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# DOES COMPULSORY ACQUISITION FRUSTRATE A CONTRACT FOR THE SALE OF IMMOVABLE PROPERTY? *LIM KIM SOM* REVISITED

When a contract for the sale of real property is entered into, what happens if, between the time of contract and completion, an official announcement is published for the compulsory acquisition of that property? The traditional view has been based largely on one English High Court Case, *Hillingdon Estates Co Ltd* v *Stonefield Estates Co Ltd,* which held that compulsory acquisition in such circumstances did not affect the purchaser's obligation to complete the purchase. That view was rejected by the Singapore Court of Appeal in *Lim Kim Som* v *Sheriffa Taibah bte Abdul Rahman,* which declared such a contract frustrated. However, the Privy Council has now expressly approved the reasoning in *Hillingdon's* case in *E Johnson (Barbados) Ltd* v *NSR Ltd.* This paper analyses the three decisions and the developments in local case law after *Lim Kim Som's* case, and suggests how the courts may proceed to deal with this question in future.

IN *Sheriffa Taibah bte Abdul Rahman* v *Lim Kim Som*[1] the High Court in Singapore upheld the validity of a contract for the sale of land where the land had been gazetted for acquisition[2] between contract and completion. The Court's decision was based, in part, on the only directly relevant English case on point, *Hillingdon Estates Co* v *Stonefield Estates Co Ltd* ("*Hillingdon*").[3]

On appeal, the Court of Appeal expressly declined to follow *Hillingdon* and, in *Lim Kim Som* v *Sheriffa Taibah bte Abdul Rahman,*[4] held that the contract of sale had been frustrated by the gazette notification.

The Judicial Committee of the Privy Council has now, in *E Johnson (Barbados) Ltd* v *NSR Ltd,*[5] re-affirmed the validity of the reasoning in *Hillingdon,* and held that a contract of sale for immovable property is not frustrated if it is gazetted for possible acquisition between contract and completion.

1 [1992] 2 SLR 516 (decision of Michael Hwang JC).
2 Under section 5 of the Land Acquisition Act (Cap 152, 1984 Rev Ed).
3 [1952] Ch 627.
4 [1994] 1 SLR 393.
5 [1997] AC 400.

It is therefore an appropriate time to revisit the decision in *Lim Kim Som* v *Sheriffa Taibah,* both in the light of the Privy Council's decision, as well as other decisions which have purported to follow *Lim Kim Som* v *Sheriffa Taibah.*

## I. The High Court Decision *(Sheriffa Taibah)*

The case concerned a piece of land then known as 74 King's Road. At the time of the contract in 1983, there were a number of rent controlled tenants or squatters on the property. However, shortly before the date of the contract, a fire had broken out on the property. This was known to the vendor, but not to the purchaser. The significance of the fire was that it brought into play section 33 of the Land Acquisition Act (commonly known as the "fire site" provisions) whereby a property compulsorily acquired within 6 months of such fire would be subject to the "one-third" rule of compensation, *ie,* one-third of market value immediately before the fire, or the market value as at 30 November 1973, whichever was the lower.[6]

The vendor granted the purchaser an option to purchase the property for $2,138,000. The option was granted within 2 months of the fire, with completion fixed on a date just under 5 months after the date of the fire. However, the purchaser did not complete on the contractual completion date. One week later, the vendor served a 21-day notice to complete, pursuant to Condition 29 of the Law Society's Conditions of Sale 1981.[7] On the same day, the President proclaimed his intention of compulsory acquisition of the property;[8] however, the proclamation was not gazetted until another week later.[9]

Following the gazette notification, and before the expiry of the 21-day notice, the purchaser informed the vendor that he was not prepared to complete the purchase in view of the acquisition. A few days later, the 21-day notice expired, and the vendor then purported to terminate the contract. In due course, the acquisition was completed, the compensation of $450,000 (plus accrued interest) being paid to the vendor, and the Government taking possession of the land and vesting title in itself.[10] The vendor then sued the purchaser for the balance of the purchase price less the 10% deposit paid by the vendor and the compensation paid by the Government. The purchaser counterclaimed for the return of his deposit.

6 S 33 has been amended. The current law fixes the date of valuation as 27 September 1995.

7 This Condition remains essentially the same in the present Law Society of Singapore's Conditions of Sale 1999 as Condition 29.

8 The date of the proclamation appears to have no legal significance: see s 5.

9 This is the operative date on which the acquisition process commences.

10 Under section 18 of the Land Acquisition Act.

In the High Court, the purchaser concentrated his defence on the property law aspect of the case.[11] His argument was that, once a property was gazetted for acquisition under section 5 of the Land Acquisition Act, the vendor ceased to have a good title which he could pass on completion, because his interest in the property was, by virtue of the notification, converted to an interest in compensation.[12] He relied heavily on a passage from the Judicial Committee's judgment in *Re Robinson's*[13] which, after a detailed analysis, the Court rejected as an authority in support of his argument.

He also contended that the notification was an encumbrance on the title which, being incapable of discharge before completion, frustrated the contract.[14]

Finally, there was also a brief defence based on the contractual argument that the sale contract was frustrated because of the radical change in the subject matter of the contract.[15]

The High Court therefore spent much time on the law of vendor and purchaser, analysing the devolution of title in a compulsory acquisition, and concluding[16] that, under Singapore law, unlike certain other countries,[17] a property owner does not normally[18] lose his title to his property until three conditions are met:

(a) an award for compensation has been made;[19]

(b) possession of the property has been taken by the Government;[20] and

(c) the Government has entered an endorsement in the Registry of Deeds or (as the case may be) the Land Titles Registry to the effect that title has now vested in the Government.[21]

11 *Supra,* note 1, pp 523-4
12 *Ibid,* p 523H.
13 [1980] 1 MLJ 255 at 257.
14 *Supra,* note 1, p 544.
15 *Ibid*, p 548.
16 *Ibid,* p 536D-F.
17 Australia and New Zealand.
18 S 17 gives the acquiring authority power to complete the acquisition process before an award of compensation in case of emergency.
19 S 10.
20 S 16.
21 S 18.

It was therefore inevitable, on the arguments before the High Court, that the Court should have found (as a matter of property law) that the contract could still be performed by the vendor, notwithstanding the Section 5 gazette notification, so long as the compulsory acquisition had not been completed by the vesting of title in the Government before the date fixed for completion.

Because Singapore's land acquisition laws are so different from those of other countries, no direct assistance could be found from Commonwealth case-law. The closest parallel to our land acquisition laws (other than India and Malaysia, which offered no case-law on the vendor and purchaser point) was England, where a compulsory purchase order does not immediately vest title in the acquiring authority. This inevitably led to a consideration of *Hillingdon*, the only English authority which was directly on the question of the effect of a compulsory acquisition order (which does not immediately vest title in the acquiring authority) on a contract of sale of immovable property. *Hillingdon* was clear and unambiguous on this point; the purchaser must complete in such a scenario.

The facts in *Hillingdon* were relatively simple, although unusual. A contract was made in 1938 for the purchase for two plots of land. One contract was completed, but the other was not, owing to the outbreak of World War II in 1939. In 1948 a compulsory purchase order was issued, and in 1949 the order and a notice to treat[22] were served on the vendor, who then sought to enforce the delayed contract against the purchaser. The latter claimed that it bought the land on the basis that it could develop it and contended that the contract was frustrated, and claimed a refund of its deposit. Vaisey J held that the contract was not frustrated, and ordered specific performance in favour of the vendor.[23]

Bearing in mind that the following part of Vaisey J's judgment:[24]

> I have always understood (and indeed it is a common-place) that when there is a contract by *A* to sell land to *B* at a certain price, *B* becomes the owner in equity of the land, subject, of course, to his obligation to perform his part of the contract by paying the purchase-money; but subject to that, the land is the land of *B,* the purchaser. What is the position of *A,* the vendor? He has, it is true, the legal estate in the land, but, for many purposes, from the moment the contract is entered into he holds it as trustee for *B,* the purchaser. True, he has certain

[22] An English notice to treat does not vest title to the land in the acquiring authority, which only occurs by voluntary conveyance of the landowner after the quantum of compensation has been agreed or, in the absence of agreement, by deed poll by the acquiring authority after the assessed compensation has been paid into court (see *supra,* note 1, p 529).

[23] *Supra,* note 3, pp 633-636.

[24] *Ibid,* pp 631-632.

> rights in the land remaining, but all those rights are conditioned and limited by the circumstance that they are all referable to his right to recover and receive the purchase-money. His interest in the land when he has entered into a contract for sale is not an interest in land; it is an interest in personal estate, in a sum of money; and it seems to me that in a case such as this, when the date for completion is long past, the purchasers, subject to the payment of that purchase-money are to be regarded as the owners of the land. So I think they are; and the effect of this notice to treat and this compulsory purchase process is merely to place an obligation on those who are already the owners of the land in question. The compulsory purchase order does not affect the vendors; they have no interest in the matter save in respect of the purchase-money which they are entitled to be paid. The persons who are affected by the compulsory purchase order are the owners of the land, namely, the plaintiffs, *ie,* the purchasers.

has been the subject of some judicial[25] criticism, the Court expressly[26] eschewed reliance on the controversial passage. It was not necessary for the property law part of the Court's judgment to rely on the concept of passing of beneficial ownership. *Hillingdon* was helpful as being the only case with a similar fact situation to *Sheriffa Taibah,* and from a jurisdiction with a similar compulsory acquisition regime to Singapore.

Quite apart from his remarks about the passing of beneficial ownership, Vaisey J also addressed the contractual argument that the contract had been frustrated. Vaisey J's remarks on this point are straightforward and pungent:[27]

> I agree that this compulsory purchase order very much altered the situation, but I cannot appreciate that it has altered it in such a fundamental and catastrophic manner as to justify the court in holding that the whole contract has been frustrated.
>
> . . .
>
> To say, however, that the contract has been frustrated goes far beyond any authority cited to me and does not accord with what I understand as frustration of a contract.

[25] *SJR Investment Co Pty Ltd* v *Housing Commission of Victoria* [1971] VR 211 at 213; *Austin* v *Sheldon* [1974] 2 NSWLR 661 at 669-672. However, there are other authorities expressly approving this passage, some of which are identified at *supra,* note 1, pp 538-539. This passage has now been approved by the Privy Council in *Johnson* v *NSR:* see note 100 below.

[26] *Supra,* note 1, pp 538-539.

[27] *Supra,* note 3, pp 633-634.

. . .

