



Neutral Citation Number: [2023] EWHC 2529 (Ch)

Case No: CH-2022-000222

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
APPEALS (ChD)

ON APPEAL FROM THE COUNTY COURT AT MAYORS & CITY OF LONDON
ORDER OF HHJ BACKHOUSE 15 NOVEMBER 2022 IN CLAIM G36YJ795

7 Rolls Building
Fetter Lane,
London, EC4A 1NL

Date: 12 October 2023

BETWEEN

MOQSUD AHMED KHAN

Appellant/Defendant

and

(1) **ABDUL MALIK**
(2) **ADNAN MALIK**

Claimants/Respondents

Before:
THE HONOURABLE MR JUSTICE RICHARD SMITH

Kerry Bretherton KC of Counsel (instructed by **Taylor Fordyce Solicitors**) appeared for the **Appellant**

Aaron Walder of Counsel (instructed by **Mills Chody LLP**) appeared for the **Respondents**

Hearing date: 10 July 2023

APPROVED JUDGMENT

This judgment was handed down remotely at 10.30am on 12 October 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Mr Justice Richard Smith:

A. Background

1. This judgment concerns an application by the Appellant/Defendant (**Defendant**) for permission to appeal against the order of HHJ Backhouse dated 15 November 2022 which gave effect to her judgment allowing claims by the Respondents/Claimants (**Claimants**) against the Defendant and ordering payment of costs and interest.
2. The Claimants, Mr Abdul Malik and Mr Adnan Malik, are, respectively, father and son. They claimed £92,071.22 from the Defendant, Mr Moqsud Khan, pursuant to an alleged oral agreement dated 8 August 2016. Although originally formulated more broadly, their claims in deceit, misrepresentation and unjust enrichment were not pursued at trial.
3. The Defendant and his wife own the freehold to 2 and 4 High Street, Sunninghill, near Ascot (**Property**). From 1986, the Defendant ran a restaurant called Rajvoog at the Property in his own name or through different companies. In September 2014, he sold the restaurant business for £67,000 to a company incorporated for that purpose, Moitree Limited (**Moitree**).
4. Mr Saifur Rahman, long term waiter at the restaurant, is the husband of the First Claimant's sister, Ms Jasmine Rahman. He was director of Moitree and owned 34% of its shares, with two other waiters, Mr A.Z.M. Shamsur Rakib and Mr Sarwar Hossain, each owning 33%. In 2016, Mr Hossain sold his shares to Mr Yann Mohammed Salimur Rahman.
5. As part of the restaurant sale, the Defendant intended to grant a lease of the Property. Solicitors were instructed and a draft lease prepared for a term of 20 years at an annual rent of £25,000, with clauses commonly found in commercial leases and to be excluded from the protections of the Landlord and Tenant Act 1954 (**1954 Act**). The lease was to be granted to Moitree, with its three shareholders as personal guarantors.
6. The correspondence suggests that signed counterpart leases were exchanged in December 2014, albeit that the shareholders were reluctant to sign their personal guarantees and the formalities were not completed. Nor was the lease registered. Mr Rahman and his colleagues ran the restaurant from late 2014 and paid rent to the Defendant.
7. The Claimants contended that, in around June 2016, Saifur and Jasmine Rahman came to them and said that the restaurant was failing and asked for help from the Malik family, Mr Malik (Snr) having run a number of restaurants, Mr Malik (Jnr) being an architect. The Claimants decided to invest in the restaurant by buying out the other shareholders, apart from Saifur Rahman, and refurbishing the Property.
8. The Claimants further contended that there was a meeting at the Property on 8 August 2016 attended by them, Mrs Fahmida Malik (the First Claimant's wife), their youngest son, Nabhan Malik, Saifur Rahman, Mr Rakib and Salimur Rahman, at which the following was expressly agreed (as pleaded at paragraph 14 of the Particulars of Claim) (**agreement**):-

