

FONG LEE

v.

MITLAL AND RAM KISSUN

[SUPREME COURT, 1965 (Mills-Owens C.J.), 15th, 16th February,
28th May]

Civil Jurisdiction

[COURT OF APPEAL, 1966 (Marsack V.P., Hammett J.A., Gould J.A.),
29th October 1965, 14th January 1966]

Civil Jurisdiction

Contract—right of pre-emption of land—no price or means of fixing price specified—void for uncertainty.

Contract—agreement to sell land—provision for obtaining consent of Director of Lands—mistake—correct authority Native Land Trust Board—consent of Board obtained—absence of consent of Director of Lands not material—waiver.

Native land—agreement to sell—consent of Native Land Trust Board not obtained before agreement signed—agreement made subject to consent being obtained—executory instrument insisting upon compliance with Native Land Trust Ordinance—not void—Native Land Trust Ordinance (Cap. 104) ss.3,12,35—Native Lands Ordinance 1905.

Sale of land—agreement for sale containing right of pre-emption of other land—contract taking effect in personam—not barred by rule against perpetuities.

Sale of land—agreement to sell to purchaser having no notice of prior equity—notice of claim of right of pre-emption before payment of price—whether purchaser for value without notice.

Equity—right of pre-emption—mere equity distinguished from equitable interest in land.

Caveat—equity creating no interest in land—relevance of caveat—Land (Transfer and Registration) Ordinance (Cap. 136) ss.29,124—Land Charges Act 1925 (15 & 16 Geo. 5, c.22) (Imperial)—Real Property Act 1900 (N.S.W.) s.43.

In 1957 Mitlal (respondent in the appeal and the original defendant) was the lessee of Allotments 7 and 8 of Section 3 of Rakiraki township and by an agreement in writing dated the 20th February 1957 he agreed to sell Allotment 7 to Ram Kissun (second respondent in the appeal and original third party). The agreement for sale, which was duly perfected, contained the following clause, hereinafter referred to as clause 7 :—

“7. The vendor undertakes not to sell allotment No. 8 being part of lease No. 21087 which in turn is part of Native Lease No. 3238 to anyone other than the purchaser and shall give the purchaser right to first refusal.”

In 1963 Mitlal offered Allotment 8 to Fong Lee (the appellant and original plaintiff) and on the 30th August 1963 a Sale Note was prepared and signed accordingly at a price of £1400, which sum was

to be held by Mr. Sahu Khan, solicitor, in trust pending the necessary consents being obtained. The agreement was made subject to the consent of the Director of Lands being obtained and Mitlal undertook to apply for that consent.

- A On the 2nd September 1963, Ram Kissun's solicitor wrote to Mitlal informing him that any sale of Allotment 8 would be in contravention of clause 7. On the 2nd September 1963, also, Fong Lee became aware that Ram Kissun was claiming some interest in the property. On the 3rd September 1963, Fong Lee's son went from Ba to Suva and lodged a caveat to protect Fong Lee's interest. On the same date
- B he applied to the Director of Lands with a view to obtaining his consent to the sale, but was informed that the consent required was that of the Native Land Trust Board. On the same day he obtained the consent of that Board to the sale. On the 4th September 1963, a caveat was lodged (for the first time) on behalf of Ram Kissun. Fong Lee commenced proceedings in the Supreme Court against Mitlal, and Ram Kissun was later joined on his own application as a
- C third party, being in effect an intervener seeking to restrain the contract of 1963 being carried into effect and to obtain specific performance of clause 7.

In the Supreme Court :

- D Held: 1. The lack of consent of the Director of Lands could not be relied upon to show that no contract with Fong Lee came into existence as the Director of Lands could not in the circumstances be heard to say that his consent had not been obtained; the reference in the contract to the Director of Lands was a mere misnomer, the requirement of his consent was not a condition precedent to the contract, and in effect Fong Lee, being satisfied with the consent of the Native Land Trust Board, had waived the requirement.

- E 2. If the land was Native Land, the agreement with Fong Lee was not void under section 12 of the Native Land Trust Ordinance, because it was an executory instrument recognising and insisting upon compliance with the Ordinance, and contracting in terms negating any "dealing" in the event of the Board's consent not being given.

- F 3. Clause 7 was not to be regarded as a restraint on alienation and in substance granted a right of pre-emption or first refusal; the difficulty of ascertainment of the purchase price was overcome by the intention to bind Mitlal, in the event of his receiving an offer from a third party, to offer the land to Ram Kissun at the same price.

- G 4. That clause 7 was not void as infringing the rule against perpetuities as the rule affords no bar to the enforcement of an option or right of pre-emption as between the immediate parties where the contract takes effect *in personam* as well as *in rem*.

- H 5. The maxim *prior in tempore, potior in jure* does not apply in favour of Ram Kissun. Assuming that Ram Kissun acquired an interest in the property under his agreement and not a mere equity, this was not a case of equitable interests competing for priority; if he acquired a mere equity it is not a case of the plaintiff being a purchaser for value of an equitable interest without notice of the equity.

6. By virtue of clause 7 a valid right of pre-emption was vested in Ram Kissun. At the same time Fong Lee had a valid contract binding the owner Mitlal.

7. Though the grantee of an option or right of pre-emption may not obtain specific performance until a binding contract has come into being by reason of its exercise, the court may, while the matter remains *in fieri*, restrain an intending purchaser. Clause 7 contains an express negative provision which Ram Kissun is entitled to have enforced although to the detriment of an innocent third party.

8. The provisions of the Land (Transfer and Registration) Ordinance as to caveats were not relevant, and a case had been made out for restraining Mitlal from breach of the right of pre-emption on terms which, so far as possible, preserved Fong Lee's rights. An injunction would be granted restraining Mitlal from completing the sale to Fong Lee without first offering the property to Ram Kissun at the price agreed between Mitlal and Fong Lee.

In the Court of Appeal :

Held: 1. (per Marsack V.P. and Hammett J.A.) Clause 7 was void for uncertainty as the price at which Ram Kissun could buy the property was neither agreed nor stated therein; no means for ascertaining the price were provided and none should be implied by the court. Clause 7 was therefore incapable of enforcement on the basis set out in the judgment under appeal.

2 (per Marsack V.P.). The principle that an innocent purchaser without notice is not protected against prior equities unless and until the legal estate has passed to him applies only when the prior interest amounts to an equitable interest which could be regarded as of equal standing to that acquired by the subsequent purchaser. Under clause 7 Ram Kissun acquired at best an equity giving him a personal right of action against Mitlal for breach of contract. Fong Lee's equitable interest is to be preferred to the equity of Ram Kissun as being a better equity and an equitable interest in land as opposed to what at best is an equity giving rise to purely personal rights.

3. (per Gould J.A. — dissenting) Ram Kissun's right under clause 7 was not so uncertain as to be unenforceable and was not void under the rule against perpetuities. Fong Lee could not validly claim to be a purchaser for value without notice and could derive no assistance from the fact that Ram Kissun did not register a caveat when his right arose. The learned Chief Justice was therefore entitled to make the order set out in his judgment in the Supreme Court.

Cases referred to :

Harnam Singh and Bakshish Singh v. Bawa Singh (1958) 6 Fiji L.R. 31; *Chalmers v. Pardoe* [1963] 3 All E.R. 552; [1963] 1 W.L.R. 677; *Bromley v. Jefferies* (1700) 2 Vern. 415; 23 E.R. 867; *Worthing Corporation v. Heather* [1906] 2 Ch. 532; 95 L.T. 718; *Stocker v. Dean* (1862) 16 Beav. 161; 51 E.R. 739; *Barrett v. Ring* (1854) 2 Sm. & Giff. 43; 65 E.R. 294; *Griffith v. Pelton* [1958] Ch. 205; [1957] 3 All E.R. 75; *Beesly v. Hallwood Estates Ltd.* [1960] 2 All E.R. 314; 104 Sol. Jo. 407; *Day v. Singleton* [1899] 2 Ch. 320; 81 L.T. 306; *Ellis v. Rogers* (1885) 29 Ch. D. 661; 53 L.T. 377; *Manchester Ship Canal*

- Coy. v. Manchester Racecourse Coy.* [1900] 2 Ch. 352; 16 T.L.R. 429; on appeal [1901] 2 Ch. 37; 17 T.L.R. 410: *Ryan v Thomas* (1911) 55 S.J. 364: *Woodroffe v. Box* [1954] A.L.R. 474; 28 A.L.J. 90: *Hutton v. Watling* [1948] Ch. 26; [1947] 2 All E.R. 641; on appeal [1948] Ch. 398; [1948] 1 All E.R. 803: *London and South Western Railway Company v. Gomm* (1882) 20 Ch. D. 562; 46 L.T. 449: *South Eastern Railway Company v. Associated Portland Cement Manufacturers* [1910] 1 Ch. 12; 101 L.T. 865: *Willmott v. Barber* (1880) 15 Ch. D. 96; 43 L.T. 95: *Morland v. Hales and Somerville* (1911) 30 N.Z.L.R. 201: *Phillips v. Phillips* (1862) 4 DeG.F. and J. 208; 5 L.T. 655: *Cave v. Cave* (1880) 15 Ch. D. 639; 42 L.T. 730: *Hardingham v. Nicholls* (1745) 3 Atk. 304; 26 E.R. 977: *Abigail v. Lapin* [1934] A.C. 491; 151 L.T. 429: *Butler v. Fairclough* (1917) 23 C.L.R. 78: *Honeybone v. National Bank of New Zealand Ltd.* (1890) 9 N.Z.L.R. 102: *Clark v. Barrick* [1950] 1 D.L.R. 260: *Miller v. Minister of Mines* [1963] A.C. 484; [1963] 1 All E.R. 109: *Staples & Co. Ltd. v. Corby and the District Land Registrar* (1900) 19 N.Z.L.R. 517: *Re Kharaskhoma Exploring and Prospecting Syndicate* [1897] 2 Ch. 451; 13 T.L.R. 530: *Hamlyn & Co. v. Wood & Co.* [1891] 2 Q.B. 488; 7 T.L.R. 731: *Douglas v. Baynes* [1908] A.C. 477: *Milnes v. Gery* (1807) 14 Ves. 400; 33 E.R. 574: *Lapin v. Abigail* (1930) 44 C.L.R. 166: *Templeton v. Leviathan Proprietary Ltd.* 30 C.L.R. 34: *Rice v. Rice* 2 Drew. 73; 61 E.R. 646: *Westminster Bank Ltd. v. Lee* [1955] 2 All E.R. 833; 99 Sol. Jo. 562.

D Action in the Supreme Court for specific performance of agreement for sale and purchase or alternatively damages and appeal from judgment of the Supreme Court to Court of Appeal. The facts are set out in detail in the judgment of the Chief Justice in the Supreme Court.

- E** In the Supreme Court.
 A. H. Sahu Khan for the plaintiff.
 R. A. Kearsley for the defendant.
 R. I. Kapadia for the third party.

MILLS-OWENS C.J. [28th May 1965]—

- F** By a Sub-lease dated 19th August 1939, registered under the provisions of the Land (Transfer and Registration) Ordinance (Cap. 136) as No. 21087 and made between the Director of Lands on behalf of the Crown on the one part and Messrs. Lee and War of the other part, land known as Allotments Nos. 7 and 8 of Section 3 of Rakiraki Township comprising 1 rood 23.7 perches were demised to Messrs. Lee and War for the term of 75 years from the 7th February 1933 at the yearly rent of £9. It was a condition of the Sub-lease that the lessees should not transfer or assign the premises without the written consent of the lessor, provided that such consent should not be unreasonably withheld. By a transfer duly registered on the 6th June 1950 the Sublease was transferred to the defendant Mitlal.

- H** By an agreement dated the 20th February 1957 Mitlal agreed to sell to Ram Kissun Allotment No. 7 together with the buildings thereon for the unexpired term of the Sublease. The sale was in

fact completed by the registration of a Sub-Sublease in Ram Kissun's favour for 50 years and 7 months from the 3rd June, 1957, at a rent of £4. 10. 0 per annum. Allotment No. 7 contained 32 perches and the Sub-Sublease was duly registered on the 12th June, 1957. The Agreement of the 20th February 1957 contained the following material clause :

"7. The vendor undertakes not to sell allotment No. 8 being part of lease No. 21087 which in turn is part of Native Lease No. 3238 to anyone other than the purchaser and shall give the purchaser right to first refusal."

The 'purchaser' was, of course, Ram Kissun; there was no express provision or indication in the Agreement that assigns or persons deriving title under the parties were to be bound thereby.

In March 1963 the defendant Mitlal executed a mortgage, in favour of one Shiu Shankar, over Allotment No. 8 and this mortgage was duly registered on the 15th March 1963 against the title to the Sub-lease. By August of that year Shiu Shankar was threatening to exercise his powers of sale as mortgagee. He had gone so far as to advertise the property for sale, inviting offers therefor through his solicitor, such offers to be open to be received up to the 31st August 1963. It is clear that in order to avoid a forced sale Mitlal sought out the plaintiff on the 30th August 1963 and offered the property, Allotment No. 8, to him. After some negotiation they struck a bargain and on the same day they went to a solicitor (Mr. Sahu Khan) to have a contract drawn up and signed. The contract contained the following material clauses :

"3. The Vendor shall forthwith upon the execution hereof apply to the Director of Lands as Lessor of the said lands for consent to transfer the said lands to the Purchaser."

