

## Case Note

### INFORMAL DEALINGS WITH LAND

#### Retaining the Knotty Apron Strings

*Joseph Mathew v Singh Chiranjeev*  
[2010] 1 SLR 338

*Joseph Mathew v Singh Chiranjeev* [2010] 1 SLR 338 presented a rare opportunity for the Court of Appeal to address the complex provision as to formalities for contracts for the sale or disposition of land or interests in land that is s 6(d) of the Civil Law Act (Cap 43, 1999 Rev Ed). The case is doubly interesting (and important) because it also addresses how the statutory provision may be satisfied by electronic communications such as e-mail. The court also considers and rejects the case for consigning the doctrine of part performance to the history books.

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#### I. Introduction

1 Whilst land used to be the most valuable and important type of property, it is today eclipsed in value by such assets as intellectual property and various other forms of intangible property. Even some chattels, such as luxury cars, yachts and aeroplanes, are as valuable as or even more valuable than land. However, it remains the most valuable asset with which most ordinary people are likely to transact in their lifetimes. Given its well-trodden nature, it is somewhat quaint to see an issue as old and simple as that of gazumping<sup>1</sup> raising its head in the 21st century. It is in part a product of the volatility in the property market at the time of the disputed sale in *Joseph Mathew v Singh Chiranjeev*.<sup>2</sup> Furthermore, the use of e-mail communications to satisfy the requirement of formalities had never been addressed by the Court of Appeal.

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1 Although this was not the ostensible reason for the dispute in this case: see *Joseph Mathew v Singh Chiranjeev* [2010] 1 SLR 338 at [15].

2 [2010] 1 SLR 338.

2 The facts of the case may be stated briefly. The vendors in the disputed sale were Joseph Mathew and Mercy Joseph. The purchasers were Singh Chiranjeev and Gulati Jasmine Kaur. The parties negotiated the sale of the property known as 26 Upper Serangoon View, #04-32, Rio Vista, Singapore 534206 through a property agent,<sup>3</sup> Helene Ong. After an earlier offer was rebuffed, the purchasers made a renewed offer of \$506,000 for the property on 11 May 2007. At the same time, the purchasers handed a cheque of \$5,060, being 1% of the offered purchase price, to the agent. The cheque was intended to be an advance payment in consideration for the grant of the option to demonstrate the purchaser's sincerity and the seriousness of the offer. The agent sent two e-mails to Mathew on 11 and 12 May 2007 detailing the key terms of the option and requesting that he confirm them. Mathew replied to her via e-mail on 13 May 2007 indicating that he wished to proceed with the sale and requested that she deposit the cheque into his POSB bank account. On 14 May 2007, the agent confirmed the grant of the option with Chiranjeev and couriered the option document to Mathew in India for the vendors' signature. The purchasers' cheque was deposited into Mathew's account on 16 May 2007 but despite receiving the option document, the vendors did not sign the option to purchase. On 22 May 2007, Mathew informed the purchasers and the agent that he was cancelling his plans to sell the property. The purchasers therefore brought an action against them. The trial judge allowed the purchasers' claim<sup>4</sup> and the vendors appealed against this decision.

## II. The issues

3 The issues before the Court of Appeal were:

- (a) whether the vendors had concluded a contract by accepting the purchasers' offer to take an option to buy the property;
- (b) if such a contract had been intended by the parties, whether there had been compliance with s 6(d) of the Civil Law Act;<sup>5</sup> and
- (c) if the contract did not comply with s 6(d) of the Civil Law Act, whether the purchasers could nevertheless enforce the contract on the basis of the doctrine of part performance.

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3 Hereafter referred to as "agent" though it is important not to assume that she is an agent in the legal sense since there is no indication that she was so authorised by any party.

4 *Singh Chiranjeev v Joseph Mathew* [2009] 2 SLR(R) 73.

5 Cap 43, 1999 Rev Ed.

### A. *Was there a binding contract?*

4 This first issue may be dealt with briefly as it involves primarily a finding of fact. Although the communications from the vendors emanated solely from Mathew, the court concluded that Joseph had impliedly authorised Mathew to conclude the contract.<sup>6</sup> Thus, the issue turned on the significance of Mathew's exchanges with the purchasers. The vendors had argued that an e-mail sent by one of them, Mathew, to the agent stating that "I am taking a decision to sell the property at this price of S\$506K",<sup>7</sup> which led the agent to indicate to the purchasers that the vendors had accepted their offer, was *not* an acceptance of the purchasers' offer. It was argued that they intended to be bound only upon signing the option agreement. It is trite law that, in determining if a person intended to be bound, the law is concerned not with his subjective intention but the objective appearance of his intention. Thus, a person is bound "whatever [his] real intention may be" if "a reasonable man would believe that he was assenting to the terms proposed by the other party and that other party upon that belief enters into a contract with him".<sup>8</sup> In Mathew's e-mail, he had instructed the agent to deposit the purchasers' cheque into his bank account, an instruction only consistent with the conclusion of a contract, even from a subjective perspective since payment was only due on the conclusion of the contract.<sup>9</sup>

### B. *Compliance with s 6(d) of the Civil Law Act*

5 It was necessary to comply with s 6(d) of the Civil Law Act<sup>10</sup> because an option to purchase land creates an equitable interest in land in favour of the option holder.<sup>11</sup> The predecessor of s 6(d) is s 4 of the English Statute of Frauds 1677,<sup>12</sup> which applied in Singapore prior to its enactment.<sup>13</sup> It is also, with one arguably crucial exception, *in pari materia* with s 40(1) of the English Law of Property Act 1925,<sup>14</sup> which is the successor to the Statute of Frauds 1677 in England and Wales. The Statute of Frauds 1677 was enacted to prevent the fraud and perjury that

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6 *Joseph Mathew v Singh Chiranjeev* [2010] 1 SLR 338 at [20].

