IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[1999] SGCA 2

CA 74/1998

Between

British Malayan Trustees Ltd

… *Appellant*

And

Sindo Realty Pte Ltd (in liquidation)

… *Respondent*

GROUNDS OF DECISION

Contract — Contractual terms — Rules of construction; Contract — Remedies — Specific performance; Equity — Remedies — Specific performance

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British Malayan Trustees Ltd v Sindo Realty Pte Ltd (in liquidation) and Others

[1999] SGCA 2

CA 74/1998
Karthigesu JA; L P Thean JA; Yong Pung How CJ
11 January 1999

1 **Judgment:**

2 **KARTHIGESU JA**

3 (delivering the judgment of the court): This appeal arises from a consolidated action involving three separate proceedings filed in the court below, namely, Suit No 196 of 1981, OS 995 of 1987 and OS 540 of 1993. The central issue concerns competing claims to a piece of land between the appellants on the one hand and the respondents on the other. During the hearing, the second and third respondents defended their claim jointly whilst the first respondents, who were represented by the Official Assignee, informed us that they were not defending the appeal.

4 2. ***Background facts***

5

6 To understand the appeal fully, it is necessary to set out the background facts which led to this appeal. The subject matter of dispute is a piece of land known as lot 1734 Mukim 20 (`the property`), in the size of approximately 1.5 acres. There are presently two graves on the property, both belonging to one Tan Tye (`the testator`) and the hut of the alleged caretaker of the graves. The older of the two graves sits just within the property at its North-East corner whilst the newer grave which contains the remains of the testator situates squarely within the property. The caretaker`s hut straddles between the southern boundary of the property and the adjoining neighbouring piece of land, lot 1735 Mukim 20.

7 3.The testator passed away on 22 July 1898, leaving behind to the appellants herein, British Malayan Trustees (`BMT`), as his trustees three lots of land, lots 89-9, 89-10, and 89-11 of Mukim 20 (`the three lots`). These three lots were issued in his favour by Statutory Land Grant No 8208 on 4 December 1897. Upon his death, he was buried in part of lot 89-11 Mukim 20, which is within the boundaries of the property.

8 4. ***The 1971 agreement***

9

10 By an agreement dated 10 April 1971 (`the 1971 agreement`), BMT sold the three lots to one Ho Yeow Koon (`Ho`). Ho had in as early as March 1971 expressed a keen interest in purchasing the three lots. There was no dispute that the 1971 agreement was validly and properly executed. By cl 17 of the agreement, Ho was to reconvey part of lot 89-11, an area of approximately four acres (`the four acre land`), back to BMT upon the carrying out of certain

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conditions on his part. The reason, as was obvious, was that the testator`s original and new graves and the hut of the caretaker stood within the boundaries of this four acre land and the family of the testator were reluctant to part with them notwithstanding that the remaining of the three lots were sold. At all times, Ho was fully appraised and had no objection to this reconveyance clause. It is pertinent to set out cl 17:

11 Near the South East boundary of the said lot 89-11 there are situate the original grave of [the testator], a new grave in which he is reburied and the hut in which the caretaker of the graves resides. It is agreed that approximately four acres of land surrounding the said graves and the caretaker`s house shall be resold and conveyed back to the vendors by the purchasers and the vendors shall purchase the same at the price of Dollar One and cents thirty-four point three ($1.343) per square foot. The vendors shall bear the costs of survey of the said approximately four acres of land and preparation of plans in respect thereof. After the completion of the sale of the said three lots to the purchaser, the purchaser shall surrender to the State the grant in respect of the said lot 89-11 and apply for the division of the said lot and shall do all other things necessary for the early issue by the State of a separate grant in respect of the said approximately four acres of land pursuant to s 11 of the State Lands Ordinance (Cap 244). Immediately after such grant has been issued by the State, the purchaser shall convey and do all other things necessary to assure the said approximately four acres of land to the vendors and the vendors shall on such conveyance pay the price thereof computed at the rate of Dollar One and cents thirty-four point four ($1.343) (sic) per square foot.

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12 5.On 12 April 1971, pursuant to OS No 30 of 1964, the 1971 agreement was sanctioned by an order of court. On the 27th of that same month, the court order was registered in the Registry of Deeds in Volume 1848 No 57.

13 6. ***The indenture***

14

15 Sometime later that year, Ho came to an agreement with Sindo Realty Pte Ltd (`Sindo`), the first respondents herein, to sell and transfer the three lots to them. By an indenture of conveyance dated 19 October 1971 (`the indenture`) made between BMT, Ho and Sindo, it was agreed that the three lots would be transferred to Sindo. The indenture provided for Ho to sell the three lots to Sindo at the same price as that which he paid and on the terms and conditions contained in the 1971 agreement. It referred to certain terms and conditions in the 1971 agreement as well as to the court order of 12 April 1971 sanctioning the said agreement in its entirety. In the indenture, Sindo was named as the sub-purchaser for the three lots with Ho as the original purchaser.

16 7.Clause 3 of the indenture reads:

> (a) On completion of the conveyance and transfer of [the three lots], [Sindo] shall apply to the Planning Authority for approval under s 9(3) of the Planning Ordinance to divide Government Survey lot 89-11 of Mukim XX … to enable [Sindo] to sell and convey to [BMT] in accordance with the terms of [the 1971 agreement], a part of Government Resurvey lot 89-11 of Mukim XX being approximately four (4) acres of land situate near the South East Boundary of the said lot 89-11 (hereinafter referred to as `the four acre plot`) whereon is situate the original grave of the testator and a hut in which the caretaker of the grave resides.

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> (b) As soon as the said approval under s 9(3) of the Planning Ordinance is obtained [Sindo] shall surrender to the Government the said Government Resurvey lot 89-11 of Mukim XX pursuant to s 11 of the State Lands Act and shall do all such other things necessary for the early issue by the Government of a separate Statutory Land Grant for the four acre plot.
>
> (c) Immediately after the new Statutory Land Grant for the four acre plot is issued [Sindo] shall convey and do all other things necessary to assure the four acre plot to [BMT] and [BMT] shall on such conveyance pay to [Sindo] the price thereof computed at the rate of dollar one and cents thirty four point three ($1.34.3) per square foot. [BMT] shall bear the cost of survey of the four acre plot and the preparation of plans in respect thereof.

17 8.Clause 3 reproduced, to be performed by Sindo, Ho`s obligation to sub-divide lot 89-11 and to reconvey the four acre land containing the testator`s graves and the caretaker`s hut back to BMT in the same manner proposed in cl 17 (see [para ] 4 above). Initially, Sindo`s solicitors insisted that there be a proviso which provided that if approval for sub-division of lot 89-11 was not obtained within a year, then BMT must release Sindo from the obligations stated therein. However, BMT felt that such a proviso was unnecessary, and agreed that in the event of non-approval, an application to court would be made for directions after consultation with the beneficiaries of the testator (`the beneficiaries`). Consequently, completion took place on 19 October 1971 and the indenture with its covenants thereto were registered at the Registry of Deeds in Volume 1891 No 129 two days later by Sindo.

18 9.Between 1972 and 1981, Sindo attempted, with little success, to complete its obligations under cl 3 of the indenture. Amongst other matters, it asked BMT`s solicitors for a rough sketch of the four acre land which they were required to reconvey to BMT and sought to apply for sub-division of lot 89-11 to the relevant authorities. The events which transpired were these: by letters dated 9 May and 28 August 1972 addressed to BMT, a rough sketch plan of the

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proposed four acre land was asked for, and obtained by Sindo, and such plans were forwarded to Sindo`s architects for application for sub-division. Thereafter, BMT heard nothing from Sindo for the next three years, although the former did send a reminder sometime in May 1973. Sindo finally replied on 6 May 1975, and BMT was informed that the application for sub-division of lot 89-11 was pending. In addition, Sindo also attached a sketch plan of the four acre land for BMT`s approval. Sindo`s letter in this respect reads:

> *Under cl 3 of the indenture dated 19 October 1971 between your goodselves and our company, regarding the purchase and sale of the above mentioned property, we covenanted to sell four acres of land situate near the south eastern boundary of lot 89-11 on which the original grave of the testator was situated.*
>
> *We are applying to the Planning Department for approval under s 9(3) of the Planning Ordinance to divide the said land to enable us to sell and convey to you. We forward herewith the sketch plan of the area which we are required to sell to you.*
>
> *Please let us have your confirmation that the layout is acceptable to you. If we do not hear from you within seven days we shall assume that it is acceptable to you and proceed to submit the necessary plan for subdivision.*

19 10.BMT forwarded this sketch plan to the beneficiaries but it was rejected for not containing any measurement, area or any means of ascertaining from the same where the four acre land was situated. That same month, BMT wrote to Sindo requesting for a copy of the sub-division plan which they were submitting for approval under s 9(3) of the Planning Act. Sindo did not reply.