> No doubt these departmental interferences and interventions do make a very great difference to ordinary life in this country, but that does not mean that, whenever such interference or intervention takes place, parties are discharged from bargains solemnly entered into between them. In my judgment, it is the duty of the parties, in such a case as this, to carry out their obligations; and I cannot see that there is any reason at all for supposing that there is either an implied term of this contract that it should be frustrated in the event which has happened, or that there has been such a destruction of the fundamental and underlying circumstances on which the contract is based as to justify my saying that the contract did not exist, or ceased to exist at the date when the notice to treat was served, or at any other date in the process of the making and carrying into effect of the compulsory purchase order.

The decision of Vaisey J was clear and unambiguous. He held the purchaser liable to complete, and there was no reason for the High Court not to follow that decision, without necessarily completely embracing his reasoning.

## II. The Court of Appeal Decision *(Lim Kim Som)*[28]

In the Court of Appeal the argument took a different turn, possibly owing to the appointment of an *amicus curiae*.[29] The emphasis was no longer on property law but on contract, and on the doctrine of frustration. There was therefore no detailed discussion of the impact of the devolution of title on the contractual obligations of the parties. Indeed, the Court of Appeal accepted[30] the High Court's analysis of the devolution of title, but approached the problem in a different way. It posed two questions:

[28] For further academic comment on this case, see Andrew Phang, "Frustration of Contracts for the Sale of Land in Singapore" (1995) 44 ICLQ 443, *Cheshire, Fifoot and Furmston's Law of Contract* (2nd Singapore and Malaysian Edition) at 963-964,971-972, Joan Sethupathy, "When Equity and the Common Law conflict, Equity does not always prevail" (1995) 7 SAcLJ 212, Hairani Saban, *Singapore Conveyancing Practice* Vol 2, V [9.7], IX [1431].

[29] The appointment of an *amicus curiae* in a commercial case where both parties were already represented by counsel was itself an unusual procedure, where no apparent separate public interest needed to be represented.

[30] *Supra,* note 4, pp 404-405.

(a) is a contract for the sale of land capable of frustration?

(b) if so, should that doctrine be applied to the present case?

### A. *Whether Frustration can Apply to a Contract for the Sale of Land*

The Court of Appeal, after examining several authorities, came to the conclusion that a contract for the sale of land was capable of frustration.[31] Put in that abstract way, there can be no quarrel with this finding. Although it is questionable whether all the cases cited by the Court of Appeal are valid authorities for that proposition,[32] the proposition itself is nevertheless supported by other cases and textbook writers, and is not controversial.[33]

### B. *Whether Frustration Applies on the Facts of the Case*

The Court correctly observed that each case of frustration turns upon its own specific facts.[34] However, the problem with the Court's analysis of this case is that its treatment of the facts of this case is controversial. Further, its analysis of the law is couched in general terms which suggests that *Lim Kim Som* is not a case decided on its special facts, but is meant to be the paradigm for the future.

Let us examine the Court's reasoning in detail.

[31] *Ibid,* p 402.

[32] For example, *Wong Lai Ying* v *Chinachern Investment Co* (1979) 13 BLR 81 (a sketchily reported case) may be analysed as a building contract (to which different principles of frustration apply) rather than as a contract for the sale of land; *National Carriers Ltd* v *Panalpina (Northern) Ltd* [1981] AC 675 is a case on frustration of leases (where again different principles of frustration apply because there is a continuing contractual relationship); *Capital Quality Homes Ltd* v *Colwyn Construction Ltd* (1976) 61 DLR (3d) 385, a decision of the Ontario Court of Appeal, was distinguished by the same court in *Victoria Wood Development Corp Inc* v *Ondrey* (1979) 92 DLR (3d) 229, and has been criticised by Professor S W Waddams in *The Law of Contracts* (3rd Edition) at 248.

[33] The proposition is generally accepted, albeit cautiously, and with the qualification that it operates very rarely: see *eg*, *9 Halsbury's Laws of England* (4th Ed Reissue) para 452. The matter seems to have been put beyond doubt by the Privy Council in *Johnson* v *NSR* (see note 88 *infra*), where the judgment proceeded on the assumption that the contract of sale was capable of frustration.

[34] *Supra*, note 4, p 403E-F.

### C. *The Test for Frustration*

The Court of Appeal adopted the well known test propounded by Lord Radcliffe in *Davis Contractors Ltd* v *Fareham UDC ("Davis Contractors"),* which defines frustration as occurring where (without default) a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract. In short, can the party claiming frustration say: "It was not this that I promised to do"?[35]

Again, there is no difficulty here; this is a universally accepted test – the question is how it is to be applied.

The Court then focussed on the terms and conditions of the contract made in this case (read in the light of the surrounding circumstances) as well as the supervening event, to see if the agreement was wide enough to cover this development. To paraphrase the words of Lord Radcliffe, had any unexpected event occurred that had changed the face of things?

### D. *The Terms of the Contract*

The Court referred to various clauses in the Law Society's Conditions of Sale 1981, and concluded that they did not deal with the question of compulsory acquisition.[36] It then referred to Special Condition 5, which was in the following terms:

> The sale and purchase herein is subject to satisfactory replies to legal requisitions filed with various government departments. Provided always that any outstanding property tax or other charges which are capable of being paid and discharged on or before completion or any outstanding notice which is capable of being complied with on or before completion or any road, drainage sewerage or government scheme which does not adversely affect the property shall not be construed as unsatisfactory and the purchaser shall be bound to complete the purchase in accordance with and subject to the terms and conditions herein contained. Subject to the above, if the answers to any requisitions are unsatisfactory, the purchaser may annul the sale in which event, all moneys paid to the vendor to the account of the purchase price herein (including the option money) shall be refunded to the purchaser forthwith free of interest and neither party shall have any claim or lien against the other whatsoever

[35] [1956] AC 696 at 728-729.
[36] *Supra,* note 4, pp 403-404.

> thereafter, provided further that in the event any replies shall not be received by the date fixed for completion, the same shall be deemed satisfactory.

The Court observed that this clause did not cover the present situation and the question of compulsory acquisition was not provided for in this clause.[37] It then went on to say:[38]

> The agreement therefore has not provided for the event of compulsory land acquisition. From the nature of the property the purchaser obviously purchased it for a commercial purpose. It was obviously not contemplated that compulsory acquisition by the government would occur. There was no indication known to the purchaser on which he ought to have known that such an event would take place.

With great respect, these conclusions can be challenged. The question of contractual provision for compulsory acquisition has to be analysed in the light of the prevalence of compulsory acquisition in Singapore (particularly in 1983), as well as the practice of conveyancing lawyers then and now in relation to clauses providing for the possibility of compulsory acquisition.

It is commonplace that (i) compulsory acquisition was a frequent practice in the 1980's, and (ii) conveyancing lawyers were well aware of its possibility. This was particularly true of undeveloped land, especially those with rent-controlled tenants or squatters, which made it difficult, if not impossible, for the owner to develop such land. No self respecting lawyer could have said that the acquisition of any particular property could not be foreseen, particularly undeveloped land. Indeed, the use of the "satisfactory answers to requisitions" clauses emerged precisely as a response to the problem of purchasers wishing to enter into a binding contract before their lawyers could complete their searches on the local authorities to ascertain (among other things) whether the subject property (or any part of it) was going to be acquired. There are, of course, many forms of "satisfactory answers to requisitions" clauses in use in Singapore,[39] some more precise than others as to the disclosure of the existence (or even the possibility) of compulsory acquisition as an "unsatisfactory answer". But the point is this: if a requisition on a local authority sent out by the purchaser's lawyer had revealed either

[37] *Ibid,* p 403H-I.
[38] *Ibid,* p 404B-C.
[39] Each solicitors' firm will have at least two different forms, one when acting for a vendor, and one when acting for a purchaser.

a current or an impending acquisition, would the purchaser, on the wording of Special Condition 5, not have been entitled to treat that answer as "unsatisfactory" and to annul the contract accordingly?[40] The term "satisfactory" was not defined in Special Condition 5 (unlike many versions in use today) but, taking the objective test of "satisfactory" to mean "satisfactory to a reasonable purchaser acting honestly and reasonably",[41] can it be seriously argued that an answer to a requisition that showed an actual or threatened acquisition would be regarded as satisfactory? If not, then the law must acknowledge that the insertion of a "satisfactory answers to requisitions" clause is meant to cover the possibility of compulsory acquisition to some degree or other. In many cases, the exact wording of the clause will have been the subject of negotiations.[42] If then the clause does not quite achieve its purpose (*eg,* because there is no specific requisition inquiring about a section 5 gazette notification), is it the court's function to repair the gaps in the drafting so as to give the purchaser (and possibly the vendor) a protection that his solicitors did not see fit to accord him, even though they must have foreseen the possibility of acquisition?[43]

In the light of the foregoing analysis, it is respectfully submitted that the Court of Appeal's remarks about the terms of the contract and the contemplation of the parties are an unrealistic analysis of the situation in fact and in law.

This issue also needs to be looked at together with the later discussion about the foreseeability of the supervening event.

[40] In the 1970's and 1980's, the standard requisition on the Development Control Division contained a question: "Is the property affected by any Government Gazette Notification?", which would have captured any existing s 5 notification. The current forms of requisition do not contain any specific question about compulsory acquisition, as a s 5 notification would now be revealed by the Lotbase search in the Registry of Deeds and Titles. In theory this means that existing gazette notifications should be discovered before a contract is entered into.

[41] See *Hudson* v *Buck* (1877) 7 Ch D 683, *Smallwood* v *Smallwood* (1971) 3 All ER 717 at 720, *Meehan* v *Jones* (1982) 56 ALJR 813, Tan Sook Yee, *"The Road Interpretation Plan – Requiescat in Pace?"* [1988] 2 MLJ lxxxviii at xciii.

[42] In 1989 I gave a paper at a seminar organised by the Singapore Academy of Law on "Satisfactory Answers to Requisitions". Before the seminar I communicated with the Law Society to inquire if the Council wished to suggest a form of standard "satisfactory requisitions" clause that could be adopted by the profession in the same way as its standard Conditions of Sale. I was informed that there was so much disagreement among practitioners about such a clause that it was not possible for the Society to agree on the wording of a standard clause, even on a recommendatory basis.

[43] The purchaser in *Lim Kim Som* entered into a binding contract before seeing his solicitor. He also sued his solicitor (who was appointed after the date of contract) for negligence; his suit was dismissed. See [1992] 2 SLR at 566F-H.