7 *Joseph Mathew v Singh Chiranjeev* [2010] 1 SLR 338 at [7].

8 *Smith v Hughes* (1871) LR 6 QB 597 at 607.

9 See, generally, Tan Sook Yee, Tang Hang Wu & Kelvin F K Low, *Tan Sook Yee's Principles of Singapore Land Law* (LexisNexis, 3rd Ed, 2009) at pp 389–390.

10 Cap 43, 1999 Rev Ed.

11 *Ong Chay Tong & Sons (Pte) Ltd v Ong Hoo Eng* [2009] 1 SLR(R) 305.

12 Statute of Frauds 1677 (c 3) (UK).

13 Andrew Phang, *Cheshire, Fifoot and Furmston's Law of Contract* (Butterworths Asia, 2nd Singapore and Malaysian Ed, 1998) at p 356.

14 Law of Property Act 1925 (c 20) (UK).

were endemic at the time.<sup>15</sup> It is unclear why perjury was particularly prevalent then but it is thought that the poorly developed rules of evidence at the time were one of its root causes. Of the three usual functions of formalities – evidentiary, cautionary and channelling<sup>16</sup> – the uppermost on the minds of the Legislature at the time of the enactment of the Statute of Frauds 1677 was thus evidentiary. Over the years, however, this function of the Statute of Frauds 1677 has diminished since “the defects in the rules of evidence and procedure have long since been rectified”.<sup>17</sup> It has never been regarded as serving the channelling function in any meaningful fashion.<sup>18</sup> This leaves the cautionary function as the predominant justification for its continued existence. Thus, according to the Law Commission, formalities prevent “the parties from being bound inadvertently or prematurely. Without formalities, it may be difficult to ascertain the exact time when a contract is created, and this would lead to confusion. As a result, pre-contract negotiations would be unnecessarily uncertain and hazardous”.<sup>19</sup>

6 However, whilst the Statute of Frauds 1677 operated to prevent perjury, “it opened new and different possibilities of deception”.<sup>20</sup> By setting out formality requirements for sales and other dispositions of land, it paved the way for persons involved in such transactions to repudiate them on the basis of failure to comply with the Statute. This led in turn to two developments. First, the development of the doctrine of part performance.<sup>21</sup> Secondly, “judges have wrestled with its interpretation in a valiant endeavour to enforce the bargain the parties

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15 T G Youdan, “Formalities for Trusts of Land, and the Doctrine of *Rochefoucauld v Boustead*” [1984] CLJ 306 at 307.

16 For a general discussion of the functions of formalities, see Lon L Fuller, “Consideration and Form” [1941] 41 Columbia L Rev 799. See also T G Youdan, “Formalities for Trusts of Land, and the Doctrine of *Rochefoucauld v Boustead*” [1984] CLJ 306; Patricia Critchley, “Taking Formalities Seriously” in Susan Bright and John Dewar (eds), *Land Law: Themes and Perspectives* (Oxford University Press, 1998) 507 at pp 513-519.

17 Law Commission, *Transfer of Land: Formalities for Contracts for Sale etc of Land* (Law Com No 164, June 1987) at [2.5], citing the following English Acts: Evidence Act 1843, Evidence Act 1851 and Evidence Further Amendment Act 1869. In Singapore, the position is governed by the Evidence Act (Cap 97, 1997 Rev Ed), which is likewise free from the relevant defects inherent in the English law of evidence of the 17th century and was probably so from its inception in 1893 as the Evidence Ordinance (Ordinance 3 of 1893).

18 Law Commission, *Transfer of Land: Formalities for Contracts for Sale etc of Land* (Law Com No 164, June 1987) at [2.11].

19 Law Commission, *Transfer of Land: Formalities for Contracts for Sale etc of Land* (Law Com No 164, June 1987) at [2.10].

20 Robert Megarry and H W R Wade, *The Law of Real Property* (Stevens & Sons Ltd, 5th Ed, 1984) at p 587.

21 For which, see text accompanying nn 59–80.

have made”<sup>22</sup>. These attempts to bend the interpretation of the statute to create what the courts consider to be fair and just results have resulted in a complex body of case law as to how the statutory requirements may be satisfied, not all of which are entirely logical. It is no secret that the courts were not enamoured of the Statute of Frauds 1677. Lord Mansfield once remarked that “[h]ad the Statute of Frauds been always carried into execution according to the letter, it would have done ten times more mischief than it has done good, by protecting, rather than by preventing frauds”<sup>23</sup>. Likewise, Lord Campbell remarked that it “promotes fraud, rather than prevents it”<sup>24</sup>. However, it may be said that, to the extent that it usefully serves a cautionary function, then the ability of parties to repudiate their agreements is simply a necessary consequence. To the extent, therefore, that the courts curtail its strict requirements, they are in effect reducing the efficacy of its cautionary function.