20 11.On 17 May 1975, a fresh plan was sent by Sindo to BMT for the latter`s approval. Again, it was rejected when the beneficiaries pointed out that the plan received failed to show any measurements of the boundaries of the four acre land nor the area of the lot. The plan also had no markings of where the testator`s graves were situated, despite earlier indications by Sindo to the

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contrary. Similarly, a further plan sent by Sindo in October 1976 was rejected for identical reasons, it being too vague to ascertain the four acre land. In fact, sometime in June 1975, BMT reminded Sindo that the certified survey plan of the four acre land for the beneficiaries` consideration should indicate the position of the testator`s graves and the boundaries of the land specifying the area but this reminder apparently fell on deaf ears. It was also requested, to no avail, that the corners of the four acre land be marked on the site and pointed out that the plot should not include any proposed road.

21 12.In December 1976, the beneficiaries changed their minds and informed Sindo, through BMT, that they would, contrary to earlier indications, now accept that since part of the testator`s old grave would be affected by governmental road widening works, they were willing to consider a smaller plot of land provided the new plot contained the new grave. Eventually, on 2 February 1977, a meeting was set up between BMT and Sindo to discuss the difficulties encountered in the siting of the four acre land. At this meeting, it emerged that there were in fact three huts which stood on lot 89-11 and it was unclear which of these three huts belonged to the alleged caretaker. None of the beneficiaries had ever met the registered caretaker nor seen his photograph, and their one and only concern was that there should be a proper caretaker for the two graves and that he had a place to stay within the vicinity of the graves. The beneficiaries were however certain that one of the huts numbered 674-C was not on the land before the sale of lot 89-11 to Sindo. It was recollected that in 1898, the site of that hut only sat a chicken shed.

22 13.Following this meeting, Sindo offered a new plan sometime in December 1977 but it was rejected. Finally, in January 1978, Sindo produced a plan which the beneficiaries were prepared to accept, subject to the condition

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that there be a minimum clearance of five metres from the edge of the caretaker`s hut to the boundary of the four acre land so delineated (`the five metre condition`), or alternatively, that Sindo demolish the affected hut and rebuild a new one within the proposed four acre land as stated in the said plan to their satisfaction. It then came to the parties` attention that, with the exception of hut 674-C, all the other huts on lot 89-11 had been demolished. This hut continues to be the hut which now sits on the property. Accordingly, by consensus, the occupier of the hut, one Phua Bok Hwee, was assumed to be the caretaker of the testator`s grave.

23 14.On 10 March 1978, a further meeting was held between Sindo and BMT to resolve matters, from which fresh plans were received in the same month by BMT. Again, the beneficiaries indicated their acceptance of the plan, subject to the five metre condition previously stated. For some reason, Sindo failed to reply nor accede to the beneficiaries` request. Consequently, it emerged from Sindo that there were some difficulties in computing the distance from the edge of the road to the testator`s grave and on 16 April 1979, they sent a letter to BMT pointing out that it was not possible to alienate the four acre land such that the `graveyard` was five metres away from a proposed road. It appears to us from the corresponding correspondence between BMT and Sindo that there was some confusion as to what the beneficiaries` `five metre condition` was. On the one hand, the beneficiaries understood that their condition was a minimum clearance of five metres from the edge of the ***caretaker`s hut to a proposed road*** lying on the boundary of the four acre plot but Sindo appeared to confuse the former with the ***testator`s tombs*** , which was evidenced by their reply of 16 April 1979.

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24 15.On 4 May 1979, a third meeting was held between Sindo and BMT and this time, the former disclosed that owing to the requirements of governmental authority and the gradient of the land, it was more advisable for the testator`s graveyards to be moved to an alternative site. Sindo was queried about the governmental authority requirements and to furnish any details thereof but this never materialised.

25 16.On 2 August 1979, a qualified certificate of title was issued over the whole of lot 89-11 Mukim 20 in the name of Sindo, vide Certificate of Title Volume 215 Folio 115. This title was held subject to any interest which may have affected lot 89-11 as at that same date. Two months later, on 15 October 1979, BMT, Ho and Sindo executed a deed of rectification (`the rectification deed`) which was supplemental to the indenture. It was discovered that there was a typographical error at page four of the indenture whereby Sindo was referred to as the `Purchaser` instead of the `Sub-Purchaser`. In addition, Sindo agreed to continue to be bound by the terms of the indenture despite all the problems which had arisen in determining and reconveying the four acre land back to BMT. The exact words pertaining to this part of the rectification deed was this:

> *Save as amended as aforesaid the said [indenture] and every clause thereof shall continue of full effect and be binding on the respective parties thereto.*

26 17.The rectification deed was subsequently registered at the Registry of Deeds on 21 December 1979.

27 18. ***Suit No 196 of 1981***

28

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29 On 17 January 1981, unable to wait any longer for Sindo`s delay in complying with its covenants for reconveying the four acre land to them, BMT commenced Suit No 196 of 1981 (`the Suit`) against Sindo, enforcing the said covenants as contained in cl 3 of the indenture. According to BMT, they had, prior to the execution of the rectification deed, requested that Sindo expedite compliance of the stated covenants but Sindo continued to drag their feet over the matter. As a result, BMT felt that they were left with no choice but to commence court proceedings. Sindo`s defence was that they could not apply for sub-division of lot 89-11 as that was only possible when the requirements of the relevant authorities relating to road proposals were complied with. However, the road proposals affected the old grave, and since negotiations on re-siting the old grave were still pending with BMT, it was impossible for them to take any further action as required until an agreement had been reached with BMT. In fact, Sindo confirmed that the authorities had granted in-principle approval on 9 December 1974 for sub-division for the three lots subject to the road proposals being implemented. But since no agreement had been reached on the re-location of the old grave, they were unable to obtain final sub-division for the parts of the land where the testator`s graves were located. Sindo insisted that BMT knew at all material times the predicament they were in and were unsympathetic to their position.

30 19. ***The 1973 agreement***

31

32 In the meantime, unknown to BMT, Sindo entered into a sale and purchase agreement on 11 April 1973 (`the 1973 agreement`) with the third respondents herein, President Emporium (Pte) Ltd (`President`), for a plot of

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land described as Private lot 14 (`the old lot 14`). This plot of land formed a small portion within lot 89-11. The contract was conditional upon approval by the competent authority for sub-division of lots 89-10 and 89-11 and completion was to take place 14 days from the date of notification given to President on the approval of the said sub-division. The exact terms describing the old lot 14 contained in the 1973 agreement was this:

> *All that piece of land situate in the District of Seletar in the Island of Singapore estimated according to a recent private survey to contain an area of 65,000 square feet being part of the land marked on the Government Resurvey Map as lots 89-10 and 89-11 of Mukim XX which said piece of land is marked as Private lot 14 and is more particularly delineated and edged pink in the plan hereto annexed and forms part of the land comprised in Statutory Land Grant No 8208.*

33 20.President made two payments of $39,000 and $156,000 on 9 December 1972 and 1 August 1973 respectively to Sindo pursuant to the 1973 agreement.

34 21. ***The supplementary agreement***

35

36 After the 1973 agreement was executed, lot 89-11 and parts of lots 89-9 and 89-10 were re-partitioned pursuant to a scheme of provisional re-partitioning under an approved government plan, DC 624/39 III. A total of 15 separate new lots came into existence. Due to this re-partitioning, the lot described as Private lot 14 in the 1973 agreement became a different portion of land within lot 89-11 (`the new lot 14`), but still of approximately the same size as the old lot 14. On 28 October 1980, aware that a change in lot 14 had taken place (ie that the old lot 14 under the 1973 agreement was no longer in

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existence), Sindo and President entered into a supplementary agreement where the former agreed that the land sold to President under the 1973 agreement was now to be the new lot 14 instead of the old lot 14. The relevant parts of this supplementary agreement read:

> *Now it is hereby agreed between the parties hereto as follows:*
>
> 1 The land agreed to be sold by [Sindo] and to be purchased by [President] under [the 1973 agreement] annexed hereto instead of the [old lot 14] as shown on the plan annexed to [the 1973 agreement]
>
> 2 [The 1973 agreement] is hereby varied as follows:
>
> (a) [The 1973 agreement] shall be read and construed as if the new lot 14 were substituted for the [old lot 14].
>
> (b) the plan annexed hereto shall be substituted for the plan annexed to [the 1973 agreement].

37 22.The new lot 14 was consequently renamed lot 1734, otherwise known as the property.