### E. *The Supervening Event that had Occurred*

This is the core of the Court of Appeal's reasoning, which may be summarised as follows:

(i) It rejected Vaisey J's argument that frustration was not applicable because the purchaser of land became its owner in equity as from the date of contract, citing various authorities criticising this proposition,[44] and relying on the argument that the passing of beneficial ownership to a purchaser of land is premised on the availability of specific performance, and this remedy will not be ordered of a frustrated contract.[45]

(ii) It also rejected the High Court's alternative analysis[46] that, where the date fixed for completion falls prior to title vesting in the acquiring authority, the vendor is able to convey his interest to the purchaser and the contract is not frustrated on the ground that the availability of specific performance is only decided at the time of the proceedings (which is invariably after the date when the date for completion has passed).[47]

(iii) It agreed with the High Court that (i) a section 5 declaration does not vest the title to the state and (ii) the title only vests when the entry or notification is made in the register under section 18. However, it argued that, once a declaration is made, the process of acquisition has started and "its progress will lead with almost absolute certainty to divesting the owner of his title to the land and vesting it in the state", relying on the passage from *Re Robinson's* discussed and rejected by the High Court.[48]

(iv) It accepted that, technically, an owner of a property gazetted for acquisition was capable of conveying both title and possession to the purchaser prior to entry on the register pursuant to section

[44] *Barnsley's Conveyancing Law and Practice* (3rd Ed) at 227, *Austin* v *Sheldon* [1974] 2 NSWLR 661 at 670, 672 and MP Thompson. [1984] *The Conveyancer* at 49. However, the two commentators, while criticising the argument, do not attack *Hillingdon* as such. Indeed, the 4th Edition of *Barnsley* (edited by MP Thompson and written before *Johnson* v *NSR)*) specifically cites *Hillingdon* with approval. (at 250-251).

[45] *Supra,* note 4, pp 406-407.

[46] *Supra,* note 1, pp 527-528, 539-544.

[47] *Supra*, note 4, p 407.

[48] *Ibid,* pp 407-408 (and see note 13 above).

> 18. However, the Court felt that the position *vis-à-vis* the property had fundamentally altered. On completion, the purchaser would acquire possession of the property for a limited period and a title which would become defeasible in a matter of one or two years (or thereabouts). In reality, the purchaser would not on completion get what he had bargained for, *viz* not only the legal estate but the use of the property. Further, the compensation the purchaser would receive would be far below the market value of the property. Accordingly, applying the Lord Radcliffe test in *Davis Contractors,* the compulsory acquisition had fundamentally altered the "face of things" and "there was such a change in the significance of the obligation that the thing undertaken would, if performed, be a different thing from that contracted for". This case was therefore an appropriate one to which to apply the doctrine of frustration.[49]

The following comments may be made on this line of reasoning.

First, while Vaisey J's emphasis on the passing of beneficial ownership upon contract is controversial, the contrary argument based on the discretionary nature of specific performance proves too much. If one cannot determine whether specific performance will be granted until the actual date of hearing of the trial to enforce the contract, then we are left with no rule at all as to the passing of beneficial ownership. The only other possible rule is that beneficial ownership does not pass until legal ownership passes, and this is certainly not the law as it stands.[50] Merely because the law will in some exceptional cases deny specific performance is no reason to deny the *prima facie* rule that, as a general rule, the court will grant specific performance to enforce any contract for the sale of immovable property, however commonplace and lacking in uniqueness it may be.[51] That proposition would then create a rebuttable presumption that, absent exceptional circumstances, equitable ownership will pass on contract.[52] This is also the *prima facie* rule in the sale of goods, which suggests that it is a sensible rule of thumb.

[49] *Ibid,* p 410A.

[50] There is no rule preventing beneficial ownership passing before, at or after the passing of legal ownership; it is all a matter of agreement.

[51] *Chitty on Contracts* (28th Ed), Vol 1, at para 28-007.

[52] The United Kingdom's Law Commission, in its Working Paper No 109 *Transfer of Land: Passing of Risk from Vendor to Purchaser* (1988) decided against recommending what circumstances should cause a contract for the sale of land to be frustrated, on the basis that this issue was best left to case law (p 82).

Second, (and more important) the issue of the passing of beneficial ownership is not the key question to determine the question of frustration. The more relevant consideration is the passing of risk, because frustration is about the allocation of risk, and the doctrine obviously needs to be applied having regard to the general legal rules relating to the passing of risk in a contract for the sale of immovable property. By way of analogy, the Sale of Goods Act shows us that, while risk normally passes with property or beneficial ownership in the sale of goods, the two concepts are distinct and not necessarily intertwined, and can pass at different times.[53]

Third, while it is true that, as a matter of practice, once a property is gazetted for acquisition, the acquisition process is almost always carried out to the end, the fact remains that Section 48(1) of the Land Acquisition Act specifically allows for the possibility of the process being terminated or withdrawn, and section 18 makes it clear (and accepted by the Court of Appeal) that beneficial ownership does not vest in the acquiring authority until the entry or notification in the register under section 18. Moreover, the Australian and English cases are persuasive authority that the virtual certainty of acquisition does not of itself automatically frustrate a contract for the sale of immovable property.[54]

Finally, to say that compulsory acquisition changes the bargain between the parties is to beg the question. One must first analyse the particular contract to see what (objectively) that bargain was, not only considering its express terms, but also taking into account what the parties did not say which they could have said. In this exercise, the normal rules of contractual interpretation should be followed, and evidence of subjective intention not translated into the words of the contract (or reasonably to be inferred from its express terms) should be ignored. On the facts of this case[55] the evidence of the intention of the parties in entering into this contract was disputed, and no primary findings of fact were made by the High Court at first instance, except to express skepticism about the credibility of the purchaser as to the circumstances in which he entered into the contract. With respect, there was an insufficient factual basis for the Court of Appeal's

[53] S 20(1) (Cap 393, 1999 Ed). Under s 17(1), property passes when the parties intend it to pass and under s 18(2) the presumptive rule is that, where there is an unconditional contract for the sale of goods in a deliverable state, the property in the goods passes to the buyer when the contract is made. See also *Chitty on Contracts* (28th Ed), Vol 2, at para 43-188.

[54] *Tsekos* v *Finance Corp of Australia Ltd* [1982] 2 NSWLR 347, *Johnson* v *NSR* (note 88 *infra*).

[55] *Supra,* note 1, pp 549-553.

[56] *Supra,* note 4, p 404C.

conclusion[56] that:

> From the nature of the property the purchaser obviously purchased it for a commercial purpose...There was no indication known to the purchaser from which he ought to have known that such an event would take place.

Even assuming this to have been the case, what matters is, not so much the purchaser's purpose or intended use of the property, but how the contract (or bargain) is to be characterised. There are many ways in which a bargain can be characterised for the purposes of Lord Radcliffe's test in *Davis Contractors.* If it is a simple contract for the sale of a piece of property without more (*eg,* under an open contract with no special terms) then it is submitted that compulsory acquisition would not make it a different bargain from what had been agreed.[57] However (to take only one example), if the contract is one which contains a term that the purchase is subject to planning approval for a certain type of development, then the bargain would be characterised differently, because there would be a contractual recognition by the seller that the purchaser is buying not just a piece of land, but one capable of development. If therefore unexpected Government intervention makes that purpose impossible, then the case would be much stronger for frustration. In *Lim Kim Som,* there was only Special Condition 5, which arguably did not change the characterisation of the contract from a plain vanilla contract for the sale of land to a contract for the sale of land which was (say) capable of development.[58] In any event, the Court of Appeal's remarks raise the issue of foreseeability, which will be discussed later.

The Court of Appeal then dealt with two remaining objections made by

[57] *Cf Amalgamated Investment & Property Co Ltd* v *John Walker & Sons Ltd* [1977] 1 WLR 164 at 176H: "The subject matter of the contract is simply a specified piece of land described in the contract and nothing more. Can it then be said that listing before completion frustrated the contract?" (*per* Sir John Pennycuick). That question might just as well have been asked with reference to the facts of *Lim Kim Som,* substituting "compulsory acquisition" for "listing".

[58] *Cf Tat Lien Hardware Pte Ltd* v *Tan & Lie* [1982] 1 MLJ 9 and the cases that followed (discussed in Hairani Saban Singapore Conveyancing Practice Vol 2 IX [1431]). In *KBK No 138 Ventures Ltd* v *Canada Safeway Ltd* (2000) 185 DLR (4th) 650, a contract for the sale of a property was held frustrated owing to Government downzoning causing a 90% reduction in expected floor space since the contract expressly contemplated development of the property by the buyer.

the vendor.

1. *The purchaser had been at fault in delaying completion*

The first argument was that, if the purchaser had completed the contract on the date fixed for completion, the contract would have been fully discharged and there would have been no basis for any argument of frustration. Instead, the acquisition had been gazetted after the contractual date of completion.The Court of Appeal rejected this argument summarily:[59]

> Whilst such delay was fortuitous from the viewpoint of the purchaser, as long as the contract remained executory it could be frustrated. Breach by the purchaser can only prevent frustration where there is a causal link between the breach and the event which is alleged to be frustrating.

The Court cited two cases to illustrate the latter proposition. In *Shepherd & Co Ltd* v *Jerome*,[60] the English Court of Appeal rejected an argument of self-induced frustration where an apprentice, having been imprisoned for a criminal offence, was prevented from performing his contract of employment. This was because his criminal act had not by itself affected his performance of his contract of employment; it was the act of the tribunal in sentencing him to a prison term.

The other case was *The Super Servant Two,*[61] where the defendant had signed a contract which stipulated that performance could be effected by either one of two transportation units, "Super Servant One" or "Super Servant Two". The latter vessel sank, and the English Court of Appeal held that the plea of frustration was not available because the defendant could have used "Super Servant One" to fulfil its obligations but chose not to do so. *The Super Servant Two* was distinguished in a single sentence by the comment that its facts were far removed from those in the present case.

After this short discussion, the Court concluded that it could not be said that the purchaser was in any way responsible for the compulsory acquisition of the property. Accordingly, his breach of contract was irrelevant to the question of frustration.

With respect, this argument deserved a more thorough discussion than was given by the Court of Appeal.

The Court's reliance on *Shepherd & Co Ltd* v *Jerome* was misplaced.

[59] *Supra,* note 4, p 410B.
[60] [1987] 1 QB 301.
[61] [1990] 1 Lloyd's Rep 1.