6. This agreement is subject to the consent of the Director of Lands and possession of the said lands shall be given to and taken by the Purchaser on 1st September 1963."

By a separate transaction Mitlal sold certain chattels on the premises to the plaintiff.

On the 1st September 1963 the plaintiff's son went to the premises to collect the chattels. He was seen doing so by Ram Kissun from his next-door premises, No. 7. As a result of this, on the following day, the 2nd September, Ram Kissun went to see Mr. V. R. Sharma who was the solicitor who had drawn up the Agreement of 1957. Mr. V. R. Sharma, on the same day, wrote to Mitlal informing him that any sale of Allotment No. 8 would be in contravention of clause 7 of the Agreement. Mr Sharma also telephoned to the office of the plaintiff and spoke to the plaintiff's clerk, Ranjit, in terms indicating that Ram Kissun was claiming an interest in the property. No written intimation of Ram Kissun's claim was, apparently, given to the plaintiff, but it is clear that on the 2nd September the plaintiff did become aware that Ram Kissun was claiming some interest in the property. On the following day, the 3rd September, the plaintiff's

A son made a journey from Ba to the land registry at Suva (a distance of some 130 miles) in order to lodge a caveat to protect the plaintiff's interest under his contract. At the same time he called at the office of the Director of Lands with a view to obtaining his consent to the sale. At the office of the Director of Lands he was informed that the consent properly required was that of the Native Land Trust Board, obviously on the basis that the property was considered to be "native land". He thereupon went to the office of the Board, on the same day, and obtained the Board's written consent to the sale. On the following day, the 4th September, Mr V. R. Sharma lodged a caveat on behalf of Ram Kissun.

B The position, therefore, is that whatever right Ram Kissun has under clause 7 of the Agreement of 1957 is prior in time to the plaintiff's contract, but that the plaintiff's caveat was lodged prior to that of Ram Kissun; further that throughout the 6½ years or so which had elapsed since the Agreement of 1957 there was nothing on the register maintained under the Ordinance, Chapter 136, to give notice of the provisions of clause 7 of the contract of 1957 or of any interest arising thereunder.

C After some negotiation a writ in the proceedings was issued in October 1963 by the plaintiff against Mitlal claiming specific performance of the contract of 1963 and damages for breach of contract; it is agreed that the claim for damages is in the alternative. In April 1964 Ram Kissun made application to be joined as a third-party and it was ordered accordingly. In effect, he is an intervener in the suit, resisting the claim of the plaintiff and making his own claim to restrain the contract of 1963 from being carried into effect and for specific performance of clause 7 of the Agreement of 1957.

E It was submitted that the plaintiff was guilty of fraud, or a species of fraud, in lodging his caveat in the knowledge that Ram Kissun was claiming an interest in the property. I have no doubt that it was known to the plaintiff when he lodged his caveat on the 3rd September that Ram Kissun was claiming some interest in the property. I have no doubt that it was a hurried journey to Suva, commenced in the early hours of the morning, by the plaintiff's son in order to be first to lodge a caveat. But it certainly does not follow that the plaintiff was acting fraudulently, in any sense. For all the plaintiff knew the claim of Ram Kissun was completely insupportable. In lodging the caveat the plaintiff, in my view, was doing no more than acting prudently in his own proper interests. It is a well-known feature of the registration system that instruments take priority according to date of registration and, no doubt, the plaintiff or his son, on advice or otherwise, thought that the same applied to the entering of a caveat. I see nothing remotely approaching fraud in anything the plaintiff or his son did at any stage.

H It was submitted, with respect to the plaintiff's contract, that the consent of the Director of Lands was a condition precedent; such consent not having been obtained, no binding contract came into existence; if a mistake was made in requiring the consent of the Director of Lands rather than that of the Native Land Trust Board — and it is not certain that a mistake was made, as it is not clear that

the land is native land — it cannot assist the plaintiff. On the face of the Sublease the 'lessor' is the Director of Lands (on behalf of the Crown) and by virtue of condition No. 6 of the endorsed conditions the consent of the 'lessor' is required to any assignment. The Sublease does, however, afford some evidence that the property is native land to which the Native Land Trust Ordinance (Cap. 104) now applies. It has a sub-heading, in the top left-hand corner: "Sub-Lease (Native)". The word "Crown" has been struck out in the reference to the registration number of the document at the top right-hand corner: thus "~~Crown~~ Lease No. 21087"; likewise in the memorial of registration at the foot of the document. In particular, the parcels refer to the property as "Part of N.L. No. 3238". And, obviously, both the Director of Lands' office and the office of the Native Land Trust Board considered the property to be native land. The consent of the Board could only have been intended to be a consent given pursuant to section 12 of the Native Land Trust Ordinance, Chapter 104. At the date of the Sublease, the 9th August 1939, the Ordinance had not yet come into force, so that the Board had not yet come into existence. As at 1939 leases of native land were granted by the native owners, under the provisions of the Native Lands Ordinance 1905. It is to be inferred, I think, that the head lease was a lease of native land in favour of the Crown granted under that Ordinance. By virtue of section 35 of the Ordinance, Chapter 104, any such lease now continues in force as if granted under, and is in all respects subject to, the provisions of the Ordinance, Chapter 104. Under section 12 the consent of the Board is required to a sale of his interest by a lessee of native land, including a sub-lease; under the section it is unlawful to alienate or deal with native land by sale, transfer etc. without the consent of the Board "as lessor or head lessor". It is sufficiently clear, in my view, that the requirement of the consent of the Director of Lands in the plaintiff's contract was a mistake. It should perhaps be mentioned that the Director of Lands is a statutory member of the Board (section 3 of Chapter 104). The point made with respect to lack of consent of the Director of Lands may, in my view, be met in a number of ways :

- (a) the consent required by the contract was a 'lessor's' consent and as the Director was no longer the lessor his consent was unnecessary, and thus the relevant portion of the contract became immaterial;
- (b) the Director of Lands could not now be heard to say that his consent had not been obtained, in the circumstances, so that the position is the same as if it had been given; alternatively, he or his office on his behalf waived consent;
- (c) the reference in the plaintiff's contract to the Director of Lands was a mere misnomer for the proper 'lessor'; a case of '*falsa demonstratio*';
- (d) the requirement of consent was not a condition precedent to the contract but a matter of 'conveyance' or title, so that it would satisfy the terms of the contract if the consent of the Director of Lands were to be obtained at any time before completion (see *Day v. Singleton* [1899] 2 Ch. 320; *Ellis v.*

Rogers (1885) 29 Ch. D. 661). It is not as if consent had been refused;

- A (e) it was Mitlal's duty as vendor to obtain the consent; in effect the plaintiff has waived it, being satisfied with the consent of the Native Land Trust Board in lieu.

B It was submitted further that if the property is 'native land', as I hold it to be, the plaintiff's contract was null and void as an illegal 'dealing', the contract having been entered into without the prior consent of the Board. But this would mean, as I see it, that an intending purchaser would be unsafe in entering into any contract which did not contain a provision for the Board's consent as a condition precedent to its binding effect. I do not read section 12 as bringing about that result. If parties contract to effect a dealing in native land in terms which recognise that the dealing is not to be carried into effect contrary to the provisions of the Ordinance, then, in my view, they do not, merely by entering into the contract 'deal' with the land without consent. Clearly, in such a case, no breach of the statute is contemplated; the parties are recognising and insisting upon compliance therewith and they are expressly contracting in terms negating any 'dealing' in the event of consent not being given. In *Harnam Singh and Bakshish Singh v. Bawa Singh* (1958) 6 Fiji L.R. 31 the President of the Fiji Court of Appeal (Sir George Lowe) said that it would be an absurd position if an agreement to deal with native land were to be held to be void *ab initio* so that it could not even be submitted to the Board for its consent. This statement was referred to in the opinions of their Lordships of the privy Council in *Chalmers v. Pardoe* [1963] 1 W.L.R. 677 at 684, with apparent approval. In the present case, it is true, the contract contained no express provision for the consent of the Board being obtained — as I think, purely by mistake — but, clearly, it was an executory instrument, not itself intended to carry the transaction into effect. I do not regard the provision enabling the plaintiff to take possession before completion as affecting the conclusion that it would satisfy the provisions of section 12 if the Board's consent were obtained at any time before completion. A number of contentions were advanced as to the validity of clause 7 of the contract of 1957. F It was submitted on behalf of the plaintiff that the clause is void for uncertainty; alternatively, void as a restraint on alienation. As to uncertainty, it was argued, the clause laid down no machinery for ascertainment of the price which Ram Kissun was to pay for the property; it is not to be implied that a reasonable price was to be paid (see 8 Halsbury, para. 178 at p.108). The clause, read as a whole, it was argued, was intended to give a right of 'first refusal'; while such a contract was held good in the case of *Manchester Ship Canal Co. v. Manchester Racecourse Co.* ((1900) 2 Ch. 352 (affirmed): (1901) 2 Ch. 37)) in that case the contract had been confirmed by an Act of Parliament; see also *Ryan v. Thomas* (1911) 55 Sol. Jo. 364. Counsel for Mitlal submitted that the Courts would not grant an injunction to restrain a breach of a clause so indefinite and ambiguous in its terms (see 21 Halsbury, para. 798 at pp. 379-80). Mitlal, he said, H would, however, be prepared to submit to an injunction — not in the terms of clause 7 but in terms to be decided.

I do not regard clause 7 as a restraint on alienation. The clause must be read as a whole and construed *ut res magis valeat quam pereat*. The opening words of restraint, in my view, are intended merely to implement the intention of the clause as a whole. In substance the clause grants a right of pre-emption or 'first refusal', being intended to bind Mitlal, in the event of his receiving an offer for the property from a third party, to offer it to the 2nd defendant, at the same price. Thus the difficulty of ascertainment of the purchase-price is overcome; *id certum est quod certum reddi potest*. In the case of *Manchester Ship Canal Co. v. Manchester Racecourse Co.* (*supra*), I agree, the ultimate decision as to the validity of the contract there in question rested on the confirmation of the agreement by Act of Parliament, but support for the view which I take is to be found in the judgment of Farwell J. sitting at first instance. He said, at p. 363—

"In this case the price is ascertainable by the fact that it is to be the same as that offered by any other company or person."

I have considered also the case of *Bromley v. Jefferies* (1700) 2 Vern. 415; 23 E.R. 867, but that, it appears to me, was a different case.

Then it was argued that the clause was void as infringing the rule against perpetuities. Counsel for Ram Kissun was concerned to argue that the contract of 1957 was a personal contract, in the sense that it was intended to bind only the parties, Mitlal and Ram Kissun, and not their personal representatives or successors in interest. Thus any contingent interest arising in the property under clause 7 was bound to vest during the joint lifetimes of the parties.

Halsbury (3rd Edn. Vol. 29 paras. 592-4 at pp. 297-8) distinguishes three cases: where the contract operates as a personal contract only; where it operates solely to create a remote limitation; and where it operates both as a personal contract and to create a future interest in land. A right of pre-emption is given as an example of an equitable interest to arise in the future although, it is pointed out, on the appeal in *Manchester Ship Canal Co. v. Manchester Racecourse Co.* (*supra*) the Court of Appeal differed from Farwell J. on this point. I take the expression 'personal contract', in this context, to mean a contract which is not intended to give rise to rights *in rem*. If merely a personal contract in this sense the rule does not apply. If, upon its true construction, it is both a personal contract and a contract attempting to create a too remote limitation, the attempted limitation is bad for perpetuity but the personal contract is enforceable, if the case otherwise admits, against the promisor by specific performance or damages. Clearly, I think, clause 7 was intended to operate both *in personam* and *in rem*. Whether or not it was in breach of the perpetuity rule, it is, if the case otherwise admits, specifically enforceable against Mitlal as an immediate contracting party. This appears to follow quite clearly from the decision of Jenkins J. in *Hutton v. Watling* [1947] 2 All E.R. 641, where the authorities were very fully examined. It seems a curious position that one may achieve by contract what one cannot do by direct grant, namely bring about the creation of an interest which, essentially, is to arise at a time

A beyond the relevant perpetuity period. It is said that as between the original contracting parties the rule against perpetuities has no application; the rule affects interests in land, not contracts. It is also said that an option or right of pre-emption is enforceable against a successor in interest of the covenantor only if it gives rise to an interest in land, not being void for remoteness. Logically, if a too remote interest in land is created then it is void also as between the contracting parties; but the law studiously avoids that and concentrates its attention on the contract in so far as it operates in *personam*. Warrington J., in *Worthing Corporation v. Heather* [1906] 2 Ch. 532, found justification, for the third party being held bound, in the doctrine of specific performance whereunder, he said, "the covenantee is regarded in a Court of Equity as having an actual interest in the land". Jenkins J., in *Hutton v. Watling* (*supra*), thought the authorities to be not wholly satisfactory, and said that the jurisdiction to grant specific performance is founded not on the ground that an equitable interest is created but on the simple ground that damages do not afford an adequate remedy; "in other words", he said, "specific performance is merely an equitable mode of enforcing a personal obligation with which the rule against perpetuities has nothing to do". Putting aside these matters of principle, *Hutton v. Watling* is clear authority for holding that the rule against perpetuities affords no bar to the enforcement of an option or right of pre-emption as between the immediate parties where the contract takes effect in *personam* as well as in *rem*.