38 23.In February 1984, pursuant to a letter of facility, the second respondents, United Overseas Bank Ltd (`UOB`), extended to President a loan of S$3m to be secured by a mortgage over the property. By way of a facility agreement dated 28 February 1984 and a security agreement dated 1 March 1984, President effected an absolute assignment of all their beneficial interests arising out of the 1973 agreement, as well as a mortgage-in-escrow thereof in favour of UOB. The letter of facility detailed:

> *The above line of credit shall be secured by the following:*
>
> 1.1 Legal mortgage up to S$3,000,000 on land at part of lots 89-10 and 89-11 (Private lot 14) MK XX, Sindo Industrial Estate, Singapore 2057. Area approximately 65,000 sf.

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> 1.2 A joint and several guarantee for S$3,000,000 from Datok Ng Quee Lam, M/s Ng Kwee Teng, Ng Eng Kiat, Ng Eng Choon and Ng Siew Hong.

39 24.The assignment of President`s interest in the property, described as Private lot 14, was contained in cl 10 of the security agreement which reads:

> *Assignment of property*
>
> *In consideration of the premises, the borrower [President] as beneficial owner hereby assigns absolutely unto the lender [UOB]:*
>
> (a) all rights, title, interest, benefits, advantages which the borrower has, in under or arising out of the [1973 agreement] and all remedies for enforcing the same, and
>
> (b) all the estate right title and interest of the Borrower in the property,
>
> *To hold the same unto the lender subject to the proviso for redemption, that is to say, provided always that if all moneys covenanted to be paid by the borrower under this agreement or the mortgage shall be duly paid, the lender will at the request and cost of the borrower discharge the security hereby created.*

40 25.President`s directors approved the mortgage to UOB in their resolution passed on 28 February.

41 26.On 5 March 1984, taking steps to protect their security, UOB lodged caveat No CV/97738 over the property, being part of lot 89-11 and against Certificate of Title Volume 215 Folio 115. On 4 February 1985, President also lodged their caveat No CV/11866A over the property. Pursuant to the security agreement, UOB disbursed the banking facilities to President. Shortly thereafter, President defaulted on the loan payments, as a result of which, in a letter dated 9 January 1986, UOB gave Sindo notice of their assignment. Sindo acknowledged receipt of the notice of assignment in their letter dated 22 January 1986.

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42 27.On 23 August 1986, a separate qualified certificate of title was issued in respect of the property, in the name of Sindo, vide Certificate of Title Volume 298 Folio 153. As with the previous certificate of title issued for lot 89-11, the title for the property was held subject to any interest which may have affected lot 89-11 at the date of issue of its certificate of title, ie 2 August 1979. BMT claimed in the trial below and during the appeal that Sindo never informed them that a separate title had been issued for the property.

43 28. ***Originating Summons No 995 of 1987***

44

45 On 11 September 1987, UOB commenced OS 995 of 1987 (`the first OS`) against Sindo to enforce their security. Sindo resisted the action on the basis that UOB had taken a mortgage over the old lot 14, which was non-existent, as set out in the schedule to the 1973 agreement and a plan annexed thereto. It was argued that the loan facility granted by UOB in favour of President in 1984 was in respect of President`s beneficial interests arising out of the 1973 agreement, of which the land sold was the old lot 14, and not the property as subsequently amended under the Supplementary agreement. On 23 September 1988, an order of court was made for the proceedings to continue as if begun by writ and for pleadings to be filed.

46 29.Prior to this action, BMT, unaware of the multitude of events which transpired between Sindo, President and UOB, commissioned their own registered surveyors to conduct a private survey on lot 89-11 for the purposes of ascertaining the exact location of the four acre land. When the surveyors` report came out, it was discovered that the four acre land would have included

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the property, the adjoining lot 1735, a public road and State Land. Accordingly, on 7 March 1987, to protect their interest, BMT lodged caveat No CV/39516A against the property, claiming interest as purchaser by virtue of the covenants contained in the indenture. As for lot 1735, it had been sold by Sindo to Hanson Engineering Pte Ltd and the transfer registered thereon on 5 March 1987.

47 30.On 17 October 1988, upon learning of the assignment of the property by President to UOB, and President`s default of their loan facility thereafter, BMT obtained an interim injunction in the Suit restraining Sindo from selling, transferring or disposing of the property until further notice. On 11 May 1989, this injunction was extended until trial or further order. As a matter of safeguard, BMT further lodged two caveats Nos CV/80012A and CV/88218A on 16 February 1989 and 15 May 1989 pursuant to the two injunctions respectively. Consequently, BMT extended its existing caveat CV/80012A on 30 November 1993 and lodged a fresh caveat No CV/012086D.

48 31.On 9 November 1988, Sindo was wound up by Companies Winding Up No 221 of 1990. Thereafter, the Official Receiver gave notice that Sindo would not be defending the suit or the first OS, given Sindo`s insolvency and that there were potential conflicting claims to the property.

49 32. ***Originating Summons No 540 of 1993***

50

51 This leaves us with Originating Summons No 540 of 1993 (`the second OS`), the last set of proceedings filed between the parties in this appeal. On 11 June 1993, BMT filed the second OS against President for a declaration that the latter had no interest in the property, or if they had any interest, such interest

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had been and was always subject to that of BMT, given their interest in the four acre land. This OS came about when President placed an exhumation notice of the testator`s graves on the property in the Straits Times on 31 May 1993 which was brought to the attention of BMT on 2 June 1993. Pursuant to the same proceedings, BMT obtained a restraining order against President from exhuming the testator`s graves or otherwise dealing with the property until the matter was resolved. President counterclaimed for a declaration that they were entitled to the beneficial interest in the property as purchasers under the 1973 agreement which was varied by the Supplementary agreement. On 30 June 1995, by an order of court, UOB was added as a second defendant to the second OS. UOB`s counterclaim was for a declaration that they were entitled to the beneficial interest in the property as assignees of the interest of President.

52 33.On 13 January 1995, the suit, the first and the second OSs were consolidated for trial. The full proceedings were heard in mid-1997. The learned judge found for UOB in the first OS and dismissed BMT`s actions in the Suit and their application in the second OS. Against this decision, BMT appealed. The learned judge`s judgment is reported at [1998] 2 SLR 495.

53 34. ***The appeal***

54

55 Before us, BMT conceded on a number of issues which were argued in the court below, namely, President and UOB`s beneficial interests in the property. BMT accepted that there was no question that President and UOB had obtained valid interests in the property pursuant to the 1973 agreement, the supplementary agreement and the security agreement executed by President in

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favour of UOB for a mortgage of the property, which the latter in turn properly gave their notice of assignment of when President defaulted on their loan facility (see [para] 26 above). Notwithstanding that, BMT claimed that their interest in the property, which formed a small part of the four acre land, took priority over that of President and UOB. It was contended that by the 1971 agreement and the indenture, BMT obtained an equitable interest to the four acre land and this prior interest in time subjugated President and UOB`s claim to the property. There was little argument that a substantial part of the property, if not the whole of it, fell within the four acre land which BMT sought by the suit to be reconveyed back to them pursuant to the 1971 agreement and the indenture.

56 35. **(a) The validity of the reconveyance clauses in the 1971 agreement and the indenture**

57 There are two issues which BMT needs to satisfy before this appeal can be ruled in their favour. The first to show that both cll 17 and 3 in the 1971 agreement and the indenture respectively are valid and binding. Otherwise, there is no base to claim that they were entitled to the four acre land, in equity or otherwise. The locus classicus in this respect is the case of **Lysaght v Edwards** [1876] 2 Ch D 499, which establishes that an equitable interest arises in a sale of land only when the contract of sale is valid and one where specific performance can be granted. ***Lysaght v Edwards*** has been considered in several local decisions, most notably **Lee Christina v Lee Eunice & Anor** [1993] 3 SLR 8 , a decision which we will come to later.

58 36.For present purposes, we are of the opinion that there are no significant differences between cll 17 and 3, and we will, for convenience, only make reference to cl 3. As we have stated, cl 3 merely repeats Sindo`s

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obligations which would otherwise have had to be performed by Ho under cl 17 of the 1971 agreement in the event that the indenture was not executed. In the court below, the learned judge came to the conclusion that both cll 17 and 3 were too uncertain to be given any effect. In the instance, both were void and BMT could never compel Sindo to reconvey the required four acre land as originally agreed. It follows that BMT therefore never obtained any equitable interest in the property. The following conclusion can be found in her grounds of judgment (at [para] 50):

> 50 … In the present case, neither the 1971 agreement nor the indenture contained sufficient details as to the exact location and configuration of the four acre plot to be reconveyed. In fact, both cl 17 of the 1971 agreement and cl 3(c) of the indenture provided that BMT shall bear the costs of survey of the four acre plot and the preparation of plans in respect thereof. Clearly, something had to be done to ascertain the exact location of the four acre plot. Until then, the agreement on the face of it was incomplete and it would have been unclear, in 1981, how the court could have enforced the covenant to reconvey when the exact location of the four acre plot was neither agreed upon nor ascertained by a survey. …

59 37.BMT argued that the learned judge misconceived the law. They took the position that cl 3 was sufficiently certain to be upheld. The area of the four acre land was not in dispute, nor was where it was roughly to be situated within lot 89-11, it having to contain the testator`s two graves and the caretaker`s hut. The test for determining certainty in the present case, so their arguments went, was not whether the four acre land could be identified with absolute certainty but rather whether it was conceptually certain that the said land could be ascertained. It was contended that it was not necessary for all the configurations and dimensions of the land to be set out in cl 3. It was sufficient that the clause could identify the land, albeit to a reasonable degree with some ambiguity, and

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the fact that there could have been several possibilities to ascertaining the four acre land did not render cl 3 void for uncertainty.