7 The facts of *Joseph Mathew v Singh Chiranjeev*<sup>25</sup> raised four interrelated issues. First, the degree of completeness of the note or memorandum. Secondly, whether or not the requirement of writing may be satisfied by e-mail correspondence. Thirdly, the requirement of a signature. Finally, the extent to which the requirements may be met by a joinder of documents.

(1) *Necessary content of note or memorandum*

8 The Court of Appeal,<sup>26</sup> citing Professor Furmston,<sup>27</sup> observed:

The agreement itself need not be in writing. A ‘note or memorandum’ of it is sufficient, provided that it contains *all 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 by the court]

9 This translates roughly to the three or four (depending on whether the contract is open or closed) “P”s that conveyancers will be familiar with. In an open contract for the sale of land, the minimum requirements to satisfy the contractual requirement of certainty would be an agreement as to the “P”arties, the “P”roperty and the “P”rice.

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22 D G Barnsley, *Barnsley’s Conveyancing Law and Practice* (Butterworths, 2nd Ed, 1982) at p 102.

23 *Simon v Metivier* (1766) 1 Bl W 601.

24 *Marvin v Wallace* (1856) E&B 726.

25 [2010] 1 SLR 338.

26 *Joseph Mathew v Singh Chiranjeev* [2010] 1 SLR 338 at [26].

27 Michael Furmston, *Cheshire, Fifoot and Furmston’s Law of Contract* (Oxford University Press, 15th Ed, 2007) at p 271.

Where the contract is closed, then in addition to these three “P”s, a fourth “P” or other “P” provisions will be found.

10 It is necessary, however, to distinguish between the requirements for contractual *certainty* and that to satisfy the *formalities* set out by s 6(d) of the Civil Law Act<sup>28</sup> and it appears as if the court failed to do so in one respect. One of the controversies at trial was whether the property had been sufficiently identified by the various documents forming the “note or memorandum”. It has been said that, in building up a memorandum out of several documents, the starting point is always the document signed by the party to be charged,<sup>29</sup> in this case the vendors. The crucial e-mail from Mathew failed to do any more than refer to the property as “Rio Vista” in its subject heading.<sup>30</sup> This was not regarded as sufficient by the trial judge who instead considered the requirement of identification of the property as satisfied by the notation “1% Deposit Sale of 26 Upper Serangoon View #04-32 Rio Vista (S) 534206”<sup>31</sup> made by the agent on the back of the cheque made out by the purchasers, which he considered “can be read together with the four e-mails because it only elaborates the precise address of the Property and does not contradict any part of any of the e-mails”.<sup>32</sup> The Court of Appeal affirmed this aspect of the trial judge’s reasoning.<sup>33</sup> Whether such reference is permissible is surely controversial since the vendors had not had sight of the cheque and thus had no means of knowing what, if anything beyond the price, their names and perhaps the vendors’ names, had been written on the cheque. It is thus arguably difficult to consider its contents as “authenticated” by the signature to be found on Mathew’s e-mail by way of joinder of the documents.

11 However, case authority demonstrates that this is really a non-issue and there was no need for the courts to have extended joinder to the cheque to satisfy s 6(d) of the Civil Law Act.<sup>34</sup> It is said that whilst “[a] memorandum must ... indicate the property which is the subject matter of the contract[,] the property need only be described so as to be identifiable”.<sup>35</sup> It has thus been said that the possessive adjective “my” sufficed to create certainty in *Cowley v Watts*<sup>36</sup> where the property was referred to only as “my house”. Likewise, “the house in Newport” without a reference to “my” was regarded as sufficient in *Owen v*

28 Cap 43, 1999 Rev Ed.

29 *Timmings v Moreland Street Property Co Ltd* [1958] Ch 110 at 130.

30 *Singh Chiranjeev v Joseph Mathew* [2009] 2 SLR(R) 73 at [34].

31 *Singh Chiranjeev v Joseph Mathew* [2009] 2 SLR(R) 73 at [34].

32 *Singh Chiranjeev v Joseph Mathew* [2009] 2 SLR(R) 73 at [35].

33 *Joseph Mathew v Singh Chiranjeev* [2010] 1 SLR 338 at [42].

34 Cap 43, 1999 Rev Ed.

35 Kelvin F K Low, “Sale of Land” in *Law Relating to Specific Contracts in Singapore* (Michael Hwang & Yeo Tiong Min eds) (Sweet & Maxwell, 2008) at [12.5.14].

36 (1853) 17 Jur 172.