In that case an apprentice, who had become involved in a fight between two motor-cycle gangs, was convicted of conspiracy to commit assault, and sentenced to a period of Borstal training, which sentence he served for 39 weeks. The employers told his father that they were not prepared to take him back, and subsequently resisted his claim for compensation for unfair dismissal on the ground that the contract had been frustrated. It was to rebut this defence that the apprentice argued that there had been no discharge by frustration since the alleged frustration had been self induced. Sir Guenter (formerly Professor) Treitel has pointed out that[62] acceptance of the apprentice's argument would have entirely perverted the purpose of the rule that frustration must not be due to the fault of the party relying on it. That purpose is to prevent the party at fault from relying on an allegedly frustrating event (where it is due to his fault) and so to impose a liability on that party. In *Shepherd & Co Ltd* v *Jerome* the apprentice sought to rely on his own criminal conduct in order to *establish a right* to compensation for unfair dismissal. The Court of Appeal rightly rejected his claim and held that the contract was frustrated. This is wholly consistent with the well-known formulation that "reliance cannot be placed on self-induced frustration" for the party relying on frustration was the employer, and he had not induced the frustration. Treitel goes on to say that the classic formulation would, however, have excluded frustration if the claim had been made, not by the employee but against him: *ie,* if the employer had been claiming damages for the employee's breach of the contract in failing to render the agreed services. In other words, the employee would have been held to his contract and have been liable for damages for breach of contract. If Treitel's comments are applied to the facts of *Lim Kim Som,* the claim of frustration should not have been available to the purchaser, but may have been available to the vendor.

The reference to *The Super Servant Two* was, with respect, a red herring, because the principle of self-induced frustration was well established long before that case, and the case itself has in any event been criticised by Treitel as a controversial application of that principle.[63]

A more relevant precedent for discussion would have been *Hillingdon* itself, where the fact situation was essentially identical to the present case. There, the date fixed for completion was January 31 1939, but the purchaser did not complete, and in 1948 the compulsory purchase order was made. The purchaser's breach was acknowledged by the fact that it paid late completion interest up till 1949. Vaisey J clearly took this factor into account

62 *Frustration and Force Majeure* (1994) at 489.
63 *Ibid,* at 492-493.
64 *Supra,* note 3, p 635.

before rejecting the argument of frustration:[64]

> The purchasers in this case are certainly no worse off than they would have been if they had completed their contract in a period rather less than 12 years from the time when they agreed to complete it. Had they completed the contract without the delay of 12 years, quite clearly the compulsory purchase order would have affected them. However that may be, I have to consider the matter as I find it; and taking into consideration the long delay which has taken place, I still think that the contract, so far from being frustrated, can and should be carried out.

It was this narrow finding that the High Court found of assistance in coming to its decision,[65] although neither the English Court nor the Singapore Court dealt specifically with the argument of self-induced frustration, since that argument was not raised directly before either court. Unfortunately, Vaisey J's judgment is not as fully reasoned as one might wish (hence leading to academic speculation as to the exact basis for his decision). Treitel has justified[66] the decision in *Hillingdon* on the basis of the excessive delay in completion and argues that this is a version of the principle that a party cannot rely on self-induced frustration (the principle being capable of application even through the conduct in question does not amount to an actual breach of contract, as in this case).

One may respectfully disagree with Treitel on his last proposition, because the passage in *Hillingdon* he refers to makes it plain that, while the issue of breach was not clearly pleaded, Vaisey J was in no doubt that he viewed the failure to complete as being a default by the purchaser. Nor is it clear that the decision in *Hillingdon* turned on *excessive* delay; the significance of delay was surely that it put the purchaser in breach of contract which (however slight) must amount to a self-induced frustration if conduct falling short of breach can be so classified. However, the point to note is that Treitel sees no difficulty in recognising this as a case akin to self-induced frustration. While it may not come within the classical definition of that principle as being frustration due to the contracting party's own conduct or to the conduct of those for whom he is responsible,[67] there is another principle which comes into play here.

The Court of Appeal in *Lim Kim Som* argued that the purchaser's breach in not completing on the contractual completion date did not cause the

[65] *Supra,* note 1, p 538.
[66] *Supra,* note 62, at 126-127.
[67] *Ibid,* at 473.

happening of the frustrating event (*ie,* the acquisition). But it is undeniable that, if the purchaser had completed on the contractual date, the acquisition, when it occurred, could not have been a frustrating event. Why then should the purchaser be allowed to act in wilful default of his contractual obligations, and to take advantage of his own breach to create a situation when frustration applies?[68]

The practical consequence of the Court of Appeal's finding is that a purchaser who (before completion) gets wind of a possible compulsory acquisition may delay completion for as long as possible, even to the point of resisting a writ for specific performance. If at any time before he is actually forced to complete (possibly even after judgment), a section 5 gazette notification is published, he will be relieved from his contractual obligations.[69] Is that the kind of contractual behaviour the law wishes to encourage?

It may well have been open to the vendor in *Lim Kim Som* to have invoked the principle that, where a party who, by his own act or default, makes further performance of the contract impossible, the other party may treat the contract as discharged and sue for breach of contract.[70] The purchaser, by failing to complete on time, created a situation where (on the approach taken by the Court of Appeal) the acquisition adversely affected the vendor by leaving him to suffer the consequences of the acquisition. Would the vendor not have a claim against the purchaser for the loss suffered by the purchaser's breach, quantified as the amount he would have received from the purchaser had the contract been completed on time?

It should be noted that frustration did not apply till the date of the gazette notification, which was after the breach had already occurred and the vendor's right of action had crystallized. And if he had such a right of action, could the law not reach the same conclusion by simply denying that the doctrine of frustration applies where it occurs after one party has been in breach of its obligation to complete the contract?[71]

This point is well demonstrated by the House of Lords decision in *Monarch SS Co* v *A/B Karlshamns Oljefabriker*[72] where a ship was chartered for a voyage, but was prevented from completing the voyage by detention owing

[68] *Ibid,* at 473-475.

[69] *Cf Johnson* v *NSR* (note 88 below) where, although it held that the purchaser had wrongfully refused to complete (since the acquisition of the property had in fact been completed by the time the appeal was heard), the Privy Council declined to order specific performance. However, because the contract had not been frustrated, the Privy Council ordered an assessment of damages for breach of contract.

[70] *Cf supra,* note 62, at 476-478, where Treitel argues that frustration will even be denied if the party claiming it has been guilty of mere default (even if without actual fault).

[71] *Ibid,* at 478-479.

[72] [1949] AC 196 (although frustration was not specifically mentioned in the judgments).

to the outbreak of war. However, it was found that the ship was unseaworthy, and that the voyage would have been accomplished before the outbreak of the war, if the shipowner had not been in breach of its duty to provide a seaworthy ship. The House of Lords held that the shipowner was precluded by its own breach of contract from relying on the detention as a ground of discharge, even though the unseaworthiness would not of itself have given rise to a frustrating delay. This case, and others like it,[73] illustrate the proposition that the doctrine of frustration is not available to a party where his own breach was one of the factors giving rise to the impossibility that would, but for his breach, be a ground of discharge. The doctrine of frustration is excluded even though the breach does not amount, or of itself give rise, to the impossibility, but is only one of the factors leading to it.[74]

This then qualifies the Court of Appeal's test of when a breach of contract disentitles the guilty party from relying on the doctrine of frustration. The test is not (as the Court of Appeal put it) a simple analysis of whether the breach caused the frustrating event (in the criminal or tortious sense of the *causa causans*), but rather whether the breach was one of the factors leading to the contract becoming impossible of performance.[75]

If the *Monarch* approach is adopted, it can clearly be seen that, while the purchaser's delay in *Lim Kim Som* did not of itself *cause* the compulsorily acquisition, had the purchaser fulfilled his contractual obligation to complete on the date fixed for completion, there would have been no argument available to the purchaser if (i) he had completed on the contractual date, and (ii) the acquisition was gazetted after completion. Both common law and common sense demanded that the purchaser should not have been allowed to take advantage of his own wrong to wriggle out of his contractual obligations.

### 2. *Compulsory acquisition was a possibility in Singapore in 1983 and should have been foreseen by the purchaser*

The Court of Appeal, having first expressed its doubts about the relevance of foreseeability to the doctrine of frustration,[76] argued that there was no evidence in the present case that the parties actually foresaw that an acquisition might take place. There was no discussion of acquisition or the insertion of any clause to cover its consequences. There was no effort even to negotiate

[73] *The Eugenia* [1964] 2 QB 226, *The Lucille* [1984] 1 Lloyd's Rep 244.
[74] *Supra,* note 62, at 479.
[75] See also *Galoo Ltd* v *Bright Grahame Murray* [1994] 1 WLR 1360 (causation expressed in terms of the "dominant cause").
[76] *Supra,* note 4, p 410.
[77] *Ibid,* pp 411-412.

with the vendor to make the sale subject to planning approval, as was normal with contracts of this kind.[77]

With respect, the factual analysis was both incomplete and unnecessary.

It was incomplete in that it omitted to consider, in this context, the incorporation of Special Condition 5 in the contract, and the significance of this clause in considering the contemplation of the parties has already been discussed earlier in this article.

It was also unnecessary in the broader context of the whole conveyancing picture that prevailed in Singapore in the 1980's and even (if to a slightly lesser extent) today. The first duty of any purchaser's solicitor (then as now) is to ensure that his client gets a good title to the property being purchased. High on the list of priorities in the title search is the need to ensure that the property is as safe from compulsory acquisition as the solicitor can make it from his inquiries and contractual negotiations. Conversely, the vendor's solicitor will try (as far as he can) to make the contract one where *caveat emptor* applies, and to reduce the circumstances where the contract can be rescinded to as few as possible. The end result in most cases is the contract being made subject to "satisfactory answers to requisitions",[78] one of the main purposes of requisitions being to ascertain the reality or likelihood of all or part of the property being compulsorily acquired.

It requires no factual analysis to conclude that, once a "satisfactory answers to requisitions" clause is included in the contract, the possibility of compulsory acquisition has been (or must be deemed to have been) considered by both parties (whoever first introduced that clause into the contract), however perfunctory that consideration may have been. Once it is acknowledged that the parties did apply their minds to the possibility of acquisition by the provision of a clause to cover that eventuality, then the parties should be bound by the solution they have voluntarily adopted to meet that eventuality, however imperfect that solution might be. It has already been noted earlier that the contract in *Lim Kim Som* did include a "satisfactory answers to requisitions" clause (Special Condition 5), thus pointing to the fact that the parties had given consideration to the usual precautions that a purchaser would want to take to protect against the possibility of compulsory acquisition.[79]

[78] See "Satisfactory replies to legal requisitions", a paper presented by Associate Professor Tan Sook Yee at a seminar presented by the Singapore Academy of Law in 1989, Hairani Saban, *Singapore Conveyancing Practice* Vol 2 V [9.8 – 9.12].

