Joseph Mathew and Another v Singh Chiranjeev and Another
[2009] SGCA 51

Case Number : CA 200/2008

Decision Date : 29 October 2009

Tribunal/Court : Court of Appeal

Coram : Chan Sek Keong CJ; Andrew Phang Boon Leong JA; V K Rajah JA

Counsel Name(s) : Leslie Netto (Netto & Magin LLC) for the appellants; Boo Moh Cheh and Arthur Edwin Lim (Kurup & Boo) for the respondents

Parties : Joseph Mathew; Mercy Joseph — Singh Chiranjeev; Gulati Jasmine Kaur

Contract – Formation – Electronic Transactions Act

Land – Sale of land – Contract

29 October 2009

Andrew Phang Boon Leong JA (delivering grounds of decision of the court):

The factual background

1 The present appeal raises, in a relatively straightforward factual matrix, a number of general (albeit significant) issues – in particular, issues relating to a contract to grant an option for the purchase of real property as well as issues concerning the statutory formalities that have to be satisfied before such a contract is legally enforceable (assuming that such a contract exists in the first instance).

2 Turning to the relevant factual matrix, the first appellant, Joseph Mathew, is married to the second appellant, Mercy Joseph (collectively, "the appellants"). The appellants are the joint owners of a property known as 26 Upper Serangoon View, #04-32, Rio Vista, Singapore 534206 ("the Property"). The first respondent, Singh Chiranjeev, is married to the second respondent, Gulati Jasmine Kaur (collectively, "the respondents"). The respondents were the intending purchasers of the Property. The negotiations between the appellants and respondents for the sale of the Property were conducted orally as well as via e-mails through Helene Ong Geok Tin ("Helene"), a property agent working as an associate of Dennis Wee Properties Pte Ltd ("Dennis Wee Properties").

3 It should be noted, at this juncture, that Helene as well as Dennis Wee Properties were, respectively, the third and fourth defendants in the court below. The respondents had originally brought the action only against the appellants for both specific performance as well as damages with regard to the sale and purchase of the Property. However, because the first and second appellants alleged in their defence that Helene had no authority to conclude any agreement to sell the Property, the respondents joined both Helene and Dennis Wee Properties as the third and fourth defendants, respectively, in the suit. The respondents' claim against the third and fourth defendants was based on negligent misrepresentation and was also a claim that was *alternative* to that against the appellants. However, after evidence was led in the court below, no submissions were made *vis-à-vis* this alternative claim. We pause to observe that we find it odd that the respondents had not mounted its alternative claim against the third defendant for breach of warranty of authority either in addition to or as an alternative to the claim in negligent misrepresentation. In the circumstances, however, nothing turns on this. Indeed, we are concerned here only with the appeal by the appellants,

although we will return briefly to the third and fourth defendants at the end of this judgment in relation to the issue of costs.

4 Returning to the salient facts for the purposes of the present appeal, on 6 May 2007, Helene showed the Property to the respondents. Helene asked the first respondent for a cheque for $5,000, being 1% of $500,000 as a deposit. She told the first respondent that she would inform the first appellant of his offer and if the first appellant agreed to his offer to purchase the Property at $500,000, she would give the cheque to the first appellant. The first appellant refused to accept the offer and this was communicated to the respondents on 7 May 2007. Between 7 May 2007 and 10 May 2007, the first respondent negotiated the selling price of the Property with Helene over the telephone. On 11 May 2007, the respondents viewed the Property for the second time and they made a renewed offer of $506,000 for the Property. Helene collected a cheque for $5,060 (1% of the offered purchase price of the Property) from the respondents dated 6 May 2007 and returned them their earlier cheque for $5,000. The parties did not dispute that the cheque for $5,060 was advance payment in consideration for the grant of the option. Helene wrote the following words on the back of the cheque for $5,060:

> 1% Deposit Sale of 26 Upper Serangoon View #04-32 RIO VISTA (S) 534206

5 We now proceed to set out the important e-mail correspondence between the parties; in this regard, there are four key e-mails. The first key e-mail is dated 12 May 2007 from Helene to the first appellant which was sent after Helene had shown the respondents the Property for the second time on 11 May 2007 ("the First E-mail"). It read as follows:[note: 1]

> Dear Mr Joseph
>
> Buyer Mr & Mrs Chiranjeev Singh viewed the apt late this evening again. Similarly buyers also must have confidence that they did buy the right property and at a fair right price. I did my best to convince them about your asking price with the fact that they have been increasing their offer since last 5 days. I told them about your asking price and they finally offered 506K which you did mention that you will accept. I went back to collect the 1% deposit from them I.e. for the sale price of $506K.
>
> Option To Purchase (OTP) will be prepared upon their agreement and also yours. It will be as follow [*sic*] and pls confirm.
>
> * 1% deposit of $5060.00 received (Option money).
>
> * 3 wks to exercise Option I.e. from 14/5 to 4/6/07. Next 9% will be paid to your Lawyer by 4/6/07.
>
> * Completion date is 10 weeks after i.e. 13 August 2007.
>
> Do you have a Solicitor (lawyer) you are using or I can recommend. I need to fill up in the Option. Pls provide me.
>
> Buyers want to have vacant possession i.e. Tenant has to leave upon completion. Base [*sic*] on the dates as mentioned above, it will be just in time of 12 weeks notice for tenant to leave. Total is 13 weeks upon completion of sale.
>
> So, pls write a note to Tenant immediately to give them the 12 weeks notice wef 14 May 2007 or

latest by 21 May 2007 (date of notice). Pls do not delay cos that is your agreement with the Tenant. Completion date is sensitive.

Please address notice to Tenant Mr IKENNA IGWE. I can also plan this notice/letter for you but still need your signature.

I will courier the OPTION to you but need the address immediately. Will do it by Monday, no delay. Or you want to fly in Mon or Tues to settle all the signing. I can help you arrange a lawyer also. Pls advise.

As agreed and with the fact that I have put in my utmost effort to convince the Buyers to increase their offers. I am charging a 1% service fee of the sale price with GST.

Thank you.

You can call me to clarify and confirm all text as written herewith.

Regards

Helene …

6 The second key e-mail is Helene's e-mail to the first appellant on the same day dated 12 May 2007, which referred to a telephone conversation she had with the first appellant after she sent the First E-mail. It reads as follows:[note: 2]

Hi Mr Joseph

Follow up to my telephone call, I hope you are clear of my 1st email. So pls let me know all the info required, date as stated agreeable to coincide the 3 + 10 wks, lawyer's address, contact No. and the lawyer's name to fill into the OPTION.

The 1% deposit of S$5060.00 (cheque) is in your name. I will send it to you together with the OPTION via courier.

I can help you write the notice to Mr Igwe (Hart) re the notice of tenancy. But will courier together with all papers and you need to sign and return this fast. So the notice is 12 weeks as agreed in your tenancy with him.

Pls email address for my courier. This will take up 3 to 4 days if no delay on your side thus EXERCISE OPTION date will be affected if delay. I will do it early on Monday as I have to book the courier service. They will then pick it up by Noon.

Regards

Helene

7 The third key e-mail is the first appellant's e-mail on 13 May 2007 to Helene in response to her earlier e-mails ("the Third E-mail"), and it reads as follows:[note: 3]

Dear Helene,

Understand that at this growing market, the property price is going up including rental market. *However I am taking a decision to proceed to sell the property at this price of S$506K which is reasonably OK* as my minimum expectation was S$510K which we couldn't achieve.

After deducting agent fee and lawyer fee at least I should get minimum of S$500K. I had taken loan of S$250K and also paying heavy interest for the last one year (not much gain), also very less rental of S$1500 which is also not attractive. As discussed through phone I can only agree for an agent fee of S$4000 + tax which is reasonable. Also I can give more business for you through various contacts. Pleas [*sic*] raise the invoice accordingly.

