Lal Hiranand v Kamla Lal Hiranand
[2007] SGCA 5

Case Number : CA 3/2006

Decision Date : 29 January 2007

Tribunal/Court : Court of Appeal

Coram : Chan Sek Keong CJ; Kan Ting Chiu J; Andrew Phang Boon Leong JA

Counsel Name(s) : Kenneth Tan SC (Kenneth Tan Partnership), Siva Murugaiyan and Parveen Kaur Nagpal (Madhavan Partnership) for the appellant; Michael Hwang SC (Michael Hwang), Roslina bte Baba and Constance Tay (Ramdas & Wong) for the respondent

Parties : Lal Hiranand — Kamla Lal Hiranand

Contract – Contractual terms – Rules of construction – Interpretation of clause in deed – Whether parties' testimony as to intention in entering into deed may be taken as form or substance of parties' undertakings in deed – Applicable principles

Contract – Remedies – Specific performance – Whether specific performance of certain clauses in deed should be ordered where meaning of such clauses uncertain – Whether court may remedy uncertainty to give effect to clauses

29 January 2007 *Judgment reserved.*

Kan Ting Chiu J (delivering the judgment of the court):

Background

1 The parties before us have been engaged in litigation for several years over the wills and estate of the appellant's father. They eventually entered into a deed of settlement to resolve their differences. Ironically the deed became another area of contention between them. Issues were raised, firstly, whether the settlement is conditional on the authenticity of a will, and secondly, whether some of the terms of settlement are too uncertain to be enforced, and these are the issues we have to deal with in this appeal.

2 The appellant Lal Hiranand, and the respondent, Kamla Lal Hiranand were husband and wife. They were married in 1969, but a decree *nisi* dissolving the marriage was granted in 2002. There are three children of the marriage, two sons Shaon and Ravine, and a daughter Priya. The two elder children are in their thirties, and the youngest, Ravine is in his late twenties.

3 The appellant's father was Manghanmal Hiranand Ramchandani alias Mangahanmal Hiranand ("MHR"), who passed away in August 1994. MHR made a will dated 24 April 1986 ("the 1986 will") in which he named his wife (*ie*, the appellant's mother) and the appellant as beneficiaries. Under the will, the respondent and her three children were not to receive anything.

4 The division of MHR's substantial estate gave rise to a series of legal proceedings between and involving the appellant and the respondent. These first came about because the respondent claimed that MHR had revoked the 1986 will and replaced it with another will dated 22 November 1988 ("the 1988 will" or "the will"), but the appellant disputed its authenticity. Under the 1988 will, the appellant and the respondent were to get 25% of the estate, and her three children were to get 15% each, with the remaining 5% to go to the managers of MHR's businesses.

5 In addition to these two wills, there is another significant document in these proceedings. This is a deed dated 28 May 1999 ("the deed") entered into between the appellant and the respondent, which provided that:

Whereas:-

(a) The [respondent] is the lawful wife of the [appellant]. They have three children, namely: Shaon Hiranand ("Shaon"), Ravine Lal Hiranand ("Ravine") and Priya Lal Hiranand ("Priya").

(b) An appeal is pending in an action in the High Court of the Republic of Singapore in Suit No. 349 of 1999 touching on the estate of Manghanmal Hiranand Ramchandani @ Manghanmal Hiranand, deceased, wherein the [respondent] is the Plaintiff and one Harilela Padma Hari @ Padma Hari Harilela ("PHH"), one Hari Naroomal Harilela ("HNH") and the [appellant] are the Defendants AND wherein the [respondent] claims as one of the beneficiaries in accordance, inter alia, under a document intitled "The Last Will of Manghanmal Hiranand Ramchandani" (the deceased) dated 22 November 1988 ("the 1988 Will").

(c) The [respondent] and the [appellant] have agreed that the terms of this Deed shall constitute the full and final settlement of all matters arising out of the said action as between them AND of all their present differences.