[79] *Quaere* whether a "satisfactory answers to requisitions" clause today may still have the same effect, since a s 5 gazette notification is now disclosed by the Lotbase search rather than a government requisition (see note 40 above).

In any event, even in the absence of a "satisfactory answers to requisitions" clause, it is clear from the English authorities that actions by Government affecting the value or permitted usage of the property being purchased are such commonplace events that purchasers must be taken to have foreseen such a possibility. This principle clearly underpinned Vaisey J's remarks quoted earlier,[80] even though he did not articulate the principle. These remarks have now been expressly approved by the Privy Council.[81]

A clear expression of the principle may be found in *Amalgamated Investment & Property Co Ltd* v *John Walker & Sons Ltd,*[82] a case strangely cited by the Court of Appeal in *Lim Kim Som* in support of its conclusions. In this case, a building was entered in the statutory list of buildings of special architectural or historical interest a few days after the date of a contract for its sale. The listing had the effect of dramatically reducing its market value. The English Court of Appeal held that the risk of a building being listed was one to which every owner and purchaser must recognise that he is subject, with the result that the contract was not frustrated. The following words of the court are as relevant to *Lim Kim Som* as they were to *Amalgamated Investment*:[83]

> (*per* Buckley LJ)
> I have reached the conclusion that there are not here the necessary factual bases for holding that this contract has been frustrated. It seems to me that the risk of property being listed as property of architectural or historical interest is a risk which inheres in all ownership of buildings. In many cases it may be an extremely remote risk. In many cases it may be a marginal risk. In some cases it may be a substantial risk. But it is a risk, I think, which attaches to all buildings and it is a risk that every owner and every purchaser of property must recognise that he is subject to...
>
> They must also, in my judgment, be taken to have known that there was the risk, although they may not have regarded it as a substantial risk, that the building might at some time be listed, and that their chances of obtaining planning permission might possibly be adversely affected to some extent by that, or at any rate their chances of obtaining speedy planning permission. But, in my judgment, this is a risk of a kind which every purchaser should be regarded as knowing that he is subject to when he enters into his contract of purchase. It is a risk which I think the purchaser must carry, and any loss that

[80] See note 27 above.
[81] *Johnson* v *NSR* [1997] AC 400 at 407.
[82] [1977] 1 WLR 164.
[83] *Ibid,* pp 173, 175, 176, 177.

may result from the maturing of that risk is a loss which must lie where it falls...

(*per* Lawton LJ)
Anybody who buys property knows, and certainly those who buy property as property developers know, that there are all kinds of hazards which have to be taken into consideration. There is the obvious hazard of planning permission. There is the hazard of fiscal and legislative changes. There is the hazard of existing legislation being applied to the property under consideration – *compulsory purchase, for example*... (emphasis added)

At common law anyone entering into a contract for the purchase of real property had to accept the risk of damage to the property after the contract had been made. Damage to the property nowadays can arise from causes other than fire and tempest. Financial loss can arise from government intervention. This is a risk which people have to suffer...

(*pe*r Sir John Pennycuick)
Again certainly, the vendors knew the purchasers' purpose and knew that the price would have been less if the purchasers had known that the property would not be available for development, even if the purchasers had been willing to purchase at all. But, on the other hand, it was not a term or condition of the contract that the property should continue to be available for development at the date of completion; nor, I think, can such a condition be implied into the contract. The subject matter of the contract is simply a specified piece of land described in the contract and nothing more. Can it then be said that listing before completion frustrated the contract? ...

The listing struck down the value of the property as might a fire or a *compulsory purchase order* or a number of other events. It seems to me, however, that the listing did not in any respect prevent the contract from being carried to completion according to its terms; that is to say, by payment of the balance of the purchase price and by conveyance of the property. The property is none the less the same property by reason that listing imposed a letter upon its use. It seems to me impossible to bring the circumstances of the present case within the test enunciated by Lord Radcliffe. One cannot say that the circumstances in which performance, *ie,* completion, will be called for would render that performance a thing radically different from that which was undertaken by the contract. On the contrary, completion, according to the terms of the contract, would be exactly what the

> purchasers promised to do, and of course the vendors... (emphasis added)

The parallels between *Amalgamated Investment* and *Lim Kim Som* are striking in the following respects, and it is surprising that the Singapore Court of Appeal did not find more assistance from this case:

(a) the English court was (as was the Singapore court) applying Lord Radcliffe's test of frustration to a contract for the sale of land;[84]

(b) it was a contract for the commercial purpose of enabling the purchaser to redevelop the property (as the Singapore court found was the case in *Lim Kim Som),* but the contract made no stipulation that the purchase was subject to planning permission being obtained (which is a common term in Singapore contracts);

(c) the English court would have treated an order for compulsory acquisition no differently from the listing, since two judges specifically drew analogies with compulsory acquisition for this purpose.[85]

However, it is difficult to be dogmatically assertive about the Court's reasoning on foreseeability, as this is an area beset by uncertainty.

The fact that the parties have foreseen the event but not made any provision for it in their contract will usually, but not necessarily, prevent the doctrine of frustration from applying when the event occurs. It is a question of construction of the contract whether the parties intend their silence to mean that the contract should continue to bind in that event, or whether they intend the effect of that event, if it occurs, to be determined by any relevant legal rules.[86]

The issue is ultimately whether one party or the other has assumed the risk of the occurrence of the event. The degree of foreseeability needed to support the inference of risk assumption is higher than the test applied for the tort of negligence, and must be one which the parties could reasonably have thought was a real, rather than a theoretical, possibility.[87]

Against that background, one must concede that the wording of Special Condition 5 and the factual circumstances of this case (shrouded as they were in unsettled controversy) could give rise to a justifiable difference of views as to the foreseeability of compulsory acquisition of this property provided a court felt it was necessary to look into these matters at all.

[84] *Ibid,* pp 172-173, 176-177.
[85] Lawton LJ at 175B, Sir John Pennycuick at 177C.
[86] *Chitty on Contracts* (28th Ed), Vol 1, at paras 24-057, 24-058.
[87] *Supra,* note 62, at 466.

However, the thesis of this paper is that, on the authority of *Amalgamated Investmen*t (now approved by the Privy Council):

(a) the possibility of compulsory acquisition is taken as a matter within the reasonable contemplation of a normal vendor and purchaser of real property; and

(b) the intention of the parties on this subject need not (in the absence of any exceptional contractual provisions or special facts) be the subject of a detailed contractual analysis or factual investigation.

## III. The Privy Council Decision *(Johnson v NSR)*

The Judicial Committee of the Privy Council has now spoken unequivocally on the question in *E Johnson & Co (Barbados) Ltd* v *NSR Ltd,*[88] and affirmed the correctness of *Hillingdon.*

The facts of this case require a little attention, as they can be distinguished from *Lim Kim Som.* In July 1989 NSR agreed to buy a piece of land from Johnson. A deposit was paid, and completion was fixed for the end of September. Prior to the date fixed for completion, a notice was issued under section 3 of the Barbados Land Acquisition Act that the property was likely to be required for acquisition or other public purposes. The purchaser (NSR) then sued for the return of its deposit and the vendor (Johnson) counterclaimed for specific performance. Under the Barbados Act, a section 3 notice enabled the Government to do a number of acts preparatory to compulsory acquisition, but did not have the effect of vesting the land in the Government until a notice was published under section 5 of the Act declaring it to have been acquired, whereupon the land would vest in the Government. Before the action came to trial a section 5 notice was published, vesting the land in the Government.

The Judicial Committee held that the publication of a notice under section 3 of the Barbados Land Acquisition Act warning that land under a contract of sale was likely to be required for Government purposes did not frustrate the contract since it was to be presumed, in the absence of specific provision to the contrary, that the purchaser had agreed to accept the normal risks incidental to land ownership as from the date of the contract, including the risk of interference with land-owning rights by the Government. The Committee further held that the limited powers accruing to the Government pursuant to the issue of a section 3 notice did not extend to a right to immediate possession so as to prevent the owner of the land from being able to give vacant possession to a purchaser on completion. Accordingly, since the

[88] *Supra,* note 5.
[89] *Ibid,* p 409E.

vendor had been in a position to give vacant possession on completion, the contract had not been frustrated and the purchaser had been in breach of contract.[89]

Lord Jauncey of Tullichettle, delivering the advice of the Judicial Committee, dealt with the frustration argument in a relatively short passage:[90]

> Consideration of these submissions requires in the first place an analysis of the precise effect of publication of a section 3 notice. This is threefold, namely: (1) it is a warning that the land is likely to be required for Crown purposes; (2) it empowers the chief surveyor to enter on the land for certain limited purposes none of which involves taking possession of the land or any part thereof, and (3) it enables the Governor-General to authorise, under section 4, the chief surveyor to do work on the land before it vests in the Crown by publication of a section 5 notice. However it provides no certainty that the land will be acquired and section 9 makes provision for abandonment of the compulsory purchase procedure at any time before payment of compensation.
>
> Is this threefold effect such as to render the obligation to give vacant possession "incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract?" (*Davis Contractors Ltd* v *Fareham UDC* [1956] AC 696, 729, *per* Lord Radcliffe). Their Lordships consider that the answer must be "No." On the conclusion of a contract for *sale* of land the risk passes to the purchaser. It will be presumed, in the absence of specific provision to the contrary, that the purchaser has agreed to accept the normal risks incidental to land ownership. The risk of interference with land-owning rights by the Crown or statutory authorities is always present. The land may be needed for the construction of a road or an airport, wayleaves for power lines or for gas or oil pipes may be required, restrictions may be imposed on the use of the land by planning legislation or the peace and quiet which the owner had hoped to enjoy may be shattered by a noisy local development. These are some of the examples of the ways in which a landowner is at risk of having his rights and enjoyment removed or curtailed. A threat of compulsory purchase, and publication of a section 3 notice can amount to no more than that, does not radically alter the nature of the contract of sale. What it does

[90] *Ibid,* pp 406-407.

> is simply to increase the likelihood of an existing albeit remote risk becoming an eventuality.