*Thomas*,<sup>37</sup> as were similar expressions in *Bleakley v Smith*<sup>38</sup> and *Wood v Scarth*.<sup>39</sup> In *Smith v Mansi*,<sup>40</sup> the English Court of Appeal approved of “this chalet”. Indeed, the courts have gone so far as to uphold a description without any particularising adjective in *Plant v Bourne*.<sup>41</sup> In *Joseph Mathew v Singh Chiranjeev*, not only did the subject-heading of Mathew’s e-mail refer to “Rio Vista”, he referred to “the property” in its body and there was also a reference to the tenant of the apartment, one Mr Igwe.<sup>42</sup> In the circumstances, it would appear that the requirement of identification of the property for the purposes of satisfying the *formalities* set out by s 6(d) of the Civil Law Act could easily have been met without a need to resort to joinder of the cheque. The need to refer to the full address as specified in the cheque appears to have been borne out of a confusion between the requirement of identifying the property for the purposes of *certainty* of contract and that required to satisfy the *formalities* set out by s 6(d).

12 Whereas the court may arguably have overextended the doctrine of joinder of documents to include the cheque, it is arguable that they failed to consider whether it was necessary to extend the doctrine to the unsigned option document. As the Court of Appeal had rightly noted, to satisfy s 6(d) of the Civil Law Act,<sup>43</sup> the note or memorandum must refer to *all material terms* of the contract.<sup>44</sup> “If the memorandum is not in accordance with the true contract, it is a bad memorandum.”<sup>45</sup> In *Lee Christina v Lee Eunice*,<sup>46</sup> the Court of Appeal remarked that a memorandum “will normally be insufficient unless it simply records neither more nor less than the terms of [the] agreement”. Although the documents relied upon by the Court of Appeal (several e-mails and the cheque) may have established the parties, the property, the price as well as the period for which the option was open and the completion date for the conveyance should the option be exercised, it referred to no other terms of the contract. It seems unlikely that the option agreement that was intended to govern the transaction would be so sparsely documented. If so, then the e-mails and the cheque would not have referred to *all material terms* of the contract.

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37 (1843) 3 My & K 353.

38 (1840) 11 Sim 150 (“the property in Cable Street”).

39 (1855) 2 K & J 33 (“the intended new public-house at Putney”).

40 [1963] 1 WLR 26.

41 [1897] 2 Ch 281 (“twenty-four acres of land, freehold, at Totmonslow”).

42 *Joseph Mathew v Singh Chiranjeev* [2010] 1 SLR 338 at [7].

43 Cap 43, 1999 Rev Ed.

44 See also Tan Sook Yee, Tang Hang Wu & Kelvin F K Low, *Tan Sook Yee’s Principles of Singapore Land Law* (LexisNexis, 3rd Ed, 2009) at p 393.

45 *Crane v Naughten* [1912] 2 IR 318 at 324.

46 [1993] 2 SLR(R) 644 at [29].

(2) *Use of e-mails to satisfy requirement of writing*

13 The Court of Appeal confirmed that e-mail correspondence would satisfy the writing requirement in s 6(d) of the Civil Law Act<sup>47</sup> despite the exclusion of the Electronic Transactions Act<sup>48</sup> from contracts for the sale of land pursuant to s 4(1)(d) of the Electronic Transactions Act. In this respect, the court agreed with Judith Prakash J's decision in *SM Integrated Transware Pte Ltd v Schenker Singapore (Pte) Ltd*<sup>49</sup> that the Electronic Transactions Act was purely facilitative of transactions within its purview. The exclusion under s 4(1)(d) was *not* intended to determine authoritatively that electronic records would not satisfy any requirements of writing. Instead, the exclusion was intended to permit the courts to decide, independently of the Electronic Transactions Act, if electronic records sufficed for such excluded transactions on a case-by-case basis. This is amply demonstrated both in the text of the legislation itself<sup>50</sup> as well as the relevant aids to interpretation permitted under s 9A of the Interpretation Act.<sup>51</sup> Given the historical rationale for the Statute of Frauds 1677, which is the precursor to s 6(d) of the Civil Law Act, the Court of Appeal concluded, in agreement with Judith Prakash J in *SM Integrated*, that "[r]ecognising 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".<sup>52</sup>

(3) *Signature*

14 The Court of Appeal rightly noted that the requirement of a signature in s 6(d) of the Civil Law Act<sup>53</sup> is a very lax one. In the words of Pettit,<sup>54</sup> "[t]he courts have been at their most generous in interpreting the meaning of signature under [the statute]". This view of the requirement of a signature reflects the courts' distaste for the effect of the statute, which appears to permit contracting parties to avoid their obligations on a technicality. It is arguable though that a signature in the popular sense of putting pen to paper will better serve a cautionary function than simple typewriting or printing. However, the body of case

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47 Cap 43, 1999 Rev Ed.

48 Cap 88, 1999 Rev Ed.

49 [2005] 2 SLR(R) 651.

50 See Electronic Transactions Act (Cap 88, 1999 Rev Ed) ss 11 and 12.

51 Cap 1, 2002 Rev Ed. *Singapore Parliamentary Debates, Official Report* (29 June 1998) vol 69 at col 254. See also *Joint IDA-AGC Review of Electronic Transactions Act Stage II: Exclusions Under Section 4 of the ETA (Consultation Paper)* (LLRD No 2/2004) at para 2.1.5.

52 *SM Integrated Transware Pte Ltd v Schenker Singapore (Pte) Ltd* [2005] 2 SLR(R) 651 at [80], cited with approval in *Joseph Mathew v Singh Chiranjeev* [2010] 1 SLR 338 at [38].