E It was further argued, with reference to the rule against perpetuities that the contract of 1957 was a personal contract in the sense that it was not intended to bind the parties' personal representatives or successors in interest; the contract makes no reference to personal representatives or assigns; clause 7 must therefore, counsel said, have effect, if at all, within the period of the joint lives of the parties. In my view, this may well be so. notwithstanding that the parties contracted in terms of indefinite duration and that the sublease had still some 50 years to run, and that in the absence of a period being expressed the rule is that the 21 year period of the perpetuity rule is to be applied. Superficially, the right of pre-emption was exerciseable at any time during the unexpired term but it might well be that as a matter of construction it was intended to operate only during the life or lives of one or both of the parties. In *Hutton v. Watling* (*supra*), Jenkins J. said that if the exercise of an option were confined to the grantee personally that would "in itself provide a complete answer to the objection founded on the rule against perpetuities." *Stocker v. Dean* (1862) 16 Beav. 161; 51 E.R. 739) is to the same effect.

H I would now refer to an argument based on the proposition that the maxim '*potior in tempore, potior in jure*' applies. It was suggested that as Ram Kissun acquired his right or interest first it prevails over the plaintiff's interest. In my view the maxim has no application. Assuming that the 2nd defendant acquired an interest in the property under the contract of 1957, and not a mere equity, this is not a case of equitable interests competing for priority. And if he acquired but

a mere equity, it is not a case of the plaintiff being a purchaser for value of an equitable interest without notice of the equity.

Summarising the position thus arrived at, I hold that by virtue of clause 7 of the Agreement of 1957 a valid right of pre-emption or 'first refusal' is vested in Ram Kissun. At the same time the plaintiff has a valid contract binding the owner, Mitlal.

It was argued that to grant specific performance of the plaintiff's contract would be to sanction or compel a breach of Mitlal's prior contract with Ram Kissun, contrary to what was laid down in *Willmott v. Barber* ((1880) 15 Ch. D. 96) by Fry J. I doubt whether this case is authority for the wide proposition that the Court will never grant specific performance of a later contract when to do so would mean that one party would thereby be rendered unable to perform a prior contract; in other words I do not agree that no discretion is left to the Court in such a case. In *Barrett v. Ring* (1854) 2 Sm. & Giff. 43; 65 E.R. 294, the Court ordered specific performance of a contract for sale of land although the vendors were in breach of a statutory obligation to first offer the land to a third party; but it must be conceded that the third party was not a party to the suit and made no claim to restrain the sale. In the present case, it is admitted, Ram Kissun never took any step to protect his right or interest, by lodging a caveat, until it was too late. The registration aspect is one which must be examined; for the time being I deal with other points.

I think it is clear that in any event Ram Kissun cannot, as matters now stand, have specific performance. That would be premature; it remains to be seen whether a binding contract for a sale to him comes into existence as the result of his exercising his right of pre-emption. Although he says he wants to buy I cannot dispel a strong impression that he is not so much interested in securing the property for himself as in preventing the sale to the plaintiff going through. Mitlal has chosen not to give evidence; I do not have his version to set against that of Ram Kissun. Their Solicitor in 1957, Mr V. R. Sharma, could not recall precisely why no caveat was lodged in 1957 on behalf of Ram Kissun. He said that it might have been the case that he deliberately decided not to lodge a caveat in order to keep the title clear as both parties wished to obtain a Bank mortgage. Mr Sharma also said that he has doubts whether a caveat could lawfully have been lodged in respect of such a right of pre-emption and that it might have been a lapse on his own part. He is, and was in 1957, a very experienced practitioner in systems of land registration and it may well have been his view at the time that clause 7 did not give rise to a caveatable interest.

But although the grantee of an option or right of pre-emption may not obtain specific performance until a binding contract has come into existence by reason of the exercise of the option or right of pre-emption, as Farwell J. said in the case of *Manchester Ship Canal Co. v. Manchester Racecourse Co.* (*supra*), while the matter remains *in fieri*, the Court, by inverse application of *Willmott v. Barber* (*supra*), may restrain an intending purchaser. On the appeal, the

Court of Appeal (Rigby, Vaughan Williams and Stirling L.JJ.) at pp. 50-1, said—

- A "It seems, however, from the decision in *Willmott v. Barber* (1880) 15 Ch. D. 96 that the Trafford Park Company could not obtain a decree for specific performance of a contract for sale and purchase of land, if that sale would be a breach of a prior contract with a third person; and it seems to us to follow that one ought to treat this case on the basis of an action to restrain a breach of a contract threatened to be carried out in pursuance of a subsequent contract by the defendant with a third person having full knowledge of the first contract. This seems to bring the case within the principle of *Lumley v. Wagner* 1 D.M. & G. 604. The contract here to give the canal company the 'first refusal' involves a negative contract not to part with the land to any other company or person without giving that first refusal. If the action had been brought against the racecourse company, the party to the contract, alone, the injunction asked for could not have been granted without affecting the rights and interests of the Trafford Park Company. They are necessary parties to the action, just as Mr. Gye was a necessary party to the action to *Lumley v. Wagner* (*supra*), for to grant the injunction in that case was to prevent Miss Wagner from carrying out her contract to sing at Mr. Gye's opera-house; and, if the defendant, thus brought in, comes and insists on his right to have the second contract carried out, we do not see why the injunction should not be granted against him."
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- This passage refers to the third person having full knowledge of the first contract. That is not the position in the case before me. I am entirely satisfied that the plaintiff had no knowledge of the contents of the Agreement of 1957. But I do not think that can assist him. Clause 7 contains an express negative provision which, subject to consideration of the registration aspect, it seems to me, Ram Kissun is entitled to have enforced, although to the detriment of an innocent third party, the plaintiff. I cannot carry my doubts about the *bona fides* of Ram Kissun and Mitlal to the point of refusing relief to Ram Kissun, if the registration aspect permits. At the same time it would be unfortunate, I think, to treat the plaintiff's claim as one which may sound only in damages. If he is now awarded damages that would be an end to his contract, when it may well turn out that Ram Kissun never takes up his right of pre-emption. The plaintiff's right to specific performance of his contract should, I think, in that event be preserved. It is not open to me to adjourn the proceedings to see whether Ram Kissun does in fact exercise his right of pre-emption — to the point of completion — but it may be that a just result can be brought about by other means. At this point I would turn to the registration aspect.
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- It was much pressed on me, on behalf of the plaintiff, that the case is governed by the decision of their Lordships of the Privy Council in *Abigail v. Lapin* [1934] A.C. 491, on the basis that the failure of Ram Kissun to lodge a caveat prejudiced the plaintiff. But nothing done by Ram Kissun facilitated the entry by the plaintiff
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into his contract with Mitlal and nothing left undone by Ram Kissun misled the plaintiff. The plaintiff made no prior search of the register maintained under the Land (Transfer and Registration) Ordinance, Cap. 136.

Section 124 of the Ordinance, Chapter 136, does not say that caveatable interests shall be void or unenforceable if not protected by caveat. There is no provision for the registration of options or rights of pre-emption as land charges, as for example under the (English) Land Charges Act, 1925. Nor is there any provision, in express terms, that priority as between competing equitable interests shall be determined by priority of caveat. In *Abigail v. Lapin (supra)* the Privy Council found it unnecessary to consider whether, under a system of registration of legal titles and for the protection of equitable interests by caveats, such as prevails under the Torrens system, the ordinary rules of equity governing the priority of equitable interests are affected. It was also held unnecessary to consider an argument based on section 43 of the Real Property Act 1900 of New South Wales. That section is identical in its terms with section 29 of the Fiji Ordinance, Chapter 136, and reads as follows—

"29. Except in the case of fraud no person contracting or dealing with or taking or proposing to take a transfer from the registered proprietor of any registered estate or interest shall be required or in any manner concerned to inquire or ascertain the circumstances in or the consideration for which such registered owner or any previous registered owner of the estate or interest in question is or was registered, or to see to the application of the purchase money or any part thereof, or shall be affected by notice, direct or constructive, of any trust or unregistered interest, any rule of law or equity to the contrary notwithstanding, and the knowledge that any such trust or unregistered interest is in existence shall not of itself be imputed as fraud."

The argument was that the terms of the section forced the owner of an equitable interest to protect his interest by caveat, at the peril of being postponed to any subsequent equitable interest whose owner managed to lodge a caveat first. The opinion of the Court in the decision appealed from, that of the High Court of Australia, was that the section protected registered dealings only (see per Knox C.J. at 44 C.L.R. 182, Isaacs J. at p.188; Dixon J. at p.203; Gavan Duffy and Starke JJ. at p.196).

In my view the corresponding section of the Fiji Ordinance, Chapter 136 (section 29 (*supra*)) has no relevance to the present case, if the case is viewed, as I think substantially it ought to be viewed, as a claim by Ram Kissun to restrain Mitlal from carrying into execution his sale to the plaintiff in breach of the right of pre-emption. As it appears to me, it is unnecessary to decide whether the right of pre-emption gave rise to an interest in land, which might be a very considerable question — cf. the *Manchester Ship Canal* case, on appeal (*supra*); *Hutton v. Watling (supra)*; *L. & S. W. Railway Co. v. Gomm* (1882) 20 Ch. D. 562 at pp. 581-2, 587-8; *Griffith v. Pelton* [1957] 3 All E.R. 75; and *Beesley v. Hallwood Estates* [1960] 2 All E.R. 314, 321). No caveat had in fact been lodged by Ram Kissun

when the plaintiff entered into his contract. Even if the plaintiff's contract had gone through to completion it would have been of no assistance to Ram Kissun (under a system of registration of title) to establish that his right of pre-emption gave rise to an interest in land.

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- I conclude that a case is made out for restraining the defendant Mitlal from breach of the right of pre-emption, but on terms which so far as possible preserve the plaintiff's rights. In the circumstances, I think the injunction should be in the terms that Mitlal, for himself, his personal representatives and assigns, is to be restrained from completing the sale to the plaintiff without first offering the property to Ram Kissun at the price agreed to be paid by the plaintiff, namely £1,400, and otherwise on the terms of the plaintiff's contract except that for the consent of the Director of Lands should be read the consent of the Native Land Trust Board. If Mitlal fails to make the offer when called upon by Ram Kissun to do so then Ram Kissun may apply for such further order as he may be advised. If the offer is made and accepted, and the contract thus arising is carried through to completion by registered transfer then the plaintiff may proceed herein to have his damages for breach of contract assessed against the defendant Mitlal, on such evidence as may be adduced, and for judgment against Mitlal accordingly. If a sale to Ram Kissun is not carried through to completion as aforesaid within 3 calendar months hereof, or such extended period as the parties may agree, then the plaintiff may proceed herein for an order for specific performance against Mitlal. Liberty to all parties to apply, at any time to enlarge the said period of 3 calendar months, whether before or after its expiry, and liberty to apply generally.
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- Ram Kissun, having substantially succeeded, is entitled to judgment for his costs as against both the defendant Mitlal and the plaintiff; the costs as between the plaintiff and Mitlal (including the question of ultimate responsibility for or indemnity in respect of the costs payable to Ram Kissun as aforesaid) are reserved for argument.

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- From this judgment the plaintiff appealed.

In the Court of Appeal.

A. H. Sahu Khan for the appellant.

R. A. Kearsley for the first respondent.

R. I. Kapadia for the second respondent.

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- [14th January 1966]—

The following judgments were read:

MARSACK V.P.:

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- For the purpose of this judgment it is not necessary to repeat the findings of fact which appear in the judgment appealed from, and which are fully dealt with in the comprehensive judgment of Sir

Trevor Gould, J.A. which I have had the advantage of reading. All that needs to be stated here is that part of those findings upon which what may be referred to as the contending equities of Fong Lee and Ram Kissun are founded. This may be shortly summarised as follows :

- (a) In the agreement dated 20th February, 1957, whereby Ram Kissun agreed to purchase Mitlal's leasehold interest in Allotment 7, the following clause occurs :

"7. The vendor undertakes not to sell allotment No. 8 being part of lease No. 21087 which in turn is part of Native Lease No. 3238 to anyone other than the purchaser and shall give the purchaser right to first refusal."

That clause is the source of any equity in favour of Ram Kissun affecting the adjoining Allotment 8.