- You can also deposit the cheque to my account POSB-026-XXXXX-X
- Pls send me the draft letter for Mr. Igwe so that I can sign the letter with effect from 14 May 07.
- My address as follows

Joseph Mathew

Keppel FELS Offshore,

Unit No. 3, 8th floor, Prism Tower A,

Mindspace, Malad West,

Mumbai – 400062

India.

- Also appreciate your follow up to find a suitable flat which can demand higher rental value (ex. Summerdale etc) or Any new EC coming up /any good deal.

Thanks for your understanding and support.

Best Regards

Joseph Mathew

[emphasis added; underlining in original]

8 The fourth key e-mail is Helene's reply to the first appellant on the same day in the following manner ("the Fourth E-mail"):[note: 4]

Hi Mr Joseph

Yes I agree with the growing market but different sector with different growing percentage. I do not need to refresh my explanation again. I think it is a genuine offer especially your unit with original condition – no renovation and other factors which I did mention).

Aiya – it's always the poor hard working [*sic*] agent who has to bear and share the story and compensate by lossing [*sic*] their service fee. What can I say.

Okay $4000+GST. But other fee of courier, etc, I have to bill to you accordingly, thank you.

Okay will deposit your 1% Buyer's deposit into your POSB account.

Will courier OPTION and any other papers to you on Monday. Would appreciate you sign immediately and courier back to me to my home address. My address :-

...

What about the lawyer. If you have your own lawyer just email back, I will fill it up.

Otherwise I will have a lawyer to help you out and they will contact you once they have the OPTION.

I will be sending a separate email for Mr Igwe's notice re ending the Tenancy. Pls print it out and sign then fax to my office first. I will give him the copy first. Original copy can be courier back with the Signed copy of OPTION. Then I can give him the original once I receive it.

...

9 Helene contacted the first respondent on 14 May 2007 and told him that the first appellant had agreed to accept his offer of $506,000. On the same day, she sent the Option to Purchase to the first appellant in India by courier. She deposited the first respondent's cheque into the first appellant's POSB account on 16 May 2007.

10 On 18 May 2007, Helene sent three e-mails to the first appellant. The first e-mail, which was sent to the first appellant and copied to the first respondent, was to confirm that the first appellant had received the Option to Purchase and she recorded that the first appellant would be confirming the sale as soon as he could. The next e-mail sent on the same day from Helene to the first appellant after a telephone call from him reads as follows:[note: 5]

Hi Mr Joseph

Just send a mail to you and cc: Mr Singh (the Buyer). As a courtesy, after your call, I rang him to tell him to give you few days to confirm your consideration.

I am informing you as per your instruction regarding the 1% cheque to be deposited to your account (given by you). I have done it already.

Please update me fast. No delay.

Regards Helene

11 The third e-mail on that same day reads as follows:[note: 6]

Dear Joseph

2 emails sent, to be sure you received it. 1st mail cc to Mr Singh. Informing him about your telephone call to me. 2nd mail is to inform you that I have deposited the 1% check into your POSB account as per your request. Done. Pls attend to this matter fast and reply. Are you still forwarding IGWE's letter of notice to me to forward to him. Thanks.

…

Regards Helene

12 Helene's evidence is that, on 18 May 2007, the first respondent was unhappy that the first appellant had remained silent and had not given his confirmation on the sale. She therefore sent an e-mail dated 19 May 2007 to the first appellant, informing him that the first respondent was "not very happy of what is going on – holding on his purchase and no confirmation"; she added that "[The first respondent] is not happy and he feels that you have accepted his offer thus he paid the 1% Option fee deposit. So what other consideration. But I told [the first respondent] it is not the price issue as price offered has been accepted by you."[note: 7] On the same day, Helene sent the first appellant another e-mail to inform him that she needed "an answer fast" and wrote further that "[the first respondent's] check is already bank in and cleared. and [*sic*] this is your instruction. I did not foresee that you will call me back for not signing the OPTION and accepting the deal in a way, due to reasons you told me. Or else I would not bank the check for you".[note: 8] We should note, parenthetically, that the first respondent's concern at this particular point in time was unnecessary in the light of the legal position (which is set out below at [19]–[22]), although it presumably had a bearing on his concern in relation to his (and the second respondent's) financial arrangements (see also the next paragraph).

13 On 20 May 2007, Helene wrote an e-mail to the first respondent and copied the same to the first appellant, stating that the first appellant would be meeting with his directors by 22 May 2007 or at the latest by 23 May 2003 regarding his company reorganisation, at which time he would be able to give the first respondent a confirmed answer regarding his sale of the Property. The first respondent replied in an e-mail to Helene and the first appellant on 22 May 2007 stating:[note: 9]

Dear Mr. Joseph/ Helen [*sic*],

As per our last discussions - I am hoping that this can be closed today and I can get the Signed option to purchase to enable me to start talking to the banks

Best regards,

Chiranjeev Singh

14 This was followed up by Helene's e-mail to the first appellant and copied to the first respondent on the same day asking him to let her have his confirmation soon because the first respondent required the Option to Purchase to confirm his purchase before the bank could act further. The first appellant replied to Helene and the first respondent on the same day informing them that he was cancelling his plan to sell the apartment. He added as follows: "Understand that Ms. Helene has already deposited the advance cheque to my account. Therefore, the same cheque amount ($5060) will be handed over to Helene during my visit to Singapore on 26th May 07."[note: 10] On 23 May 2007, Helene sent an e-mail to the first respondent (copied to the first appellant) "to confirm that [the first appellant had] to shelf the plan of selling his apt" and that the first appellant "[would] return [the first respondent's] deposit (1%) in cheque when he [arrived] in Singapore on 26th May [2007]".[note: 11]

15 On 26 May 2007, the first appellant and first respondent met at the Property by the swimming pool along with Helene. The first appellant said that he had to cancel his plan to sell the Property

because he might have to come back to Singapore in the near future. The first respondent stated that if the first appellant was sure of coming back to Singapore, he was prepared to let the deal go, but if that was not the case then he should proceed to complete the sale of the Property. At the same meeting and from then onwards, the first respondent refused to accept a cheque for $5,060 from the first appellant (via Helene).

16 On 31 May 2007, the first respondent wrote an e-mail to the first appellant to inform him that he would be proceeding with legal action if the first appellant did not agree by 4 June 2007 to complete the deal. The first appellant replied to the first respondent and Helene on 5 June 2007 reaffirming his position by reference to their discussion on 25 May 2007. The dispute between the appellants and respondents proceeded to trial with the hearing taking place from 23 to 24 June 2008. The trial judge ("the Judge") held, in *Singh Chiranjeev v Joseph Mathew* [2008] SGHC 222 ("the Judgment"), in favour of the respondents; in particular, he ordered that:

(a) the appellants jointly sign and grant the Option to Purchase for the respondents to purchase the Property for the price of $506,000;

(b) the appellants pay damages in the sum of $15,510.05 to the respondents;

(c) if the appellants should refuse or neglect to sign the Option, the Registrar of the Supreme Court shall have the power to sign and grant the Option to the respondents on behalf of the appellants;

(d) upon the respondents exercising the Option to Purchase the property, the appellants are to pay the said sum of $15,510.05 to the respondents;

(e) the appellants are to pay the respondents their costs and disbursements, with such costs and disbursements to be agreed or taxed; and

(f) the appellants are to pay Helene and Dennis Wee Properties their costs and disbursements, with such costs and disbursements to be agreed or taxed.

17 We dismissed the appeal against the Judge's decision and now give the detailed grounds for our decision.

The issues

18 There were three main issues before this court:

(a) Whether there was a binding contract between the appellants and the respondents for the grant of an option for the sale of the Property.