Lord Jauncey then went on to quote with approval the remarks of Vaisey J in *Hillingdon* about frustration which have been quoted above[91] ("No doubt these departmental interferences and interventions do make a very great difference to ordinary life in this country..."), and said:[92]

> Their Lordships consider that these observations are equally applicable to the position in this case after the publication of the section 3 notice.

Lord Jauncey also relied on the Court of Appeal's decision in *Amalgamated Investment* and concluded:[93]

> It follows that a section 3 notice does not amount to a frustrating event.

Essentially the Judicial Committee decided as follows.

(1) The risk of Government intervention in land-owning rights is always present and (implicitly) must be foreseen (contrast this with the Singapore Court of Appeal's view[94] that "the rigid insistence on the fact that the event ought to have been foreseen cannot be an adequate solution and it would negate the very test propounded by Lord Radcliffe in the *Davis Contractors* case").

(2) A threat of compulsory purchase does not radically alter the nature of the contract of sale within the Lord Radcliffe test, but only increases the likelihood of an existing (albeit remote) risk becoming an eventuality, and therefore does not frustrate the contract (compare this with the Singapore Court of Appeal's view[95] that a section 5 gazette notification means a moral certainty that the property will be acquired and this does radically alter the nature of the contract).

(3) Despite a section 3 notice, the vendor was still in a position to

[91] See note 27 above.
[92] *Supra,* note 5, p 407D.
[93] *Ibid,* p 407F.
[94] *Supra,* note 4, p 409D-G.
[95] *Ibid,* p 398.
[96] *Supra,* note 1, p 536D-E.

deliver vacant possession at the date of completion and (implicitly) to fulfil its contractual obligations to vest legal title in the purchaser (compare this with the High Court's reasoning in *Sheriffa Taibah*[96] that a section 5 gazette notification did not take legal title away from the owner until a section 18 entry had been made in the relevant register).

(4) The decisions and reasoning in *Hillingdon* and *Amalgamated Investment* apply to a section 3 notice under the Barbados Act (contrast this with the Singapore Court of Appeal's express refusal to follow *Hillingdon* and its curious citation of passages from *Amalgamated Investment* effectively supporting *Hillingdon* without any comment on those passages except to rely on them for the proposition that a contract for the sale of land can be frustrated).[97]

A further aspect of the Judicial Committee's decision is of interest. Although it held that the contract was not frustrated by the section 3 notice, it went on to hold[98] that the vendor's counterclaim for specific performance could not be enforced by the time of the trial (this being the relevant date for consideration: see *Price* v *Strange,*[99] the same authority relied in by the Singapore Court of Appeal) since by then a section 5 notice had been published vesting the land in the Government, hence preventing the vendor from conveying title. While, therefore, the Judicial Committee(unknowingly) agreed with the Singapore Court of Appeal that the question of specific performance could only be determined at the trial, this did not prevent the Privy Council from expressly agreeing with Vaisey J's controversial remarks about beneficial ownership passing on contract.[100] In other words, the Judicial Committee saw no problem with reconciling its approval of the principle that equitable ownership passes on contract (which was one of the main reasons for Vaisey J's decision in *Hillingdon*, and which was rejected by the Singapore Court of Appeal) with its holding that specific performance is in effect a floating remedy that only crystallises at the time of the trial of a dispute about its enforcement.

This lends strong support to the argument raised earlier in this article that equitable ownership has to be decided on a *prima facie* basis, *ie,* on the presumptive rule that, absent special circumstances, the court will enforce every contract for the sale of real property. This in turn leads to the logical

[97] *Supra*, note 4, pp 397-398.
[98] *Supra,* note 5, pp 410-411.
[99] [1978] Ch 337.
[100] *Supra,* note 5, p 407B-D.

connection between the passing of property and the passing of risk, which puts the purchaser on risk of anything untoward happening to the property between contract and completion.

It is unfortunate that *Lim Kim Som* was not cited to the Judicial Committee, and we can never know how the Privy Council would have dealt with that decision. There may be those who would argue that the Judicial Committee's decision is distinguishable from *Lim Kim Som* because the two cases were interpreting two different statutory provisions which are not in *pari materia.* While that may be a technically correct argument, it is submitted that the Judicial Committee is unlikely to have decided *Lim Kim Som* in the same way as the Court of Appeal. It is true that a Barbados section 3 gazette notification does not have the same relative finality in terms of the acquisition process as a Singapore section 5 gazette notification. However, it is clear that the Judicial Committee was giving broad approval to the line of reasoning first espoused by Vaisey J in *Hillingdon*, and later developed in *Amalgamated Investment*. Even the controversial remarks of Vaisey J about the passing of beneficial ownership on the signing of the contract were in effect approved by repetition of the same argument by Lord Jauncey, who expressly approved the same line of reasoning adopted in *Amalgamated Investment.* Further, the Committee expressly applied Lord Radcliffe's test of frustration in *Davis Contractors,* and it would take a brave person to argue that the Judicial Committee would have decided *Johnson* v *NSR* differently had *Lim Kim Som* been cited to it.

Subject to the remarks which will be made at the end of this article, any future consideration of *Lim Kim Som* and *Johnson* v *NSR* should therefore at least begin on the premise that these two decisions are inconsistent with each other (at least in spirit). The question will therefore be: which path will the law follow? It is clear which way the English courts will go, judging from the wholesale acceptance of *Johnson* v *NSR* by English textbooks (in the absence of any English case authority for the moment);[101] The present English position after *Johnson* v *NSR* is definitively stated by Treitel as follows:[102]

> Specific performance of a contract for the sale of land can be ordered against the purchaser even though, after contract, a compulsory purchase order is made in respect of the land. *(Hillingdon)* The contract is not

[101] *Eg, Chitty on Contracts* (28th Ed), Vol 1, at para 24-055, *Anson's Law of Contract* (27th Ed) at 526.

[102] *The Law of Contract* (10th Ed) at 835.

> frustrated because the risk of compulsory acquisition is on the purchaser from the time of the contract, and because the court's order will result in the conveyance of the land to him, against payment of the price, so that he will in due course get the compensation payable by the acquiring authority. Where, in pursuance of the compulsory acquisition order, the land is taken over by the acquiring authority *after* completion has become due, but before the hearing, the court will not order *specific* performance, since it cannot order the vendor to convey, but the contract is not frustrated, so that the purchaser's failure to complete on the due day is a breach for which he is liable in damages. (*Johnson* v *NSR*) The position is different where the land is sold with vacant possession and is actually requisitioned *before* completion is due. In such a case it has been held, not only that the vendor cannot specifically enforce the contract (since he cannot perform his obligation to give possession on the due date), but also that the purchaser can get back his deposit. It must follow from this reasoning that the purchaser will not be liable in damages.

It is therefore a matter for speculation as to how the Singapore courts will proceed from here.

## IV. Local Case Law after *Lim Kim Som*

There have been a surprising number of cases which have referred to *Lim Kim Som.* Not all are relevant to the issue of frustration.[103] Those that deal with frustration show that the principle has been applied in a way that was not perhaps intended by the Court of Appeal, and sometimes with surprising consequences.

### A. *Win Supreme Investment (S) Pte Ltd* v *Joharah bte Abdul Wahab*[104] *(Win Supreme)*

This was the first Singapore case in which *Lim Kim Som* was judicially cited.

The plaintiff bought a property from a mortgagee (UMBC) of the developer

[103] In *British Malayan Trustees Ltd* v *Sindo Realty Pte Ltd* [1999] 1 SLR 623 the Court of Appeal reiterated (at p 646B) its view expressed in *Lim Kim Som* (at 646) that ownership passes on contract only where that contract is specifically enforceable. This view has been criticised by Joan Sethupathy *op cit* (see note 28 *supra*).

[104] [1997] 1 SLR 679.

of the property (Sri Jaya), and sued the occupier (the defendant) of the property for vacant possession. The occupier's father had bought the property from the lessee (the Society) of the developer, whose interest had been overreached by the mortgagee sale. After his father's death, the occupier agreed to pay a fresh fee to the lessee in return for a new lease to be issued in the name of the occupier. When the plaintiff sued the occupier, the latter claimed third party relief against the lessee for breach of this agreement. The lessee claimed that the agreement had been frustrated by the mortgagee's action in selling the property.

Chao Hick Tin J (as he then was) dealt with the frustration argument in this way: he cited *Lim Kim Som* as deciding that frustration applies to a contract for the sale of immovable property, but distinguished it from the present case because *Lim Kim Som* was a case of statutory intervention. Further, the developer's default under the mortgage was clearly something foreseeable (an interesting observation in the light of the Court of Appeal's doubts about the relevancy of foreseeability). The lessee was therefore in breach of contract even through its breach was caused by the developer, against whom the lessee could claim an indemnity.[105]

There can be no quarrel with Chao J's holding that the doctrine of frustration applies to the sale of land, and his instinct in restricting the scope of *Lim Kim Som* is to be commended. However, nothing in the judgment deals with the merits of the Court of Appeal's findings on the facts of that case.

### B. *Lee Seng Hock* v *Fatimah bte Zain*[106] *(Lee Seng Hock)*

The appellant was the registered proprietor of a H share in a piece of land. The other H share was owned by the estate of a deceased person, of which the respondent was the administratrix. In December 1979, the respondent (as administratrix) agreed to sell the deceased's H share to the appellant for RM 40,000, and a deposit of RM 4,000 was paid. In March 1990 a *kadi's* certificate was issued distributing the deceased's H share to the respondent and *baitulmal (ie,* property of the Muslim community and public treasury comparable to the old common law escheat) in equal shares. This had the legal effect of preventing the sale of the deceased's H share to the appellant. In May 1994 the whole land was acquired by the Government.

[105] *Ibid,* pp 688-689.
[106] [1996] 3 MLJ 665.

Compensation was awarded to the appellant and respondent for their respective shares in the land. The respondent's compensation for her G share was RM 97,314 and the same amount was awarded for the estate's G share. The sale and purchase agreement between the appellant and the respondent had not been completed as it was subject to an order of court sanctioning the sale, which could not be applied for owing to the events described above. The appellant then claimed the respondent's personal share of the compensation (less the balance of the purchase price of RM 36,000), since the amount awarded to her as administratrix belonged to *baitulmal*. He based his claim on the premise that the sale agreement was still valid despite the failure to obtain a court order to sanction the sale and despite the fact of the acquisition, arguing that the contract had not been frustrated.