- (i) The First Claimant would purchase two-thirds of the shares in Moitree for £10,000, in effect buying out Mr Rakib and Salimur Rahman. Saifur Rahman would retain his shares. Moitree would then be wound up and a new trading entity established;
 - (ii) The restaurant would be refurbished by the Second Claimant in his personal capacity, using his skills and qualifications;
 - (iii) A new 20 year lease would be granted to the new entity, which would be controlled by Fahmida Malik; and
 - (iv) Should the new lease not be granted for any reason, the Second Claimant would be paid for undertaking the works by the Defendant since he would benefit from the refurbished Property.
9. On 9 November 2016, a company called Sunninghill Limited (**Sunninghill**) was incorporated. The Claimants says this was done through Saifur Rahman, who made himself sole director, with himself and Fahmida Malik each owning half the shares. That new company paid rent between December 2016 and March 2018, with Moitree being struck off the Register on 7 March 2017.
 10. In January 2017, correspondence commenced between Saifur Rahman’s solicitors and the Defendant’s solicitors. At one stage, this indicated that the lease was to be granted to Sunninghill but later that the lease was to be granted in the sole name of Saifur Rahman, with the Defendant apparently being adamant about this.
 11. In February 2018, Saifur Rahman incorporated a new company called Hill Station Limited, with Jasmine Rahman the sole director and shareholder, that new company then paying rent to the Defendant. Throughout this period, Saifur Rahman continued to run the restaurant, with the Malik family very much the ‘sleeping partners’.
 12. By April 2018, further inter-solicitor correspondence indicated that the lease would be granted to Jasmine Rahman, with the First Claimant indicating that he would agree to this but wanted to see the lease first. The First Claimant reiterated that agreement in June 2018, albeit with the requirement that Jasmine Rahman grant a declaration of trust as to Fahmida Malik’s interest. Jasmine Rahman refused to do so.
 13. On 7 November 2018, the Defendant granted a 20 year lease in favour of Jasmine Rahman from 29 November 2014.
 14. Saifur Rahman dissolved Sunninghill in July 2018, apparently without Fahmida Malik’s agreement. Despite the latter filing objection with Companies House, the company was struck off the Register in January 2019.
 15. Finally, Saifur Rahman was declared bankrupt in January 2019, with the Malik family then instructing solicitors to write a letter before action to the Defendant. This claim was issued in March 2020.

B. The Judge's decision

16. The Judge heard oral evidence from the Claimants, Fahmida Malik, Nabhan Malik, Mr Rakib, the Defendant and Saifur Rahman. From the Judge's analysis of the evidence, it is fair to say that the content and course of the evidence (written, oral and documentary) were problematical in a number of respects (and on both sides). Nevertheless, after careful analysis of the evidence, including the honesty and credibility issues arising, the Judge rejected the Defendant's case that he was at the August 2016 meeting only briefly, he did not make any agreement with the Malik family and the discussion had nothing to do with him, finding that the Claimants' "*fundamental case as to the agreement reached is correct*".
17. At trial, the Defendant took two points as to the suggested uncertainty of the agreement, namely (a) the so-called "agreement for lease" issue and (b) the identity of the grantee of the lease (as to which it is fair to say the evidence on behalf of the Claimants was not consistent). As to the former, the Judge considered important the context of the parties' dealings, namely the existence of the (Moitree) draft lease on known terms (including as to term and rent), with the Claimants' evidence (which she considered entirely likely) that the new lease was to be either the existing lease with different names or a new lease on similar terms.
18. The Defendant relied on *Harvey v Pratt* [1965] 1 WLR 1025 in which the Court of Appeal held that it was settled law that, in order for there to be a valid agreement for lease, agreement as to the parties, property, lease term, rent and lease commencement date was essential. The court in that case rejected the argument that the law will imply that a lease is to commence within a reasonable period of time of the agreement.
19. In this case, however, the Judge accepted the Claimants' argument that this was not an agreement for lease rather than an agreement by the grantor and others to grant a lease in favour of a third party and, as such, more in the nature of an agreement to offer a lease or a right of first refusal. But even if that distinction lacked merit, the Judge considered that the date for commencement of the lease could be ascertained by 'reasonable inference from the language used' and that such an inference here was that the lease was to commence when the new company was set up. The Judge was therefore not persuaded that the lease was void for uncertainty in that respect.
20. As to the suggested uncertainty as to the identity of the grantee of the lease, the Judge relied on general principles that the court's job was to give effect to what can be discerned from the parties' intentions and not to strike down contracts save where it is legally or practically impossible to do so. In this case, at its heart, the agreement the Judge found was for the Defendant to give some proprietary interest in the Property to Fahmida Malik. Although this could be achieved by a lease to Moitree, with Saifur Rahman and Fahmida Malik as shareholders, or to a new company they owned, what the parties had agreed was sufficiently certain for this agreement to be effective.
21. Given these findings, the Judge went on to find that the Defendant was in breach of the agreement since he did not offer a lease to Sunninghill or Fahmida Malik in any guise but only initially to Saifur Rahman and then to Jasmine Rahman. The Judge also rejected arguments that there had been compliance because a lease was, in fact, granted to Moitree

(in which the First Claimant had acquired a majority stake) or that, because there was no specified lease start date, it was still open to the Defendant to grant a lease to the Malik family running concurrently with that granted to Jasmine Rahman. The former scenario did not afford Fahmida Malik an interest and, as to the latter, the agreement was clearly for the grant of an occupation lease, not some more remote interest. The agreement was also clear that the lease should be granted in short order.