(b) If there was a binding contract between the appellants and the respondents, whether the requirements in s 6(*d*) of the Civil Law Act (Cap 43, 1988 Rev Ed) ("s 6(*d*)") were satisfied.

(c) If the requirements in s 6(*d*) were not satisfied, whether the contract between the appellants and the respondents was nevertheless enforceable on the ground of part performance.

Was there a binding contract between the appellants and respondents for the grant of an option for the sale of the Property?

19 One of the key issues before this court was whether the parties had entered into a valid

contract for the grant of an option by the appellants to the respondents for the sale of the Property (see above at [18] as well as the Judgment at [29]). An agreement to grant an option can be enforced if all the essential terms have been agreed upon and the requirement that the terms be evidenced in writing has been satisfied (we will consider the relevant statutory requirements in the next part of this judgment). In this regard, the relevant e-mail correspondence (centring on the four key e-mails) is of the first importance. This has, in fact, been set out above (at [5]–[8]). However, counsel for the appellants, Mr Leslie Netto, argued that the appellants' understanding was that they were only to be bound upon *signing* the Option to Purchase. If the appellants were arguing that their signatures on the Option to Purchase were necessary as a *condition precedent* to a binding agreement arising between them and the respondents for the grant of an option, it is clear (in particular, from the Third E-mail (reproduced above at [7]), and discussed in the next paragraph) that this was *not* the case. Indeed, the need to courier the Option to Purchase to the appellants for their signature was merely *a necessary part of the process of giving effect to a binding agreement (to grant an option) that had already been entered into between the appellants and the respondents*. Let us elaborate on the reasons why we found that a binding agreement to grant an option had indeed been entered into between the appellants and the respondents.

20 There is clear evidence, based on the e-mail correspondence between Helene and the first appellant, that the parties had indeed entered into a valid contract for the grant of an option for the sale of the Property. In particular, the Third E-mail (reproduced above at [7]) from the first appellant to Helene (as his and the second appellant's agent) is especially instructive (having regard to the fact that there had been a clear offer by the respondents to the appellants (through Helene as their agent) to purchase the Property for $506,000). Contrary to what the appellants had argued before this court, this represented the *end-point* (and *not* the initial stage or trigger-point) of the contractual process. We pause to note that although the second appellant did not communicate her acceptance of the offer to the respondents directly, the first appellant was acting as her agent as implied from the second appellant's conduct. The second appellant in her Affidavit of Evidence-in-Chief admitted that she left it to the first appellant to handle the matter of finding a buyer. She even reminded the first appellant to check thoroughly before sending any mail to Helene. What she did not give the first appellant authority to do was to sign the option on her behalf. However, as already mentioned, the issue in this appeal is whether there was a binding contract to grant an option for the sale of the Property.

Returning to the issue as to whether or not there was a binding contract to grant an option for the sale of the Property, in the Third E-mail, the first appellant stated that he was "taking a decision to proceed to sell the property at this price of S$506K". The first appellant was also aware of all the other terms relating to the option to be granted which were in fact contained in the First E-mail (reproduced above at [5]). In this particular e-mail (*viz*, the Third E-mail), he instructed Helene to deposit the 1% cheque from the respondents into his bank account (Helene duly noted, *inter alia*, this instruction in the Fourth E-mail and deposited this cheque into the first appellant's bank account accordingly).

21 In the circumstances, there had not only been the fulfilment of the requisite legal elements of offer and acceptance but there had also clearly been sufficient consideration furnished by the respondents to the appellants as well in so far as the promise by the latter to grant an option to purchase the Property was concerned (and, on the current status and possible future of the doctrine of consideration, see generally the decision of this court in *Gay Choon Ing v Loh Sze Ti Terence Peter* [2009] 2 SLR 332). In this regard, we agree with the Judge's conclusion that the contract to grant an option for the sale for the Property was binding between the parties when (at the latest) the 1% cheque had been deposited into the first appellant's bank account simply because the requirements for the formation of a valid contract (offer and acceptance as well as consideration)

would have been fulfilled at this particular point in time. Needless to say, the final requirement relating to the formation of a valid and binding contract, *viz*, an intention to create legal relations, was also present at this particular point in time.

22 The legal result, in our view, was clear: The first appellant and the second appellant (on whose behalf, as the Judge (correctly, in our view) found, the first appellant had been acting (see the Judgment at [25] and above at [20])) had entered into a legally valid as well as binding contract with the respondents to the effect that an option would be granted to the latter to purchase the Property. The terms of the option to be granted were clear as well as unambiguous, and the (subsequent) signing of the option was a mere formality. Not surprisingly, therefore, the Judge in fact ordered the appellants to grant an option to the respondents to purchase the Property for the stated price of $506,000 (and that, if the appellants refused to do so, the Registrar should have the power to sign and grant the option to the respondents on the appellants' behalf (see above at [16] as well as the Judgment at [42])). We understand, in fact, that completion of the sale and purchase of the Property was (at the time of the hearing before this court) imminent. Nevertheless, this was not an end to the matter. In order to be enforceable by the respondents, the contract had to comply with the statutory formalities pursuant to s 6(*d*), which reads as follows:

> **Contracts which must be evidenced in writing**
>
> **6**. No action shall be brought against —
>
> …
>
> (*d*) any person upon any contract for the sale or other disposition of immovable property, or any interest in such property;
>
> …
>
> unless the promise or agreement upon which such action is brought, or some memorandum or note thereof, is in writing and signed by the party to be charged therewith or some other person lawfully authorised by him.

23 Before we turn to consider this particular issue, it should be noted that s 6(*d*) is applicable in the present appeal because an option creates in favour of the option holder an equitable interest in the land (see the decision of this court in *Ong Chay Tong & Sons (Pte) Ltd v Ong Hoo Eng* [2009] 1 SLR 305 at [75]; the Singapore High Court decisions of *Eng Bee Properties Pte Ltd v Lee Foong Fatt* [1993] 3 SLR 837 at [26] and *Ho Seek Yueng Novel v J & V Development Pte Ltd* [2006] 2 SLR 742 at [52]; as well as Martin Dray and Adam Rosenthal, *Barnsley's Land Options* (Sweet & Maxwell, 4th Ed, 2005) at pp 51–53).

Were the requirements under section 6(*d*) of the Civil Law Act satisfied?

The applicable principles

24 Section 6(*d*) is, of course, an important and well-known one, having its genesis in s 4 of the UK Statute of Frauds 1677 (Cap 3) ("the 1677 UK Act") which was later re-enacted (in the UK) in substantially the same form in s 40 of the UK Law of Property Act 1925 (Cap 20) ("the 1925 UK Act") (and for the legal position in Singapore prior to the introduction of s 6(*d*) (during which time, in essence, s 4 of the 1677 UK Act applied), see *Cheshire, Fifoot and Furmston's Law of Contract* (2nd Singapore and Malaysian Ed, Butterworths Asia, 1998 at p 356)). It should be noted that the

current legal regime in the UK context is (with effect from 27 September 1989) no longer the same and (unlike the Singapore position) is governed by the UK Law of Property (Miscellaneous Provisions) Act 1989 (Cap 34) ("the 1989 UK Act"), in which, *inter alia*, contracts for the sale of land or other disposition of an interest in land must *themselves* be in writing (see s 2 of the 1989 UK Act).

