) demonstrating why such a principle of "transformation" ought *not* to be adopted apply with equal force to the views in the Commonwealth decisions just quoted.

103 It should also be noted that the force of the *criticism* of *Pritchard v Briggs* has also been *recognised judicially in the English context*; in the more recent English Court of Appeal decision of *Dear v Reeves* [2001] 3 WLR 662, for example, Mummery LJ, with whom May LJ agreed, not only set out the criticism (at [32]–[34]) but also observed thus (at [43]):

> I would distinguish *Pritchard v Briggs* [1980] Ch 338. It is a decision on the construction of the Land Charges Act 1925, which has a different statutory objective and the provisions referring to

an "interest" are more narrowly drafted than those in the 1986 Act. It has not been contended on this appeal that that case was wrongly decided. It is neither necessary nor appropriate for this court to hold that it was wrongly decided. I would accept, however, that the reasoning in the judgments in *Pritchard v Briggs may require re-consideration. I see the force of the criticisms* quoted from *Megarry &Wade*. I would add that I also see difficulties in regarding a right of pre-emption as similar to the hope of a person who is a beneficiary in the will of a living testator. Under the general law there is no fetter on the freedom of a testator during his lifetime to decide on whom he wishes to include as a beneficiary in his will and whom he wishes to exclude from it. He cannot be prevented from deciding to change his will and he will not incur any legal liability for so doing. In the case of a right of pre-emption, the grantor is free to decide not to sell the property, but, if he decides to sell it, he is legally bound to offer it first to the grantee. If he does not do so, he is liable to the grantee for breach of contract. [emphasis added]

104 As it turned out, there was in fact subsequent *legislative* change in the English context *that has endorsed the approach I have suggested in the present case in so far as registered land is concerned*. One may in fact trace such reform back to at least the UK Law Commission's consultation paper entitled *Land Registration for the Twenty-First Century – A Consultative Document* (Law Com No 254, 1998) (see generally paras 3.29–3.32) and its subsequent report entitled *Land Registration for the Twenty-First Century – A Conveyancing Revolution* (Law Com No 271, 2001) (see generally paras 5.26–5.28 as well as pp 417 and 548–549). In the report, it is stated thus (at paras 5.27–5.28):

> In the Consultative Document, we recommended that a right of pre-emption in registered land should take effect from the time when it was created and not, as *Pritchard v Briggs* suggested, only from the time when the grantor decided to sell. This recommendation was supported by 96 per cent of those who responded to the point. It was clear from the tenor of the responses that the result in *Pritchard v Briggs* was not well regarded because of the practical difficulties to which it gave rise.
>
> The Bill provides that a right of pre-emption in relation to registered land has effect from the time of creation as an interest capable of binding successors in title (subject to the rules, explained above, about the effect of dispositions on priority). In other words, it takes its priority from the date of its creation. If the dicta in *Pritchard v Briggs* do represent the present law, then the Bill changes the law in its application to registered land. The change is therefore prospective only. It applies to rights of pre-emption created on or after the Bill comes into force.

105 The present English law with regard to *registered* land is presently embodied within s 115 of the Land Registration Act 2002 (c 9) (UK), which adopted, *in toto*, the clause suggested by the UK Law Commission, and which reads as follows (see also *Barnsley's Land Options* ([50] *supra* at pp 212–213):

> **115 Rights of pre-emption**
>
> (1) A right of pre-emption in relation to registered land has effect from the time of creation as an interest capable of binding successors in title (subject to the rules about the effect of dispositions on priority).
>
> (2) This section has effect in relation to rights of pre-emption created on or after the day on which this section comes into force.

Conclusion

106 In summary, it appears to me (if I may reiterate) eminently fair, logical and commonsensical to allow a caveat to be lodged by the holder of a right of first refusal at any time, assuming that the contract he or she has with the owner is a valid and enforceable one. In particular, the following principal reasons support the approach I have adopted, and which I have elaborated upon in more detail above.

107 First, allowing a caveat to be lodged is consistent with the function of a caveat inasmuch, as a matter of justice and fairness, a person who feels that he or she has a legitimate interest (here, a right of first refusal) ought to be given an opportunity to make out his or her case *vis-à-vis* the proposed registration of other dealings which would otherwise adversely affect such an interest. As I have also pointed out, justice and fairness would also result to other parties who wish to register their respective dealings as well inasmuch as they would also be cognizant of the caveated interest. In fact, in the context of the present case, one of the twelve properties (albeit not one of the subject properties involved in the present proceedings) was in fact sold by the plaintiffs without any notification being given to the defendant and without any caveat being lodged in respect of that particular property. Indeed, as has already been noted, it was also only by chance that Mr Tan had discovered the attempted sale of one of the subject properties involved in the present case (*viz*, 696 Geylang Road) (see [6] above).

108 Secondly, the cases that appear to state that a right of first refusal is merely a contractual right and not an interest in land do *not*, in my view, purport to do so *conclusively*.