- (b) On the 30th August, 1963, Mitlal agreed to sell his leasehold interest in Allotment 8, together with the wood and iron shop building thereon, to Fong Lee for the sum of £1400. An agreement to this effect was prepared by Mr. Sahu Khan, Solicitor acting for both parties, and signed on that day. The full purchase price of £1400 was lodged by Fong Lee with the solicitor pending the granting of the necessary consent. The authority whose consent was required in order to validate the transfer was the Native Land Trust Board, and the consent of that Board to the transfer to Fong Lee was granted on the 4th September, 1963.
- (c) No search of the title was made by Fong Lee prior to the completion of the contract for the sale to him of Allotment 8, but the title in fact was free from any memorial which would have given Fong Lee notice of Ram Kissun's claim. Fong Lee became aware of this claim only after the contract for sale had been signed and the purchase price paid in full to the solicitor acting for the parties. He thereupon lodged a caveat on the 3rd September, 1963, to protect his interest. On the following day, 4th September, a caveat was lodged on behalf of Ram Kissun.

In the view I take of the case it is necessary to examine these facts for the purpose of ascertaining firstly if Ram Kissun had a good and valid contract affecting Allotment 8, and secondly what equity or equitable interest was acquired by each of the contending parties, Fong Lee and Ram Kissun.

The wording of Clause 7, which forms the basis of any rights acquired by Ram Kissun, differs considerably from the wording of the options and pre-emptive rights considered by the Courts in the cases quoted in the very full and careful judgments both of the learned trial Judge and of Sir Trevor Gould. The trial Judge has held that the clause granted a right of first refusal to Ram Kissun, and that this necessarily implied a provision that before agreeing to sell Allotment 8 to any third person he must first offer it to Ram Kissun at the price which that third person was prepared to pay and Mitlal to accept. I agree that if it is necessary to find some meaning for the phrase "first refusal" then this interpretation

would be reasonable. But with respect I feel that this would be to take the phrase out of its context. Under Clause 7 Mitlal convenants unequivocally that he will not sell the property to anyone other than Ram Kissun; and his agreement to give a right of first refusal to

- A Ram Kissun must be examined in the light of his agreement not to sell to anyone else. The clause, in my opinion, must be considered as a whole and not in two separate and possibly inconsistent parts. As he is restrained from selling to any person other than Ram Kissun, then it is to my mind clear that he cannot enter into *bona fide* negotiations with another possible purchaser for the purpose of ascertaining the price at which Mitlal should make his offer to Ram
- B Kissun. A possible interpretation of the clause therefore would, in my opinion, be this: if Mitlal desired to sell the property at a certain price he must first offer it — without negotiations with a third party — to Ram Kissun at that price, and Ram Kissun would be at liberty to accept or refuse. It might well be contended that if Ram Kissun refused, Mitlal would still be bound by his covenant not to sell to
- C anyone else.

Another possible interpretation might be, by analogy with what was said in *Manchester Ship Canal Company v. Manchester Race-course Company* [1901] 2 Ch. 37 at page 46, that Ram Kissun is thereby granted the opportunity of refusing a fair and reasonable offer; if, but only if, Ram Kissun desires to sell the property.

- D It was strongly urged by counsel for the appellant that Clause 7 in any event was unenforceable in that it does not either state the price or provide machinery for its ascertainment.

In my opinion Clause 7 was not a contract of which specific performance could be ordered; this is consistent with the view expressed by the learned trial Judge, where in the course of his judgment he

- E says:
- “I think it is clear that in any event Ram Kissun cannot as matters now stand have specific performance.”

Before specific performance of any contract will be granted by the Courts it is necessary, as pointed out by Lord Hardwicke in *Buxton v. Lister* 3 Atk. 386, that the agreement must be certain, fair and just in all its parts. If any of those ingredients were wanting the

- F Court would not decree specific performance.

It is, of course, not necessary that the contract should in the first instance determine the price. It may either appoint a way in which the price is to be determined or it may stipulate for a fair price. As is said by Grant, M.R. in *Milnes v. Gery* 33 E.R. 574 at p.577:

- G “Upon the principle, that a fixed price was an essential ingredient in a contract of sale, the ancient Roman lawyers doubted, whether an agreement, that did not settle the price, was at all binding. Justinian’s Institutes and the Code state that doubt; and resolve it by declaring, that such an agreement should be valid and complete, when and if the party, to whom it was referred, should fix the price: otherwise it should be totally inoperative: ‘*quasi nullo pretio statuto*’; and such clearly is the
- H Law of England.”

In view of what I regard as the uncertainties in the terms of Clause 7, I am of opinion that it is incapable of enforcement on the basis set out in the judgment from which this appeal is brought. The law, as I understand it, is that in a suit for specific performance — and under Clause 3 of the claim which Ram Kissun has filed in these proceedings he asks for an order for specific performance of Clause 7 — the Court is not entitled to read into the agreement any clause which is not there, which is not expressed or which does not logically and inevitably follow from the wording of the agreement itself. As is said by Lord Esher in *Hamlyn v. Wood* [1891] 2 Q.B.D. 488 at 491 :

“I have for a long time understood that rule to be that the Court has no right to imply in a written contract any such stipulation, unless, on considering the terms of the contract in a reasonable and business manner, an implication necessarily arises that the parties must have intended that the suggested stipulation should exist. It is not enough to say that it would be a reasonable thing to make such an implication. It must be a necessary implication in the sense that I have mentioned.”

The principle is stated in *Fry on Specific Performance* 6th Edn. at p.173 :

“The Court, however, will not imply a term in a contract unless there arises from the language of the contract itself, and the circumstances under which it is entered into, such an inference that the parties must have intended the stipulation in question, that the Court is necessarily driven to the conclusion that it must be implied.”

I am in full agreement with the learned trial Judge and also with Gould J.A. that it would be convenient to read Clause 7 in the way set out in the judgment appealed from, and thus give full validity to a contract which might otherwise lack the certainty necessary to make it enforceable. But I am not convinced that this interpretation must necessarily follow as a matter of law.

Both in the judgment appealed from and in the New Zealand case of *Morland v. Hales and Somerville* (1911) 30 N.Z.L.R. 201, which is referred to at some length in the judgment of Sir Trevor Gould, great reliance is placed on the decision in the Manchester Canal case (*supra*). But that case is in my view distinguishable on two grounds. In the first place the wording of the agreement which there had to be interpreted, differed materially from that of Clause 7 which is in issue in this case. In the second place, there the contract had been given statutory validity; and Farwell J. made it clear that as the Legislature had declared the agreement valid, the Court must avoid coming to any conclusion which would render the agreement void for uncertainty. The Manchester Canal case was considered by Warrington J. in *Ryan v. Thomas* (1911) 55 S.J. 364, cited in the argument in the Court below. In the course of his judgment he says, after referring to the fact that the Court in the Manchester Canal case was bound to find a meaning for the agreement under consideration there :

A "Now, in dealing with an ordinary contract, the court is not bound to find some meaning for the words used. It is not my business to expand the words of a contract; if a contract does not contain certain stipulations, it is not for me to make them. I must let the actual words stand. The case cited has no bearing on the case before me. Here people have purported to come to an agreement, but, in fact, have not come to any agreement at all, because the terms of the agreement are not expressed. The words 'first option' by themselves have no meaning; there is no mention of price, or time, or anything else. I hold that there was no contract, and therefore the defence fails, and the plaintiff is entitled to have the lease set aside."

B That, in my respectful opinion, is an accurate statement of the law applicable to cases such as the present one.

C In the result I am of opinion that Clause 7 is void for uncertainty. With respect I do not feel that the interpretation of that clause adopted by both the learned trial Judge and Sir Trevor Gould follows logically and inevitably from the words used in that clause. I am fully aware of the desirability of giving effect to a contract where the terms of that contract are clear from the express wording of the contract or necessary inference from the words used. In the present case I feel that it would be possible to place several interpretations upon the clause considered as a whole. As the clause is drawn it is D obscure and lacking in the essentials of a clear and ascertainable contract. No doubt the agreement between the parties concerning Allotment 8 could have been ascertained and correctly set out in the document. But this has not been done. The only method of making Clause 7 a binding contract between the parties would, in my opinion, be for the Court itself to supply the missing terms, by E choosing among the available possibilities. But that is not the function of the Court. It is not a question of what would be reasonable. It is a matter of deciding by the express terms of the contract, or necessary inference therefrom, exactly what was agreed, and what it is that the Court is asked to enforce. That to my mind cannot be done here. It is for these reasons that I would hold Clause 7 void and unenforceable on the ground of uncertainty.

F If I am right in this conclusion then it follows that there is no foundation for Ram Kissun's claim that Mitlal be restrained from selling to Fong Lee, and Fong Lee is entitled to a decree of specific performance.

G If, however, I am wrong in holding that the contract sought to be established by Clause 7 is void for uncertainty, then it will be necessary to decide exactly what equities or equitable interests were acquired by Ram Kissun and Fong Lee respectively, and which of those equities or equitable interests is to be held to over-ride the other.

H It is, I think, clear that Clause 7 did not create an interest in land, and in this respect it is to be distinguished from an option to purchase. As is pointed out by Williams J. in *Morland v. Hales and Somerville* (*supra*) at p.208, the holder of an option has a vested

right to take the land from the owner without his consent; while a right of pre-emption does not compel the vendor to sell if he does not choose to do so.

At its best, the right acquired by Ram Kissun can only be an equity which, as Sir Trevor Gould indicates, may be an equity affecting land but which confers no interest in the land. In my opinion the effect of Clause 7 at most is to create an equity in favour of Ram Kissun, but one which operates *in personam* only and does not pass any interest in land.

Turning now to the position of Fong Lee. Under the agreement of the 30th August, 1963, Fong Lee acquired an equitable interest in the land, and, leaving out of account for the moment any possible rights of a third party, the granting of the consent of the Native Land Trust Board on the 3rd September established the unquestionable right of Fong Lee to specific performance of his contract as against Mitlal. As is stated in *Williams on Vendor and Purchaser* 4th Edn. p.59 :

“As from the date of the contract for sale (but subject to the condition that the contract be duly performed) the property shall in equity belong to the purchaser.”

The principle is set out in 14 Hals. 3rd Edn. p.558 para. 1040 :

“Upon the signing of a contract for sale of land a change takes place in the equitable, but not the legal, interest in the land. At law the purchaser has no right to the land, nor the vendor to the money, until the conveyance is executed. In equity, however, if the contract is one of which specific performance would be ordered, the beneficial interest passes to the purchaser immediately on the signing of the contract, and thereupon the vendor, in regard to his legal ownership and possession of the land, becomes constructively a trustee for the purchaser.”

It is true that the legal estate in the land does not pass by the contract itself; but in equity the property in the land sold is considered as being vested in the purchaser from the date of the contract for sale. Here the purchaser has carried out all his obligations under the contract and has paid the full amount of the purchase price into the hands of the solicitor authorised by the contract to receive it. The consent of the Native Land Trust Board has been given and as between Fong Lee and Mitlal, leaving out of consideration for the moment any rights of the third party Ram Kissun, the purchaser Fong Lee is entitled to specific performance against the vendor Mitlal.

It is generally accepted that the rule to the effect that upon the execution of a contract of sale the purchaser becomes in equity the owner of the property applies only as between the parties to the contract, and cannot of itself necessarily put an end to any rights which a third person may have acquired affecting the land which is the subject of the contract for sale. But if the test suggested by Isaacs J. in *Lapin v. Abigail* 44 C.L.R. 166 is applied there is no doubt in my mind that Fong Lee has a better equity and one that may be considered more meritorious. I quote from the judgment of Isaacs J. at p.185 :

A "In *Taylor v. London and County Banking Co.* (1901) 2 Ch., at p.260 Stirling L.J., with the approval of the other members of the Court, said that priority in point of time would govern as between purely equitable titles, 'unless there has been some act or omission on the part of the owner of an equitable title prior in point of time, such as to cause that title to be postponed to a subsequent equitable interest'. In my opinion those enunciations are not exhaustive: they state rather a working rule, which applies in the great majority of instances, but do not state the principle. The principle is that the Court seeks, not for the worst, but for the best equity. And the best equity — for there
B may be several claimants — is that which on the whole is the most meritorious, it may be because the others are, by reason of circumstances indicated in the passages quoted, lessened in relative merit, or because one is, by reason of some additional circumstance, not attributable to any act or omission of the others, rendered in the eye of equity more meritorious than the rest."

C Although the decision of the High Court of Australia was reversed by the Privy Council, this dictum of Isaacs J. was not referred to in their Lordships' judgment.

D It has been found as a fact that Fong Lee was an innocent purchaser, in that he had no notice, actual or constructive, of any prior equity in favour of Ram Kissun. No caveat was lodged by Ram Kissun until after a binding contract had been entered into by Mitlal and Fong Lee, the whole of the purchase money paid by the purchaser, the consent of the Trust Board obtained and a caveat lodged by Fong Lee against the registration of any other dealing prior to his own.

E The question then arises whether Fong Lee can be considered a purchaser for value without notice. If so it is clear that he is entitled to a decree of specific performance. In the New Zealand case of *Morland v. Hales and Sommerville* (supra) reference is made in the judgment of Williams J. to the dictum of Lord Westbury in *Phillips v. Phillips* 4 DeG. F. & J. at p.218:

F "Where there are circumstances which give rise to an equity as distinguished from an equitable estate, as, for example, an equity to set aside a deed for fraud or rectify it for mistake, the plea of purchase for valuable consideration without notice is a good defence."