60 38.There are several cases, advanced by BMT, which we need to examine in some detail. The first is that of Brown v Gould [1972] 1 Ch 53. In this case, the issue for the court was whether a tenant`s option for renewal contained in a lease was void for uncertainty. The facts of the case were these: by the option to renew the lease of certain business premises, it was provided that the new lease was to be for a further period of 21 years at a rent

> *to be fixed having regard to the market value of the premises at the time of exercising this option taking into account to the advantage of the tenant any increased value of such premises attributable to structural improvements made by the tenant during the currency of this present lease ... (Clause 3(c))*

61 39.The tenant sought to exercise the option, whereof the landlord contended that the option to renew was void for uncertainty, because no machinery was provided in the option for determining the rent payable upon the renewal of the lease. The landlord was willing to grant the tenant a new lease, but under the Landlord and Tenant Act 1954, which was more advantageous to him as compared to the terms of the renewal of the lease under the option.

62 40.On the tenant`s application to court to determine whether the option was valid and enforceable, Megarry J held that cl 3(c) was not void for uncertainty and therefore the court had the jurisdiction to determine the rent. He cited his own decision in **Re Lloyds`s Trust Instruments** (Unreported) , 24 June 1970) and summarised the law as such (at p 56 [para] G):

> *In an unreported case, **Re Lloyd`s Trust Instruments**, 24 June 1970, to which I referred counsel, I endeavoured to state the basic principles applicable in cases of uncertainty. What I said there was:*

> *`I think the starting point on any question of uncertainty must be that of the court`s reluctance to hold an instrument void for uncertainty. Lord Hardwicke LC once said, `A court never construes a devise void, unless it is so absolutely dark, that they cannot find out the testator`s meaning`:* ***Minshull v Minshull*** *[1737] 1 Atk 411, 412. Lord Brougham said: `The difficulty must be so great that it amounts to an impossibility, the doubt so grave that there is not even an inclination of the scales one way`:* ***Doe d Winter v Perratt*** *(1843) 9 Cl & F 606, 689. In a well-known statement, Sir George Jessel MR said that the court would not hold a will void for uncertainty `unless it is utterly impossible to put a meaning upon it. The duty of the court is to put a fair meaning on the terms used, and not, as was said in one case, to repose on the easy pillow of saying that the whole is void for uncertainty`:* ***Re Roberts*** *[1881] 19 Ch D 520, 529. That this is not a doctrine confined to wills but is one which applies to other instruments, such as planning permissions, is shown by cases such as* ***Fawcett Properties Ltd v Buckingham County Council*** *[1961] AC 636, where, by a majority, the delphic language of a condition in a planning permission escaped from being held void for uncertainty largely because of its resemblance to a section to be found in a modern Act of Parliament. The second question is that of the types of uncertainty. The basic type (and on one view the only true type) is uncertainty of concept, as contrasted with mere difficulty of application: see, for example,* ***Re Gape*** *[1952] Ch 418, affirmed at p 743, where the question was one of a condition subsequent, in which special considerations apply. In* ***Fawcett****`s case [1961] AC 636, 670, Lord Keith of Avonholm said: `The point is one of uncertainty of concept. If it is impossible, on construction of the condition, to reach a conclusion as to what was in the draftsman`s mind, the condition is meaningless and must be read as pro non scripto.` Putting it another way, the question is one of linguistic or semantic uncertainty, and not of difficulty of ascertainment: see* ***Re Baden`s Deed Trusts*** *[1971] AC 424, 457, per Lord Wilberforce. If there is a trust for `my old friends,` all concerned are faced with uncertainty as to the concept or idea enshrined in these words. It may not be difficult to resolve that `old` means not `aged` but `of long standing`; but then there is the question how long is `long.` Friendship, too, is a concept with almost infinite shades of meaning. Where the concept is uncertain, the gift is void. Where the concept is certain, then mere difficulty in tracing and discovering those who are entitled normally does not invalidate the gift.`*

63 41.Applying those principles, the learned judge came to the conclusion that the court could reach a reasonable conclusion in determining the lease to be

paid upon the renewal of the lease. The fixing of the rent was essentially a discretionary matter `having regard` to certain factors referred to under cl 3(c) (at p 61 [para] B):

> *I readily accept that the words of cl 3(c) might have been more precise. But that is not the point: the point is whether it is void for uncertainty. If one approaches the formula stated in the clause with reasonable goodwill, as I think I am entitled and, indeed, required to do, does it appear to embody such uncertainty of concept as to make it void? Without saying that there is no room for argument on the details, I would answer No to that question, or, indeed, to any other reasonable way of formulating the question that I can conceive. The question is not, I think, whether the clause is proof against wilful misinterpretation, but whether someone genuinely seeking to discover its meaning is able to do so. To that question I would answer Yes. The rent is to be fixed by whatever method is adopted: in the phrase of Sir William Grant MR in* ***Milnes v Gery*** *14 Ves 400, 406, there is nothing to preclude the court `from adopting any means, adapted to that purpose.` In the process, regard must be had to the market value of the premises when the option is exercised: but then there is to be taken into account, for the benefit of the tenant, any increased value of the premises attributable to any structural improvements that he has made during the lease. Having regard to the market value thus adjusted, a rent is to be fixed for a term of 21 years from the expiration of the lease on all the terms of that lease except the option for renewal. In all probability, if such a formula were to be given to a valuer employed by the landlords and a valuer employed by the tenant, the figures produced by the two valuers would not be identical; valuation is like that. Yet in all probability also, if those valuers gave evidence before the court and were duly cross-examined, the court could reach a conclusion: courts and tribunals have long been hardened to resolving such conflicts. On that footing, I cannot see where the uncertainty lies. In the face of language such as cl 3(c) employs, it seems to me somewhat wilful to say that although the rent is to be fixed `having regard` to such matters, nevertheless the fixing of the rent is to be basically a discretionary matter, with the person fixing the rent obliged merely to `have regard` to certain matters, and then, provided he does not altogether forget these matters or depart from the rational, being fancy-free in the rent that he fixes. This is a clause in a lease; it is far removed from the powers of trustees under a discretionary trust, and so on.*

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64 42.We do not for a moment doubt the principles of law enunciated in ***Brown v Gould*** . They are of equal applicability in the present instance. In our opinion, in considering the validity of any term of a contract, it is sufficient that there be certainty in concept though not application. However, the facts in ***Brown v Gould*** are unhelpful, to the extent that it assists us in drawing an analogy with the present case. In that case, there was clearly no ambiguity in concept, as it deals with the determination of rent having regard to factors set out under the terms of contract. The only question was how much rent should be charged. The question in the present case is whether the determinants given under cl 3 provide sufficient identification to the four acre land and ***Brown v Gould*** fails to give any guidance on this question.

65 43.The second case is **C&S Construction Property Ltd v Dawson** [1991] ATPR 41, a decision of the Court of Appeal in New South Wales. There, the claimant purchased a pet food business from the opponent`s family. The contract of sale contained a restrictive covenant which prevented the opponent from competing with the claimant as follows:

> *The vendors or any one of them will not directly or indirectly and whether solely or jointly with or as director, manager, agent or servant of any person or corporation carry on, or be engaged or interested in, any business of the nature of the business hereby sold, or any significant component thereof, or permit their names or the names of any of them to be used in connection with any such business -*
>
> (i) within the area set out in O(a) of the particulars
>
> (ii) for a period set out in O(b) of the particulars.