25 As can be seen, s 6(*d*) (reproduced above at [22]) comprises a number of requirements.

26 In so far as the *specific contents* of a *sufficient* note or memorandum within the meaning of s 6(*d*) are concerned, the following observations by Prof Furmston in *Cheshire, Fifoot and Furmston's Law of Contract* (Oxford University Press, 15th Ed, 2007) ("*Cheshire, Fifoot and Furmston*") at p 271 are apposite:

> The agreement itself need not be in writing. A 'note or memorandum' of it is sufficient, provided that it contains *all the material terms* of the contract. Such facts as the names or adequate identification of *the parties*, the description of *the subject matter*, the nature of *the consideration*, comprise what may be called the minimum requirements. [emphasis added]

Reference may also be made to Kevin Gray and Susan Francis Gray, *Elements of Land Law* (Oxford University Press, 5th Ed, 2009) ("*Gray and Gray*") at para 8.1.26 as well as G H Treitel, *The Law of Contract* (Sweet & Maxwell, 7th Ed, 1987) ("*Treitel*") at p 140 (it should be noted that later editions of this last-mentioned work consider only the 1989 UK Act (as to which, see above at [24])). It should be noted that Prof Treitel also observes, as follows (see *Treitel* at pp 141–142):

> The memorandum need not be prepared for the purpose of satisfying the statutory requirements of written evidence. A writing which comes into existence before an action is brought on the contract will suffice so long as it acknowledges or recognises the existence of the contract.

27 Section 6(*d*) can also be satisfied by a *joinder of several documents*. As Prof Furmston observes (*Cheshire, Fifoot and Furmston* ([26] *supra*) at p 274):

> The framers of the Statute of Frauds clearly contemplated the inclusion of all the contractual terms in a single document. *But here again the judges, in their anxiety to protect honest intentions from the undue pressure of technicality, have departed widely from the original severity of the statute. The reports reveal a progressive laxity of interpretation*. [emphasis added]

Reference may also be made to *Treitel* ([26] *supra*) at pp 142–143; in particular, the learned author observes as follows (at p 142):

> Where no single document fully records the transaction it may be possible to produce a sufficient memorandum by joining together two or more documents.
>
> Joinder is, in the first place, possible where one document expressly or impliedly *refers* to another transaction. If that transaction is also recorded in a document, and that document was in existence when the first was signed the two documents can be joined.
>
> Even where the first document contains no reference to the second, the two can be joined if, on placing them side by side, it becomes obvious without the aid of oral evidence that they are connected. …
>
> But if the document signed by the defendant contains no reference to another document or

transaction, and if the connection between the two documents can only be established by oral evidence, joinder is not permitted.

[emphasis in original]

28 Next, and more specifically, there is the important requirement in s 6(*d*) that the note or memorandum be "*in writing*".

29 Yet another requirement in s 6(*d*) is that the note or memorandum must be "*signed*". In this regard, the observations by Prof Furmston, once again, are apposite (see *Cheshire, Fifoot and Furmston* ([26] *supra*) at p 273):

> The word 'signature' has been *very loosely interpreted*. In the first place, it need not be a subscription; that is to say, it need not be at the foot of the memorandum, but may appear in any part of it, from the beginning to the end. *In the second place, it need not, in the popular sense of the word, be a 'signature' at all. A printed slip may suffice, if it contains the name of the defendant*. The relaxation of the statutory language was well established a hundred years ago and offers a striking instance of the way in which legislation may be overlaid by judicial precedent. [emphasis added]

Reference may also be made to *Treitel* ([26] *supra*) at p 141 as well as to the following observations by Prof Pettit (see P H Pettit, "Farewell Section 40" [1989] Conv 431 at 439 ("Pettit")):

> The courts have been at their most generous in interpreting the meaning of a signature under section 40 [of the 1925 UK Act]. In *Caton* v. *Caton* [(1867) LR 2 HL 127] Lord Westbury pointed out that the section required a signing and not a subscribing and accordingly did not need to be at the end or any particular place in the document. *Signature in the popular sense of putting pen to paper was not necessary – typewriting or print might suffice. What was required was that the person "signing" had to have shown in some way that he recognised the document as an expression of the contract*. In *Caton* v. *Caton* Lord Chelmsford said that the signature must be inserted so as to have the effect of "authenticating the instrument" or "so as to govern the whole agreement" or "so as to govern what follows." [emphasis added]

30 A relevant (and important) decision in the local context with regard to, *inter alia*, both these last-mentioned requirements (*viz*, relating to writing *and* signature (and which was therefore, not surprisingly, relied upon by the Judge in the court below)) is the Singapore High Court decision of *SM Integrated Transware Pte Ltd v Schenker Singapore (Pte) Ltd* [2005] 2 SLR 651 ("*SM Integrated*"). This case endorsed the general principles noted above in respect of both the basic requirements in relation to the specific contents of a sufficient note or memorandum within the meaning of s 6(*d*) (see above at [26]) as well as the joinder of documents (see above at [27]) (see generally *SM Integrated* at [72] and [73], respectively). In addition, one of the issues which arose in this case was whether because the Electronic Transactions Act (Cap 88, 1999 Rev Ed) ("ETA") did not apply to the contract concerned (pursuant to the exclusion under s 4(1)(*d*) of the ETA), the e-mail correspondence concerned could not be considered to be "in writing" for the purposes of s 6(*d*); and (by the same token) whether (as another issue) such correspondence could not constitute a sufficient "signature" for the purposes of the same provision if the proposition just mentioned holds good. If, of course, the ETA was applicable, there would have been no problems fulfilling the requirements under s 6(*d*) inasmuch as the ETA enables electronic records and signatures to satisfy the legal requirements for both writing and signature.

31 Judith Prakash J held, in *SM Integrated* ([30] *supra*), that e-mail correspondence could indeed

be considered to be "in writing" and could also satisfy the requirements for a "signature" for the purposes of section 6(*d*); in particular, the learned judge observed thus (at [76]):

> Whilst the statute [*viz*, the ETA] does make it plain that electronic records will be adequate to satisfy legal rules relating to writing and signature in most commercial matters, its conservative approach in not extending these provisions to contractual matters falling within s 6 of the CLA [Civil Law Act] does not mean that, as a matter of law, electronic means of communication cannot satisfy the requirements of s 6. The ETA does not change the common law position in relation to s 6 of the CLA. Whether an e-mail can satisfy the requirements for writing and signature found in that provision will be decided by construing s 6(d) of the CLA itself and not by blindly relying on s 4(1)(d) of the ETA. This is a view that has supporters. As part of their review of the ETA, on 25 June 2004, the Infocomm Development Authority of Singapore and the Attorney-General's Chambers released a public consultation paper dealing with the exclusions under s 4 of the ETA. Paragraphs 2.1.3 and 2.1.5 of the consultation paper state:
>
> > 2.1.3 The effect of section 4 is that, in such excluded transactions, one cannot rely on the provisions in the ETA that enable electronic records and signatures to satisfy legal requirements for writing and signature. For example, sections 6 and 7 of the Civil Law Act impose legal requirements for writing and signature in the case of certain land transactions and for trusts respectively.
> >
> > 2.1.5 **Even where legal form requirements apply, exclusion under section 4 of the ETA may not necessarily prevent such transactions from being done electronically**. Electronic records or signatures could still possibly satisfy the legal requirements without reliance on the provisions of the ETA. It would be a matter for legal interpretation whether an electronic form satisfies a particular legal requirement for writing or signature. Some legislative provisions, by reason of their detailed specifications, would clearly exclude the use of electronic means even if the ETA were applicable. ...
>
> [emphasis in bold in original]