G Williams J. points out in his comment on this that if a *bona fide* purchaser has notice of a prior equity before he pays the whole of his purchase money he is bound in the same manner as if he had notice before the contract. If that were the only criterion then I would hold that Fong Lee could be considered a *bona fide* purchaser for value without notice as he has in fact paid the whole of the purchase money to the person appointed by the contract to hold it. No doubt it would follow from the terms of that contract that as
H soon as the consent of the Native Land Trust Board had been obtained the solicitor would hold the purchase money as trustee

for the vendor Mitlal. It must, therefore, in my opinion be treated, as between vendor and purchaser, as payment of the whole of the purchase money by the purchaser to the vendor.

It may be contended that a further step must be taken before the purchaser is entitled to claim release from any prior equitable interests on the ground that he is the *bona fide* purchaser for value without notice. There is authority for the proposition that an innocent purchaser without notice is not protected against prior equities unless and until the legal estate in the land has passed to him. In *Templeton v. Leviathan Prop. Ltd.* 30 C.L.R. 34 at p.55 Knox C.J. quotes with approval this passage from Hogg on the *Registration of Title to Land* :

"The immunity which the purchaser is to enjoy from the effect of notice is only to be afforded him if and when he does become registered, and not before. Before he does become registered it is open to any adverse claimant to step in and assert his claim, and for the purpose of trying his claim registration may be stayed — by caveat or otherwise . . . The doctrine of notice is not, in fact, affected by these enactments except as regards registered interests, and any questions of priority between unregistered interests that depend on that doctrine will have to be decided on general principles of equity jurisprudence."

In my view, however, that principle applies only when the prior interest amounts to an equitable interest which could be regarded as of equal standing to that acquired by the subsequent purchaser. In this case that is not so. The most that Ram Kissun acquired under Clause 7 was an equity as distinguished from an equitable interest in land. As I understand the position, it was at best an equity giving him a personal right of action against Mitlal in the event of a breach of contract, but not such an equity as could be pleaded to defeat a subsequent purchaser for value even though the subsequent purchaser had acquired not the legal estate but an equitable estate in the land.

The law with regard to this aspect of the case is set out in 14 *Halsbury* 3rd. Edn. p.534, para. 1005 :

"The plea of 'purchase for value without notice' is looked upon with favour in equity. Under the former practice it was frequently effectual in defeating claims against a purchaser who could set it up; and though, since the Supreme Court of Judicature Act, 1873, and still more since the Law of Property Act, 1925, its use has been greatly restricted, it is still available for a purchaser who has got in the legal estate, and will usually give him priority over equitable claims which rank before him in point of time; and it is also available, without the legal estate, against equities as distinguished from equitable interests."

Two cases are quoted as authorities for this proposition. The first is *Rice v. Rice* 2 Drew. 73, 61 E.R. 646. At p.648 Kindersley V.C. states the rule as to priority of equities thus :

"To lay down the rule therefore with perfect accuracy, I think it should be stated in some such form as this :— "As between persons having only equitable interests, if their equities are in

all other respects equal, priority of time gives the better equity; or *qui prior est tempore potior est jure*".

A I have made these observations, not of course for the purpose of a mere verbal criticism on the enunciation of a rule, but in order to ascertain and illustrate the real meaning of the rule itself. And I think the meaning is this: that, in a contest between persons having only equitable interests, priority of time is the ground of preference last resorted to; i.e. that a Court of Equity will not prefer the one to the other, on the mere ground of priority of time, until it finds upon an examination of their relative merits that there is no other sufficient ground of preference between them, or, in other words, that their equities are in all other respects equal; and that, if the one has on other grounds a better equity than the other, priority of time is immaterial."

C The second case is *Westminster Bank Limited v. Lee* [1955] 2 All E.R. 833. I quote from the judgment of Upjohn J. at p.887:

D "The Court of Equity has been careful to distinguish between two kinds of equities, first an equity which creates an estate or interest in the land and secondly an equity which falls short of that. An equitable mortgagee takes subject to all prior equitable estates or interests in the land whether he has notice of them or not, but in relation to a mere equity the defence of purchaser for value without notice may be available even as between the owners of equitable estates."

E If this principle is applied then it seems to me inevitable that the equitable interest in the land acquired by Fong Lee under the contract for sale must be preferred to the equity granted to Ram Kissun by Clause 7 of the agreement dated 20th February, 1957. Moreover this view is consistent with what was said by Isaacs J. in *Lapin v. Abigail* (*supra*) to the effect that the determining factor must be rather the best equity than the first equity. The principle is expressed in *Snell's Principles of Equity* 24th Edn. p.54:

F "If the moral claims of the plaintiff and the defendant are not on an equality, the one who has the better claim will be preferred, although his interest arose after the other's."

For these reasons I am of opinion that Fong Lee's equitable interest is to be preferred, in all the circumstances of the case, to the equity of Ram Kissun, as being a better equity and an equitable interest in land as opposed to what is at best an equity giving rise to purely personal rights.

G In view of my conclusions on the two points with which I have tried to deal, the uncertainty of the terms of Clause 7, and the priorities as between Fong Lee's equitable interest in the land and the possible equity acquired by Ram Kissun, I have not found it necessary to consider two other points which received some attention at the hearing of the appeal. The first of these was that Clause 7 is in any event void as infringing the rule against perpetuities. The second concerned the extent to which Ram Kissun may have forfeited any priority he had by his failure to take the necessary steps to

protect his equity, in that he did not lodge a caveat against the title during the whole of the period between the signing of the agreement on the 20th February, 1957, and the 4th September, 1963, after he had become aware of the sale to Fong Lee and Fong Lee had already lodged his own caveat. It may well be that in accordance with the well-known doctrine of equity *vigilantibus, non dormientibus jura subveniunt* Ram Kissun's failure to protect his equity could result in its postponement to the equitable interest acquired by Fong Lee. However, in the view which I take of the case I do not find it necessary to express a considered opinion on either of these points.

Accordingly I would allow the appeal, set aside the judgment of the Supreme Court, and remit the case to that Court to make an order granting specific performance to Fong Lee of the contract of sale dated 30th August, 1963, as consented to by the Native Land Trust Board on the 4th September, 1963. There should be an order in that Court for the payment of the costs of the appellant Fong Lee by the 1st and 2nd respondents jointly. If Ram Kissun seeks, under his claim for further and other relief, to recover damages against Mitlal for breach of the covenant not to sell Allotment 8 to any other person, that matter should in my opinion be left for the Court below to decide, with power to hear further evidence or argument thereon if the learned trial Judge thought fit. This Court is not called upon to make any finding as to whether such a right to damages exists or not.

The appellant Fong Lee should have his costs in this Court as against the 2nd respondent Ram Kissun. Although Mitlal was cited as 1st respondent, he took no part in the argument in this Court.

HAMMETT J. A. :

In 1957 the defendant, Mitlal, the registered proprietor of two leasehold titles known as Allotment Nos. 7 and 8 of section 3 in Rakiraki township, under Lease No. 21087, sold Allotment No. 7 to the third party, Ram Kissun.

The Agreement for sale, dated 20th February 1957 under which he sold Allotment No. 7, contained the following clause concerning Allotment No. 8 :

"7. The vendor (i.e. Mitlal) undertakes not to sell Allotment No. 8 being part of lease No. 21087 which in turn is part of Native Lease No. 3238 to anyone other than the purchaser (i.e. Ram Kissun) and shall give the purchaser right to first refusal."

In 1963 Mitlal entered into a formal written contract to sell Allotment No. 8 to the plaintiff, Fong Lee.

In the proceedings in the Court below Fong Lee who had had no notice of this clause in the 1957 Agreement, before he entered into his contract with Mitlal in 1963, sought an order against Mitlal for specific performance of his 1963 contract whilst Ram Kissun, the third party, sought to enforce his rights under Clause 7 of the 1957 Agreement.

The learned trial Judge held that Ram Kissun was entitled to an injunction restraining Mitlal from completing his contract to sell the

property to Fong Lee until he, Ram Kissun, had been given the opportunity of buying the property from Mitlal, within three months, at the same price that Mitlal had agreed to sell it to Fong Lee.

A Against this decision Fong Lee has appealed on a number of grounds of which the material part of ground 5 reads as follows :

"5 That... Clause 7 contained in agreement dated 20th February 1957... was uncertain in terms of ascertaining the price at which the... sale... was to be made... and not having defined how the price was to be ascertained the purported agreement... was incomplete and unenforceable..."

B This ground of appeal complains that the agreement contained in Clause 7 is void for uncertainty. This was one of the issues raised in the Court below as the records of counsels' addresses clearly show.

As was pointed out by counsel for Ram Kissun in his address in the Court below, Clause 7 purports to impose two obligations on

C Mitlal, namely :

Firstly — an undertaking by Mitlal not to sell Allotment No. 8 to anyone other than Ram Kissun; and

Secondly, — to give Ram Kissun the "right to first refusal".

D It was the contention of the appellant, Fong Lee, in this Court and in the Court below that Clause 7 contains neither the price at which the land was to be sold to Ram Kissun nor any agreed method by which it could be ascertained.

In the sixth Edition of Fry on "Specific Performance" at page 164 appears the following passage :

E "In all sales it is evident that price is an essential ingredient, and that where this is neither ascertained nor rendered ascertainable, the contract is void for incompleteness, and incapable of enforcement."

In *Re Kharaskhoma Exploring and Prospecting Syndicate* [1897] 2 Ch. 451 at page 464, Lindley L.J. said :

F "Now, what is meant by 'a contract in writing'? I take it that nothing, whether it is under seal or not, answers that description which does not shew the consideration in writing; and if you have a document in writing which does not shew in writing what is the consideration, it is not a contract at all in writing — in other words, a document which only discloses part of a contract is not a contract in writing."

G and Chitty L.J. at p.467 says :

"A contract in writing must express as part of the contract the consideration."

H On these authorities it is clear that Clause 7 in the 1957 Agreement, in so far as it does not express the consideration, is defective as a contract, unless the price was rendered ascertainable by its own terms or the Court implies a term in the contract to render the price ascertainable.

It was contended on behalf of Ram Kissun that by his being given the "right of first refusal" the consideration could be ascertained by finding out what a willing and able purchaser would be prepared to offer for the property. I concede that this may possibly be so but not that it is necessarily so. On the other hand since Clause 7 also contains an undertaking not to sell Allotment No. 8 to anyone other than Ram Kissun, it is difficult to know how one could ascertain what a willing and able purchaser, other than Ram Kissun, would be willing to pay for the property if in fact such a person knew the property could not be sold to him. The only way in which the price at which the property should be sold to Ram Kissun might be ascertained, therefore, would be by getting an offer from a person who did not know that, in fact, whatever offer he made, the property could not be sold to him. But even so, such a proposition does not take into account the fact that there might well be other persons who would have made an offer for the property but did not do so because they knew of the restriction imposed on its sale, and that whatever they offered they could not buy the property. It appears to me that the first part of Clause 7, i.e. the undertaking not to sell the property to anyone other than Ram Kissun, makes it impossible to ascertain the price at which Ram Kissun should be allowed to exercise any right of first refusal ostensibly given by the second part of Clause 7. Clause 7 appears to me to contain provisions which make it impossible to ascertain the price at which any sale of the property to Ram Kissun ought to take place.

In *Fry on Specific Performance* at pp.164 and 165 appears the following passage:

"Accordingly where A. agreed to sell an estate to B. for £1,500 less than any other purchaser would give, the contract was held void: for if the estate was not to be sold to any other purchaser than B, it was impossible to know what such a purchaser would give for it."

(*Bromley v. Jefferies*, 2 Vern. 415).

This appears to me to be the very position in which the parties found themselves in this case.

The two provisions of Clause 7 are mutually contradictory. The price at which Ram Kissun may buy the property was neither agreed nor stated in Clause 7 and no means of ascertaining it are expressly provided. The clause could therefore only be saved from being void for uncertainty if from its own terms the Court can and ought, by implication, to read into the contract a method by which the price at which Ram Kissun may buy the property can be ascertained.

In *Hamlyn v. Wood* [1891] 2 Q.B. 488 at page 494, Kay L.J. said:

"The Court ought not to imply a term in a contract unless there arises from the language of the contract itself, and the circumstances under which it is entered into, such an inference that the parties must have intended the stipulation in question that the Court is necessarily driven to the conclusion that it must be implied."

These words were quoted with approval by Lord Atkinson in the judgment of the Privy Council in *Douglas v. Baynes* [1908] A.C. at page 482.

A In the particular circumstances of this case I do not think the Court ought to or can properly imply any term in Clause 7 whereby the price at which any sale of the property to Ram Kissun should take place. For these reasons I am of the opinion that the purported agreement in Clause 7 is void for uncertainty.

B I would therefore allow the appeal. I concur with the resulting orders as to costs and otherwise that should follow the allowance of this appeal which are set out in detail in the judgment of the learned Vice President of the Court.

GOULD J. A. :

C This is an appeal from a judgment of the Supreme Court of Fiji in an action in which the appellant was plaintiff, the first respondent was the defendant and the second respondent was third party, arising out of a dispute relating to leasehold land described as Allotment 8 of Section 3 of Rakiraki Township. It will be convenient, I think, to refer to the parties by their names.