22. Nor was the Judge persuaded by the Defendant's argument that the agreement constituted a guarantee and therefore fell foul of the requirement of the Statute of Frauds 1677 for this to be in writing. Properly understood, the arrangements could not be construed as the Defendant providing a guarantee for the debts of a third party.
23. As to quantum, there was no dispute that the First Claimant paid Salimur Rahman and Mr Rakib £5000 each for their Moitree shares. However, the Defendant challenged the First Claimant's claim for the cost on the basis that any loss was caused by Moitree's dissolution, not the Defendant's breach. The Judge rejected this, finding that the value of those shares had been transferred to Sunninghill. As such, that loss was recoverable as an expense rendered futile by the Defendant's breach as envisaged by *Anglia Television v Reed* [1972] 1 QB 60.
24. Nor was it disputed that the restaurant shut for five weeks from the end of September 2016 for the refurbishment. The amount of the expenditure was not seriously challenged and was accepted by the Judge who awarded the Second Claimant the amount claimed.
25. Finally, the Judge refused the Defendant's application for permission to appeal made on the basis the Judge was wrong to (a) find the agreement sufficiently certain and (b) accept the Claimants' evidence given the documentary record.

C. The Appeal

26. The Defendant renewed his application for permission to appeal to this court on three grounds, namely that the Judge was wrong to find that:-
 - (i) the agreement was sufficiently certain (**Ground 1**);
 - (ii) the Claimants had established the agreement in light of her further finding that they had been dishonest about an alternative contract with the Defendant (**Ground 2**);
and
 - (iii) the First Claimant's claim was established since, even if there were a contract of sufficient certainty, the claim simply did not arise (**Ground 3**).
27. On 20 February 2023, Joanna Smith J refused permission to appeal on Ground 2 on the basis there was no real prospect of overturning the Judge's related findings of fact, directing that the application for permission to appeal on the other two grounds be heard orally, with the appeal to follow if permission was granted. That hearing took place before me on 10 July 2023 when Grounds 1 and 3 were fully argued.

28. I should add that, although not advanced by way of Respondent's Notice, the Claimants also contended that, even if the agreement found by the Judge was void for uncertainty, the Defendant would still be liable to compensate the Claimants based on their alternative claim in restitution, the Judge also finding that the Defendant directly benefitted from the refurbishment works undertaken at the Property. The Defendant says that, having expressly abandoned their claim in unjust enrichment shortly before trial, it is not open to the Claimants to seek to 'revive' this for the purpose of this appeal.

D. The parties' arguments – Ground 1 – uncertainty of contract

(a) Defendant's position

29. The Defendant contended in his skeleton that the agreement found by the Judge was uncertain in three respects, namely as to (a) when the lease to be granted by the Defendant would commence (b) the identity of the grantee of the lease and (c) the rent and any premium payable or the other covenants.

30. The Defendant also rejected the materiality of the distinction drawn by the Judge between an agreement for lease and a contract giving a right of first refusal of a lease for the purpose of determining whether the contract was certain. Even if to be granted pursuant to a right of refusal, a lease is defined by its term and commencement date. *Harvey* remains on point and binding authority.

31. Moreover, the primary basis for the Judge finding that the agreement was sufficiently certain, namely that it could be inferred that the lease was to commence when the company was set up, was also flawed for a number of reasons:-

- (i) The Court of Appeal in *Harvey* rejected an implied term that a lease would commence within a reasonable period of time. It is hard to see how an uncertain event such as the setting up of a company should succeed as an implied term when an argument as to a reasonable time failed;
- (ii) No such implied term was pleaded;
- (iii) It is unclear from the judgment which company it was the formation of which was to trigger the commencement of the lease. Certain companies were mentioned during the conveyancing process, including Moitree and Sunninghill. However, the former was in existence at the date of the agreement in August 2016. Although Saifur Rahman and Fahmida Malik were equal shareholders in the latter, Mr Rahman was sole director. Neither company therefore met the criteria pleaded of "*the new company, which would be controlled by the First Claimant's wife, Fahmida Malik*", a difficulty compounded by the inconsistent evidence on this point. As such, the parties too were uncertain;
- (iv) The uncertainty regarding the agreement made it entirely unclear how or when the breach could or did occur, no deadline being defined by which the Defendant was required to grant the lease. As such, the Defendant could comply at any time at the expiry of the lease granted to Jasmine Rahman or its earlier determination.

Moreover, the Malik family agreed to the lease being granted to Jasmine Rahman and the Defendant was not responsible for her failure to execute a deed of trust; and

- (v) Nor did any of the pleaded terms of the contract make reference to the term, rent or obligations proposed under the lease. None of these vital terms were discussed or agreed at the time of the agreement nor was it pleaded that they were.

32. Accordingly, by reason of *Harvey*, and the lack of any pleaded case as to implied terms, the Judge was bound to find the agreement uncertain. Alternatively, even if the Judge was entitled to imply (unpleaded) terms, those she implied were still so uncertain that the contract was void for uncertainty, both with respect to the commencement date and the parties.

(b) Claimants' position

33. The Claimants, by contrast, emphasised the rarity of a finding that a contract is uncertain, requiring as it would, the legal or practical impossibility of giving the parties' agreement any sensible content.