109 Thirdly, the position adopted by the majority in *Pritchard v Briggs* to the effect that a right of first refusal can be transformed into an interest in land once the grantor of that right decides to sell the property concerned generates much uncertainty and has been, to that extent, correctly criticised – although such an approach does acknowledge, albeit in a somewhat more *limited* sense, that a right of first refusal can be an interest in land.

110 Fourthly, since an option is now widely acknowledged to create an interest in land, there appears to be no reason why a right of first refusal cannot also create an interest in land. The distinction between an option and a right of first refusal is not particularly convincing – especially having regard to their respective natures and (especially, commercial) functions. Further, the argument to the effect that the right accorded under a right of first refusal, unlike an option, is governed by the volition of the *grantor* rather than that of the grantee is not persuasive because, as Prof Wade has aptly put it (at [90] above), "[t]he law is not normally fussy about conditions governing interests in land, and why the owner's initiative should be thought so objectionable is a mystery". Finally, a right of first refusal can, in appropriate circumstances, be enforced by an injunction and perhaps even by an order for specific performance; in any event, the fact that it could be enforced by way of an injunction is itself an indication of the proprietary nature of a right of first refusal.

111 Fifthly, legislation in at least the UK has finally acknowledged, at least in so far as registered land is concerned, that a right of first refusal constitutes an interest in land. As we have seen, there was a clear dissatisfaction with the majority position in *Pritchard v Briggs*. In my view, a similar legislative amendment might not be necessary in the local context, except *ex abudante cautela*. What *does* matter, in my view, is that the *substance* of the approach I have advocated is in fact embodied in UK legislation at least in so far as registered land is concerned; this is an important point in so far as the issue of *justification* of the approach I have proffered is concerned.

112 I realise that no case, to the best of my knowledge, has yet taken such an ostensibly radical step. I would like to emphasise the word "ostensibly". As I have sought to explain above, there is

really nothing radical at all with the approach I have proposed. Indeed, it is but a short step of logic (and not blind faith) to arrive at the proposition I have just enunciated, *assuming that one endorses the latter approach* (embodied in the majority judgment in *Pritchard v Briggs*) *in the first instance* (which, unlike the former approach, at least recognises that a right to lodge a caveat could be triggered or catalysed by the decision of the owner to sell the property in question). This latter approach is, as we have seen, already firmly established in the existing case law itself. Indeed, the approach I have suggested *avoids* all the criticisms that have been levelled against the leading decision of *Pritchard v Briggs*. In addition, it is important to reiterate that the case law that suggests the contrary (*viz*, that a right of first refusal is merely a contractual right giving rise to no interest in land as such) is, as I have sought to demonstrate, not as emphatic as it might appear to be at first blush.

113 One other alternative is of course for the Singapore legislature to clarify the position. This approach is not at all fanciful, as demonstrated by the legislative clarification in the UK in so far as registered land is concerned, and which I have referred to briefly above (at [105]). However, the UK reform was part of a larger project. Parliamentary time is limited and precious. And there is no reason in principle why such a specific clarification in the existing law could not be effected by the courts. Again, however, a definitive view can only be laid down by the Singapore Court of Appeal as it is the highest appellate court of the land.

114 If the approach I have proffered is accepted, then it is clear that the defendant could not be criticised in the least for having lodged caveats against the properties concerned.

115 Nevertheless, even if the view I have proffered is not accepted, this is not an end to the matter. Reverting to the earlier part of my judgment, it will be recalled that I had held that, in any event, the defendant's *interest in the sale proceeds itself constitutes an interest capable of being the subject matter of a caveat*. Based on *that* ground *alone*, the defendant would be *justified* in lodging the said caveats. Whilst this particular interest was contained in the same contract as that granting the defendant a right of first refusal, that is, in my view, immaterial since the focus just referred to would be on the former rather than the latter. It is therefore, strictly speaking, unnecessary for me to decide whether a right of first refusal can constitute, *without more*, a sufficient interest for the purpose of lodging a caveat under the LTA. However, as already mentioned above, my own preferred view would be to decide this particular issue in the affirmative for the reasons I have set out above. I should also point out that if it is at least accepted that the majority position in *Pritchard v Briggs* obtains, then it would follow that the defendant was, *in any event*, entitled to lodge a caveat at least in so far as one of the two subject properties is concerned (696 Geylang Road), since *the plaintiffs had already entered into a sale and purchase agreement with the third parties with respect to that property* (and see [6] above).

A *coda* – the last-ditch attempt by the plaintiffs to shore up their case

116 After the hearing had been concluded, the plaintiffs sought to introduce new evidence to shore up their case. In particular, they sought to introduce new evidence to undermine what was one of the most glaring pieces of evidence against their case – the testimony of Ms Tay Ai Khim, the independent witness. This is not in the least surprising, given my very positive assessment of Ms Tay's evidence as set out briefly above (at [23]–[26]). I must assume that the plaintiffs must have been similarly impressed as well – hence, this particular application to introduce new evidence after the hearing had in fact already been concluded.