Now this deed witnesseth and it is hereby agreed as follows:

1. The [appellant] shall instruct as soon as practicable all his solicitors acting on his behalf not to proceed with divorce proceedings against the [respondent] and shall discharge them from further acting in respect thereof. The parties hereto shall proceed hereafter to effect a reconciliation.

2. The [appellant] undertakes to settle all matters in dispute with the [respondent] (and their said children) out of Court and in particular all disputes in relation to the estate of his late father, the said deceased. In this regard, the [appellant] undertakes to implement and faithfully carry out all the wishes of the deceased as manifested and executed by the deceased in the 1988 Will both in substance and according to the spirit of the 1988 Will notwithstanding that the 1988 Will may in any way be defective or unenforceable in law.

3. The [appellant] shall remit US $1,000,000.00 each to the bank accounts of Shaon, Ravine and Priya before the 10th day of August 1999.

4. The [appellant] shall remit US $2,000,000.00 to the [respondent]'s bank account before the 10th day of August 1999.

5. The [appellant] shall remit US $700,000.00 into the bank account of Mrs. Sundri Watumull (the mother of the [respondent]) towards the reimbursement to her of all costs and expenses incurred within ten days from this date.

6. The [appellant] shall procure the appointment of Shaon as the Managing Director of all Hiranand family companies as soon as possible. The Hiranand family companies are listed in Schedule 1 to this Deed.

7. The [appellant] shall transfer and divest proportionate shares in the family business to Shaon in accordance with the laws of the country in which each of the Hiranand family

companies are situate to enable him to become Managing Director as per Articles of Association of the companies.

8. The [appellant] shall procure as soon as is practicable the discharge and/or the removal of PHH and HNH as the trustees and executors of the document described in the above action as:

(1) The 1986 Will and codicil;

(2) The document described as the 1983 Will; and

(3) The discharge and/or removal of PHH and one Ram G Hiranand as trustees and executors of the 1988 Will,

and shall appoint in their place such person(s) to be approved in writing by the [respondent].

Provided that the [appellant] need not so discharge or remove the said persons in respect of any or all of the 1986 Will and Codicil, 1983 Will and 1988 Will if so agreed to in writing by the [respondent].

9. The [appellant] undertakes to and shall as soon as is practicable:

(a) inform PHH and HNH to return to him with immediate effect:

(1) all shares and interest belonging to him in the Hiranand family companies; and

(2) All monies held by them belonging to him in any and all banks or financial institutions;

(b) give notice to PHH and HNH revoking with immediate effect all powers of attorney given to him/her or them to act on his behalf and give notice in writing of the same to all affected parties.

10. The [appellant] undertakes to and hereby revokes all previous wills and codicils made by him and shall take steps to execute a fresh will, according to law, leaving his entire estate to the [respondent], Shaon, Ravine and Priya in such proportions as he deems fit.

11. For the removal of doubts, the parties hereto agree that nothing in this Deed shall be construed as an admission by the [respondent] for whatever purpose of proceedings that:-

(a) the 1986 Will and codicil was executed by the deceased;

(b) the 1988 Will is legally defective or unenforceable; and

(c) the 1983 Will has not been revoked and remains valid and enforceable.

The proceedings

6 As stated, there was a series of proceedings in Singapore and in Hong Kong, which should be mentioned:

(a) *Kamla Lal Hiranand v Harilela Padma Hari* – Suit No 349 of 1999 and on appeal, CA No 4

of 2000

These are proceedings in Singapore reported at [2000] 2 SLR 479 and [2000] 3 SLR 696.

The main issue in these proceedings was whether the 1988 will was valid for the purpose of creating or evidencing a trust in the assets of the estate of MHR. It was common ground that the will was not properly executed because it was not properly witnessed, and was not a valid will.

The matter first came before an assistant registrar, who ruled in the negative. The matter then went on appeal before Tay Yong Kwang JC (as he then was), who upheld the decision of the assistant registrar. Ultimately, the matter went before the Court of Appeal, which upheld Tay JC's decision.