53 Cap 43, 1999 Rev Ed.

54 P H Pettit, "Farewell Section 40" [1989] Conv 431 at 439, cited with approval in *Joseph Mathew v Singh Chiranjeev* [2010] 1 SLR 338 at [28].

law on this issue is now overwhelming and it may be too late to turn the tide. In *Joseph Mathew v Singh Chiranjeev* itself, the issue was not controversial as Mathew had signed off his e-mail of 13 May 2007 as “Joseph Mathew”,<sup>55</sup> thus clearly satisfying the requirement of signature.

15 The more interesting aspect of the court’s decision on this issue lies in its *obiter* approval of the decision of the High Court in *SM Integrated Transware Pte Ltd v Schenker Singapore (Pte) Ltd*,<sup>56</sup> which decided that the signature requirement where the writing takes the form of an e-mail is satisfied by the “From” field to the header of the e-mail. In that case, the sender had not appended his name to any part of the body of the e-mail and it was argued that there was therefore no relevant signature that could satisfy s 6(d) of the Civil Law Act.<sup>57</sup> However, the High Court disagreed, taking the view that the line reading “From: ‘Tan Tian Tye’ <tian-tye.tan@schenker.com>” sufficed to satisfy the requirement of a signature. However, neither of the US cases cited by the High Court in *SM Integrated Transware Pte Ltd v Schenker Singapore (Pte) Ltd – Shattuck v Klotzbach*<sup>58</sup> and *Cloud Corp v Hasbro Inc*<sup>59</sup> – goes quite so far. The inclusion by the sender of an e-mail of his name or initials in the body of the e-mail is arguably different from its appearance in the “From” field in its header given that many e-mail clients, such as Microsoft Outlook, do not include a “From” field in its header when the sender types the e-mail. It is, of course, arguable that the “From” field will appear in the e-mail as received by the recipient and that since this message is caused by the act of the sender, it can be treated as his signature, but this is by no means clear. The opposite appears to have been decided in England.<sup>60</sup> Even if one accepts such an argument, there will be difficulties where the actual e-mail address of the sender does not comprise or include his name, *eg*, bengster1974@gmail.com. Can such an e-mail address still be regarded as his signature? It is unlikely that *Joseph Mathew v Singh Chiranjeev*<sup>61</sup> will be the last word on this issue.

#### (4) Joinder of documents

16 The Court of Appeal considered that it was “clear” that various e-mails could be viewed together with the cheque by way of joinder of documents to establish the relevant memorandum.<sup>62</sup> It is unclear which e-mails the court had in mind as they referred to some seven e-mails,

55 *Joseph Mathew v Singh Chiranjeev* [2010] 1 SLR 338 at [7].

56 [2005] 2 SLR(R) 651.

57 Cap 43, 1999 Rev Ed.

58 14 Mass L Rep 360 (2001).

59 314 F 3d 289 (2002).

60 *J Pereira Fernandes SA v Mehta* [2006] 1 WLR 1543, particularly at [29]–[30].

61 [2010] 1 SLR 338.

62 *Joseph Mathew v Singh Chiranjeev* [2010] 1 SLR 338 at [42]–[43].

four of which were described as “key”. However, only one of these was sent by Mathew. In truth, the issue of joinder of documents is far more complex than appears from the judgment. Certainly, of the four “key” e-mails, one of them cannot be joined and if we are to look at all seven e-mails, four of them cannot be joined. There is some controversy over whether or not documents unknown to the defendant may be joined by way of reference,<sup>63</sup> but it seems clear that there can be no reference to a document not yet in existence when the defendant signed<sup>64</sup> except where the two are executed so closely in time that they ought to be regarded as contemporaneously signed.<sup>65</sup> There is also the question of whether the earlier e-mails from the agent to Mathew may be joined to the crucial e-mail signed by him, as well as the question of joinder of the cheque.

17 The Court of Appeal remarked that Mathew’s e-mail was “in response” to the agent’s two earlier e-mails.<sup>66</sup> However, that is not sufficient *in itself* to justify joining the three e-mails together for the purposes of satisfying s 6(d) of the Civil Law Act.<sup>67</sup> The rules on joinder of documents are complex and unwieldy. Where the signed document expressly or impliedly refers to a transaction which was in fact written, then oral evidence can be given to identify the transaction. This may permit a reference to the second e-mail sent by the agent since Mathew’s e-mail refers to “[a]s discussed through phone” and the agent’s second e-mail is a “[f]ollow up to my telephone call”. However, the more important e-mail by far is the first e-mail from the agent as all the key terms of the contract are contained therein. However, it is difficult to construct any reference to it or any transaction that it relates to from the reported facts.<sup>68</sup> It is possible to join documents together for the purposes of satisfying s 6(d) of the Civil Law Act even where there is no reference from one document to another if, on placing them side by side, it is obvious without the aid of oral evidence that they are connected *provided they are all signed*.<sup>69</sup> Where only one document is signed, it must itself make some reference, express or implied, to some other document or transaction so as to allow the other document to be

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63 *Cf Pierce v Corf* (1874) LR 9 QB 210; *Elias v George Sahely & Co* [1982] 3 WLR 956.

64 *Turnley v Hartley* (1848) 3 New Pract Cas 96.