32 Indeed, in addition to the views expressed in the preceding paragraph, it is imperative to have recourse to first principles – in particular, the *purpose* for which s 4 of the ETA was enacted (see also generally s 9A of the Interpretation Act (Cap 1, 2002 Rev Ed), which embodies, of course, the purposive approach which now governs the interpretation of statutes in the Singapore context (see, further, the Singapore High Court decision of *PP v Low Kok Heng* [2007] 4 SLR 183)). The purpose of s 4 of the ETA is in fact referred to in the views expressed in the consultation paper entitled *Joint IDA-AGC Review of Electronic Transactions Act Stage II: Exclusions Under Section 4 of the ETA (Consultation Paper)* (LRRD No 2/2004), which views were cited in *SM Integrated* (and which are to be found in the preceding paragraph). The following views expressed by the Minister for Trade and Industry, Mr Lee Yock Suan, during the Second Reading of the Electronic Transactions Bill should also be noted (see *Singapore Parliamentary Debates, Official Report* (29 June 1998) vol 69 at col 254):

> As e-commerce is still in an early stage of development, we foresee a period of time before the international scene settles down. As such, the provisions of the Bill should not at this time go so far as to require recognition of electronic signatures and documents in place of physical forms entirely. There are certain classes of documents or transactions that may not be ready for such an immediate change. Hence, insofar as Part II and Part IV of the Bill are concerned, it is provided in clause 4 that in certain matters such as wills and documents of title, the electronic records, signatures and contract provisions do not apply. *This does not, however, prevent the courts from recognising the use of electronic documents in these matters on a case-by-case*

basis. Eventually, when public confidence in electronic transactions grows, the Bill may be widened to include such documents. [emphasis added]

33 As a passing observation, however, it might be argued that the provisions of the ETA are not exhaustive in the first instance and that there was perhaps no pressing reason, therefore, for the exceptions contained in s 4 of the ETA to be enacted in the first place. For example, s 6 of the ETA states that "*[f]or the avoidance of doubt*, it is declared that information *shall not be denied legal effect, validity or enforceability solely on the ground that* it is in the form of an electronic record" [emphasis added]. Section 11 of the ETA states as follows:

Formation and validity of contracts

11. —(1) *For the avoidance of doubt*, it is declared that in the context of the formation of contracts, unless otherwise agreed by the parties, an offer and the acceptance of an offer *may be expressed* by means of electronic records.

(2) Where an electronic record is used in the formation of a contract, that contract *shall not be denied validity or enforceability on the sole ground that* an electronic record was used for that purpose.

[emphasis added]

34 Further, s 12 of the ETA reads as follows:

Effectiveness between parties

12. As between the originator and the addressee of an electronic record, a declaration of intent or other statement *shall not be denied legal effect, validity or enforceability solely on the ground that* it is in the form of an electronic record.

[emphasis added]

35 It will be seen that the provisions just cited are by no means exhaustive and are intended to ensure that electronic records do not become "legal obstacles" to the validity and effectiveness *vis-à-vis* the formation of contracts or actions associated therewith.

36 More pertinently, in the context of the present case, s 7 of the ETA ("s 7") states as follows:

Where a rule of law requires information to be written, in writing, to be presented in writing or provides for certain consequences if it is not, an electronic record *satisfies* that rule of law *if the information contained therein is accessible so as to be usable for subsequent reference*. [emphasis added]

37 Whilst s 7 of the ETA does suggest that an electronic record (which falls within the purview of the ETA) would have otherwise satisfied the requirements under s 6(*d*), there is nothing in that particular provision which suggests that if s 7 of the ETA is not applicable (in this instance because of the exception contained in s 4 of the ETA), an electronic record is thereby irrelevant in so far as the satisfaction of the requirements under s 6(*d*) is concerned. Indeed, there is nothing in s 7 of the ETA to suggest that the requirements under s 6(*d*) could not be satisfied by *other* means (whether electronic or otherwise). All that s 7 of the ETA states is that, *if* the ETA *is* applicable (which, however, is not the case here), then an electronic record *would satisfy*, *inter alia*, the requirements

under s 6(*d*) "if the information contained therein is accessible so as to be usable for subsequent reference". All this merely buttresses the conclusion which we have already arrived at to the effect that electronic records in general and the e-mails in this case in particular *are* relevant, notwithstanding the fact that Parts II and IV of the ETA are not applicable to contracts such as those involved in the present appeal.

38 Indeed, the recognition of electronic records (including e-mails) as satisfying the requirement of writing under s 6(*d*) is, in our view, entirely consistent with the purpose underlying that particular provision itself. The (general) purpose of s 6(*d*) itself, as already noted earlier (at [24]), can be traced back to its English antecedents originating in s 4 of the 1677 UK Act. In this regard, it is important to note that s 4 of the 1677 UK Act was enacted (as its preamble states) "[f]or Prevention of many fraudulent Practices, which are commonly endeavoured to be upheld by Perjury and Subornation of Perjury; …". Indeed, after referring to this preamble, Lord Simon of Glaisdale, in the House of Lords decision of *Steadman v Steadman* [1976] AC 536 ("*Steadman*"), observed thus (at 558):

> The "mischief" for which the statute was providing a remedy was, therefore, that some transactions were being conducted orally in such a way that important interests were liable to be adversely affected by a mode of operation that invited forensic mendacity. The remedy was to require some greater formality in the record of such transaction than mere word of mouth if it was to be enforced. The continuing need for such a remedy for such a mischief was apparently recognised as subsisting when the law of landed property was recast in 1925.

As Prakash J aptly put it in *SM Integrated* ([30] *supra* at [80]):

> The aim of the Statute of Frauds was to help protect people and their property against fraud and sharp practice by legislating that certain types of contracts could not be enforced unless there was written evidence of their existence and their terms. Recognising electronic correspondence as being "writing" for the purpose of s 6(d) of the CLA, would be entirely consonant with the aim of the CLA and its predecessor, the Statute of Frauds, as long as the existence of the writing can be proved.

We also agree with the following observations of the learned judge (at [85]):

> I therefore find that the e-mail correspondence which constituted the memorandum of the contract (as specified in [73] above) was "in writing" for the purpose of s 6(d) … I am pleased to be able to come to this conclusion which I think is dictated by both justice and common sense since so much business is now negotiated by electronic means rather than by letters written on paper and, in the future, the proportion of business done electronically will only increase. I think that the ordinary man in the street, who not only conducts business via computer but who is being encouraged to use technology in all areas of life and to become more and more technologically proficient, would be amazed to find that the law would not recognise a contract he had made electronically even though all the terms of the contract had been agreed and the parties were perfectly *ad idem*. If parties who negotiate electronically do not wish to be bound until a formal document is signed, they can have recourse to the "subject to contract" endorsement that can easily be added to their e-mail correspondence.

39 Prakash J also endorsed the more flexible approach adopted above as to what constitutes a sufficient "signature" within the meaning of s 6(*d*) (see [31] above). After considering a couple of US decisions (*viz*, *Shattuck v Klotzbach* 14 Mass L Rep 360 (2001) and *Cloud Corporation v Hasbro, Inc* 314 F (3d) 289 (2002)), the learned judge expressed the following views with regard to the approach

to be adopted in the context of e-mails (see *SM Integrated* ([30] *supra* at [91]–[93])):

> 91 I am satisfied that the common law does not require handwritten signatures for the purpose of satisfying the signature requirements of s 6(d) of the CLA. A typewritten or printed form is sufficient. In my view, no real distinction can be drawn between a typewritten form and a signature that has been typed onto an e-mail and forwarded with the e-mail to the intended recipient of that message.
>
> 92 One minor difficulty in this case is that Mr Tan did not append his name at the bottom of any of his e-mail messages. All his e-mail messages, however, including the message dated 4 February 2003 and sent to Ms Yong, had, near the start thereof, a line reading "**From**: "Tan Tian Tye" <tian-tye.tan @schenker.com>". Mr Tan confirmed in court that he had sent out those messages. There is no doubt that at the time he sent them out, he intended the recipients of the various messages to know that they had come from him. Despite that, he did not find it necessary to identify himself as the sender by appending his name at the end of any of the e-mails whether the messages were sent to his colleagues or to third parties like Mr Heng. I can only infer that his omission to type in his name was due to his knowledge that his name appeared at the head of every message next to his e-mail address so clearly that there could be no doubt that he was intended to be identified as the sender of such message. Therefore, I hold that the signature requirement of s 6(d) is satisfied by the inscription of Mr Tan's name next to his e-mail address at the top of the e-mail of 4 February 2003.
>
> 93 I recognise that one person's e-mail facility can, in some cases, be accessed by a third party who can then send out messages which purport to be authentic messages from the owner of that e-mail address. If that happened, the owner of the address would be entitled to dispute the authenticity of the messages purportedly sent by him. That is not the case here. Further, such dispute would be as to the person who initiated the message and would not be decided on the basis of whether the message bore a signature.
>
> [emphasis in bold in original]

40 We agree with the reasoning set out in the preceding paragraph, especially bearing in mind the fact that the requirement of a signature under s 6(*d*) is a flexible one provided that it is clear that the document (or documents) concerned emanated from the person (or persons) "signing" them.