66 44.Particular O stated:

> (a) Area: Three hundred (300) kilometres

(b) Period: Five (5) years

67 45.Subsequently, the opponent obtained a job as the manager of a competing pet food business five kilometres from the claimant`s business, following which the claimant brought an injunction against the opponent for breach of the restrictive covenant. In the court at first instance, the trial judge declined the interlocutory relief on the ground that the covenant was `meaningless`, as the assertion of 300 km so stated in Particular O was not capable of being seen as a defined area. On appeal, the refusal to grant the injunction was upheld, by a majority decision of 2-1, on the basis that there was no evidence that irreparable harm would be caused to the claimant if the injunction was not granted. However, the court unanimously rejected the trial judge`s assertions that Particular O was `meaningless`. The majority of the court referred to the said covenant and said (at p 52,423):

> *It is well established that in the construction of a commercial contract the court will endeavour to uphold the validity of the agreement between the parties and will not adopt a narrow or pedantic approach to the interpretation of that agreement (See* ***The Council of the Upper Hunter County District v Australian Shilling and Freezing Co*** *[1970] 118 CLR 429, at 437;* ***Biotechnology Australia Pty Ltd v Pace*** *[1988] 15 NSWLR 130, at 135.). Further, the fact that a clause in a contract is capable of more than one meaning does not mean that the contract of that clause is necessarily void for uncertainty. In the* ***Upper Hunter*** *case, Barwick CJ observed (at p 436) that as long as the clause was capable of a meaning it will ultimately bear that meaning which the courts decide is the propose construction.*
>
> *In this case Mr Brereton who appeared for the claimant, submitted that on its proper construction cl 13(a), when read with the particulars, imposed a restriction which extended the area within 300 km radius from the site of the business the subject of the sale. In the context in which the words and figures `300 kilometres` appears this appears a reasonable, if not compelling, construction. It is true that the parties could have intended that, for instance, those words and figures indicate an area within a diameter of 300 km with the business as the centre of the diameter. But this seems a much less likely interpretation of the*

> *clause. Whatever be the true meaning of the clause, when read with the particulars, we would conclude that the interpretation for which Mr Brereton contends is strongly arguable and that his Honour erred in expressing a concluded opinion that the clause was meaningless.*

68 46.The minority judgment, delivered by Kirby J, proceeded along similar lines (at p 52,419):

> *... But courts should not strain to frustrate the effectuation of commercial contracts, seriously negotiated and agreed ...*
>
> *However, when the foregoing authority is kept in mind it seems fairly plain to me that the meaning of the covenant here was, as the claimant asserted, intended to impose a restriction on engaging in a competing business in a distance measure by a radius of 300 km centred in the business sold to the claimant. It was the goodwill of that business which it was the whole purpose of the covenant to protect. Only such a construction gives meaning to the words which the parties used. Certainly, it can be inferred that the parties intended something to be meant by those words. The validity of the clause, so understood, is another matter. But (with every respect to those of a different view) the meaning does not seem to be in the slightest doubt. No speculation is required; simply the construction of a commercial contract in a sensible and business-like way.*

69 47.Again, we think this case, though correct in its propositions of law, is unhelpful. It seems to us that the court`s decision deals more with the interpretation of Particular O than with the uncertainty of the clause.

70 48.BMT also referred us to ***McDowell v Meader*** 13 ALT 116, a case which we think is somewhat akin to the one we have before us. In the case, it was held that a contract of sale describing a piece of land known as

> *All that piece of land containing twelve (12) acres more or less, situated at the corner of the roads known as the Middle Road and the Templestowe Road, being allotment [lowbar][lowbar] section [lowbar][lowbar] part of Unwin`s special survey, with weatherboard cottages erected thereon*

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71 was of sufficient description for the land such that specific performance could be ordered. It is unfortunate that the reasoning in the case is scarce and no guidance is provided as to how the court reached its conclusion. However, it is worth noting that the description of the land given in the contract was not void for want of certainty.

72 49.Finally, there is the case of ***Sanderson v The Cockermouth & Workington Railway Co*** 50 ER 909, a case decided in 1849. The plaintiff agreed to sell to the defendants, a railway company, a certain portion of his land, through which the railway was intended to pass `subject to the making such roads, ways, and slips for cattle as may be necessary`, for a sum of 352. Consequently, the plaintiff brought an action against the defendant for specific performance of the stated clause. Lord Langdale, delivering the judgment of the court, upheld the stated clause for the following reason (at p 910):

> *It must be admitted, that it is very difficult to execute an agreement expressed as this is; but the difficulty does not seem to me to be such, as to make it proper for this court to decline exercising jurisdiction over the matter in dispute between the parties.*
>
> *The railway of the defendants severs the plaintiff`s land - divides it into two parts. Under the agreement, as expressed, the plaintiff is entitled to have `such roads, ways, and slips for cattle as may be necessary.`*
>
> *The word `necessary` must receive a reasonable interpretation; and I consider the expression to mean such roads, ways and slips for cattle, as may be necessary and proper for convenient communication between the severed portions of the plaintiff`s land.*

73 50.President and UOB`s joint reply to BMT`s contentions were that it was impossible to ascertain the four acre land, regardless of what was agreed by BMT and Sindo under the 1971 agreement and the indenture. Much of what

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they argued were presented in the court below, which the learned judge subsequently adopted in her judgment (at [para] 39, 40 and 44):

> 39 … In the present case however, I find that the most favourable inference which can be drawn for BMT is that an agreement to reconvey a four acre plot existed with exact details to be worked out later. While BMT and Sindo clearly intended cl 3 to have legal effect, it was incorrect to say that Sindo had always proceeded on the basis that it was certain. There was obvious uncertainty between the parties as to what exactly was to be reconveyed and agreement was never reached on the specific location and configuration of the four acre plot (see [para] 14).
>
> 40 Linda Ho, witness for BMT, testified that the beneficiaries wrote to BMT on 11 April 1978 stating that the plan enclosed was `acceptable provided that [Sindo] confirm that there is a minimum clearance of five metres on the south western boundary from the edge of the caretaker`s hut`. According to her, the beneficiaries were not prepared to accept the plans without the confirmation and the confirmation never came. Instead, Sindo informed BMT by a letter dated 16 April 1979, that it was not possible to alienate a four acre plot with the graveyard less than 5 metres from the proposed road in the development. The only alternative was to move the graveyard to another plot. According to Ms Ho, BMT finally commenced legal proceedings against Sindo because the issue of the four acre plot could not be resolved. The lack of any agreement as to the precise location and configuration of the four acre plot is further evidenced by the fact that at the trial BMT relied on the rectangular four acre plot drafted by Mr Anthony Lim in 1987 instead of the L-shaped four acre plot last proposed to them.
>
> …
>
> 44 … BMT`s own witness Anthony Lim, a registered surveyor, agreed under cross-examination that out of five (5) elements required to draft the plot - the length of each of the four boundaries and the area, only one and a half elements were given, namely, the area and the South East boundary. He further conceded that it was reasonable to interpret the words `near the South East boundary` as not necessarily requiring one side of the four acre plot to sit on the South East boundary itself. Interpretations other than the four acre plot he drafted were possible, even though they might not be more definite or more correct. In other words, there were several possible four

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> acre plots which could be drawn using the points of reference, all of which would satisfy the terms of cl 3 of the indenture and cl 17 of the 1971 agreement.

74 51.In the course of the appeal, our attention was drawn to several reasons why cl 3 ought to be held void. The more pertinent of these reasons included there being more than one possible four acre plot which could be drawn within lot 89-11, that the present hut which stood on the property was not the original one which the parties to the 1971 agreement and indenture had in mind, and there being a lack of agreement as to what exactly constituted the exact dimensions and situate of the four acre land. Accordingly, it was impossible to define the four acre land with any sufficient degree of certainty.

75 52.Four cases were cited in support of their contentions. In **Turney and Turney v Zhilka** [1959] 18 DLR (2d) 447, a case involving the contract for sale of land, the vendor was to retain certain buildings and surrounding land out of the 60-odd acre land described as follows:

> *All and singular the land and not buildings situate on the East side of 5th Line west in the township of Toronto and known as 60 acres or more having frontage of about 2046 feet on 5th Line more or less, by a depth of about ... feet, more or less (lot boundaries about as fenced), being part of west [lowbar] lot 5 Con 5 west.*

76 53.Allowing the appeal from the court of first instance, Judson J held that the contract was not enforceable, inter alia, for want of sufficient certainty of description. The gist of his decision was at p 448:

> *... If it had been intended to sell the whole of the lands owned by the vendor, the description in the contract would have been adequate. But the contract in this case does not show what is intended to be sold and what is intended to be retained by the vendor and no parol evidence can cure this defect because the admissibility of such evidence presupposes an existing agreement and sufficient certainty of description to enable the*

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> *property to be identified once the surrounding facts are pointed to. These conditions do not exist here. There is not only lack of sufficient certainty of description but the evidence makes it quite clear that the parties never reached any agreement, oral or written, on the quantity or description of the land to be retained or the land to be conveyed.*

77 54. ***Turney and Turney v Zhilka*** can be distinguished from the present case. The facts clearly point to such an impossibility in ascertaining and determining what land, if any, was to be retained by the vendor that there was little choice for the court but to void the clause in question. There was some dispute as to what was to be sold under the contract of sale and what was to be retained by the vendor. The subject matter under the contract of sale was unclear. The case illustrates the extreme uncertainty of description which can never be upheld.