65 *Timmins v Moreland Street Property Co Ltd* [1958] Ch 110 at 123.

66 *Joseph Mathew v Singh Chiranjeev* [2010] 1 SLR 338 at [7].

67 Cap 43, 1999 Rev Ed.

68 *Joseph Mathew v Singh Chiranjeev* [2010] 1 SLR 338 at [7] (“*I am taking a decision to sell the property at this price of S\$506K*” [emphasis in original]). *Contra Elias v George Sahely & Co* [1983] AC 646 (“being deposit on property at Swan Street B’town agreed to be sold”). The reference to the sale in the former does not implicitly refer to any prior transaction whereas the reference to the sale in the latter does.

69 *Allen v Bennet* (1810) 3 Taunt 169; *Verlander v Codd* (1823) T & R 352; *Studds v Watson* (1884) 28 Ch D 305.

joined to the signed document.<sup>70</sup> It is possible that Mathew's e-mail was a reply to one (or both) of the agent's e-mails in the technical sense of an e-mail reply so that the text of her e-mail was included below the text of his e-mail as is customarily the case. If so, the relevant e-mail can obviously be joined. It may be that, even if the e-mail did not include the text of the agent's e-mail, the presence of the prefix "Re" in the subject heading of Mathew's e-mail is sufficient reference to one or both of the agent's e-mails. However, it is not clear from the judgments whether this was the case.

18 As to joinder of the cheque, it has already been noted that this appears not to have been strictly necessary. It is arguable that it can be joined by way of express reference in the e-mail sent by Mathew since that e-mail refers to "the cheque". However, the crucial part of the cheque that necessitated joinder according to the court was the reference to the property in full but it was not established that Mathew was aware that there was such reference in the cheque. In these circumstances, an issue akin to the controversy over whether or not a document can be joined by reference which the defendant was unaware of arises.<sup>71</sup> To permit joinder under such circumstances reduces to a vanishing point the cautionary and evidentiary value of insisting on a signature as authentication, lax as it already is.

### C. *Part performance*

19 The final issue before the court was whether the doctrine of part performance continued to apply in Singapore, and if so, whether it was satisfied on the facts of the case. It had previously been argued by Professor Crown that the doctrine had been abolished when s 6(d) of the Civil Law Act<sup>72</sup> was enacted.<sup>73</sup> The argument turned on the textual differences between s 6(d) of the Civil Law Act and s 40 of the English Law of Property Act 1925. Both Acts were successors to s 4 of the English Statute of Frauds 1677 but whereas the English Law of Property Act 1925 expressly preserved the doctrine of part performance in s 40(2), there was no equivalent provision in the Civil Law Act. The Court of Appeal disagreed with this view.

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70 *Timmins v Moreland Street Property Co Ltd* [1958] Ch 110, approved by the Privy Council in *Elias v George Sahely & Co* [1983] AC 646.

71 *Cf Pierce v Corf* (1874) LR 9 QB 210; *Elias v George Sahely & Co* [1982] 3 WLR 956.

72 Cap 43, 1999 Rev Ed.

73 Barry C Crown, "Cutting the Apron Strings: The Localisation of Singapore's Land and Trust Law" [1995] Sing JLS 75 at 77-81. See also Barry C Crown, "Back to Basics: Infeasibility of Title under the Torrens System" [2007] Sing JLS 117 at 125.

20 The court did not consider that the doctrine of part performance was inconsistent with s 4 of the English Statute of Frauds 1677. According to the court,<sup>74</sup> “[p]art performance was developed as a *judicial exception* to s 4 of the 1677 UK Act” [emphasis in original]. However, it failed to explain how judges may create exceptions to statutes. It is remarkable how often equity has *in the past* trodden on the clear language of a statute,<sup>75</sup> to the point where it has been regarded as “decorously disregarding an Act of Parliament”.<sup>76</sup> However, “[t]he judiciary today are undoubtedly far more conscious of their exact place in the constitutional order than the Chancery judges of the seventeenth and eighteenth centuries. While the latter experienced no qualms about adopting the pretext of enforcing the ‘equities’ arising by virtue of the acts of part performance, and not the insufficiently evidenced contract itself, it is questionable whether the courts today will find it easy or acceptable to give effect to expectations which have arisen in the context of a transaction [that fails to comply with the requisite formalities]”.<sup>77</sup> Nor have all judges have been equally comfortable with such equitable emasculating of statutes. The Court of Appeal itself noted Lord Blackburn’s discomfort with the doctrine of part performance in *Maddison v Alderson*.<sup>78</sup>

21 Rather than attempt to justify the doctrine of part performance as consistent with s 4 of the Statute of Frauds 1677 and thus s 6(d) of the Civil Law Act,<sup>79</sup> it may have been more fruitful to focus on the simple matter of legislative intent. The Court of Appeal, referring to the second reading of the Application of English Law Bill (Bill 26 of 1993),<sup>80</sup> concluded that s 6(d) of the Civil Law Act was intended purely as a re-enactment in modern language of s 4 of the Statute of Frauds 1677<sup>81</sup> without any intention to modify the substantive law. The court rightly concluded that s 40(2) of the English Law of Property Act 1925 was “at best neutral in nature and was enacted *ex abundanti cautela*”.<sup>82</sup> This was also the view of the English Law Commission, which remarked that

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74 *Joseph Mathew v Singh Chiranjeev* [2010] 1 SLR 338 at [52].