D In 1957 Mitlal was the lessee of Allotments 7 and 8 of Section 3 and on the 20th February, 1957, he agreed in writing to sell Allotment 7 to Ram Kissun, the sale being completed by registration of a sub-lease to Ram Kissun. The agreement of the 20th February, in which the parties were described as "vendor" and "purchaser" without reference to assigns or personal representatives, contained the following clause :

E "7. The vendor undertakes not to sell Allotment No. 8 being part of Lease No. 21087 which in turn is part of Native Lease No. 3238 to anyone other than the purchaser and shall give the purchaser right to first refusal."

F In March, 1963, Mitlal mortgaged Allotment 8 to one Shiu Shankar and the mortgage was duly registered. By August, 1963, Shiu Shankar was threatening to exercise his power of sale under the mortgage and advertised in a newspaper inviting offers, to be received up to the 31st August, 1963. During the argument on appeal counsel for Ram Kissun called attention to a passage in his evidence in which he denied that he had seen this advertisement. In order to avoid a forced sale Mitlal sought out Fong Lee and offered Allotment 8 to him for sale. They reached agreement and on the 30th August, 1963, they signed a Sale Note prepared by a solicitor, Mr. A. H. Sahu Khan. The price was £1,400 which was to be deposited with Mr. Sahu Khan "forthwith upon the execution thereof to be held on trust pending the necessary consents being obtained". Mitlal undertook to apply for the consent of the Director of Lands and the agreement was made subject to that consent. The learned Chief Justice in his judgment held that the reference to the Director of Lands was a mistake and that the appropriate authority was the Native Land Trust Board the consent of which was subsequently given, as will appear. No question on this aspect of the matter arises on the appeal and it will not be necessary to refer to it again.

H

On the 2nd September, 1963, Mr. V. R. Sharma, the solicitor who had drawn up the agreement of February, 1957, wrote on Ram Kissun's behalf to Mitlal pointing out that any contemplated sale to Fong Lee was in contravention of Clause 7 of that agreement and threatening proceedings. On the 3rd September, 1963, Fong Lee's son journeyed to Suva, lodged a caveat to protect Fong Lee's interest under the agreement of the 2nd September, and obtained the consent of the Native Land Trust Board in writing. On the 4th September Mr. V. R. Sharma lodged a caveat on behalf of Ram Kissun.

Fong Lee commenced proceedings in the Supreme Court in October, 1963, for specific performance of his agreement with Mitlal (or damages in the alternative) — later Ram Kissun was joined on his own application, claiming to restrain the contract of the 2nd September from being carried into effect and claiming specific performance of Clause 7 of the agreement of February, 1957. At the conclusion of the proceedings the learned Chief Justice made an order to the following effect. There was an injunction restraining Mitlal from completing the sale to Fong Lee without first offering it to Ram Kissun at £1,400. Three months (or such extended period as the parties might agree) was allowed for offer acceptance and completion of the sale to Ram Kissun. If that sale was duly completed Fong Lee could prove his damages; if it was not, he could ask for specific performance. From that judgment Fong Lee has brought the present appeal, in which all three parties were represented by counsel, but counsel for Mitlal took no part in the argument and stated that his client would abide by such order as the Court might make.

In arriving at his decision the learned Chief Justice considered a number of matters. He held, first, that Clause 7 of the agreement of February, 1957, read as a whole, and construed *ut res magis valeat quam pereat* was not void for uncertainty but granted a right of pre-emption or first refusal being "intended to bind Mitlal, in the event of his receiving an offer for the property from a third party, to offer it to the 2nd defendant, at the same price". I would interpolate that I take it to be implied that the offer from the 3rd party must be one which Mitlal was prepared to accept. That was, in the view of the learned Chief Justice, enough to overcome the difficulty of the ascertainment of the purchase price.

Secondly, he found that the rule against perpetuities presented no impediment to a finding that Clause 7 of the agreement of February, 1957, was enforceable, as Mitlal was an immediately contracting party to a contract taking effect *in personam* — it was immaterial in those circumstances whether an interest in land had passed or not.

Next, the learned Chief Justice referred to an argument that as Ram Kissun acquired his right or interest first, it prevailed over the interest of Fong Lee. He said:

"In my view the maxim has no application. Assuming that the 2nd defendant acquired an interest in the property under the contract of 1957, and not a mere equity, this is not a case of equitable interests competing for priority. And if he acquired

but a mere equity, it is not a case of the plaintiff being a purchaser for value of an equitable interest without notice of the equity.

- A At that stage the learned Chief Justice summarized the position he had arrived at and held that a valid right of pre-emption or 'first refusal' was vested in Ram Kissun, and at the same time Fong Lee had a valid contract binding Mitlal.

- B The learned Chief Justice next considered passages from the judgments in *Manchester Ship Canal Company v. Manchester Racecourse Company* [1900] 2 Ch. 352, and on appeal (1901) 2 Ch. 37. He concluded that, while he was satisfied that Fong Lee, when he entered into his agreement, had no knowledge of the contents of the agreement of February, 1957, that did not disentitle Ram Kissun from having enforced the express negative provision contained in Clause 7, although it was to the detriment of Fong Lee as an innocent third party.

- C The learned Chief Justice, in his final order which I have summarized earlier, devised a method of giving effect to the view set out in the last paragraph; but before doing so he considered an argument that Fong Lee should have priority because Ram Kissun had failed to register a caveat before Fong Lee entered into his agreement. His view, as expressed in the judgment, was that section D 29 of the Land (Transfer and Registration) Ordinance (Cap. 136) had no relevance "if the case is viewed, as I think it substantially ought to be viewed, as a claim by Ram Kissun to restrain Mitlal from carrying into execution his sale to the plaintiff in breach of the right of pre-emption". That argument failed.

- E I have set out in summary the points which were considered and decided by the learned Chief Justice, as they have all been put in issue on the appeal by Mr. Sahu Khan, counsel for Fong Lee. I will take the questions, so far as I am able, in the same order.

- F I respectfully agree with the interpretation placed by the learned Chief Justice on Clause 7 of the agreement of February, 1957. Read as a whole it can only have been intended to create a right of pre-emption. This interpretation was in fact not challenged on the appeal, but it was submitted that the clause could not be enforced by reason of the absence of an essential term — the price — either specifically or by the provision of machinery for its ascertainment. Counsel relied upon cases relating to agreements for the sale of land, and though in my opinion an agreement giving a right of pre-emption is not an agreement for the sale of land, it is closely allied thereto, and in any event under the general law of contract if there is no way of supplying an omitted and essential term, it is an incomplete contract.

- G The learned Chief Justice quoted the following passage from the judgment of Farwell J. in first instance in *Manchester Ship Canal Company v. Manchester Racecourse Company* (*supra*) at p.363 :

- H "In this case the price is ascertainable by the fact that it is to be the same as that offered by any other company or person."

That passage indicated the learned Chief Justice's own view and was quoted by him as lending it a measure of support. That is because the contract before Farwell J. had been given statutory validity and shortly before the passage quoted, he had said :

"I, therefore, find myself in this position. I have an agreement which the Legislature has declared valid, and I have to construe it. In so doing I must avoid, of course, coming to any conclusion which would render it void for uncertainty. I must, therefore, find, if possible, a meaning for the words used."

Whether Farwell J. would have expressed the same view on the question of price in the absence of such statutory validity cannot of course be ascertained: but the method of ascertaining the price which he indicated is a reasonable one.

In the case of *Ryan v. Thomas* (1911) 55 S.J. 364 however, Warrington J. distinguished the Manchester Canal case on the ground of the statutory validity which the agreement in that case enjoyed. The report of *Ryan v. Thomas* in the *Solicitors' Journal* (which appears to be the only report available) is, unfortunately, brief and the complete facts are difficult to ascertain. The plaintiffs sought to set aside a lease to one Thomas (acting on behalf of a defendant, Manley) on the ground of fraud. The learned judge held that there was fraud and proceeded to examine a defence by Manley that the plaintiffs were not entitled to relief because they were in breach of an obligation to him. The obligation arose out of an agreement made some four years earlier "to give the defendant Manley the 'first option' of purchasing any premises that might be designated for the purpose of a dairy on the south side of the road"; the plaintiffs were the owners of land on the south side of the road. There were attempts to put the option into more specific terms but they fell through. The report of the judgment reads as follows:—

"Warrington J. reviewed the facts and held that the lease had been obtained by fraud. The question now to be decided, his Lordship continued, is whether the words of the agreement of the 19th September 1906 constitute a contract. The subsequent statements of the parties contained in the correspondence and draft conveyances throw no light on, and have nothing to do with, the original agreement. The plaintiffs' case is that there was no contract, as the parties never came to terms as to the conditions of the option; the defendants' case is that the agreement really amounts to this, that the plaintiff is to give us first refusal of the premises at a fair and reasonable price, or at a price that another has offered, or at a price he is willing to take from another purchaser. In the absence of authority I should have held that such an agreement was too uncertain for any court to enforce. Even now the defendant will not pin himself down to any one view as to the meaning of the option. But it is alleged on the defendants' behalf that the case is decided by authority, and that the meaning of such an expression is that you shall at all events make a fair and reasonable offer to the person in whose favour the option has been granted. The case cited to this effect is *Manchester Ship Canal Co. v. Manchester Racecourse Co.* (1900 2 Ch. 352) confirmed in the Court of

Appeal (1901 2 Ch. 37). In this case an agreement between the two companies was scheduled to the Act of Parliament incorporating the plaintiff company, and the case wholly turned upon the fact that the agreement was equivalent to a statute. This is made perfectly plain in the judgment of Farwell J., who, dealing with the question whether the agreement could be void for uncertainty said, 'If the Legislature has declared the contract valid, how can I declare it void? ... Unless the words were so absolutely senseless that I could do nothing at all with them I should be bound to find some meaning, and not to declare them void for uncertainty'. And, again p.363, 'I must find, if possible, a meaning for the words used'. In the Court of Appeal the case was dealt with on the same footing. Now, in dealing with an ordinary contract, the court is not bound to find some meaning for the words used. It is not my business to expand the words of a contract; if a contract does not contain certain stipulations it is not for me to make them. I must let the actual words stand. The case cited has no bearing on the case before me. Here people have purported to come to an agreement; but, in fact, have not come to any agreement at all, because the terms of the agreement are not expressed. The words 'first option' by themselves have no meaning; there is no mention of price, or time, or anything else. I hold that there was no contract, and therefore the defence fails, and the plaintiff is entitled to have the lease set aside."

The distinction made there on the basis of statutory validity is, of course, a perfectly proper one and the same distinction was referred to in the present case in the judgment of the learned Chief Justice. The case of *Ryan v. Thomas* was not mentioned by counsel either in the Supreme Court or on the appeal, and while the agreement under consideration there bears some measure of resemblance to the present one, each case must be examined on its own merits. It will be helpful, I think, to look at the judgment of the Court of Appeal in the Manchester Canal case in some detail.

The judgment (delivered by Vaughan Williams L.J.) did not deal with the question of uncertainty until a late stage and then merely by the observation that for the reasons given by Farwell J. every clause had statutory validity and no objection could be taken on that score. The court did not indicate, in dealing with the other aspects of the case, whether in any particular respect it might in other circumstances have considered that an "uncertainty" argument would have prevailed, and indeed the question appears not to have received much attention in the arguments for the two appellants as reported. The clause which had to be construed, so far as material, was—

"If and whenever the lands ... shall cease to be used as a racecourse ... or should the lands ... be at any time proposed to be used for dock purposes, then ... the racecourse company shall give to the canal company the first refusal of the ... lands."

Their Lordships said that the lands did not seem to have ceased to be used as a racecourse and had therefore to decide what was

meant by "proposed to be used for dock purposes". On the question of first refusal their Lordships said, at pp. 46-7:

"There appear to be two possible meanings of the words 'first refusal'; one is that they mean the opportunity of refusing a 'fair and reasonable offer' by the racecourse company to sell the lands en bloc to the canal company; the other is that they mean the opportunity of refusing the land at a price acceptable to the racecourse company offered by some person other than the canal company, which is what we understand by the term 'right of pre-emption'."

It was the second of these two meanings which commended itself to Farwell J. The Court of Appeal next considered the case in the light of the first of their two alternatives as being the view most favourable to the defendants, and found that no fair and reasonable offer had been made. Then follows a passage which appears to me to express the more basic view of the court. It is at p.48:

"We think that the very words 'first refusal' in clause 3 import that the price at which the racecourse company give the canal company the 'first refusal' is a price at which the racecourse company will offer the land to other would-be buyers in the event of the refusal of the canal company to buy at that price. If there is no person negotiating a purchase it may not be easy to prove that the land offered to the canal company is above the price which the racecourse company are willing to take from persons other than the canal company; but whenever this can be proved it seems to me that there is a clear infraction of the right of pre-emption given to the canal company by clause 3. In the present case however there is no difficulty of proof."