34. The Claimants also underlined the Judge's findings that the agreement was not an agreement for lease as between the parties. As such, it was not a specifically regulated contract required by section 2(1) of the Law of Property (Miscellaneous Provisions) Act 1989 to be in writing. Indeed, the Defendant has never suggested its invalidity for want of such formality. In this case, the agreement was to grant a third party a lease, akin to a right of first refusal, with that third party having the option or right (but not the obligation) to take a new lease of the Property. That right to take a lease merely formed part of the consideration for the bargain between the parties. That is amply demonstrated by the agreed contractual remedy in the event a lease was not granted. Accordingly, not being a contract for the grant of an estate in land (within the meaning of section 1(1) of the Law of Property Act 1925) in the form of a term of years absolute, the absence of defined fixed term start and end dates did not render the agreement uncertain and was, therefore, not fatal. As such, *Harvey* does not apply.

35. Moreover, even if *Harvey* did apply, the Judge applied it correctly, the date for commencement of the lease being ascertainable by reasonable inference from the language used by the parties. As to this, the context was important, the Judge noting the lack of sophistication of the parties in landlord and tenant matters, the agreement having been entered into orally without the assistance of lawyers, albeit the Judge finding that the new lease was either to be on the same or similar terms, that lease setting out the term, rent, 1954 Act exclusion and all the landlord and tenant covenants.

36. In this regard, the Claimants placed reliance on *Liverpool City Council v Walton Group Plc* [2002] 1 EGLR 249, a case in which the court was able to derive certainty in an agreement for lease where no commencement date was expressly stated. The Claimants say that *Walton* bears factual similarities to this case given the requirement to undertake works before the lease was granted and the existence of a lease in draft form and that, based on the terms of the agreement, the draft lease, surrounding circumstances and commercial context, the court had little difficulty in concluding that the term of the lease should start on its execution date. The Claimants submitted that the court's reluctance to hold a contract

void where the parties clearly intended it to have commercial effect, particularly where there had been meaningful performance of the agreement by the tenant, clearly influenced the court's approach in that case.

37. As to the Defendant's specific points, first, the Claimants say that, although an implied term as to a commencement date within a reasonable period was rejected in *Harvey*, it is not authority for the Defendant's broader proposition that a "*similarly uncertain event*" should be rejected, Lord Denning MR in *Harvey* himself expressly admitting of the possibility of the lease commencement date appearing "by reasonable inference from the language used". As is clear from *Walton* itself, the start date does not need to be a specific date and time but can be referable to another event so long as that event can be established by reasonable inference. In *Walton* the lease start date was the date of its execution, albeit neither party could say with any certainty when that would occur. In this case, the Judge found the lease start date to be the formation of the entity taking the lease.
38. Second, that no lease commencement date was pleaded is a bad point: the Defendant did not plead uncertainty of the agreement. Even if there were anything in the point, the court is perfectly entitled to reach a view on the matter.
39. Third, as to the suggested uncertainty of the identity of the tenant under the lease, the Judge found that "this was an agreement by Mr Khan to give some proprietary interest in the property to Fahmida Malik". The fact that the evidence was confused about this was neither here nor there; the Judge made the finding she did. This was sufficient even if Mrs Malik's specific nominee was not known at the date of the agreement.
40. Fourth, the Defendant's point about the uncertainty as to when the breach occurred is not an argument raised before the Judge but is an allegation that the execution of the lease required a deadline, not that the lease start date was uncertain. Even if the Defendant were permitted to run this point now, there is no difficulty implying a term that the time for execution of the lease falls a reasonable period after the fulfilment of all other obligations.
41. Fifth, as to the suggestion that none of the vital terms of the lease was pleaded or "discussed or agreed at the time of the contract", this ignores the Judge's finding that the context of the agreement included the parties' knowledge of the Moitree draft lease, the terms of which are clear.

E. Relevant legal principles/ authorities

42. In oral submission, I was taken to a number of authorities. Specifically in relation to the commencement date of a lease, Jessel MR in *Marshall v Berridge* (1881) 19 ChD 233 held in relation to an alleged agreement to lease furnaces that the agreement could not be enforced unless the time the commencement date of the lease could be discovered within the four corners of the agreement. There was no authority for, and much authority against, the proposition that the lease began to run from the date of the agreement itself. Baggally LJ too found no indication from the relevant memorandum that the parties intended the lease to commence from the day it was signed. Finally, Lush LJ held that it was essential to the validity of a lease that the commencement date shall appear either in express terms, in some writing that would make it certain or by reasonable inference from the language used.