The Malaysian Court of Appeal found that the delay in completion was not due to the fault of the respondent (a vital distinguishing feature from *Hillingdon* and *Lim Kim Som)* because of the events that had taken place after the sale agreement. The court found that the compulsory acquisition that occurred here took place 14 years after the contract was entered into, and could not have been foreseen by the parties. The court then applied the Lord Radcliffe test of whether there had been a radical change in the parties' obligations, and held that what had been agreed was a sale of the H share of the respondent. When the land was compulsorily acquired and compensation was awarded, the subject matter of the agreement ceased to exist and performance of the agreement became impossible, and the acquisition therefore frustrated the agreement. The Court applied *Lim Kim Som* and held that the appellant could not claim the compensation, although he was entitled to a refund of his 10% deposit.

The curious feature about this case is that, unlike *Hillingdon, Lim Kim Som* and *Johnson* v *NSR,* it was the purchaser who was seeking to enforce the contract. On the facts this was not surprising, because the value of the compensation was higher than the purchase price.

There can be no criticism of the actual decision in this case, whatever view one takes of *Lim Kim Som,* because, even if one applied *Johnson* v *NSR,* the contract would still have been held to be frustrated. The reason is that, in this case, the process of acquisition had been completed before the sale had been completed, and therefore the vendor was, at the time of the trial, unable to convey title. Further, unlike the fact situation in the three cases mentioned above, the vendor was not at fault for the late completion, and there could be no objection to her relying on the doctrine of frustration.

In the circumstances, the reliance on *Lim Kim Som* was gratuitous, and the only contribution of this case to our discussion is to point out that it is not always the purchaser who will suffer or the vendor who will gain if the parties are held to their contractual obligations despite the making

of a compulsory purchase order.

### C. *Tay Ah Poon* v *Chionh HaI Guan*[107] *("Tay Ah Poon")*

This case had even more bizarre facts than Lee Seng Hock.

The vendors agreed on 21 March 1995 to sell their HDB flat to the purchasers for $228,000. The purchasers paid a deposit of $5,000 and completion was fixed for 15 September 1995. On 22 August 1995, the Government announced that the Boon Tong Estate (where the subject property was located) would be compulsorily acquired for the Selective En-Bloc Redevelopment Scheme (SERS). The terms of acquisition were that the owners of all affected flats would be given a compensation package more favourable than under the Land Acquisition Act (indeed, virtually the same as the contract price) plus an assured allocation of a new flat for a fresh 99 year lease at a 20% discount off the price of the new flat.[108] On 14 September 1995, a formal gazette notification was published under section 5 of the Land Acquisition Act. Later, the vendors'solicitors advised the purchasers that the vendors did not wish to proceed with the sale, relying on clause 5 of the agreement, under which they claimed that they had a contractual right to terminate the agreement on refunding the deposit and paying a sum equivalent to 10% of the purchase price as liquidated damages. The vendors forwarded a cheque for $27,800 to the purchasers, who refused to accept it, and sued for specific performance.

The vendors' position was that, on the true construction of the agreement, they were entitled to terminate the agreement on paying the sum of $22,800; however, they later changed their position to argue that they need not even pay the 10% by way of liquidated damages as the contract had been frustrated since, if specific performance were ordered, the purchasers would get very much more than what they had bargained for, which was a 4-room flat.

The purchasers' position was that the doctrine of frustration did not apply because, unlike *Lim Kim Som,* the contract could still be performed, as the defendants could convey the flat. There was no change in the nature and duration of the title; the HDB would pull down the existing blocks (including the subject property) and put up new flats for the owners which would

[107] [1997] 1 SLR 369; on appeal, [1997] 2 SLR 363.

[108] Details of the HDB SERS are described in *CCH/SISV Singapore Real Estate Handbook* by Amy Lee-Khor Lean Suan and Tay Kah Poh at para 30-525, and the HDB's website (URL: http://www.hdb.gov.sg/isoa024p.nsf/SERS).

[109] [1997] 1 SLR 369 at 376.

come with fresh 99-year leases.

At first instance, Lai Siu Chiu J held as follows:[109]

> The real issue in this case is, who should reap the unexpected windfall resulting from the compulsory acquisition of the flat, unlike other acquisition exercises? Counsel for the defendants in submitting that the agreement was frustrated said if specific performance was ordered, the plaintiffs would have obtained more than what they had bargained for, which was a 4-room flat. Conversely, counsel for the plaintiffs, in arguing against frustration, pointed out that there was nothing to prevent the defendants from transferring the title in the flat to the plaintiffs; it would take some time for the government to implement the acquisition exercise which will only be done *after* the government has built new flats for affected owners to move in *before* their existing flats are demolished for redevelopment. It is also obvious that in that event the plaintiffs would have obtained more than what they had bargained for as, besides the compensation sum, they would be allotted a new flat with a fresh 99-year lease. Unlike *Lim Kim Som* v *Sheriffa* the acquisition exercise here, which was before not after, the scheduled completion date, would not frustrate the contract, as the position *vis-à-vis* the flat has not been altered fundamentally. It cannot be said that after the sale and purchase has been completed, what would be conveyed to the plaintiffs would be an estate which is unuseable *(sic)* and unsaleable let alone that the plaintiffs would receive compensation far below the market value of the flat. In fact the position would be quite the opposite. (emphasis in original)

Accordingly, as she found that, on the true construction of clause 5, the vendors were entitled to call off the sale upon payment of the liquidated damages, she upheld the vendors' rescission of the contract.

Leaving aside her interpretation of clause 5 (which was reversed on appeal), Lai J's interpretation of *Lim Kim Som* is curious. Her reliance on the ability of the vendors to convey title was precisely the argument that the High Court in *Shariffa Taibah* had relied on in denying frustration,[110] and this argument was rejected by the Court of Appeal, which underlined the point that, regardless of whether the frustrating event occurred before or after the scheduled date of completion, if the event was one that radically changed the obligation, then it would frustrate the contract so long as it was executory. This leads to Lai J's second point, that the position of the flat had not been altered fundamentally by the acquisition since, unlike *Lim*

[110] *Supra,* note 1, p 538H-I.

*Kim Som,* what would be conveyed would not be unusable and unsaleable with compensation below the market value of the flat; indeed what would happen would be quite the opposite.

Lai J's reasoning seems to imply that one applies Lord Radcliffe's test only from the viewpoint of the purchaser: if the result of the putative frustrating event is to leave him with a pig in a poke, then there is frustration, but if it gives him a windfall which would otherwise accrue to the vendor, then there is no frustration. However, the actual decision can probably be rationalised by an objective characterisation of the contract as one for the sale of property in exchange for a sum of money. The purchasers got a property which was exchangeable for a superior property at no loss to them (in fact at a financial gain), and the vendors got the same amount of money due under the contract. The real point is that, unlike in *Lim Kim Som,* neither party suffered a financial loss arising from the compulsory acquisition. As will be argued later, this is an important distinction which can lead the way to a true understanding of the limited scope of the decision in *Lim Kim Som.*

On appeal,[111] the Court of Appeal disagreed with Lai J's interpretation of clause 5 and held that it did not exclude the purchasers' common law right to specific performance, and the Court accordingly granted the purchasers that relief. Its finding made it unnecessary for it explicitly to deal with the question of frustration, but the inevitable conclusion to be drawn from its decision is that the Court must have impliedly approved of Lai J's reasoning on the issue of frustration, since it could hardly have granted specific performance of a frustrated contract. This is borne out by Karthigesu J's citation[112] of Lai J's remarks about *Lim Kim Som* quoted above, without any comment. Since Karthigesu J was one of the members of the Court of Appeal in *Lim Kim Som,* one must presume that he approved of Lai J's interpretation of his earlier judgment, strange as that interpretation may seem.

### D. *Maxi Developments Pte Ltd* v *Tan Siew Kheng Helen*[113] *(Maxi Developments)*

This is the only local case which has discussed *Lim Kim Som* and *Johnson* v *NSR* in the same judgment (indeed, it is the only local case that has mentioned *Johnson* v *NSR* at all). Unfortunately it has not enlightened us as to which decision the local courts will follow.

The purchasers of a piece of property had purchased the property by

[111] [1997] 2 SLR 363.
[112] *Ibid,* p 367.
[113] [1998] 1 SLR 875.

tender. The tender document specified that the property was sold subject to all road proposals and schemes, and the purchasers were deemed to have purchased the property subject to such proposals and schemes and also subject to the Government acquiring the property. The purchasers now claimed that the title was bad in that they had been misled by a faxed site plan into believing that the property was capable of redevelopment, when in fact a road proposal made redevelopment impossible. The contract contained no term that the property was capable of redevelopment.

Christopher Lau JC dismissed the claim on various grounds, mainly because he found that the purchasers had not relied on the site plan, and were bound by the clear terms of the contract. However, in passing, he also uttered these words:[114]

> The plaintiffs had not contended that the contract had been frustrated or that the property was subject to acquisition by the State or that the property would be unusable or unsaleable on account of such land acquisition. Such an allegation would only have applied if the properties or a substantial part thereof had been the subject matter of notice under the Land Acquisition Act (Cap 152) – see *Lim Kim Som* v *Sheriffa Taibah bte Rahman* [1994] 1 SLR 393. The properties had not been affected by any notice of land acquisition. In any event the Privy Council had recently held in E *Johnson Ltd* v *NSR Ltd* [1996] 3 WLR 583 that even if a property was subject to a notice of acquisition (which was not the case here) in the absence of a specific provision in the contract to the contrary (which was also not in the case here as the property was sold subject to all road proposals and schemes) the purchaser had agreed to accept the normal incidents of land ownership as from the date of the contract including the risk of interference with land owing rights by the State and consequently the purchaser was obliged to complete the purchase of the property.

It is not clear how Christopher Lau JC thought that the two cases were reconcilable. His use of the term "notice of acquisition" in relation to the section 3 notification in *Johnson* v *NSR* does not suggest that he was thinking of distinguishing the effect of the Barbados notification from the effect of the section 5 gazette notification in *Lim Kim Som.* However, whatever his reasoning, as will be pointed out later, the decision is important in asserting the argument that *Johnson* v *NSR* can be regarded as applicable in Singapore despite *Lim Kim Som.*

## V. *Lim Kim Som* and Private En-Bloc Sales

[114] *Ibid,* p 880.

Reference has been made above to the problems of compulsory acquisition arising from the HDB SERS. A further problem arises with private *en-bloc* sales consequent upon the recent amendments to the Land Titles (Strata) Act.[115] Part VA of the amended Act now compels individual subsidiary proprietors (and their successors in title) to sell their lots in the condominium development if an order to that effect is made by the Strata Titles Board.[116] The frustration question will then arise in the following scenario.