In the same way there was no difficulty of proof in this case and that brings me to a factor which I think distinguishes this present case from both the *Manchester Canal* case and *Ryan v. Thomas*. In both those cases the right of first refusal arose upon the happening of some event extraneous to any proposal of sale — in the *Manchester Canal Co.* case it was when it was proposed to use the lands for dock purposes and in *Ryan v. Thomas* it was that the land should be designated for the purposes of a dairy, both extremely vague concepts in themselves. Thus the right of first refusal might crystallize without there being any other possible purchaser in the background and this would give rise to the difficulties mentioned by their Lordships; there would be no machinery by which the price was to be ascertained except under the "fair and reasonable" approach.

The meaning of the present clause, as interpreted by the learned Chief Justice, is quite different. There is no extraneous event and everything is centred upon the possibility that Mitlal would wish to sell the property. What he undertook to do was not to sell it at any price without first offering it to Ram Kissun at the proposed price. That might occasion practical difficulties in Mitlal's negotiations with a prospective buyer but he chose to make Clause 7 part of his bargain with Ram Kissun and must accept the difficulty. One of the two alternatives considered in the *Manchester Canal Co.* case is eliminated because there was no obligation to make a "fair and

A reasonable" offer at any stage; except in the sense that what someone else is prepared to pay may be an indication of what is fair and reasonable, that question does not arise. If Mitlal at any stage offered to sell to Ram Kissun at a certain price and the offer was refused Mitlal would no doubt be at liberty to sell to anyone else at that price or more — but not at a lower figure without a prior offer to Ram Kissun at that figure.

B Apart from the two cases mentioned there appears to be little direct authority on this question. There are a number of cases in which the right of pre-emption arose by statute but in those the price was to be settled by arbitration. The meaning of "first refusal" was discussed in an Australian case *Woodroffe v. Box* [1954] A.L.R. 474; the following is taken from the Australian Digest, 1954, Col. 95—

C "The term 'first refusal' which occurs in such phrases as 'have the first refusal', 'give the first refusal', 'have the right of first refusal' etc. is not a technical term; it is a colloquial term of fairly flexible import. A mere promise to give the first refusal should be taken *prima facie* as conferring no more than a pre-emptive right. The whole burden of justifying this interpretation rests on the word 'first'."

D A similar meaning was attached to the phrase 'first option' in a case mentioned in the American publication "Words and Phrases" (3rd series) where it is stated—

E "Where a lease provided that should the lessors desire to sell the property, the tenant should have the 'first option' to purchase, the words 'first option' indicate that, if the lessors should desire to sell the property to any person during the term, they should give the tenant the opportunity of taking the property on the same terms, and, where an acceptable offer is made, the tenant should be given his chance to purchase: *Jorgensen v. Morris* 185 N.Y.S. 386, 387: 194 App. Div. 92."

F I do not consider that *Ryan v. Thomas* is to be taken as authority for the statement that every case of a right of pre-emption apart from statute is to be regarded as void for uncertainty unless a price is stated. On the interpretation placed upon clause 7 by the learned Chief Justice, Ram Kissun was entitled to have the property offered to him at £1,400 before Mitlal closed with Fong Lee and I find myself in agreement with the learned Chief Justice that the maxim *id certum est quod certum reddi potest* applied in the circumstances of the present case.

G The next submission is that clause 7 of the 1957 agreement is void as infringing the rule against perpetuities. On this point I have no reason to doubt that the case of *Hutton v. Watling* [1947] 2 All E.R. 641, correctly summarises the effect of the authorities in relation to an option to purchase. The reasoning would apply equally, if not *a fortiori* to a contract of pre-emption. Jenkins J. whose judgment it was, said that the state of the authorities was not wholly satisfactory: he considered *London & South Western Railway Company v. Gomm* (1882) 20 Ch. D. 562 and *South Eastern Railway*

Company v. Associated Portland Cement Manufacturers [1910] 1 Ch. 12 in detail and found (at p.645 of the report) that the latter provided clear authority :

"... to the effect that an option to purchase land without limit as regards time is specifically enforceable as a matter of personal contract against the original grantor of the option and that the rule against perpetuities has no relevance to such a case as distinct from a case in which such an option is sought to be enforced against some successor in title of the original grantor, not by virtue of any contractual obligation on the part of the successor in title, but by virtue of the equitable interest in the land conferred on the grantee by the option agreement."

Hutton v. Watling went to the Court of Appeal (see [1948] 1 All E.R. 803) but not on the point of the perpetuity rule; the appeal was dismissed. In his judgment in the court of first instance Jenkins J. referred to the fact that the correctness of the decision in the Associated Portland Cement Manufacturers case (*supra*) had been doubted in *Williams on Vendor and Purchaser* (4th Edn.) Vol 1 p.424 and *Gray on Perpetuities* (4th Edn.) 336-7; Jenkins J. gave his reasons for considering the doubts ill founded. Those reasons are reproduced in *Cheshires Modern Real Property* (7th Edn.) 298 which quotes *Hutton v. Watling* as authority for the proposition of law it purports to decide, as also does "*The Rule against Perpetuities*" by *Morris & Leach* (2nd Edn.) 221. None of the authorities quoted is in any strict sense binding on this Court but I see no reason to come to a different conclusion and respectfully agree with the judgment of the learned Chief Justice that clause 7, as between the immediate parties, can be relied upon without regard to the rule against perpetuities.

I now approach the problem of what relief should be granted and to which party, on the basis that Ram Kissun had a valid right of pre-emption and Fong Lee a valid contract. It is hardly necessary to add that the right of pre-emption was a contractual right no less than that of Fong Lee. I am in some doubt as to what the learned Chief Justice meant when he said that the maxim which he quoted as *potior in tempore, potior in jure* did not apply. The effect of the final decision was in fact to give Ram Kissun specific enforcement, not, of course, of any agreement for sale, as none existed, but of his contractual right to pre-emption (leaving Fong Lee to resort to damages) and the only reason for preferring Ram Kissun was that he was first in time. It is probably that what the learned Chief Justice had in mind was that the maxim refers to equitable estates while he was applying rules evolved in relation to the discretion to grant specific performance, such as that in *Willmott v. Barber* (1880) 15 Ch. D. 96, though the result was the same as if the maxim had been applied.

Specifically, in this phase of the case, the learned Chief Justice followed the course taken in *Manchester Ship Canal Company v. Manchester Racecourse Company* (*supra*). I have already referred to the judgment in that case, but the basic facts were that the Canal Company had, in respect of certain land, a right of first refusal or pre-emption against the Racecourse Company, and the latter, without

making an offer to sell it to the Canal Company at a commensurate or fair and reasonable price, agreed to sell the land to the Trafford Park Company. It was held (all three companies being parties to the action) that the "first refusal" involved a negative contract not to part with the land to any other company or person without giving that first refusal. That negative contract was enforced by injunction. The difference between that case and this, as has been pointed out, is that the Trafford Park Company had full knowledge of the right of first refusal and Fong Lee did not. The learned Chief Justice did not consider this difference material.

On that question there is much that is helpful in the case of *Morland v. Hales and Somerville* (1911) 30 N.Z.L.R. 201, decided by the Court of Appeal of New Zealand. The facts in essence were that M. held an option for valuable consideration from H. to purchase a piece of land at a stated price, valid for ten days. During the currency of the option, H., under the impression that M. had abandoned his option, agreed to sell the property to S. Then, still within the 10 day period, M. exercised his option. The court held that the option created an interest in land and the holder had a superior equity to that of S. and was entitled as between himself and S. to specific performance of his contract. Williams J., one of the members of the Court, held further that even if no interest in land passed to the holder of the option, yet the option was a contract affecting the land which the court would enforce in priority to the subsequent contract with S.

In his judgment Williams J. considered in detail *London & South Western Railway Company v. Gomm* (*supra*), the *South Eastern Railway Company v. Associated Portland Cement Manufacturers* (*supra*) and the *Manchester Ship Canal Company v. Manchester Racecourse Company* (*supra*). In relation to the last-mentioned case Williams J. said, at p.210:

"As the Trafford Park Company could not have obtained a decree for specific performance of their contract for purchase, and as the carrying-out of that contract would be a breach of a prior contract by the vendor affecting the land in equity, the Court restrained the carrying-out of the contract. The effect of that decision was that the right of refusal the canal company originally had was preserved to them in its integrity."

At p.211-2 he said:

"I do not think that either in *Lumley v. Wagner* 1 DeG. M. & G. 604 or in the Manchester case it was an essential element for the success of the plaintiff that the third person with whom the subsequent contract was entered into should have had at the time he entered into it knowledge of the first contract, or that the Court in the Manchester case intended to base its judgment on that circumstance. In the Manchester case, as in the present, although an interest in the land may not have passed, there was an equity attaching to the land. Where there is an equity relating to the land which binds the owner of the land, there is an equity attaching to the land. Equity acts *in personam*. It was contended that the contract for sale

vested an equitable estate in the purchaser, and that the purchaser was entitled to hold the estate discharged from all equities which existed at the time of his contract but of the existence of which he was then unaware. I do not think this is so. *Mr. Dart (Vendors and Purchasers (7th Edn.) 288)* says :

'It is sometimes stated in general terms that by the contract the purchaser becomes in equity the owner of the property; but this rule applies only as between the parties to the contract, and cannot be extended so as to affect the interests of others. If it could, a contract for the purchase of an equitable estate would be equivalent to a conveyance of it. Before the contract is carried into effect the purchaser cannot, as against a stranger to the contract, enforce equities attaching to the property.'

"Where there is an equity as distinguished from an equitable estate, and the owner of the land contracts to sell in derogation of that equity, the purchaser can only protect himself if he completes his purchase without notice of the equity. As was said by Lord Westbury in *Phillips v. Phillips* 4 DeG. F. & J. at p.218 :

'Where there are circumstances which give rise to an equity as distinguished from an equitable estate, as, for example, an equity to set aside a deed for fraud or rectify it for mistake, the plea of purchase for valuable consideration without notice is a good defence.'

"It is abundantly clear that, although a purchaser at the time he makes his contract is unaware of a prior equity, yet, if he has notice before he pays the whole of his purchase-money, he is bound in the same manner as if he had notice before the contract: *Kerr on Fraud* 3rd Edn. p.331; *Story's Equity Jurisprudence* 13th Edn. p.63, para. 64(c); *Fitzgerald v. Burk* 2 Atk. 397; *Story v. Lord Windsor* 2 Atk. 630; *Hardingham v. Nicholls*, 3 Atk. 304. No case can be found where this principle has ever been called in question."

That passage supports the opinion of the learned Chief Justice in the present case that the absence of knowledge on the part of Fong Lee of the earlier contract was not material. For completeness I would add that while the finding of the court in *Morland v. Hales and Somerville* (*supra*) was that a valid option at a fixed price passed an interest in land, a mere right of pre-emption, in the sense of first refusal, did not. *Williams, J.* at p.208 said :

"The distinction between the above case (i.e. the Manchester Canal case) and a simple option to purchase is clear. In the former case the vendor is under no obligation to sell at all. The only effect of the right of pre-emption is that the vendor, if he does sell, must give the owner of the right the opportunity of buying at the same price at which the vendor proposes to sell to a third party: see *Dart on Vendor and Purchaser* (7th Edn.) at p.275. Whether there shall be a sale or not, and the price at which the land is to be sold, rests with the vendor. In the case of an option for valuable consideration to purchase at

A a named price, the matter is altogether out of the vendor's hands, and it rests with the holder of the option alone whether he will exercise the right to purchase the lands which the option gives him. The holder of the option has a vested right to take the land from the owner without his consent. It is difficult, on the one hand, to see how an interest in land could pass to a third person under a contract which does not compel the owner of the land to sell at all unless he chooses; and, on the other, how it could not pass where there is an absolute right to purchase, and it rests entirely with the owner of that right to decide whether he will purchase."

B There is yet one more passage in this very comprehensive judgment of Williams, J. which has relevance to the present circumstances. It appears at pp.208-9 :

C "If an interest in the land passed in the present case by virtue of the option, the estate in equity, which passed to Somerville under his contract with the syndicate, would necessarily be subject to that interest. Somerville cannot claim as a purchaser for value without notice, as his contract has not been completed by payment of the purchase-money and a conveyance of the legal estate. The appellant, therefore, if he properly exercised an option which he had not abandoned, would be entitled to specific performance of the contract which his exercise of the option created."

D Following what is expressed there and in the last portion of the quotation from pages 211-2 of the judgment of Williams J. I take the view that Fong Lee could not claim to be a purchaser for value without notice, as he had not become the registered proprietor of the leasehold, the equivalent under the Torrens System of getting a conveyance of the legal estate. Further support for this proposition is to be found in *Cheshire's Modern Real Property* (7th Edn.) p.61 :

E "The one person, therefore, whose conscience was unaffected and against whom the equitable estate became unenforceable was the purchaser for value of the legal estate without notice of the rights of the *cestui que use*."