75 For a brief discussion, see Kelvin F K Low, “Of Horses and Carts: Category Errors in Recipient Liability as Applied to the Torrens System” in *Exploring Private Law* (Elise Bant & Matthew Harding eds) (Cambridge University Press, forthcoming).

76 *Spencer v Hemmerde* [1922] 2 AC 507 at 519.

77 Lionel Bently & Paul Coughlan, “Informal dealings with land after section 2” (1990) 10 LS 325 at 334.

78 (1883) LR 8 App Cas 467 at 489, cited by *Joseph Mathew v Singh Chiranjeev* [2010] 1 SLR 338 at [54].

79 Cap 43, 1999 Rev Ed.

80 *Singapore Parliamentary Debates, Official Report* (12 October 1993) at cols 609–610 and 612.

81 Which applied in Singapore through the Second Charter of Justice 1826.

82 *Joseph Mathew v Singh Chiranjeev* [2010] 1 SLR 338 at [58].

“merely repealing section 40(2) would not abolish the doctrine of part performance”.<sup>83</sup>

22 However, the retention of the doctrine of part performance does not mean that its operation should remain static. The doctrine can hardly be considered satisfactory. Contracts of guarantee are subject to precisely the same requirements as to formalities as contracts for the dispositions of interests in land.<sup>84</sup> Yet it is doubtful if the doctrine can apply to such contracts because to apply the doctrine would in effect abolish the statutory requirement.<sup>85</sup> There is also a close relation between the doctrine of part performance and that of proprietary estoppel. Indeed, the lineage of proprietary estoppel may even be traced to the doctrine of part performance.<sup>86</sup> Do the two doctrines serve the same objective? If so, why should they operate differently? If not, then what precisely are the different objectives that justify their different operations? Without delving into these important questions, one cannot help but recall the remarks of the late Professor Birks in a different context. One might thus say:<sup>87</sup>

The language of [part performance] and of [proprietary estoppel] is so different that, without a map and the will to use it, the lawyers might never even notice that they ought to check whether they are attacking one and the same problem with two armies. Ignorant armies clash by night: the two forces might indeed wipe each other out before anyone recognised the disaster which soldiers call friendly fire.

23 The Court of Appeal appeared to consider that proprietary estoppel was not up to the task of replacing the doctrine of part performance.<sup>88</sup> The doctrine of proprietary estoppel has been criticised as an inadequate replacement for the doctrine of part performance.<sup>89</sup> It is certainly true that “neither estoppels alone, nor estoppels combined with available restitutionary remedies, will be available in all situations

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83 Law Commission, *Working Paper No 92: Transfer of Land: Formalities for Contracts for Sale etc of Land* (1985) at [4.3].

84 Civil Law Act (Cap 43, 1999 Rev Ed) s 6(b).

85 Edwin Peel, *Treitel: The Law of Contract* (Sweet & Maxwell, 12th Ed, 2007) at pp 201–202. See also *Actionstrength Ltd v International Glass Engineering SpA* [2003] 2 AC 541.

86 Lionel Bently & Paul Coughlan, “Informal dealings with land after section 2” (1990) 10 LS 325 at p 330.

87 Peter Birks, “Equity in the Modern Law: An Exercise in Taxonomy” (1996) 26 UWALR 1 at 7.

88 *Joseph Mathew v Singh Chiranjeev* [2010] 1 SLR 338 at [62], citing Gerwyn LI H Griffiths, “Part Performance – Still Trying to Replace the Irreplaceable?” [2002] Conv 216.

89 Gerwyn LI H Griffiths, “Part Performance – Still Trying to Replace the Irreplaceable?” [2002] Conv 216 at 236.

formerly covered by the doctrine of part performance”.<sup>90</sup> However, this is not necessarily undesirable considering the dubious constitutional justifications for the doctrine of part performance. It may well be true that the doctrine of proprietary estoppel suffers from a degree of uncertainty but ignoring the doctrine in the context of contracts for the disposition of interests in land will not make these uncertainties go away.

24 In accepting that payment of money *can* amount to part performance, following *Steadman v Steadman*,<sup>91</sup> the Singapore courts have also introduced the same uncertainty to the doctrine of part performance that led to criticism of *Steadman v Steadman*.<sup>92</sup> The court remarked<sup>93</sup> that: “[T]he 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.” [emphasis in original] It is unclear though whether this remark provides sufficient guidance to lawyers and their clients. The facts of the case do not clearly demonstrate how it differs from a run of the mill case of part payment. One possibility is that the crucial distinguishing factor is the identification of the property at the back of the cheque but this notation was added by neither vendor nor purchaser but by the real estate agent for reasons unknown and without the knowledge of either the party suing or the party being sued.<sup>94</sup> It may be preferable to decide that the payment of money will *always* amount to part performance. Such a decision would have the benefit of certainty and simplicity.