- An existing subsidiary proprietor ("SP") agrees to sell his lot to a purchaser ("P") for $1 million.
- After the contract, but before completion, the remaining subsidiary proprietors obtain an order from the Strata Titles Board for all the units in the condominium development to be sold at a price reflecting an apportioned value for SP's lot of $1 million.
- P is upset, because he will be forced to sell the lot as soon as completion takes place, which will:
  (a) deprive him of a home, which he may consider particularly suitable for his needs;[117]
  (b) result in a net financial loss to him after paying two sets of transactional fees and expenses.
- Will *Lim Kim Som* apply to frustrate the contract? To SP, the nature of the obligation has not radically changed, as he is still selling the legal and beneficial interest to his lot. However, P may argue that there is a radical change in the nature of his obligation, as he was buying a unit for occupation, and he will not be able to occupy the unit, but will be forced to sell it, and at a loss to boot.
- Although the loss here is not as devastating as was the case in *Lim Kim Som,* the logic of the Court of Appeal's argument could be stretched to encompass P's argument. However, to accept P's

[115] Land Titles (Strata) Amendment Act 1999.
[116] S 84B(1).
[117] *Cf* the argument of the Court of Appeal in *Lim Kim Som*, *supra,* note 4, p 409G-H that the purchaser had bargained for not only the legal estate, but the use of the property, and denial of this expectation was (at least in part) justification for applying the doctrine of frustration. *Cf* also the argument of the purchasers in *Tay Ah Poon* that it would be unfair to frustrate the contract as they had spent considerable time and effort selecting this particular unit, which was especially suitable for their needs, see *supra,* note 109, p 372.

argument would lead to a detailed comparison of the terms of the order made by the Strata Titles Board with the terms of the contract made between SP and P, resulting in uncertainty as to the validity of the contract. It would also create an anomalous discrepancy between an HDB SERS situation and a private *en-bloc* sale, if the decision in *Tay Ah Poon* is accepted as the paradigm in every HDB SERS case.

The scenario described above could be varied if the apportioned *en-bloc* sale price for the lot were to be higher than the sale price agreed between SP and P. The fact situation could become somewhat complicated.

- SP might now argue for frustration, on the ground that the *en-bloc* order was unforeseeable, and P was buying the unit for personal occupation, which was now impossible. If P agreed with SP, the frustration issue would become moot because the parties would simply agree to rescind the contract.
- However, if P did not wish to argue for frustration because he was happy to take the profit on the *en-bloc* sale and buy another unit elsewhere, can SP nonetheless steal P's argument and contend that the nature of the obligation is to be determined objectively at the time of the making of the contract and P cannot be allowed to take advantage of the unexpected opportunity to change his mind about wanting the unit for occupation?

These are the problems that await a reconciliation of *Lim Kim Som* and *Johnson* v *NSR.*

## VI. The Inherent Caution of the Courts

The interesting fact that has emerged is that, although a number of courts and cases have purported to approve or apply *Lim Kim Som,* in virtually no case has a contract actually been declared to have been frustrated following *Lim Kim Som.*[118] Either *Lim Kim Som* is of narrower application than originally believed, or the courts are being affected by their natural instinct to apply the doctrine of frustration itself restrictively.

This instinct may be illustrated in another recent case, *MP-Bilt Pte Ltd* v *Edy Yumianto,*[119] which is of interest as it is another case for the sale

[118] Except for the Malaysian case of *Lee Seng Hock,* where the decision was in reality not dependent on *Lim Kim Som,* and was unnecessarily applied.

[119] [1999] 4 SLR 241.

of real property where the doctrine of frustration was invoked although reliance was (surprisingly) not placed on *Lim Kim Som.* This was one of the cases that arose out of the Asian financial crisis, resulting in a number of Asian buyers of condominiums under development (in this case Ardmore Park) being unable or unwilling to meet the progress payment claims of the developer under the standard prescribed form of housing developers' contract. One of the defences pleaded here was that the financial crisis in Indonesia had caused such inflation and consequent loss to the Indonesian buyer's business that he was no longer able to pay the instalments under the agreement, which was therefore frustrated. Choo Han Teck JC rejected this argument because the subject matter of the agreement was the property in Singapore, which was unaffected by the Indonesian crisis. Inflation might bring about frustration only in very exceptional circumstances, but this was only one factor which had to be set against the terms and nature of the contract. In this type of agreement, the financial capacity of the buyer was his own concern, and he had to run the risk of his own financial difficulties.

Choo JC's decision was upheld by the Court of Appeal (which did not deliver a written judgment), and is clearly right. However, it is slightly regrettable that he even countenanced the possibility that, in certain circumstances, inflation might bring about frustration, relying on a dictum in *Wates Ltd* v *Greater London Council.*[120]

It is respectfully submitted that inflation of any currency other than the currency of the contract can never give rise to frustration, as it will not bear on the subject matter of the contract, but merely affect the ability of one party to perform its financial obligations, which is generally accepted as not being a frustrating event.[121]

## VII. WHITHER *LIM KIM SOM?*

The key question here is whether *Lim Kim Som* is reconcilable with *Johnson* v *NSR*. Although two of the three judges in *Lim Kim Som*[122] are now no longer on the bench, given that it is a relatively recent decision of the Court, which was not only a fully considered decision, but one which has apparently been accepted by other local courts, it would be unrealistic to expect the Court of Appeal openly to reverse its own decision, despite its ability to do so.[123]

If the underlying philosophy of *Johnson* v *NSR* is accepted, then the

[120] *Ibid,* p 248.
[121] *Universal Corporation* v *Five Ways Properties Ltd* [1979] 1 All ER 552 at 554d.
[122] Karthigesu JA and Warren Khoo J.
[123] *Practice Statement (Judicial Precedent)* [1994] 2 SLR 689.

courts (including the Singapore Court of Appeal) may come to view *Lim Kim Som* more restrictively, in the light of its own special circumstances. Although this article has earlier suggested that *Lim Kim Som* can be viewed as a paradigm case (and hence a decision capable of wide, if not general, application), the case does differ from the English cases in one important respect. There is no English provision equivalent to the fire site provisions of the Land Acquisition Act that made the section 5 gazette notification such a disaster for the purchaser in *Lim Kim Som.* The compensation was not only pegged to an out-of-date valuation, but was further diminished by the one-third rule. In Western countries (and even in this part of the world under certain circumstances)[124] compulsory acquisition is not necessarily a financial disaster, and may even bring financial and other gains for the landowner. If the purchaser in *Lim Kim Som* had been forced to complete the purchase, he would have been hit with a triple body blow:

(a) he would have lost the enjoyment of the land he had bought;

(b) the valuation of the land was fixed at 30 November 1973 instead of the date of his purchase; and

(c) the actual award was one-third of that reduced value.

Clearly these factors aroused the sympathy of the Court of Appeal.[125] The argument can therefore be made that, where the fire site provisions do not apply, neither does *Lim Kim Som.* A narrower argument might be that *Lim Kim Som* does not apply to any acquisition where the artificial valuation provisions of section 33 are not invoked, with the result that the landowner receives full market value as compensation (as in *Tay Ah Poon*). Indeed, *Tay Ah Poon* provides a strong clue as to the likely direction the Court of Appeal will take, because it implicitly approved Lai Siu Chiu J's reasoning that there was no frustration since, from the financial viewpoint, the purchaser would not suffer in the same way as the purchaser would have in *Lim Kim Som.*

It has to be said that such an approach would not be intellectually satisfying because the Court of Appeal in *Lim Kim Som* appeared to place as much (if not greater) emphasis on the loss of the use of the property as on the financial consequences of the acquisition.[126] This emphasis would suggest that frustration applies to *all* cases of compulsory acquisition, whatever the financial and other circumstances of the acquisition. Fortunately, whatever the intellectual merits of the argument may be, that suggestion cannot stand

[124] As in *Tay Ah Poon* and *Lee Seng Hock.*
[125] *Supra,* note 4, p 409F-I.
[126] *Supra,* note 4, p 409G-H.

in the light of *Tay Ah Poon,* and it is suggested that the way is now clear for even lower courts to apply *Lim Kim Som* only to acquisitions where the fire site provisions do not apply or (at the least) where the compensation paid is less than the property's market value at the time of the gazette notification. Further support for this approach can be found in *Maxi Developments,* where Christopher Lau JC seemed to find no contradiction between *Lim Kim Som* and *Johnson* v *NSR,* although the basis for his reasoning is unclear.

Finally, there is sound doctrinal justification for this approach since, as noted by the Court of Appeal itself in *Lim Kim Som,*[127] each case on frustration must be decided on its own particular facts, and the courts must therefore be slow to extract broad principles from any decision on frustration unless the judgment itself is expressed in terms of such principles. The language of the Court of Appeal in *Lim Kim Som* can (if one does not interpret it too imaginatively) be confined to the peculiar circumstances of that case (as compared to the language of the Court of Appeal in *Amalgamated Investment* and the Judicial Committee in *Johnson* v *NSR*, which was expressed in much broader terms of principle).

In the ultimate analysis, *Lim Kim Som* may not be as radical or far-reaching a decision as might have first been supposed. The natural pragmatic instincts of common law judges have again demonstrated the effectiveness of the common law as an instrument of law reform – to develop the law by increments rather than by sweeping statements of new principle. It may be disappointing to proponents of a broad and liberal doctrine of frustration to see how little the law has actually changed since *Lim Kim Som.* However, this is to fail to see its true significance. It is (probably)the first direct authority in the Commonwealth for the proposition that a contract for the sale of real property may be frustrated but, on its true interpretation, the case has re-affirmed the principle that every case of frustration has to be analysed on its own facts. This in turn means that, while there is no doctrinal road-block to declaring a contract for the sale of real property frustrated, the application of that principle will still have to be based on existing methods of case by case analysis. Compulsory acquisition *per se* will not necessarily result in frustration; the courts will still have to analyse the circumstances, both of the contract as well as of the acquisition, before deciding whether to declare the contract frustrated. Put that way, *Lim Kim Som* and *Johnson* v *NSR* may (however uneasily) co-exist.[128]

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[127] *Ibid,* p 403E.

[128] Thanks are due to Professor JD Davies for his helpful comments on an early draft. The query on the status of private *en-bloc* sales was suggested by Stephen Phua. I have also benefited from several discussions with Professor Andrew Phang, but the responsibility for all errors and omissions in the final product remain with the author.

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