(b) *Kamla Lal Hiranand v Lal Hiranand* – OS No 1893 of 1999

This was an application in Singapore by the respondent for a declaration that the appellant was bound by the trusts set out in the 1988 will.

The application was dismissed by the assistant registrar, and went on appeal before Tay Yong Kwang JC (as he then was). However, the appeal was not fully argued out, as the parties informed the judge that they had come to an agreement. Consequently, a consent order was entered that:

1. This Court Doth Declare that in respect of the estate of Manghanmal Hiranand Ramchandani @ Manghanamal Hiranand, deceased, the Defendant is bound by the trusts as set out in the document intituled the "Last Will of Manghanmal Hiranand Ramchandani" subscribed to by the said Manghanmal Hiranand Ramchandani @ Manghanmal Hiranand, deceased, on the 22nd day of November 1988;

And it is ordered that:

2. The Defendant do all and such acts as is necessary to carry out the said trusts;

3. There be liberty to apply in respect of other reliefs not sought for in this Originating Summons arising from the Deed dated 28th May 1999 made between the Plaintiff and the Defendant;

4. There be liberty to apply;

5. Costs be fixed at $2,000.00 to be paid by the Defendant to the Plaintiff.

and the appeal was dismissed.

After the consent order was recorded, the respondent applied for an order that the appellant submit an account of the trust property under the 1988 will. This application was dismissed by Choo Han Teck J on grounds, *inter alia*, that the originating summons was spent, and that proceedings relating to the deed should be commenced separately by way of a writ.

(c) *Shaon Lal Hiranand v Dr Hari Naroomal Harilela* – HCAP 15/2000

These are probate proceedings in Hong Kong similar in effect to Suit No 349 of 1999 instituted by the three children. The action was struck out by Yam J, who found that there was overwhelming evidence that the 1988 Will was not genuine.

(d) Suit No 541 of 2004

This is the present action, which came up on appeal before this court.

In this action, the appellant sought an order that the deed be set aside on the ground of duress and/or undue influence while the respondent counter-claimed for the specific performance of the deed.

The trial judge's decision ([2006] SGHC 98)

7 The trial judge found on the facts that:

(a) the appellant had not signed the deed under duress or undue influence ([101] of the grounds of decision);

(b) the 1988 Will was a forged document;

and on the law that:

(c) the 1999 deed was enforceable as a contract ([100(a)]);

(d) even if the 1988 Will was a forgery, the respondent was entitled to enforce the deed [(100(b)]); and

(e) clauses 6 and 7 of the deed were severable from the rest of the deed and were not unenforceable because of uncertainty in their terms ([100(d)]).

8 The trial judge made and explained his findings at [118] of his grounds of decision:

I hold that the 1988 will was in all likelihood a forged document. However, it has not been proved that the forgery was perpetrated by or with the assistance or knowledge of the [respondent] or the children … The validity of the 1999 deed was not inextricably linked to the validity of the 1988 will. The plaintiff's testimony was that he did not believe in the authenticity of the 1988 will when he executed the 1999 deed, which was intended by the parties to resolve all the outstanding disputes within the family. One of the outstanding disputes then concerned the issue whether the 1988 will was genuine or not. The parties chose to overcome this dispute by providing in the 1999 deed that the plaintiff undertook "to implement and faithfully carry out all the wishes of [MHR] as manifested and executed by the deceased in the 1988 will both in substance and according to the spirit of the 1988 will notwithstanding that the 1988 will may in any way be defective or unenforceable in law". When the 1999 deed was made, the issue whether the 1988 will was genuine or not was completely erased. It was no longer necessary for the parties to debate the issue. They would proceed on the basis that the 1988 will contained MHR's wishes whatever view the law may take of its authenticity or efficacy. The words "as manifested and executed by the deceased" were descriptive rather than prescriptive. In other words, it was not a pre-condition of the 1999 deed that the 1988 will must be proved to have been executed by MHR. Further, there were obligations in the 1999 deed which were totally

unrelated to the 1988 will, such as the cash payments and Shaon's participation in the family companies.

and he dismissed the appellant's claim and allowed the respondent's counterclaim.