43. As noted, the Court of Appeal in *Harvey* rejected an argument that the term of a lease would commence within a reasonable period of time. Having reiterated the above *dictum* of Lush LJ, Lord Denning MR explained that it was a matter of ‘settled law’ by the time of *Marshall* that a valid agreement for lease required the date of commencement of the lease to be determined. It was not sufficient to say this can be supplied by an implied term as to reasonable time. *Marshall* also precluded an alternative argument that the lease was to commence as at the date of the agreement therefor. Davies LJ agreed that, in the case of an agreement for lease, if the commencement of the term was not defined, the agreement was uncertain. Russell LJ too rejected the suggestion that, where nothing is said in the agreement for lease to indicate when it is to commence, the law will imply that the term is to commence a reasonable period of time after the agreement (or at the date of the agreement itself).
44. The House of Lords in *Prudential Assurance Co. Ltd. v London Residuary Body and others* [1992] 2 AC 386 and the UK Supreme Court in *Mexfield Housing Co-operative Ltd v Berrisford* [2011] UKSC 52 re-affirmed the principle that leases were required to be of certain duration when created, albeit both recognising the difficulties in its continuing practical justification. In the latter, Lord Neuberger MR was inclined to the view that, even if a tenancy had not been created for ‘technical’ reasons, it did not necessarily render invalid the agreement which may yet retain contractual vitality as between the parties thereto (as seemingly were Lords Mance and Clarke).
45. I should also add that I was referred to various commentaries highlighting both the principle stated in *Marshall* and *Harvey* and the circumspection of the courts in finding a contract to be void for uncertainty.
46. Between *Prudential* and *Mexfield*, Neuberger J (as he then was) decided *Walton*, upon which, as noted, the Claimants place significant reliance. The case concerned an agreement entered into between Liverpool City Council (**Council**) and Walton Group plc (**Walton**) relating to a possible retail and leisure development in an area in Liverpool City Centre. The agreement for the potential development contained certain conditions precedent and annexed a draft lease for a term of 999 years at a premium of £15m (but no rent). The commencement date of the lease was identified as “*x.. day of x 199x.*” Clause 4.13 of the agreement provided that, upon fulfilment of the second set of conditions precedent to the satisfaction of the Council and the Council’s related notice to Walton (defined as the “*Decision Notice*”), the Council would grant, and Walton would take, “*the Lease*” (being the annexed draft), to be completed within six weeks of the Decision Notice. One of the issues arising was whether the agreement for lease in clause 4.13 was void for uncertainty on the basis it contained no commencement date.
47. Although the commencement date of the lease did not appear in the express terms, Walton contended that, in view of the other provisions of the draft lease, the terms of the agreement, the surrounding circumstances and common sense, this was a case in which it could be concluded that the parties intended the lease term to commence on the date the lease is actually executed. As Neuberger J noted (at [46]), adopting the words of Lush LJ in *Marshall* (at [244]), the question that properly falls to be determined is whether, taking into account all those matters that can properly be taken into account when construing the

agreement and the draft lease, the court can with “*reasonable certainty*” be satisfied as to the date the parties intended the lease to start. As to that question, Neuberger J observed:-

- (i) An agreement for lease can be valid even if the commencement date is defined by a future event which may not occur or, if it does, the day on which it occurs may be uncertain. In *Walton*, the lease would only be granted with the satisfaction of certain conditions, followed by service of a Decision Notice and completion of the lease within six weeks thereafter;
- (ii) *Marshall* and *Harvey* involved short and relatively simple (but invalid) agreements for lease (compared to the complex agreement in *Walton*). Nor did either case involve substantial effort and expenditure before the proposed lease; and
- (iii) A number of authorities suggest that, when faced with a document executed by parties who clearly intend it to have legal effect but which it is contended is void for uncertainty or some similar principle, the court will lean in favour of upholding the document, provided it can properly do so.

48. As to this last point, Neuberger J also noted those authorities indicating the court’s stance of leaning against uncertainty, including potentially a more ‘liberal’ approach, where there has been performance on the tenant’s side. Although that approach may be difficult as a matter of principle, subsequent events not being relevant to construction of an agreement, and may conflate construction and estoppel, it accords with broad justice and common sense. However, “*even without much leaning in favour of holding the agreement for lease valid rather than void*”, Neuberger J went on to find “*with reasonable certainty*” that the term of the lease was to commence from the date of its execution. He reached that view based on a number of matters:-

- (i) Under the agreement, Walton was to carry out a lot of work at substantial expense, with a real risk it would be wasted, in return for which, it would be granted a very long lease for no rent;
- (ii) The parties had a number of hurdles which Walton had to cross and, if and when the Council were satisfied they had been, the Council had to serve the Decision Notice, whereupon the parties had to execute a lease, in return for which Walton had to pay a substantial premium and from when its obligations as tenant would arise;
- (iii) It would make no sense on the terms of the draft lease for the term to start later than the date for execution of the lease. Although the lease would become contractually enforceable from the Decision Notice, the obligation to pay outgoings and the window for starting building works run from the date of execution, indicia that the parties intended Walton to have the rights of tenant from the date of execution of the lease; and
- (iv) Other small drafting points supported that conclusion.