78 55.There is then the case of ***Bushwall Properties v Vortex Properties Ltd*** 1976] 2 All ER 283; [1976] 1 WLR 591. There, it was agreed between the plaintiff and the defendant, through a series of letters, that the former would purchase from the latter land in three phrases, each phrase being a certain amount of the purchase price being paid by the plaintiff and a `proportionate part` of the land being released to him. A year later, the defendant sought to alter the terms of the agreement with the plaintiff, whereupon the plaintiff brought an action for specific performance against the defendant.

79 56.Dismissing the plaintiff`s claim, the Court of Appeal felt that there was an element of uncertainty within the plaintiff and defendant`s agreement which rendered the full agreement unenforceable. Buckley LJ, concurring with Sir John Pennycuick who delivered the majority judgment of the court, had this to say (at p 604 [para] F):

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> *The first question therefore must be whether the contract contained in the letters of June 1968 is on the face of it a specifically enforceable contract, which involves consideration of the question whether the parties can be seen to have agreed all the essential terms of the bargain. I do not read the terms of the letter again, but it will be remembered that it provides for payment of the purchase price by three instalments at yearly intervals, and that on the occasion of each payment of an instalment there shall be a conveyance of a proportionate part of the land sold. No machinery is expressly provided for identifying the part of the land to be conveyed on any of those three completions. I fully accept that the court should be reluctant to hold any contract void for uncertainty if that consequence can be avoided; but, on the other hand, it is not the function of the court to make or to perfect contracts entered into between members of the public. In the present case, the contract does not provide any means of ascertaining with certainty what land should be conveyed on any of the three occasions when a partial completion is to be carried out; and, for reasons that have already been indicated by Sir John Pennycuick, I agree that that is an important term of this contract, for the interests of the vendor are liable to be very substantially affected by the choice of the parcels to be conveyed. The contract (so to call it) itself does not provide any machinery for ascertaining the answer to that question, from which, in my judgment, it must follow that this contract is not one of which the court would decree specific performance. If the contract is not one of which the court would decree specific performance, the principles of law relied upon for supplying the defect in the contract cannot apply to the case, and so it is impossible by that means to arrive at the conclusion that the purchaser ought to be regarded as the person having the power to decree what parcels should be included upon each of the occasions when completions are to take place. For that reason, it seems to me to be unavoidable that one must conclude that this is not a contract capable of being specifically performed and is not an enforceable contract.*

80 57.Unlike the present case, ***Bushwall Properties v Vortex Properties Ltd*** is also a case illustrating the impossibility of identifying the subject matter under which the sale agreement pertained. The uncertainty went to the root of the agreement and it was impossible to hold the agreement valid.

81 58.In the case of **Hornsby v Johnstone** [1872] 9 NSR 1, the court found that a description referring to a piece of land contained in a memorandum was

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too vague for certainty. The learned judge in the court below cited and summarised this case at [para] 36 of her grounds of decision:

> *Another case referred to was **Hornsby v Johnstone** [1872] 9 NSR 1 where there was a memorandum stating the following: `I will sell ten acres of land (including the water lots), as also two and three-quarter acres of land belonging to Judge Johnstone adjoining`. Young CJ held that had the memorandum in the case under consideration contained the words `at or near Dartmouth` and had it been alleged in the writ or proved in the hearing that the defendant was seized of ten acres in Dartmouth and of no other property of the same extent adjoining the Honourable Judge Johnstone`s, the plaintiff would have been entitled to a specific performance. In the result, he held that the description, unassisted by any other document or reference, was too vague for specific performance.*

82 59.We fail to see the assistance which ***Hornsby v Johnstone*** provides for President and UOB. As with the two previous cases, this case is inapplicable because the description of the land as stated was too imprecise to be given any legal effect. In other words, the subject matter of the sale was uncertain, the only reference to it being the area of the land. The present case differs substantially in that the subject matter (ie the four acre land), its general location and its area are undisputed. It is the exact dimension of the land which is uncertain.

83 60.The last case relied on by President and UOB is the case of **Southridge Properties Ltd v Tissen** [1980] 3 WWR 618, which they relied on heavily and submitted was analogous to the case at hand. This case involved an agreement for the sale of land described as `containing 147 acres more or less`. The evidence showed that the vendors owned a total of 159.4 acres, of which part was to become a highway (ie 5.7 acres) and the remaining 6.34 acres left to the vendors for a home. Both parties agreed that the 6.34 acre land was to be homestead for the vendors and was to contain their home and their buildings. The plaintiff purchaser testified that the vendors said they wanted a square

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shaped parcel as indicated on the final plan. The vendors testimony was that the homestead was to be more rectangular than that shown on the plan and was to exclude a slough at the back of the property. The court held that the most favourable inference which could be drawn in favour of the plaintiff purchasers was that there was an existing agreement to leave the land to the vendors, but with the exact details as to the location of that land to be worked out later. There being no specific agreement on the latter issue, the land to be sold was insufficiently certain and the agreement was null and void. Dea J dismissed the vendors` claim on the following basis (at p 625):

> *I am not prepared to say that the failure of the [vendors] to specifically raise with the plaintiff the issue of the location of the homestead as distinct from its acreage constitutes any kind of agreement on the issue of location. In my view, the most favourable inference which can be drawn for the plaintiff on the whole issue of the location of the homestead is that an agreement on the general shape and location of the homestead existed with exact details to be worked out later. The effect of this finding is a conclusion that there was no agreement on the specific location and configuration of the 6.34-acre parcel and there being no agreement on that, `no parol evidence can cure this defect because the admissibility of such evidence presupposes an existing agreement and sufficient certainty of description to enable the property to be identified once the surrounding facts are pointed to.*
>
> *In end result, I am satisfied that the [vendors] have shown and the fact is that no agreement existed as to the location and configuration of the 6.34-acre parcel and accordingly, there was no agreement as to the location and configuration of the 147-acre parcel being sold. That lack of certainty requires that the court conclude that the agreement in question is no agreement at all - it is a nullity.*

84 61.It appears to us that ***Southridge Properties Ltd v Tissen*** , a decision of the court of first instance, is an isolated case which has substantially deviated from the settled legal principles of the preceding cases cited. With the exception of ***Turney and Turney v Zhilka*** , none of the other cases which we have

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referred to so far were considered by the learned judge. He took the view, in our judgment wrongly, that unless the specific or exact location and configuration of the land to be retained by the vendors were ascertained, the full agreement pertaining to the sale of the land was null and void. That departure of approach is not supported by general case law and is merely, in our mind, a narrow interpretation which should not be followed. In that event, we respectfully decline to accept the case as good authority.

85 62.Reverting back to the case at hand, and having particular regard to the cases mentioned, we are of the view that there is much force in BMT`s contentions. The starting point of consideration, which no parties disputed, is the great reluctance of this court to hold both clauses void for uncertainty. It is trite law that where possible, parties are to be bound by the terms of their agreements, regardless of the difficulties faced in fulfilling those terms. This common theme ran through all the authorities cited by BMT, President and UOB. In our opinion, consistent with Brown v Gould, so long as it is conceptually possible to ascertain the substance of the agreement under cl 3, there is no uncertainty, and the clause should not be voided simply because its application is of some difficulty.

86 63.In this respect, we are of the unanimous opinion that the four acre land can be reasonably ascertained. We do not propose to repeat cl 3 again but certainly, on a close reading, we do not see a problem in upholding its validity. There is no doubt as to the subject matter that is to be ascertained and reconveyed under the said clause. It is a piece of land in the size of approximately four acres situated near or on the southern boundary of lot 89-11. We have before us a sketch of lot 89-11, with the positions of the caretaker`s hut and the testator`s two graves marked. A look at lot 89-11, an L-shaped land,

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will reveal that the four acre land must lie somewhere along the shorter part of the land. The only difficulty, so far as we can see, lies in ascertaining the exact configuration of the four acre land but this is a matter to be worked out. Clause 3 does provide some guidance however. It gives a base for which an exact agreement is to be reached. BMT and Sindo`s lack of agreement on the exact boundaries is not an impediment to voiding cl 3. We feel that the learned judge took too narrow an approach when she accepted ***Southridge Properties Ltd v Tissen*** and held that both clauses were void for uncertainty. Her decision, similar to that of President and UOB`s objections to cl 3, concern the mere difficulty in precisely determining the ambit of the four acre land, but that is, in our mind, not a justifiable reason for voiding terms of agreement.

87 64.It should be added that when the 1971 agreement and the indenture was concluded in 1971 with the reconveyance clauses contained therein, it was not possible for the parties concerned to set out the exact details of the four acre land. It was contemplated that lot 89-11, together with lots 89-9 and 89-10, were all due for sub-division and approval had to be sought for such sub-division. Furthermore, the sub-divided land would have been affected by various governmental regulations, including road and drainage works. The purpose of cl 3 was to ensure that the four acre land was not affected by these regulations and approval from the relevant authorities obtained. If the four acre land was precisely determined in the indenture but was not possible to be ascertained (due to it being affected by road works or other similar proposals affecting the land), then BMT would possibly have had to take a smaller piece of land, which they were not prepared to do then.