9 The appellant appealed on the following grounds:

(a) No effect should be given to cl 2 of the deed as it expressly requires that the appellant give effect to the provisions of the 1988 document on the basis that it was a genuine will of the appellant's late father.

(b) No effect should be given to cll 6, 7 and 9(a)(2) of the deed as they are too uncertain.[note: 1]

The appeal

The Cases filed

10 There are some preliminary comments on the Appellant's Case and the Respondent's Case filed.

11 In para 28(b) of the Appellant's Case, it was submitted:

In any event, the Respondent should not be allowed to claim in contract under the Deed as she had in previous proceedings against the Appellant in the Singapore Courts proceeded on the basis that her claim under the 1988 document was in trust.

12 This was not pleaded in the appellant's defence to the respondent's counterclaim. This was also not raised in the appellant's submissions before the trial judge and was not dealt with by him. In these circumstances, the appellant cannot include this issue in the appeal.

13 In any event, counsel did not present any basis for the proposition. On the faces of the two documents, the respondent's entitlements under the deed was greater than her entitlement under the will and entitlements accrued at different times and from different persons. Consequently, they can support two distinct causes of action and the respondent should be allowed to pursue each of them.

14 The appellant in his appeal before this court did not pursue the allegation of duress and undue influence, and accepted that cll 6 and 7 of the deed were severable from the rest of the deed.

15 The respondent, on her part, did not seek a review on the finding that the 1988 will was forged. Instead, she took the unjustified position in para 53 of the Respondent's Case that:

It is the Respondent's contention that whether or not these other documents had been forged is not relevant to the present appeal, in particular, where the issue of forgery of those documents was not an issue to be decided by the Court below.

although her counsel made some attempts during the arguments to suggest that the will was not a forgery.

16 Under the Rules of Court (Cap 322, R 5, 2006 Rev Ed), a respondent in an appeal before the Court of Appeal who wishes to argue that the trial judge's decision should be affirmed on grounds other than those relied upon by the trial judge must state that in his Case. This requirement is in O 57

r 9A(5) which reads:

> A respondent who, not having appealed from the decision of the Court below, desires to contend on the appeal that the decision of that Court should be varied in the event of an appeal being allowed in whole or in part, or that the decision of that Court should be affirmed on grounds other than those relied upon by that Court, must state so in his Case, specifying the grounds of that contention.

17 If the respondent wanted this court to affirm the trial judge's decision on the basis that, despite his finding to the contrary, the will was a genuine document, that must be stated in the Respondent's Case together with the supporting grounds. There was no such statement or grounds in the Respondent's Case.

18 Even if the respondent had incorporated the contention in the Respondent's Case, there was clear evidence before the trial judge that pointed irresistibly to the will not being a genuine will. The most compelling evidence was that:

(a) the will was typed on paper stating "Law Ofices (*sic*) Berris Seton and Bishton" of Los Angeles, California which had changed its name to "Berris & Seton" in 1983;

(b) the word "Offices" was wrongly spelt "Ofices" on the paper;

(c) the will bore the chop of "Berris Seton & Bishton, Notary Public", although under the Laws of California, only a natural person can be a notary public, and the chop was not accompanied by the signature or name of any person; and

(d) MHR was not in California on 28 November 1988, the date the will was purported to have been executed.

19 Counsel for the respondent argued that there was no evidence that MHR's signature was forged. This was not helpful to the respondent's cause because:

(a) the onus was on her to prove the signature of MHR since she was relying on it;

(b) she had not produced the original will although she was relying on it; and

(c) even if it is assumed that the signature was genuine (and there is no basis for this assumption), taking into account the defects highlighted in the foregoing paragraph, the respondent still has to show that the document as a whole manifested the wishes of MHR.

Our decision

The issue of the will's authenticity

20 The trial judge found that the words "as manifested and executed by the deceased" did not mean that the parties had entered into the deed on the premise that MHR executed the will.