49. Although it could not be suggested that principle in *Marshall* and *Harvey* did not apply to every agreement for lease, the court must be careful of applying it blindly. In those cases, there was no indication when the parties intended the lease to be granted, let alone the relatively complex contractual machinery. However, on the facts of *Walton*, Neuberger J concluded as a matter of construction, and based on the principles laid down in the authorities, that the term of the lease began from the date upon which it was granted.
50. Finally, the Defendant also pointed to a recent Court of Appeal authority, *Pretoria Energy Co (Chittering) Ltd v Blankney Estates Ltd* [2023] EWCA Civ 482, not before the Judge. In that case, the court was concerned with whether the parties had entered into a binding agreement for lease contained in their Heads of Terms document. The document concerned the proposed use of certain land as an anaerobic digestion plant, its final version being described as “Heads of Terms of Proposed Agreement” (**HoT**) and stated to be subject to planning permission and appropriate consents and easements. It went on to identify its four constituent parts, the core element being the lease. Clause 1 identified the land, lease term, 1954 Act exclusion and rent and period and basis of rent review,
51. Clause 2 provided for contract maize growing, clause 3 for the supply of digestate and clause 4 for gas supply. It was common ground that these clauses were not legally enforceable. The final acceptance clause provided for the formal agreement to be drawn up within 1 month of planning permission being achieved and subject to the consents and easements being obtained. It also provided that the arrangements being negotiated were exclusive to both parties until 31 July 2014 and it was common ground that this provided a legally enforceable lock-out agreement. The HoT therefore had some parts that were contractually binding and some that were not. The question for determination on the appeal was whether clause 1 relating to the lease was legally binding, the first instance judge having held that it was not. As to that question:-
- (i) the Court of Appeal considered it significant to whether the parties considered themselves contractually bound that the parties stipulated in the HoT that a formal agreement should be drawn up. In his lead judgment, Lewison LJ reviewed the related authorities, explaining that a formal contract doing no more than putting into formal language what the parties have already agreed did not necessarily prevent a concluded contract from having arisen. However, the more complicated the subject matter, the more likely the parties will want to enshrine their written contract in a written document to review all the terms before being committed to them. The commonest way of achieving this ability is to stipulate that the negotiations are ‘subject to contract’ but it is not essential. The court considered this case to be at the “more complicated” end of the spectrum.
 - (ii) Although Pretoria had held off applying for planning permission until the HoT were signed and incurred related costs of £74,000, those costs were incurred well before the HoT were signed. In this case, there was no express obligation to apply for planning permission and it was entirely plausible that a party to a putative contract would undertake expense in the reasonable expectation agreement will be reached in due course.

- (iii) The existence of a binding contract for a 25 year lease was incompatible with the limited period of the lock-out agreement, the latter contemplating the parties would be free to negotiate after the expiry of that period. There were also still many matters still to be negotiated in relation to the proposed lease.
 - (iv) The express understanding that the lease would be contracted out of the 1954 Act, the necessary processes for that taking place before the tenant became contractually bound, was another weighty pointer against the conclusion that a binding agreement had been reached.
 - (v) In the case of a 25 year lease of an unusual property, there were a number of important terms left in the air, as shown by the 40 page draft lease prepared after the HoT.
 - (vi) In *RTS Limited v Molkerei Alois Muller GmbH & Co AG* [[1987] 2 Lloyd's Rep 601 (at [619]), Lork Clarke explained that, whether there is a binding contract, and if so, its terms, will depend on whether what was communicated between them leads objectively to the conclusion that the parties intended to create legal relations and had agreed upon all the terms which they regarded, or the law requires, as being essential for the formation of legally binding relations.
52. As to what the law requires, the court identified the longstanding common law requirement for a valid lease to have a certain beginning and end, including as identified in *Marshall, Harvey and Prudential*. Accordingly, even where it was plain that the parties intended to enter into a legally binding contract, if the time from which the lease is to begin is uncertain, the agreement is incomplete and there is no binding contract. The uncertainty of the lease start date was also a strong pointer that the parties did not intend to be bound.
53. Citing *Walton*, Lewison LJ observed that, where it was clear the parties intended to be bound, it was possible to conclude “by reasonable inference from the language used” that the parties have agreed the term start date. Although Lewison LJ did not find all Neuberger J’s reasoning easy to follow, it was clear beyond doubt that the parties in *Walton* intended to be bound by a very detailed agreement and agreement for lease annexed to it. Hence, Neuberger J’s emphasis on the court’s unwillingness to hold what the parties plainly thought was a binding contract to be void for incompleteness or uncertainty. The only issue in *Walton* was whether the agreement was too uncertain. The HoT in *Pretoria* was a very different type of document - very simple and short, running to a few lines only.
54. Lewison LJ considered that it was not possible to deduce with reasonable certainty from the HoT when the lease term was intended to begin. As noted, the HoT provided for a formal agreement to be drawn up within one month of planning permission being achieved. The Court of Appeal rejected the argument that the term of the lease would begin when it was executed (whether before or after the expiry of the one month period). There was no obligation to apply for planning permission and, even if such an obligation could be implied, there was no timetable for making such an application. In addition, unlike *Walton*, *Pretoria* was not a case where it was clear that the parties intended to create a binding obligation to enter into a lease and the court was faced with saving what the parties understood to be a binding contract alleged to be incomplete on technical grounds.