Our decision

41 It was clear, in our view, that all the requirements under s 6(*d*) were in fact satisfied in the present case.

42 In so far as the specific contents of the note or memorandum were concerned, the parties, the price and the description of the subject matter (*viz*, the Property) were all clearly stated. In this last-mentioned regard, we agree with the Judge that "the Property was fully identified in [Helene's] writing on the back of the 1% check" (see the Judgment at [34]).

43 That the relevant e-mails could be viewed together (as the Judge did) by way of a joinder of several documents is also clear.

44 Further, the e-mails noted at [5]–[8] above clearly satisfied the requirement that the note or memorandum be "in writing" within the meaning of s 6(*d*).

45 Finally, the requirement of a signature under s 6(*d*) had also been satisfied on the facts of the present case; that this was so was, in fact, clear on the face of the relevant e-mails themselves.

46 This was, in fact, a very straightforward case inasmuch as all the requirements under s 6(*d*) were clearly satisfied on the facts.

The doctrine of part performance

Is the doctrine of part performance part of Singapore law?

47 The Judge also held that, even if s 6(*d*) had not been satisfied, the doctrine of part performance ("part performance") would nevertheless apply in the respondents' favour (see the Judgment at [39]–[40]).

48 Part performance is, of course, an exception to the requirements under s 6(*d*). It is equitable in origin and was intended to prevent, *inter alia*, this very statutory provision from *itself* being utilised as an engine of fraud (and see, *eg*, *Steadman* ([38] *supra*) at 558 as well as the oft cited observations of Farwell J in the English High Court decision of *Broughton v Snook* [1938] 1 Ch 505 at 513). Indeed, Lord Hoffmann, in the House of Lords decision of *Actionstrength Ltd (t/a Vital Resources) v International Glass Engineering IN.GL.EN SpA* [2003] 2 AC 541 ("*Actionstrength*"), observed (at [22]) that part performance was introduced "[v]ery soon after" the 1677 UK Act.

49 Part performance has, in fact, been assumed to apply in the local context (see, *eg*, the Singapore High Court decision of *Midlink Development Pte Ltd v The Stansfield Group Pte Ltd* [2004] 4 SLR 258 at [66]–[67]). However, the precise reasons why the doctrine is applicable in the local context have never been canvassed in detail, despite the fact that one writer has argued that the doctrine has been *abolished* in the light of s 6(*d*) (see Barry C Crown, "Cutting the Apron Strings: The Localisation of Singapore's Land and Trust Law" [1995] SJLS 75 at 77–81 ("Crown") (a view that was reiterated recently by the same author in "Back to Basics: Indefeasibility of Title under the Torrens System" [2007] SJLS 117 at 125); and *cf* Tan Sook Yee, *Principles of Singapore Land Law* (Butterworths Asia, 2nd Ed, 2001) at p 321). Briefly put, the learned author argued that, by re-enacting s 4 of the 1677 UK Act as s 6(*d*) without expressly preserving part performance, the legislature had intended to abolish it. In this regard, when s 4 of the 1677 UK Act was re-enacted as s 40 of the 1925 UK Act, a provision expressly preserving part performance was included in s 40(2) of the 1925 UK Act, which read as follows:

> *This section* applies to contracts whether made before or after the commencement of this Act and *does not affect the law relating to part performance*, or sale by the court. [emphasis added]

50 Before proceeding to consider the learned author's argument, a preliminary observation is in order: Admittedly, the mere *factual presence* of local decisions considering and/or applying part performance does not constitute, *ipso facto*, a *normative justification* for the doctrine itself. However, the presence of such decisions also cannot be ignored as it would not be unreasonable to presume that the courts must have accepted that there was a legal basis for the recognition of the doctrine of part performance in the Singapore context – a basis which we will endeavour to articulate expressly in the present judgment.

51 Part performance has, in fact, been subject to criticism – in the main, that it generates uncertainty. This is due, in no small measure, to the House of Lords decision in *Steadman* ([38] *supra*), which led to a relaxation of the doctrine (see also *Gray and Gray* ([26] *supra*) at para 8.1.40). However (and turning to the argument by Crown (above at [49])), the key issue, in our

view, is whether or not part performance (otherwise part of Singapore law pursuant to the general reception of English law and (now) s 3(1) of the Application of English Law Act (Cap 7A, 1994 Rev Ed) ("the AELA")) is *consistent* with s 6(*d*). It is clear that s 6(*d*) *did not expressly abolish* part performance. Could it be argued that part performance was abolished because it had not (as Crown argues (above at [49])) been expressly preserved by a local equivalent of s 40(2) of the 1925 UK Act? There are several possibilities. One is that there was an omission on the part of the draftsperson. The other is that there was a conscious decision on the part of the draftsperson *not* to include a local equivalent of s 40(2) of the 1925 UK Act. Even if we assume that the latter is correct, we need to inquire what was, in fact, the *purpose* behind the enactment of s 40(2) of the 1925 UK Act in the *context* of the legal position then existing in the UK itself.

52 The legal position in the UK as at 1925 (and prior to the enactment of s 40 of the 1925 UK Act) encompassed the presence of both s 4 of the 1677 UK Act (which the 1925 UK Act repealed and re-enacted as s 40 of the same) *and* part performance. Leaving aside s 40(2) of the 1925 UK Act for the moment, could it be argued that part performance was *inconsistent* with s 4 of the 1677 UK Act? This is an important question because if there was *no* inconsistency, then s 40(2) of the 1925 UK Act should *not* be construed as having been enacted in order to *legitimise* what was *originally unlawful*. It has, in fact, been observed that part performance was "expressly preserved" by s 40(2) of the 1925 UK Act (see, *eg*, *Actionstrength* ([48] *supra*) at [3] as well as the Hong Kong Privy Council decision of *Wu Koon Tai v Wu Yau Loi* [1997] AC 179 at 187 and 188 (where only the word "preserves" is used)). This observation is consistent with the assumption that part performance was *not* viewed as being inconsistent with s 4 of the 1677 UK Act. This view must surely be correct. Part performance was developed as *a judicial exception* to s 4 of the 1677 UK Act (see also I C F Spry, *The Principles of Equitable Remedies: Specific Performance, Injunctions, Rectification and Equitable Damages* (Sweet & Maxwell, 7th Ed, 2007) ("Spry") at p 254 as well as Pettit ([29] *supra*) at 441 (where it was observed that "[a]lthough the Court of Chancery was bound by statute, it nevertheless regarded itself as having the power to intervene where the strict application of the statute would actually operate to promote fraud rather than to prevent it"); but *cf* Crown ([49] *supra*) at 77–78).