21 The trial judge placed emphasis on the appellant's evidence that he did not believe in the validity of the will when he executed the deed, and the trial judge concluded that the deed had extinguished or erased the whole issue of the will's authenticity. If that was the parties' intention, it was not stated in the deed. The will's authenticity (or otherwise) was not mentioned. Clause 2 only referred to the possibility that the will may be "defective or unenforceable in law".

22 Clause 11 referred to three wills in the name of MHR. The clause stated that the respondent did not admit the following:

(a) the 1986 Will and codicil was executed by the deceased;

(b) the 1988 Will is legally defective or unenforceable; and

(c) the 1983 Will has not been revoked and remains valid and enforceable.

It is clear that when the parties executed the deed, they had directed their minds to the different wills attributed to MHR, and the specific issues arising in relation to each of them. There was nothing in the deed to show that the issue of the authenticity of the will was brought up before the deed was executed and the respondent did not say in her affidavit of evidence-in-chief or her evidence in court that the parties had agreed that the dispute over the authenticity of the will was settled or disposed of under the deed.

23 If the parties had agreed to put aside the issue of the authenticity of the will, why was that not expressly stated in the deed? It was a fairly detailed document. It was intended by both parties to be a document that was to play a crucial part in the resolution of the disputes between them and it was drafted by the respondent's solicitor.[note: 2] Why was mention made only to defectiveness and unenforceability, and not to authenticity?

24 Clause 2 must be read in accordance to the principles by which contractual documents are to be construed, and these principles were set out by Lord Hoffmann when he delivered the leading judgment of the House of Lords in *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896 at 912–913:

(1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.

(2) The background … includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.

(3) The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification. …

(4) The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax: …

(5) The "rule" that words should be given their "natural and ordinary meaning" reflects the common sense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not

require judges to attribute to the parties an intention which they plainly could not have had. …

25 The principles were affirmed by the House of Lords in *Bank of Credit and Commerce International SA v Ali* [2002] 1 AC 251. Lord Bingham of Cornhill in delivering the leading judgment, stated at [8]:

> In construing … [a] contractual provision, the object of the court is to give effect to what the contracting parties intended. To ascertain the intention of the parties the court reads the terms of the contract as a whole, giving the words used their natural and ordinary meaning in the context of the agreement, the parties' relationship and all the relevant facts surrounding the transaction so far as known to the parties. To ascertain the parties' intentions the court does not of course inquire into the parties' subjective states of mind but makes an objective judgment based on the materials already identified. The general principles summarised by Lord Hoffmann in *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896, 912–913 apply in a case such as this.

26 The trial judge however, did not appear to have applied them when he construed the deed. He relied on the appellant's testimony that he did not believe in the authenticity of the will when he signed the deed and then came to the conclusion at [118] that as the deed was "intended by the parties to resolve all the outstanding disputes within the family. One of the outstanding disputes then concerned the issue whether the 1988 will was genuine or not."

27 With respect, that conclusion is not justified. The statement of the parties' intention to resolve all the outstanding disputes between them should be taken as the reason for, and not as the form or substance of the appellant's undertakings. The appellant's obligations were limited to and governed by the terms of the undertakings. The undertaking to implement and carry out MHR's wishes as manifested and executed by MHR in the will was conditional on there being a will, executed by MHR, in which he manifested his wishes.

28 With the finding that the will was forged, we hold that cl 2 of the deed did not come into operation, and we set aside the order for its performance.

Uncertainty – "Hiranand family companies" and "the family business"

29 The appellant had argued that specific performance should not be ordered with respect to cll 6, 7 and 9 because those clauses were uncertain when they referred to "Hiranand family companies" and "the family business".

30 "Hiranand family companies" which appear in cll 6, 7 and 9(a)(1) of the deed was not defined. In cl 6 the "Hiranand family companies" were to be listed in a schedule to the deed, but there was no such schedule. The term "family business" appearing in cl 7 was also not defined, but from a reading of cl 7 as a whole, the later part of cl 7 referred back to the "Hiranand family companies".