117 I pause at this juncture to note that this particular application was part of a pattern of what was, in my view, on the borderline of an abuse of the process of the court, at least in so far as the

introduction of evidence was concerned. Indeed, at a certain point during the proceedings itself, I had to point out that the plaintiffs were treating the introduction of evidence as part of a "game" and which they thought they could effect at will each time they thought that their case was not going well. This was, of course, wholly unacceptable by any stretch of the imagination. Counsel for the plaintiffs (whose own professionalism, I should add, was impeccable throughout these proceedings) in fact undertook that that would be the last time this would happen.[note: 1] Unfortunately, the same thing has happened – and after the conclusion of the hearing at that. Indeed, and to be more precise, the application concerned (in Summons in Chambers No 4486 of 2005/Z) was made after the hearing had concluded and just three days before written submissions from the parties were due and ten days before reply submissions were due. This was rather curious timing indeed.

118 Returning to the application at hand, the plaintiffs were seeking discovery of specific letters dated either the 1st and/or 2nd of April 2002 from M/s Lee & Lee to the defendant relating to the sale of the subject properties. The plaintiffs also sought an order that they be at liberty to admit the documents as evidence.

119 This application was extremely disturbing, not only because (as I have mentioned) it evinced a certain pattern where documents were suddenly "sprung" on the court as well as the other party but also because of the timing of the application itself as well as the fact that the documents could have been discovered earlier. Further, the plaintiffs exhibited, in their application, the first sheets of the letters. When I asked where these copies were obtained from, counsel for the plaintiffs stated that they were from Ms Neo. In the first instance, it is startling that a former employee of the defendant company had, in her possession, copies of such correspondence. Ms Neo had in fact, and as counsel for the plaintiffs confirmed, left the company in 2003. When I asked why she was still in possession of such documents, counsel for the plaintiffs replied that he did not know. Counsel for the defendant then stated that they had searched their files and that their client had confirmed that they did not have these documents in their file. He further argued that the letters sought to be introduced did not advance the plaintiffs' claim at all; he also referred to the letter of 4 April 2002 from the defendant to M/s Lee & Lee, which he said also confirmed receipt of the moneys for the subject properties in any event and pointed out (pertinently, in my view) that Ms Tay Ai Khim had in fact been cross-examined on this particular letter. Besides, counsel for the plaintiffs admitted that the conversation between Ms Tay Ai Khim and the second plaintiff, Mr Jeffrey Ho (see [23] above), could have taken place after the dates of the letters sought to be introduced in this application. What was more disturbing was counsel for the defendant's argument that this particular application had been taken out not to discover the letters as such but, rather, to show the court the handwritten note by Ms Neo. This, so the argument went, was to demonstrate that Ms Neo had dealt directly with Ms Tay, thus contradicting Ms Tay's own testimony at the trial itself that she had only dealt with Mr Jeffrey Ho and that Ms Neo was a mere messenger – testimony which I had in fact already decided to reject (see [28] above). Given the plaintiffs' general conduct throughout these proceedings, this was not an untenable argument. Be that as it may, it was clear that there was no good reason for the application and I dismissed it accordingly.

120 Finally, a more general point should be noted. The rules of civil procedure exist to ensure that there is a fair and orderly structure within which the substantive issues of law and fact can be argued and, ultimately, adjudicated upon on their merits. To this end, such rules ought not to become ends in themselves. They ought to retain that flexibility that conduces to the attainment of substantive justice. By the same token, however, they ought not – and cannot – become instruments through which substantive injustice results. They are not, in other words, instruments to be wielded calculatingly (or even cynically) in order to achieve a winning result at any cost as this would be the very antithesis of the nature and function of the ideal of justice in general as well as of the rules themselves in particular.

Conclusion

121 The present proceedings constituted, in effect, a bitter family feud, clad in the misleading guise of issues relating to caveats lodged over a couple of properties. This is of course extremely unfortunate, but the task of resolving bitter family disputes such as the one which existed here (the undercurrents of which pervaded, as mentioned at the outset of this judgement, the entire proceedings) is outside the purview of the present proceedings. It is hoped that the various parties will be sufficiently mature and magnanimous to recognise that the continued war of familial attrition will only result in all concerned being emotionally (and even financially) crippled, in the final analysis. Unfortunately, this court is powerless to resolve these deeper issues which (as I have mentioned) are, by their very nature and in any event, outside its remit. In the nature of things, only the parties can bring healing to their respective lives. As I have emphasised, the task of this court is rather more modest. It entails arriving at an objective determination of the various legal issues after an objective analysis of the evidence placed before it. To that end, I have found in favour of the defendant for the reasons set out above.

122 In the result, there will be judgment for the defendant who succeeds against the plaintiffs in the main action as well as in its counterclaim against the plaintiffs. It follows, therefore, that the plaintiffs' claim is dismissed. In so far as the counterclaim is concerned, I grant prayers (1), (2) and (3).

123 The costs of the claim and counterclaim are to be borne by the plaintiffs and are to be agreed or taxed if not agreed.

[note: 1] See generally Notes of Evidence at pp 376–377.