53 As a point of general principle, exceptions in the law are, in fact, common and furnish the requisite flexibility which ensures that the rule concerned is not ossified, hence leading to injustice. Put simply, exceptions are *not*, *ex hypothesi*, *contradictions* of the rule concerned. However, it is admitted that there is the danger that an exception could possibly "swallow up" (and thereby replace) the rule concerned. Although, as we have seen, part performance does engender some measure of uncertainty, there is *no* evidence that it *contradicts* s 4 of the 1677 UK Act. Neither could part performance be said to have "swallowed up" or replaced s 4 of the 1677 UK Act. Indeed, both the situations just mentioned would be legally unacceptable; if there is an inconsistency between a judicial rule and a statutory provision, the latter must prevail. Although it has been argued (see Crown ([49] *supra* at 77–78) that the courts had ignored the clear provisions of s 4 of the 1677 UK Act in developing the doctrine of part performance, the real issue centres on what the legal position was (in so far as *the UK legislature* was concerned) at the time s 40 of the 1925 UK Act was enacted.

54 In our view, the legal position at the time s 40 of the 1925 UK Act was enacted was that *part performance was an established part of the legal landscape and was an exception to s 4 of the 1677 UK Act (and not in derogation of it in any way)*. Indeed, even Lord Blackburn (who was clearly not enamoured of the doctrine) had nevertheless to admit (in the House of Lords decision of *Maddison v Alderson* (1883) LR 8 App Cas 467 at 489), as follows:

> Notwithstanding the very high authority of those who have decided those cases [with respect to part performance], I should not hesitate if it was res integra in refusing to interpolate such words, or put such a construction on the statute. But it is not res integra and I think that the

> cases are so numerous that this anomaly, if as I think it is an anomaly, must be taken as to some extent at least established. If it was originally an error it is now I think communis error and so makes law.

We also note that there is nothing in the language of s 40(2) of the 1925 UK Act (reproduced above at [49]) which suggests otherwise, *viz*, that part performance was considered to be unlawful. On the contrary, the language of this provision suggests the precise *opposite*, *viz*, that part performance was – and continued to be – part of the legal landscape.

55 In our view, s 40(2) of the 1925 UK Act was *merely declaratory* in nature inasmuch as it clarified by way of a declaration that part performance continued to be part of the law (in tandem with s 40 of the 1925 UK Act).

56 Such an approach is, in fact, consistent with the views of Lord Simon in *Steadman* ([38] *supra*) at 558 to the effect that part performance and its underlying rationale had "*received statutory recognition* … in section 40(2) of the [UK] Law of Property Act 1925" [emphasis added]. This particular terminology is, with respect, even more appropriate than the phrase "expressly preserved" (see above at [52]) as it accurately reflects the legal state of play at the time the 1925 UK Act in general and s 40 thereof in particular were promulgated. Looked at in this light, s 40(2) of the 1925 UK Act was *neutral* in nature: It neither added anything to nor subtracted anything from the existing law and was, at best, enacted *ex abundanti cautela*.

57 In the circumstances, the omission of a local equivalent of s 40(2) of the 1925 UK Act is, in our view, neutral at best. It certainly did *not*, in our view, signal an intention on the part of the local legislature to *abolish* part performance. Indeed, such an intention *was* manifested by the UK legislature (albeit in a *completely different context*) only with the promulgation of the 1989 UK Act when (as noted above at [24]), contracts for the sale of land or the disposition of an interest in land had to be *in writing*, and not (unlike s 4 of the 1677 UK Act, s 40 of the 1925 UK Act as well as the present Singapore position) merely evidenced by writing. More specifically, s 2(8) of the 1989 UK Act stated that "[s]ection 40 of the [UK] Law of Property Act 1925 (which is superseded by this section) shall cease to have effect". That meant, of course, that s 40(2) of the 1925 UK Act was *abolished* and, with that, part performance. *Furthermore*, and from a substantive perspective, since contracts for the sale of land or other disposition of an interest in land had to be *in writing* (pursuant to s 2 of the 1989 UK Act), it was *conceptually as well as logically inconsistent* for part performance to exist (let alone continue); as was aptly put in a leading textbook (see Spry ([52] *supra*) at p 260 (see also p 250)):

> The Law of Property (Miscellaneous Provision) Act 1989 has provided in s. 2 that a contract "for the sale or other disposition of an interest in land" can only be made in writing. Since this provision does not have a mere evidentiary effect, but a failure to comply prevents the existence of a contract, the view has been expressed that in England the doctrine of part performance can no longer apply to contracts of this kind.

Yet another leading textbook has also observed (in a similar vein) thus (see *Gray and Gray* ([26] *supra*) at para 8.132):

> Where an agreement relating to land fails to comply with section 2 of the [1989 UK Act], there is simply no contract in support of which acts of part performance can ever be pleaded. The statutory avoidance of unwritten contracts has caused a fatal detachment of the entire document.

And Prof Pettit has also observed as follows (see Pettit ([29] *supra*) at 441):

> It is an inevitable consequence of section 2 [of the 1989 UK Act] that the doctrine of part-performance no longer has a role to play in contracts concerning land. The simple fact is that under the new law if section 2 is not complied with there is no contract for either party to perform.

58 It is true that s 40(2) of the 1925 UK Act has, in fact, been reproduced in other Commonwealth legislation (see Crown ([49] *supra*) at 78–79). If, however, as we have already pointed out above, this particular provision was at best neutral in nature and was enacted *ex abundanti cautela*, then it could, in fact, be argued that the draftsperson of s 6(*d*) was very perceptive in not "blindly" including a saving provision that added nothing to the existing legal position. Such an approach is, of course, wholly consistent not only with sound legislative drafting but also the development of an autochthonous Singapore legal system (see generally in this latter regard the Singapore High Court decisions of *CHS CPO GmbH (in bankruptcy) v Vikas Goel* [2005] 3 SLR 202 at [87] and *Tang Kin Hwa v Traditional Chinese Medicine Practitioners Board* [2005] 4 SLR 604 at [27]–[28]).

59 Although, as already explained above, the argument centring on s 40(2) of the 1925 UK Act is wholly without merit, we would, in fact, go *further* and observe that the very premise upon which this particular argument is based is, with respect, flawed. In particular, this argument assumes that the Singapore Parliament based s 6(*d*) *wholly* on s 40 of the 1925 UK Act – in terms of not only the language of the latter provision but also (and more importantly) in terms of its substance and purpose at the time the 1925 UK Act was promulgated (*viz*, 1925). A closer examination of the relevant parliamentary background reveals, however, that this was *not* the case, at least in so far as the *latter* aspect (of substance and purpose as at 1925) was concerned. Let us elaborate.

60 Section 6(*d*) was, in fact, originally introduced by s 7 read with the Second Schedule of the AELA. In the Explanatory Statement to the Application of English Law Bill (Bill 26 of 1993) ("the Bill"), it was stated as follows:

> Clause 7 [which was subsequently enacted as s 7 of the AELA] read with the Second Schedule inserts a number of provisions (*derived from pre-1826 English enactments which will cease to be applicable*) in [*inter alia*] *the Civil Law Act …* [emphasis added]

And, during the Second Reading of the Bill (which was later enacted as the AELA), the Minister for Law, Prof S Jayakumar, observed thus (see *Singapore Parliamentary Debates*, *Official Report* (12 October 1993) at cols 609–610):

> The Second Charter of Justice of 1826 introduced into Singapore (which was then part of the Straits Settlements) the common law of England, including the principles and rules of equity, as well as English statutes enacted before 27th November 1826. Whether a pre-1826 English statute was received as part of the law of Singapore depended on whether it was one of general application and adaptable to the condition and wants of the inhabitants of the land. *Past judicial decisions have authoritatively held that certain pre-1826 English statutes, for example, the Statute of Frauds 1677, have been received in Singapore*. However, the problem is that it is not possible to say with certainty what other pre-1826 English statutes which have not been considered by our courts remain receivable. Of those statutes which have been held to apply in Singapore, many are also inaccessible and unavailable to the general public and even to lawyers. *Moreover, the language of these ancient statutes is archaic and very difficult to understand*. [emphasis added]