31 The trial judge dealt with this issue at [120] of the grounds of decision:

> The final issue concerned the alleged uncertainty of cll 6 and 7 of the 1999 deed. This allegation was not raised in the pleadings or in evidence. The defendant therefore had no opportunity to adduce evidence as to whether the parties knew what the terms meant. In any event, the plaintiff obviously knew what they meant as he had signed the 1999 deed with a view to furnishing the list of such companies but failed to do so. When he wrote to [the respondent's solicitor] in November 1999, he referred to the 1999 deed and to the shares in the Hiranand

companies in various parts of the world that would be transferred to Shaon. There was certainly no indication, six months after the execution of the 1999 deed, that there was uncertainty about the scope of the phrases in issue.

32 On the face of the deed, the term "Hiranand family companies" is not defined. The companies were intended to be named in the schedule to the deed, but there was no schedule.

33 What is the relation between the term "Hiranand family companies" and the companies that were intended to be named? There are two possibilities. The first is that the term controls the companies to be named, so that any company will be named if it is a Hiranand family company. This cannot be the function because "Hiranand family companies" does not set out identifying characteristics of the intended companies. It does not identify the persons who constitute the Hiranand family and the necessary connection between a company and the Hiranand family to make it a Hiranand family company.

34 "Hiranand family companies" could also be used as a collective term for the companies that the parties agree to be named in the schedule. When it is used for this purpose, there is no requirement for identifying characteristics of the Hiranand family companies to be specified, because any company named is *ipso facto* a Hiranand family company. We find that the term in the deed served the second function.

35 Whether it served the first or the second function, the term, on the face of the deed, is uncertain. A meaning may nevertheless be given to a term that is on its face uncertain. Lewison's *The Interpretation of Contracts* (Sweet & Maxwell, 3rd Ed, 2004) ("*Lewison*") states at para 8.09:

> A contract, or a provision in a contract, may be uncertain if it is unintelligible; if it is meaningless; if the court is unable to select between a variety of meanings fairly attributable to it, and the circumstances are not such that one or other party to the contract may elect between meanings; where the court is unable to discern the concept which the parties had in mind; or where the terms of the contract require further agreement between the parties in order to implement them.

36 The learned author cited Megarry J in *Brown v Gould* [1972] Ch 53 at 61–62:

> A provision may be void for uncertainty because it is devoid of any meaning. … The other main head is where there is a variety of meanings which can fairly be put on the provision, and it is impossible to say which of them was intended. Mere ambiguities may sometimes be resolved by the application of legal presumptions, and so on; but where the language used is equally consistent with a wide range of different meanings, it may be impossible to discern the concept which the provision was intended to enshrine. If a case is to be brought under this head, the attack will usually start with the demonstration of a diversity of meanings which are consistent with the language used; and if this is not done, the attack will usually fail.

37 But *Lewison* goes on to state at para 8.11:

> Where parties have entered into what they believe to be a binding agreement the court is most reluctant to hold that their agreement is void for uncertainty, and will only do so as a last resort.

citing *Greater London Council v Connolly* [1970] 2 QB 100, where Lord Denning MR said at 108:

> The courts are always loath to hold a condition bad for uncertainty. They will give it a reasonable

meaning whenever possible.

and Lord Pearson said at 110:

> [T]he courts are always loath to hold a clause invalid for uncertainty if a reasonable meaning can be given to it, and it seems to me easy to give a reasonable meaning to this condition.

38 To this end, courts would act in proper cases to remedy uncertainties. *Lewison* referred to the judgments of Lord Denning MR in *The Tropwind* [1982] 1 Lloyd's Rep 232:

> We have on a few occasions rejected a sentence as meaningless, as in *Nicolene v Simmonds*. But this is only when it is impossible to make sense of it. Rather than find it meaningless, we should strive to find out what was really intended – by amending the punctuation, or by supplying words and so forth.

and of Megarry J in *Brown v Gould* ([36] *supra*, at 57–58):

> No doubt there may be cases in which the draftsman's ineptitude will succeed in defeating the court's efforts to find a meaning for the provision in question; but only if the court is driven to it will it be held that a provision is void for uncertainty.