F The matter must, however, be taken a step further. The requirement that Fong Lee had to become the registered proprietor before he could successfully rely on a plea of purchaser for value without notice applies only if Ram Kissun's right amounted to an equitable interest in land. If he had no more than what is called a mere equity (see *Snell on Equity* 25th Edn. p.18) Fong Lee's interest would prevail, even though he did not obtain the legal estate, provided he was the purchaser for value of an equitable interest without notice: *Snell on Equity* (op. cit.) p.18; *Phillips v. Phillips* (1862) 4 DeG. F. & J. 208 at 215-218; *Cave v. Cave* (1880) 15 Ch. D. 639. The learned Chief Justice considered, but without enlarging on the topic, that this was not a case of Fong Lee being a *bona fide* purchaser for value of an equitable interest without notice of the equity. I have been in some doubt on the question. Certainly Fong Lee acquired an equitable interest as soon as he agreed to buy the leasehold. But was he a purchaser "for value" before he received notice

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of Ram Kissun's claim? The facts found were that he had notice, after signing the agreement, but before his son went to Suva on the 3rd September 1963, to lodge a caveat and obtain the necessary consent. Paragraph 2 of the agreement of the 30th August, 1963, indicates that the purchase money was paid to the solicitor to be held in trust pending the consent being obtained. Before that happened therefore, Fong Lee had notice, which he admitted in his pleadings to be notice of an option to purchase. He also pleaded that on the 4th September, 1963, Mitlal refused to sell and purported to treat the agreement as null and void so there can be no doubt that the purchase money remained available for Fong Lee if he was prepared to take it. A

I do not think that in the circumstances Fong Lee had parted with his money in a sense which made him a purchaser for value, before he received notice, particularly as it was through efforts made on his behalf after he received notice, that the necessary consent was forthcoming. In a sense the money was secured to Mitlal by being held by the solicitor as stakeholder, but it was decided in *Hardingham v. Nicholls* (1745) 3 Atk. 304 that security for payment given before notice was not enough; there must be actual payment. I conclude therefore, though not without hesitation, that a plea of purchase for value without notice cannot be supported on any ground. B

That being my opinion I do not find any ground for holding that the learned Chief Justice erred when he treated the matter, not as a case of competing equities, but on a purely contractual basis, and applied the principles laid down in the Manchester Canal Co. case which were followed in *Morland v. Hales*. I respectfully agree with the conclusions he arrived at on that aspect of the case and it remains only to consider the arguments based on the failure of Ram Kissun to protect his rights under clause 7 of the agreement of February, 1957, by registering a caveat. C

I will assume for the purpose of discussion that Ram Kissun had what is called a "caveatable interest" by virtue of that clause. The facts relevant to this part of the case are that Ram Kissun, between February 1957, and the date of Fong Lee's agreement did not lodge a caveat: Fong Lee made no search of the title before entering into his agreement, though his son may have done so before lodging Fong Lee's caveat. In *Abigail v. Lapin* [1934] A.C. 491 the Privy Council described, at p.500 the system of registration in force in Australia, which is similar to that in Fiji. Having said that no notice of trusts may be entered in the register book their Lordships continued that it has long been held that equitable claims and interests are recognised and— D

"for the protection of such equitable interests or estates, the Act provides that a caveat may be lodged with the registrar by any person claiming as *cestui que* trust, or under any unregistered instrument or any other estate or interest; the effect of the caveat is that no instrument will be registered while the caveat is in force affecting the land, estate or interest until after a certain notice to the person lodging the caveat. Thus, though the legal interest is in general determined by the registered E

transfer, and is in law subject only to registered mortgages or other charges, the register may bear on its face a notice of equitable claims, so as to warn persons dealing in respect of the land and to enable the equitable claimant to protect his claim by enabling him to bring an action if his claim be disputed."

As to the position where there are conflicting equities the maxim *Qui prior est tempore potior est jure* applies unless "that which is relied on to take away the pre-existing equitable title can be shown to be something tangible and distinct having grave and strong effect to accomplish the purpose" — see *Abigail v. Lapin* (*supra*, at p.504). To overcome the priority in time rule the later equity must be what has often been called a "superior" equity and, as it was put in *Abigail v. Lapin*, at p.504—

"... the test for ascertaining which incumbrancer has the better equity must be whether either has been guilty of some act or default which prejudices his claim."

The essential facts in *Abigail v. Lapin* were that registered proprietors of land transferred the same in December, 1923, to a second party, by way of absolute transfer though the real nature of the transaction was one of mortgage. The second party became the registered proprietor and in September, 1925, mortgaged the land to a third party, but the mortgage was not registered; the third party had no notice of the prior equitable interest of the original owners but had not searched the title. The original owners had lodged no caveat. The Privy Council found that the equity of the third party prevailed, because the original owners had armed the second party with power to deal with the land as owner. The majority judgment of the High Court of Australia was reversed: that judgment had proceeded largely upon the view that the absence of a caveat by the original owners can have had no effect in inducing the third party to lend the money because no search had been made. The Privy Council thought that the majority of the High Court might have taken the view that there must be something in the nature of a direct representation by the original owner to the third party. To this their Lordships said, at p.507:

"It is true that in cases of conflicting equities the decision is often expressed to turn on representations made by the party postponed, as for instance in *King v. King* (1931) 2 Ch. 294. But it is seldom that the conduct of the person whose equity is postponed takes or can take the form of a direct representation to the person whose equity is preferred: the actual representation is in general, as in the present case, by the third party, who has been placed by the conduct of the party postponed in a position to make the representation, most often, as here, because that party has vested in him a legal estate or has given him the *indicia* of a legal estate in excess of the interest which he was entitled in fact to have, so that he has in consequence been enabled to enter into the transaction with the third party on the faith of his possessing the larger estate. Such is the position here, which in their Lordships' judgment entitles the appellants to succeed in this appeal."

In their judgment their Lordships referred to *Butler v. Fairclough* (1917) 23 C.L.R. 78 and it is necessary to look at that case. On the 30th June, 1915, G., the registered proprietor of a lease, agreed to charge it to the plaintiff. On the 2nd July, 1915, G. agreed to sell the lease to the defendant and on the same day the consideration was paid and a transfer executed. Before paying the consideration the defendant caused a search of the title to be made and found no notice of the plaintiff's charge — no caveat having been lodged at that stage. The defendant had in fact no notice, express or implied, of the existence of that charge. The plaintiff lodged a caveat before the defendant's transfer was lodged for registration, but in very unusual circumstances it was later registered without fraud on the defendant's part. This fact, I think, played a major part in the decision of the majority of the High Court of Australia, but it was the aspect of the judgment in relation to the priorities between equities which was considered by the Privy Council in *Abigail v. Lapin*, and stated to have been rightly decided.

In *Butler v. Fairclough*, Griffiths C.J., treated the problem as being whether the plaintiff having acquired his equitable right took or failed to take all reasonable steps to prevent G. from dealing with the land without notice of the plaintiff's title. He considered that he had not, was unable to draw any line as to the time within which a caveat should be lodged, and said that a person who does not act promptly loses the advantage which he would have gained through promptitude. Isaacs J. said (at p.97) —

"In my opinion, in the absence of some clear explanation justifying or excusing this failure it is one which, at all events in so simple a case as an equitable mortgage, postpones the mortgagee to the person *bona fide* misled by the result of a search as in the present case. The protection given by the Act to an unregistered and, perhaps, unregistrable transaction is coupled with the price of diligence in guarding others against loss arising through ignorance of the transaction."

In addition to stating that they considered *Butler v. Fairclough* was rightly decided their Lordships in *Abigail v. Lapin* said that the only distinction between the two cases was that *Abigail* was not proved to have made any search before lending the money. They went on to hold that in *Abigail's* case the absence of a search was not material. I do not understand that the true meaning of their Lordships in so holding was that the absence of a search is never material. It was certainly held to be material in *Butler v. Fairclough* which their Lordships held was rightly decided, and I would make bold to say that had no search been made in that case (which already appears to place upon the holder of the earlier equity a requirement of promptitude of the highest degree) *Butler v. Fairclough* would have been differently decided. On this question, in *Abigail's* case their Lordships referred also to the New Zealand case *Honeybone v. National Bank of N.Z. Ltd.* (1890) 9 N.Z.L.R. 102 in which the facts were very similar, in that the true owner of land had enabled another to obtain a registered title and thereby to hold himself out as full owner and so to mortgage the property. Their Lordships observed

that no question was raised in that case whether the second incumbrancer (the bank) made any search or inquiries. It is in fact an open question whether the bank did cause the title to be searched but there is a clear indication in the judgment of Denniston J. (at p.105) that he would have considered a search by the true owner at a certain stage of the events as a material factor.

My understanding of this aspect of Abigail's case is that it holds, that on facts such as were being considered and which also obtained in the Honeybone case, a search was not material. I apprehend that decision to arise from the fact that in each case a decision could be arrived at upon equitable principles without particular regard to the land registration legislation, and because in both cases the earlier equitable incumbrancer had by a positive act created a false situation and thereby enabled another to deal with the second incumbrancer on that false basis. The difference between those cases on the one hand, and the instant case and *Butler v. Fairclough* on the other is that in the latter there were no positive acts on the part of the earlier equitable incumbrancers which changed the position of the true owner in any way. He was always registered as the proprietor of the land and did not acquire such registration because of any act of the earlier incumbrancers. The only way in which the position could be expressed in terms of Abigail's case is that the earlier incumbrancer, by failing to register a caveat, had enabled the registered proprietor to hold himself out as an owner who had created no equitable interests. But how can that failure have any effect on the mind of a later incumbrancer who does not know whether there is a registered caveat or not, because he has not bothered to search? It is true that in Abigail's case the Privy Council held that there need be no direct representation from the earlier to the subsequent incumbrancer where the act of the earlier had enabled another to clothe himself with the *indicia* of title and so make the representation, but there was no such enabling act in the present case. It seems to me that, where the only failure on the part of the one arises out of a neglect to take advantage of machinery provided by the land registration legislation, neglect by the other to search the title is equally a failure to take advantage of the same machinery and it would be difficult to separate the degrees of culpability or negligence of the two parties. Certainly on an attempted balance of the two I would not say it was weighed down adversely to the earlier incumbrancer by "something tangible and distinct, having grave and strong effect to accomplish the purpose".

For the reasons I have given, if the interests of Ram Kissun and Fong Lee were regarded as competing equitable interests, I do not consider that in the circumstances the failure of Ram Kissun to caveat was sufficient to displace the effect of the maxim *qui prior est tempore potior est iure*. Had Fong Lee searched the register before entering into his agreement and found no caveat I would have been of the contrary opinion. I am aware that in certain Canadian cases much greater effect has been given to the registration of a caveat than has been the case in Australia or New Zealand. For example, in *Clark v. Barrick* [1950] 1 D.L.R. 260 an equitable interest protected by a caveat was held to prevail over an earlier equitable

interest the caveat in respect of which was lodged later than the one first mentioned; no party had acted other than innocently. That decision seems to have been influenced by a different approach to the position of equitable estates under the Canadian legislation, and to amount to saying that registration of a caveat will of itself confer priority. That has not been the case in Australia or New Zealand and was not urged in Abigail's case. In a comparatively recent case, *Miller v. Minister of Mines* (1963) 1 All E.R. 109, the Privy Council said, in relation to New Zealand legislation, which is similar in this respect to that of Fiji (pp.112-3) —

"The caveat procedure is an interim procedure designed to freeze the position until an opportunity has been given to a person claiming a right under an unregistered instrument to regularise the position by registering the instrument."

It has not been claimed in the present case that Fong Lee's caveat of itself afforded him any priority.

I have discussed the last question on the assumed basis that Ram Kissun had by virtue of clause 7, an interest in land. This approach seemed necessary because if on that basis Fong Lee's interest would have prevailed in the absence of a caveat, it would be difficult to deny him specific performance if Ram Kissun's interest were in fact less than an interest in land and not such as to entitle him to lodge a caveat. It would have appeared paradoxical that a mere equity should prevail in Ram Kissun's favour where a full equitable interest would not. On the view I have expressed, that position does not arise. It emerges with some clarity, however, from the Manchester Canal Case (*supra*) and *Morland v. Hales* (*supra*) that Ram Kissun's right of pre-emption did not in fact give rise to an interest in land and was therefore not caveatable: (see *Adam's Land Transfer Act* (1958) pp.297-301 and *Staples & Co. v. Corby & D.L.R.* (1900) 19 N.Z.L.R. 517 at 536-7). On this basis Fong Lee's failure to search the title was immaterial but Ram Kissun was guilty of no default in failing to lodge a caveat, as he had no caveatable interest. (For the purpose of the argument I think the fact that the Land Office, at a later stage, did not reject a caveat is immaterial.) The resulting position is that the rights of Ram Kissun and Fong Lee fall to be decided without regard to the Land (Transfer and Registration) Ordinance (cap. 136) which was the approach adopted by the learned Chief Justice.

To summarize my conclusions, I agree that Ram Kissun's right is not too uncertain to be enforceable, that it is not void by reason of the rule against perpetuities, that Fong Lee cannot validly claim to be a purchaser for value without notice and that he can derive no assistance from the fact that Ram Kissun did not register a caveat when his right arose. In the result the learned Chief Justice was entitled, in my judgment, to apply, so far as the circumstances would allow, the principles of the Manchester Canal Company case.

I would therefore dismiss the appeal with costs.

Appeal allowed; case remitted to Supreme Court to decree specific performance to the Plaintiff.