F. Discussion – Ground 1

55. As noted, the Claimants argued as a preliminary matter that, even if the Judge had fallen into error with respect to the certainty (or otherwise) of the agreement, this took the Defendant nowhere since exactly the same outcome would follow on the basis of the claim also advanced in unjust enrichment, there being a failure of basis if the agreement as found by the Judge turned out to be void. This submission had a superficial attraction: on an abstract level, it is not difficult to see how, based on the Judge's factual findings, the same outcome could be reached through the prism of a claim in unjust enrichment. However, I am unable to accede to it.
56. Although the Claimants did originally frame their claim alternatively in unjust enrichment, they expressly confirmed prior to the trial that this cause of action was not being pursued. I accept the Defendant's submission that, had it been, he may well have approached matters differently, including for example by exploring in the evidence the questions of who exactly had benefitted from the refurbishment works as well as the value of that person's suggested enrichment. Although the Judge did accept that the Defendant had benefitted from the refurbishment and the quantum claimed, it does not follow that she would have made the same findings in the context of a cause of action in restitution had that been pursued. As such, it is not open to this court on this appeal to affirm the outcome before the Judge based on the substitution of a different cause of action.
57. Turning to the certainty question which took up by far the greater of the argument on the appeal, I agree with the Judge that the agreement the parties reached on 8 August 2016 was not an agreement for lease. Rather, it was akin to an agreement between the parties for the Defendant to offer a new lease to the new entity. That follows from the fact that (i) the new entity was not a party to the 8 August 2016 agreement (ii) that new entity did not exist at the date of the agreement (iii) the agreement could not therefore have created any obligation on that entity to take the new lease and (iv) although the agreement is expressed in terms of an *obligation* on part of the Defendant to grant a lease, it also recognises that, for whatever reason, this outcome may not, in fact, come about. As such, I am satisfied that section 2(1) of the Law of Property (Miscellaneous Provisions) Act 1989 was not engaged such that the agreement does not fail for want of writing. Nor, indeed, did the Defendant suggest it might.
58. More importantly for the purpose of this appeal, the agreement neither being the grant, nor an agreement for the grant, of a term of years absolute, I am satisfied that the principle stated in *Marshall* and *Harvey* does not apply here such that the agreement does not fail for uncertainty on that account. The Defendant suggested that *Harvey* remains on point even on the basis of the distinction drawn by the Judge as to the type of agreement that subsisted, the certainty of its subject-matter, including as to when the term is to commence, still being required. Although I accept that there must still be certainty, I do not agree that an agreement of this nature that fails to specify at the outset the commencement of any term that might be granted in due course would fail on that account. In my view, this would represent an impermissible extension of the *Harvey* principle in circumstances in which it has been considered in the authorities to be 'technical' and its rationale difficult to discern today.

59. I should also say, however, that, even if *Harvey* did apply, I consider it was open to the Judge on the basis of the agreement as she found it, and the surrounding circumstances and commercial sense, to conclude (as she did) that the lease would commence when the new entity was formed. The term could obviously not start before then but, with Moitree having being ‘bought out’, it makes sense that it would commence upon the formation of the new entity which would now own, and operate from the Property, the business. The fact that the Court of Appeal in *Harvey* was unable to find an implied term that the relevant lease in that case would start within a reasonable time has no bearing on the Judge’s ability to construe the parties’ agreement in the way she did on the very different facts of this case. Nor does the fact that the date of formation of the new entity to which the lease was to be granted was not known at the date of the agreement detract from the Judge’s finding, *Walton* making clear that the term start date can be ascertained by reference to another event, even if it is uncertain when that might occur.

60. As to the certainty of the agreement in this case more generally:-

- (i) Although short and simple, the scheme of the parties’ agreement was clear and commercial in nature: the Claimants would (a) take control of the loss-making restaurant business by (the First Claimant) acquiring two-thirds of the Moitree shares (b) seek to improve the prospects for that business by (the Second Claimant) refurbishing the Property (c) run the restaurant through a new entity (controlled by Fahmida Malik) which would take the new lease of the Property, albeit (d) the parties recognising, and providing for the contingency, that this might not come about for whatever reason.
- (ii) It is also clear from the Judge’s findings that the parties intended to be commercially bound by their agreement when it was made, having agreed on what they regarded as the essential terms.
- (iii) As to the proposed new lease, as important as this no doubt would be, the parties did not intend its finalisation to operate as a pre-condition to a concluded agreement. This is hardly surprising in circumstances in which, as the Judge found, its terms would likely be the same as or similar to those in the Moitree draft lease as was already known to the parties. As such, although the lease was to be granted in the future, the parties did not agree this aspect in a vacuum.
- (iv) Importantly, the agreement itself specifically provided for what was to happen if the lease was not granted for any reason, namely the reimbursement of the monies spent on the refurbishment works.
- (v) Finally, the agreement was substantially performed on the Claimant’s side, not least through the purchase of the Moitree shares, the performance of the refurbishment works and the related expenditure incurred.