39 But there are situations that are beyond remedy. *Lewison* cites *Nicolene Ld v Simmonds* [1953] 1 QB 543, relating to an acceptance of an order where "the usual terms of acceptance" were to apply, *Murray v Dunn* [1907] AC 283 where there was a building restriction against "any building of an unseemly description", and *Re Lloyd's Trust Instruments* (24 June 1970) (unreported) which involved a trust for "my old friends".

40 In the present case, the "Hiranand family companies" was a collective term for the companies to be agreed on. The trial judge in [120] of the grounds of decision referred to a letter of 22 November 1999 which the appellant wrote to the respondent's solicitors and noted that the appellant had not raised the issue of uncertainty and held that against him. The letter states:

> I refer the deed of May 1999 under the conditions of the deed I have settled partly with my family:
>
> AA) US$600,000 – as part settlement against the total amount of US$5 million.
>
> BB) *Shares of USA companies*.
>
> Shares allotted to Shaon Hiranand.
>
> Balance of US$4.4 million by 24th November 1999.
>
> Balance of shares for allotment to Shaon Hiranand *companies in Hong Kong, Dubai, Singapore and Japan*.
>
> Other conditions as per the deed will be settled prior to 30th November 1999.
>
> [emphasis added]

41 This letter indicated that the appellant contemplated that some companies in the USA, Hong

Kong, Dubai, Singapore and Japan should fall within the agreed companies, but it did not give any indication of the basis or concept by which he would identify the companies.

42 In any event, even if the appellant had believed there was certainty, and even if the respondent had also believed there was certainty, that would not dispose of the matter. If an artist agrees to sell "my best painting" to a collector, the artist may be clear in his mind that he is selling painting A, whereas the collector may instead be sure that he is buying painting B. In such a situation, their beliefs do not give certainty to that uncertain term. A provision is certain if it is certain, and not because the parties believe it to be certain.

43 It was not the respondent's case that although there was no schedule to the deed, the parties had agreed on the companies to be named, or had agreed on the concept by which they were to be identified. She attempted to define "Hiranand family companies" in the draft judgment prepared after the trial judge had delivered his grounds of decision. In the draft, the "Hiranand family companies" were described as:

> … private companies wherever incorporated, registered or situate, which [MHR] and/or the Plaintiff beneficially *owns or owned*, including but not limited to the following companies and/or any subsidiary, holding company, related corporation (as defined in the Singapore Companies Act, Cap 50 of the Statutes of the Republic of Singapore) and/or associated company of each of [a list of 27 named companies]. [emphasis added]

44 The appellant objected to the description, and the trial judge rejected it and consequently the judgment retained the words "Hiranand family companies", but without reference to the schedule. It can be seen from the draft that the respondent herself did not have a clear concept of the companies to be included. The draft does not explain whether "owns or owned" referred to majority or minority ownership, or how the appellant's obligations are to apply to companies *owned* by MHR or the appellant.

45 Clauses 6, 7 and 9 are so uncertain that no order can be made that they are to be performed. Such an order, if made, would create immediate difficulties to the appellant who needs to know what he has to do to comply.

46 If it is found that the undertakings should be performed, then the court must clarify the uncertainties so that there is certainty and content to the appellant's obligations. As the trial judge had not provided any guidance on how the undertakings were to be performed, his orders cannot stand in their present form.

47 As we have found that "Hiranand family companies" was used as a collective term for the companies to be agreed on and not as the criteria for the identification of the companies, we are unable to cure the uncertainty, and we set aside the orders that the undertakings be performed.

Conclusion

48 The appeal is allowed, with costs here and below. The deposit for costs paid by the appellant is to be refunded to him.

[note: 1] Paragraph 28 of the Appellant's Case.

[note: 2] Notes of Evidence, 5 August 2005 page 131.