More importantly, Prof Jayakumar also observed as follows (*id* at col 612):

> The First Schedule does not specify any pre-1826 English statute. *This is because those provisions of the pre-1826 English statutes which are still relevant and applicable in Singapore have been restated and revised in modern form and will be incorporated into the appropriate local Acts*. Clause 7 [later enacted as s 7 of the AELA] *and the Second Schedule provide for this restatement and revision*. [emphasis added]

61 It is clear, therefore, that *s 6(d) was merely a re-enactment, in modern language, of s 4 of the 1677 UK Act*. Section 40 of the 1925 UK Act was relevant *only* in furnishing *the modern language for* s 6(*d*) – and *nothing else besides*. In other words, and as is clearly evident from the *legislative background* set out in the preceding paragraph, the *substance and purpose of* s 40 of the 1925 UK Act (including that relating to subsection (2) thereof) was *wholly irrelevant in so far as the enactment of s 6(*d*) was concerned*. In so far as s 6(*d*) was concerned, the focus was, instead, on *s 4 of the 1677 UK Act*, *ie*, on what the position was in *1677* (which was, of course, prior to 1826 in general and prior to 1925 in particular). This also explains why s 6(*d*) refers to *both* s 4 of the 1677 UK Act *and* s 40 of the 1925 UK Act in its marginal note (and, significantly in our view, by the notation "*Cf*."). Put simply, the very (indeed, entire) premise upon which the argument centring on s 40(2) of the 1925 UK Act is based is, with respect, flawed inasmuch as it assumes that the Singapore Parliament based s 6(*d*) *wholly* on s 40 of the 1925 UK Act with respect to *both* its language *as well as* its substance and purpose. In the circumstances, the doctrine of part performance, which (as we have seen) was developed after the 1677 UK Act, was — and continued to be — part of Singapore law by virtue of the general reception of English law and, subsequently, via s 3(1) of the AELA.

62 Turning to another (albeit less important) issue, it should be noted that it has been argued that the abolition of part performance ought not to be lamented because there are, *inter alia*, alternative doctrines that can take its place (see Crown ([49] *supra*) at 81). However, it is significant that another author has perceptively pointed out that it is by no means clear that an adequate replacement for part performance has been developed (see Gerwyn Ll H Griffiths, "Part Performance – Still Trying to Replace the Irreplaceable?" [2002] Conv 216). In any event, the argument with regard to possible alternatives to part performance does not detract from the fact that part performance has *not* been abolished by s 6(*d*).

Our decision

63 For the reasons given above, it is our view that part performance continues to be part of Singapore law. We turn now to consider the Judge's views as to why there was part performance in the present case. He, in fact, found as follows (see the Judgment at [39]–[40]):

> 39 *Assuming arguendo that the cheque should not be read together with the e-mails and that s 6(d) of the Civil Law Act was not complied with, I nevertheless find that there was part performance of the contract by virtue of the first defendant accepting payment of the 1% cheque into his bank account. The Option stated that it was to be granted in consideration of the sum of $5,060 paid by the purchaser as the Option money*. In SM Integrated Transware, Prakash J found that the doctrine of part performance was not available to the plaintiff because it had not specifically pleaded it in its reply or pleaded the particulars of the acts of part performance on which it relied. In Tan Kia Poh v Hong Leong Finance Ltd [1994] 1 SLR 270, the Court of Appeal explained that allowing submissions to be made on matters not previously specifically pleaded might result in material prejudice to the other party because it would have had no opportunity to produce evidence that might effectively counter these submissions.

40 There is no such danger of material prejudice to the first and second defendants here. The plaintiffs pleaded in their amended statement of claim at para 11 that the 1% cheque had been presented for payment and honoured, so that the first plaintiff's bank account was debited and the first defendant's account was credited with the sum of $5,060. The plaintiffs further averred at para 12 "that by the [first defendant or his agent] presenting the [1% cheque] to the POSB Bank for payment, there is already an enforceable agreement whereby [the first and second defendants] had contracted with the Plaintiffs to sell the Property to the Plaintiffs for the sum of $506,000.00". In the amended reply, the plaintiffs further pleaded (at para 6) that they "had partially performed their part of the bargain" when they paid the 1% deposit. The correct analysis is that the first and second defendants themselves partially performed by accepting the plaintiffs' 1% cheque into the first defendant's bank account, and in consideration of that 1% deposit they must grant the Option. I therefore find that the payment of the 1% cheque, on the back of which the Property was fully identified, into the first defendant's account was an act referable to the contract to sell the Property and there was thus part performance (see also Midlink Development Pte Ltd v The Stansfield Group Pte Ltd [2004] 4 SLR 258 at [66]–[67]).

[emphasis added]

64 Although it used to be the case that the payment of money could never amount to part performance, this is no longer the case. However, the converse does not necessarily follow inasmuch as the payment of money *per se* will not *automatically* result in a finding of part performance as such payment might be equivocal in nature. Much will depend on the surrounding circumstances (see *eg* Spry ([52] *supra*) at p 274). In the circumstances, we agree with the reasoning of the Judge as set out in the preceding paragraph (the doctrine of part performance having been satisfied in this case by the payment of money which was effected by way of a cheque and having regard to the circumstances of the case itself). In any event, this does not – having regard to the reasons given above – impact on the decision we arrived at inasmuch as it constitutes an *additional* reason for our decision. Indeed, the application of part performance also constituted (as is evident from the preceding paragraph) an extra string to the legal bow in the court below.

The costs order made with regard to the third and fourth defendants in the court below

65 The Judge ordered the appellants to pay not only the costs of the respondents but also the costs of the third and fourth defendants. In particular, the Judge observed thus (the Judgment at [41]):

It is beyond dispute that the first defendant instructed the third defendant to proceed with the transaction, simultaneously preparing and couriering the Option for his signature as well as depositing the 1% cheque into his bank account, which he specified in the third e-mail. He admitted that the third defendant could not have been expected to guess from his e-mail that she was supposed to wait until the Option had been signed before depositing the cheque, and conceded that it would have been "very unfair" to subsequently object to her having deposited the 1% cheque pursuant to his instructions. *The first and second defendants raised wholly unmeritorious arguments regarding the third defendant's authority, or lack thereof, to enter into the agreement on their behalf, compelling the plaintiffs to join the third and fourth defendants*. The plaintiffs' claim must therefore succeed, with the first and second defendants to pay the costs of the plaintiffs *(who, to their credit, did not submit on their alternative claim against the third and fourth defendants) as well as the costs of the third and fourth defendants. While the plaintiffs could have subpoenaed the third defendant as a witness or left it to the first and second defendants to join the third and fourth defendants, I am of the view that their decision not to drop the third and fourth defendants in the course of trial was prudent rather than*

excessively litigious. [emphasis added]

66 We agree with the Judge and see no reason why the appellants should not also pay the costs of the third and fourth defendants with respect to the proceedings in the court below.

Conclusion

67 For the reasons given above, we dismissed the appeal with costs, and with the usual consequential orders to apply.

[note: 1]See the Appellants' Core Bundle ("ACB"), pp 95–96

[note: 2]ACB, p 97

[note: 3]ACB, pp 98–99

[note: 4]ACB, p 100

[note: 5]ACB, p 115

[note: 6]ACB, p 116

[note: 7]ACB, p 117

[note: 8]ACB, p 118

[note: 9]ACB, p 122

[note: 10]ACB, p 126

[note: 11]ACB, p 129