61. In these circumstances, I am satisfied that the agreement was sufficiently certain and that this was anything but the very rare situation in which it is “legally or practically impossible” to give it “any sensible content”. As for the specific points relied on by the Defendant in this context:-

- (i) As to the identity of the entity which was to take the new lease, although the Claimants' evidence on the point was unclear, the Judge found it was agreed that this would be a new entity controlled by Fahmida Malik. That the specific company was not known at the time of the agreement did not make it uncertain.
- (ii) That no new entity controlled by Fahmida Malik was, in fact, established and that there may have been related disagreements, does not alter the analysis. As the Judge concluded, the Defendant breached the agreement through his failure to grant a lease to Fahmida Malik in any guise, refusing a lease to Sunninghill, later granting one to Jasmine Rahman instead.
- (iii) Likewise, the fact that no deadline was specified by which the lease was to be granted does not assist the Defendant. As the Judge herself found, the lease was to be granted in 'short order'. Even if she had not made that finding, or it was not sufficiently clear, based on her other findings as to what was agreed between the parties, I agree with the Claimants that a term can readily be implied that the lease should be granted within a reasonable period.
- (iv) As for the suggestion that the important terms of the new lease were not pleaded or discussed or agreed at the time of the agreement, as the Judge found, the context in which the contract was concluded included the parties' knowledge of the draft Moitree lease, with the new lease likely to be granted on the same or similar terms. Although matters may well have been pleaded more fully, that can be said on both sides, including the Defendant's uncertainty argument. In any event, the draft Moitree lease and the role it played in the agreement were in issue on the evidence.
- (v) Although it was not clear the extent to which the point was being pressed on the appeal, the Defendant's agreement to pay the refurbishment costs if a new lease was not granted was exactly that; it was not a 'guarantee'. I agree with the Judge that the Defendant was not undertaking to be answerable for the obligations or debts of another.

62. For all these reasons, the August 2016 agreement does not fail for uncertainty.

G. Discussion - Ground 3

63. I can address Ground 3 more briefly. Although the Defendant accepted that, in principle, expenses rendered futile might be recovered by way of damages for breach of contract, he argued that these were not available here in respect of the expenditure said to have been 'wasted' through the acquisition of the Moitree shares. First, nothing in the pleaded contract involved any obligation by the Defendant to pay the First Claimant for the Moitree shares. Second, the Moitree shares became worthless as a result of the dissolution of the company by early 2017, not as a result of any breach by the Defendant. As to the latter point, absent an argument that the agreement was an unprofitable one and that the award of the Claimants' 'reliance' loss would lead to a windfall (points not advanced), it appears to me that the cost of the Moitree shares is, in principle, recoverable as 'reliance' damages.

64. Although there was, of course, no obligation expressly stated in the pleaded agreement for the Defendant to pay for the Moitree shares, the obligation to pay damages is generally considered to be a secondary obligation arising from the breach of those primary obligations which are expressed (or can properly be implied). Accordingly, in my view, the correct questions are whether (i) this expenditure was reasonably contemplated by the parties when the agreement was entered into (ii) the First Claimant ‘wasted’ this expenditure by reason of the Defendant’s breach of any of his primary obligations and (iii) there is anything in their agreement that might preclude its recovery.
65. As to the first question, the parties’ agreement envisaged the ‘buy out’ of the existing business through the Moitree share acquisition as a precursor to the Defendant’s grant of a new lease to the new entity. As such, I have no difficulty answering this in the affirmative.
66. As to the second question, the lease was granted to Jasmine Rahman instead, removing the Claimants’ ability to operate the business but only once the cost of the Moitree share acquisition had already been incurred. As such, this expenditure was wasted by reason of the Defendant’s breach.
67. As to the third question, the agreement as found by the Judge expressly provided that, if no lease was granted for whatever reason, the Defendant would pay the Second Claimant for the refurbishment works. On one view, this might be said to represent the parties’ agreed remedy in the event of the Defendant’s breach, so as to preclude the recovery of any further sums such as the cost of the Moitree shares. Subject to matters such as the operation of the rule against penalties and the regulation of exclusion clauses, there is in principle no reason why the parties could not themselves stipulate the secondary obligations that might arise as a consequence of the breach of their agreement.
68. In this case, however, I am unable to conclude that this express provision was exhaustive of the Claimants’ rights in the event of the Defendant’s breach. The term was concerned with the non-grant of the lease *for whatever reason*, not limited to the Defendant’s breach, its stated rationale being the benefit that would accrue to the Defendant. Although the circumstances it envisaged encompassed the Defendant’s breach, it was not specifically or exclusively directed to that eventuality. As such, and again in the absence of any suggested ‘windfall’ through the award of damages on a reliance basis, I consider the Judge was correct to permit recovery of this category of expenditure in addition to the refurbishment costs, both of which were wasted by reason of the Defendant’s breach.

H. Conclusion/ disposal

69. In light of my analysis and findings, the appropriate disposal of this appeal is to grant permission to appeal but to dismiss the appeal.
70. The parties are requested to agree for my approval a form of order giving effect to my judgment, including as to costs.