88 65.Although the learned judge reviewed the various authorities which we referred to, she took a broad brush approach in distinguishing BMT`s

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authorities, content only to say that those cases `merely showed the extent to which the courts would go in their reluctance to hold agreements void for uncertainty`. This is too simplistic a view taken. We cannot agree that the difficulty of application of a particular term is cause for voiding an agreement concluded between parties. Agreements must, where possible, be upheld, and we take this view in the present case.

89 66. **(b) Whether BMT`s equitable interest arose**

90 We now come to the second issue in this appeal. Our above conclusion does not automatically give rise to BMT`s equitable interest in the four acre land. It simply renders cl 3 valid and affords BMT a base from which their equitable interest, if any, can arise. The second impediment which they have to overcome proceeds along the following lines: generally, upon the immediate signing of a valid contract of the sale in land, a change takes place in the equitable, but not legal, interest in the land. The purchaser obtains an equitable interest in the land. However, the transfer of such equitable interest to the purchaser occurs only if the contract is one which specific performance would be ordered, and not otherwise. This was the observation of this court in ***Lee Christina v Lee Eunice & Anor*** . In other words, unless the contract is `performed in everything but the more formal act of sealing the engrossed deeds` (per Goh Joon Seng J at p 23 [para] D in ***Lee Christina v Lee Eunice***), no equitable interest in the property passes to the purchaser. On the facts of ***Lee Christina v Lee Eunice*** , it was found that although there were essential terms agreed between the parties which constituted a contract, the purchaser`s equitable interest never arose because the option of specific pe(1872)rformance was not open. In the course of the judgment, the case of **Ridout v Fowler** [1904] 1 Ch 658 was cited and Goh Joon Seng J held (at p 23 [para] D):

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> *The contract herein, not having been `performed in everything but the more formal act of sealing the engrossed deeds` before it was rescinded, no equitable interest in the property passed to the appellant.*

91 67.In **Lim Kim Som v Sheriffa Taibah bte Abdul Rahman** [1994] 1 SLR 393 , the same view was taken by this court, where LP Thean JA, delivering the judgment of the court, had this to say (at p 406 [para] H):

> *... The passing of the beneficial ownership to a purchaser of land is premised on the availability of specific performance, as equity looks upon as done what has been agreed to be done and the purchaser is deemed the owner in equity as of the date of the contract. If for any reason specific performance is not available then the purchaser is deemed never to have been owner of the land...*

92 68.The question now is, does BMT`s equitable interest arise at all, notwithstanding Sindo`s non-compliance with its obligations under cl 3. Put another way, can BMT compel specific performance of the reconveyance of the four acre land, such that its equitable interest can arise? It will be recalled that cl 3 stipulated that Sindo was to apply to the relevant planning authorities for approval to sub-divide lot 89-11, in particular to obtain approval for the sub-division of the four acre land within lot 89-11, before the said four acre land, together with the Statutory Land Grant issued thereof, was to be reconveyed back to BMT. Sindo never fulfilled its obligations.

93 69.In the court below, the learned judge felt that since there was no avenue in which BMT could compel Sindo to reconvey the four acre land before their prior obligations were performed, BMT`s equitable interest in the four acre land never arose. It follows that BMT never had any interest in the property. The learned judge gave her reasons at [para] 58 of her decision:

> *It is a difficult question whether a purchaser under a conditional contract, where the condition is not capable of performance by*

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> *himself, acquires an equitable interest from the date of the contract or only from the satisfaction of the condition. However, I considered myself bound to say that as the conditions of sub-division approval were not fulfilled, specific performance of the covenant to reconvey the four acre plot is not available and BMT`s equitable interest under the covenant to reconvey, if any, did not arise. It was not disputed that the Chief Planner has a very wide discretion under s 10(5) of the Planning Act to grant or refuse an application for permission to sub-divide. BMT`s witness Anthony Lim testified under cross-examination that the Chief Planner would look into many factors, some of which may be confidential matters not known to the applicant and which the Planning Authorities would not be in a position to divulge. Hence, even in 1981 [sic, it should be 1971] where the only parties involved were BMT and Sindo, the court would not order the reconveyance of a reasonable interpretation of the four acre plot. At the highest, it would only have ordered Sindo to comply with their obligations to apply for sub-division approval and a separate Statutory Land Grant in respect of a reasonable interpretation of the four acre plot and on the issue of the Statutory Land Grant, to convey the plot at the agreed price, as prayed for by BMT in the original statement of claim (see [para] 51). As was held in* ***Chang Yuen Yin v Chia Seng Yook*** *[1978] 1 MLJ 201 , `specific performance cannot be decreed while the area is unspecified and alienation or subdivision will have to be decided by the Government`.*

94 70.BMT`s response to this issue is that once the indenture was concluded in 1971, their equitable interest crystallised and Sindo was under an obligation to fulfil the terms of their agreement as stated in cl 3. As soon as their interest arose, it remained and took priority over any future interests comprised within the same land. In any event, even if specific performance of cl 3 was a requisite before BMT`s equitable interest arose, BMT contend that in 1971 when the contract was concluded such specific performance could have been obtained by BMT against Sindo. Consequently, President and UOB`s interests in the property were relegated behind BMT`s, who obtained a prior interest in the property. BMT argued that the fact that they were now claiming for a smaller portion of the land (ie the property) as compared to the four acre land is not an

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obstacle to their case, since they were entitled to take less than the four acre land if so desired (see Spry, ***Equitable Remedies*** (5th Ed, 1997) at p 302).

95 71.President and UOB`s arguments, which were similarly advanced in the court below, is this: that the obligation of reconveyance under cl 3 was conditional upon the application to and approval by the relevant planning authority for the sub-division of lot 89-11, out of which the four acre land was to have been ascertained. The application was never completed, and it was also not certain that approval would have been given. BMT`s own witness had confirmed that approval was not a formality. In the instance, specific performance of the reconveyance could never be decreed. It followed that BMT`s equitable interest never arose.

96 72.In any event, it was impossible to grant specific performance by the time the Suit was commenced, since lot 89-11 had already been sub-divided into many separate lots, all done without the application of Sindo. Furthermore, Sindo was now in liquidation, and it was impossible for this court to compel Sindo to execute its covenants under the indenture.

97 73.It must first be said, notwithstanding BMT`s contentions, that we are of the view that the cl 3 of the indenture is a severable term of the indenture which can by itself be independently performed without having regard to the general sale of the three lots to Sindo under the same. It is our opinion that cl 3, though contained in the indenture, is a separate and distinct agreement which requires Sindo to reconvey the four acre land, after sub-division of lot 89-11, to BMT after the sale. It has no bearing or connection with the sale per se. This is significant as, insofar as the four acre land is concerned, BMT becomes the `purchaser` and Sindo the `vendor`. BMT argue that both the sale of the three

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lots and the reconveyance under cl 3 were inextricably linked because the former would not have occurred without the latter but a close examination of the indenture certainly, to our mind, does not reveal this. The indenture very much mirrored the terms of the 1971 agreement, of which cl 1 reads:

> 1 [BMT] shall sell and [Ho] shall purchaser the [three lots] at the price of Dollar One and cents thirty-four point three ($1.343) per square foot making a total purchaser price of Dollars Five Million Eight Hundred and Seven Thousand Eight Hundred and seventy-three and cents seventy-one ($5,807,873.71) subject to the General Conditions known as `The Revised Singapore Conditions of Sale` so far as the same are applicable to a sale by private treaty and are not varied by or inconsistent with the following Special Conditions.

98 74.The substance of the indenture related to the sale of the three lots, and only after that was done, did Sindo have to apply for sub-division approval for lot 89-11 before reconveying the four acre land together with its Statutory Land Grant to BMT. BMT was then to pay Sindo for this reconveyance. The sale of the three lots was certainly not conditional upon the reconveyance, and the language of the 1971 agreement and the indenture was not crouched in such terms. This suggests to us that the reconveyance obligation was effectively separate from the sale and purchase agreement. Although the indenture had referred to the 1971 agreement as a conditional agreement, this condition was for the approval of the 1971 agreement by a court order, and not the reconveyance of the four acre land. This is made clear under cl 14 of the 1971 agreement, which reads:

> *The sale of the [three lots] to the purchaser is subject to the approval of the Supreme Court of Singapore and the vendors shall at their own expense and with all due expedition apply to the court and obtain an order approving the sale. In the event the said order of court is not obtained within one month from the date of this agreement of if the court approves the sale to persons other than the purchaser, then this agreement shall be deemed to be*

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> *null and void and of no effect and neither party shall have any claim against each other excepting that the vendor shall immediately upon the happening of the event refund the said deposit to the purchaser without any deductions whatsoever.*

99 75.Under cl 3, Sindo was now the `vendor` and BMT the `purchaser` of the four acre land. The issue is, on this construction of cl 3, whether the clause can be specifically performed without Sindo`s prior obligations being satisfied.