25 Further, the Court of Appeal did not clarify the lower court’s remark that “[t]he 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”.<sup>95</sup> If the trial judge had meant that the plaintiff-purchasers’ payment could not have amounted to part performance without the defendant-vendors’ assent or acquiescence, perhaps he might have said so more forcefully. The passage appears to suggest that the acts of part performance were those of the defendants, which, it is submitted, is an incorrect view of the doctrine. It is submitted that this imprecision has since led to error in

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90 Christine Davis, “Estoppel: An Adequate Substitute for Part Performance?” (1993) 13 OJLS 99 at 127.

91 [1976] AC 536.

92 Law Commission, *Working Paper No 92: Transfer of Land: Formalities for Contracts for Sale etc of Land* (1985) at [3.26]. See also the scathing criticism by H W R Wade, “Part Performance: Back to Square One” (1974) 90 LQR 433.

93 *Joseph Mathew v Singh Chiranjeev* [2010] 1 SLR 338 at [64].

94 *Singh Chiranjeev v Joseph Mathew* [2009] 2 SLR(R) 73 at [40] cited by *Joseph Mathew v Singh Chiranjeev* [2010] 1 SLR 338 at [63].

95 *Singh Chiranjeev v Joseph Mathew* [2009] 2 SLR(R) 73 at [40].

*Ching Chew Weng Paul v Ching Pui Sim*.<sup>96</sup> In the circumstances, the confusion and uncertainty surrounding the doctrine of part performance in Singapore is at least as serious as that surrounding the doctrines of proprietary estoppel and constructive trusts. If so, there is surely a case for wielding Occam's razor so that we need only sort out one muddle rather than two, to say nothing of sorting out how the two jumbles relate to one another. Retaining the doctrine in its present form, as articulated by the Court of Appeal, also raises serious questions as to whether s 6(d) of the Civil Law Act<sup>97</sup> serves any of the cautionary or evidentiary functions that Parliament presumably wished it to serve when it was enacted to replace s 4 of the Statute of Frauds 1677.

### III. Conclusion

26 Despite their protestations, it is difficult to escape the impression that the vendors were simply seeking to gazump the purchasers in a rapidly rising property market. As such, it is difficult to resist sympathising with the purchasers. Two conclusions may be drawn from the case. First, the Court of Appeal is to be lauded for confirming that e-mails will suffice as "writing" for the purposes of s 6(d) of the Civil Law Act.<sup>98</sup> One supposes that the next frontier will be the question of whether a message sent using a short message service ("sms") can be regarded as "writing" for the same purpose as these are now prevalent. Given their length, it is unlikely that a single sms or even multiple smses will suffice without a joinder (by the complicated rules briefly elaborated upon above) to some other written document. However, if sufficient documents may be joined together, there may also arise other difficulties as to whether a sender's name that appears on the mobile phone of the recipient because the recipient has programmed his phone to associate the sender's name with his phone number will suffice as a signature.

27 Secondly, it is unfortunate that the court was not invited to consider if the body of case law on the subject pays insufficient regard to the functions of formalities, being distracted by the question of legislative repeal. There is no such thing as a "mere" formality; the

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96 [2010] 2 SLR 76. See also *Ong Siew Lay v Ong Boon Chuan* [2009] SGHC 99. These two cases are also problematic in that they purport to apply (or consider applying) the doctrine in a very different context calling for very different formalities. Section 9 of the Statute of Frauds 1677 (and its successor s 7(2) of the Civil Law Act (Cap 43, 1999 Rev Ed)) requires certain grants and assignments to be in writing, *not* merely evidenced in writing. Furthermore, unlike contracts which may be executory, it is difficult to contemplate how grants and assignments may be partly performed. It is arguable that a grant or an assignment is either effective or it is not and if so may not be partly performed.

97 Cap 43, 1999 Rev Ed.

98 Cap 43, 1999 Rev Ed.

question is one of balance.<sup>99</sup> If s 6(d) of the Civil Law Act<sup>100</sup> is to serve any cautionary function at all, then the ability of *either party* to gazump or gazunder each other must be a necessary corollary. If we consider gazumping or gazundering a greater evil than incautious contracts involving what will comprise the most valuable asset they will deal with in their lifetimes for most people, then perhaps we should consider a simple repeal of s 6(d). If, however, it is considered that it serves a valuable cautionary function, then the courts ought to be slow to give in to urges to rein in gazumping or gazundering simply because they consider such behaviour unfair or unjust. As Lord Wilberforce remarked in *Midland Bank Trust Co Ltd v Green*,<sup>101</sup> “[i]t is no ‘fraud’ to rely on legal rights conferred by Act of Parliament”. Taken together with the number of (admittedly unnecessarily complex) issues missed by the parties, the time is perhaps ripe to consider reforming and simplifying s 6(d) of the Civil Law Act. The result in *Joseph Mathew v Singh Chiranjeev*<sup>102</sup> can hardly be described as unfair but it is certainly about time that Parliament considered reforming s 6(d) of the Civil Law Act for the new millennium beyond a cosmetic overhaul in language.

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99 See more generally Patricia Critchley, “Taking Formalities Seriously” in *Land Law: Themes and Perspectives* (Susan Bright & John Dewar eds) (Oxford University Press, 1998) at p 507.

100 Cap 43, 1999 Rev Ed.

101 [1981] AC 513 at 530.

102 [2010] 1 SLR 338.