100 76.Having regard to the first two authorities we cited, we are inclined to take the view that BMT`s interest, as `purchaser` of the four acre land, never arose at all. That interest arising was dependent on certain conditions being fulfilled, namely, Sindo`s application for sub-division of lot 89-11 and the approval for the four acre land from the Chief Planner. Some assistance can be derived from the case of **Shanahan v Fitzgerald** [1983] 2 NSWLR 513, where the purchaser of the land, in a suit for the specific performance of a contract for the sale of land, applied for an injunction to restrain the defendant vendor from mortgaging or charging the land pending the determination of the suit.

101 77.Holding that the purchaser had not obtained an equitable interest in land because the defendant vendor`s obligation to complete the contract was subject to an unfulfilled condition, which was at the discretion of a third party, McLelland J held (at p 515 [para] A):

> *In the present case completion of any sale under the alleged contract appears to be subject to two such unfulfilled conditions viz (1) the consent of the Minister to a transfer to the plaintiff under the relevant statutory provision which I assume to be the Close Settlement Amendment (Conversion) Act 1943, s 11, and (2) approval by the relevant council of the necessary subdivision under the Local Government Act 1919, s 327. Notwithstanding that under the alleged contract the defendant would be obliged to do all things necessary to be done on his part to obtain the Minister`s consent and the council`s approval, and that such an obligation would be enforceable in equity,* ***the plaintiff would***

> ***not, unless and until that consent and approval were obtained, have a proprietary interest in the land.*** *[Emphasis added.]*

102 78.Our view is reinforced by this court`s decision in **Chi Liung Holdings Sdn Bhd v A-G** [1994] 2 SLR 354 . There, the appellants, a foreign company, obtained permission from the Controller of Housing (`the Controller`) to purchase two plots of residential land. The appellants gave written undertakings that they would not sell the land without prior written approval from the Controller. Subsequently, the appellants sought to sell the land to another company, and the options granted in favour of the purchaser company stated, by cl 8(i), that the sale was conditional upon the purchaser company obtaining such relevant approval from the Controller. The purchaser company executed the options. The Controller refused consent and forfeited the appellant`s money, for the reason that the appellants had sold the land without his consent. The purchaser company then obtained consent from the Controller to purchase the land and the appellants consequently took out an originating summons against the respondent seeking a declaration that the Controller had acted unlawfully in forfeiting their money.

103 79.Allowing the appellants` appeal, this court held that since there was a condition precedent in the option granted to the purchaser company, namely that the sale of the land was premised on the approval from the Controller, therefore until approval was given, the essential and main obligations of the parties remained inchoate, and no sale could take place. That being so, the Controller could not forfeit the appellants` money as no sale had taken place. In the course of the judgment, this court made it clear that until specific performance was available under a contract of sale, no beneficial interest arose for the purchaser under the contract. The same principles applied regardless of

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whether the condition precedent was to be fulfilled by the vendor or by a third party whom neither the purchaser nor the vendor had control over (at p 364 [para] C):

> *One of Mr Soh`s contentions was that a sale of a property is made when a contract for the sale and purchase is entered into and the purchaser becomes the beneficial owner of the property. We accept that general proposition as correct. But it is premised on the availability of specific performance, as equity looks upon as done what has been agreed to be done and the purchaser is deemed the owner in equity as at the date of the contract. If, for any reason, specific performance is not available, the purchaser is not deemed to have been the owner of the property. Lord Parker of Waddington in* ***Central Trust and Safe Deposit Co v Harvey G Snider & Ors****, in delivering the judgment of Privy Council, said at p 272:*
>
> *`It is often said that after a contract for the sale of land, the vendor is a trustee for the purchaser, and it may be similarly said that a person who covenants for value to settle land is a trustee for the objects in whose favour the settlement is to be made. But it must not be forgotten that, in each case, it is tacitly assumed that the contract would, in a court of equity, be enforced specifically.*
>
> *If, for some reason, equity would not enforce specific performance, or if the right to specific performance has been lost by the subsequent conduct of the party in whose favour specific performance might originally have been granted, the vendor or covenantor either never was, or has ceased to be, a trustee in any sense at all.`*
>
> *More recently, in the Australian case of* ***Austin v Sheldon & Anor****, Mahoney J succinctly said, at p 670:*
>
> *`... to say that such a purchaser is the owner of the land in equity is correct only in a limited sense. Equity will so regard the purchaser only if, and in so far as, equity would grant specific performance of the particular contract ...`*
>
> *and cited various authorities in support. Reverting to the contract in this case, until the overriding condition in cl 8(i) is fulfilled, specific performance of the appellants` obligation to sell, and the purchaser`s obligation to purchase, is not available and the purchaser, in these circumstances, cannot be deemed the equitable or beneficial of the property as at the date of the contract.*

> *In our opinion, even if cl 8(i) operates as a condition precedent to the performance of the contract as contended by Mr Soh, no estate or interest whatsoever in the property passed to OST on their entering into the contract on 2 May 1989. The reason for this is s 3(1) and (2) of the Act. That section prohibits the sale or transfer of any residential property or any estate or interest therein to any foreign person except as provided in the Act and renders null and void any purchase or acquisition of such property or any estate or interest therein. As at that date, OST was a foreign person within the meaning of s 2 of the Act and had not obtained the requisite qualifying certificates for purchase of the properties. It cannot, by the contract, acquire any estate or interest in either of the properties. Mr Soh for the respondent conceded that the contract was ineffective and the operation was suspended. In our opinion, until and unless the condition is fulfilled, OST was prohibited from acquiring any estate or interest in the property under the contract. No estate or interest whatsoever, equitable or otherwise, passed to OST on the entering of the contract. It therefore follows that, by entering the conditional contract, the appellants had not made any sale or disposition of the property.*

104 80.It is obvious that BMT faces an uphill task in contending that their equitable interest in the four acre land arose. The facts of this case and the authorities cited speak for themselves. They had to overcome two difficulties before specific performance of the reconveyance of the four acre land was open to them. The first is that of Sindo`s application to the Chief Planner for approval to sub-divide lot 89-11. The second, and one which may not succeed even if Sindo applied for the requisite sub-division, is the Chief Planner`s approval for that sub-division. Neither were fulfilled. At best, as the learned judge in the court below observed, BMT could only compel Sindo to apply for sub-division of lot 89-11 and obtain the Statutory Land Grant for the four acre land, the latter of which was uncertain that it would be given. Following ***Chi Liung Holdings Sdn Bhd v A-G*** , BMT `cannot be deemed the equitable or beneficial of the [four acre land]...`.

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105 81.Clause 3 is no doubt valid, but lacks the ability to be performed, much like the situation which occurred in ***Lee Christina v Lee Eunice*** . Until Sindo applies for sub-division approval (which is now impossible), cl 3, which lists the essential and main obligations of Sindo and BMT as to the reconveyance of the four acre land, remains inchoate. This is not a situation of competing equities between BMT, President and UOB but rather a question of whether BMT`s interest ever arose. It did not, and accordingly BMT has no claim to the property.

106 82.The appeal was confined to two issues both of which were contested by UOB and President although it was clear from the outset that BMT`s success on the first issue would not determine the result of the appeal. This said, it must be observed that both sides rehearsed the same arguments they had advanced to the court below and cited the same authorities cited in the court below and in fact neither UOB nor President pressed their case on the first issue with any great vigour. It was essential for BMT to get over the hurdle of the first issue but as we have said getting over the hurdle of the first issue would not determine the result of the appeal. On the other hand apart from a purely jurisprudential view the outcome of the first issue did not directly bear on UOB or President defending this appeal. In the result BMT scored a Pyrrhic victory and this in our view is no reason for departing from the normal rule that the costs follow the event.

107 83.For the foregoing reasons, we dismiss the appeal with costs. The appeal deposit will be paid out to the two respondents in equal portions to account of their respective costs.

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British Malayan Trustees Ltd v Sindo Realty Pte Ltd (in liquidation) and Others
[1999] SGCA 2

Karthigesu JA
L P Thean JA
Yong Pung How CJ

Harry Elias SC (instructed) and Tan Teng Muan (Mallal & Namazie) for the appellants
Tan Kiat Peng (Official Assignee) for the first respondent
Alvin Yeo and Joy Tan (Wong Partnership) for the second respondent
Yang Ing Loong and Audrey Thng (Lee & Lee) for the third respondent

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