

**Ramdass Bidaisee**

*Appellant*

v.

**Dorinda Yusidai Sampath and Others**

*Respondents*

FROM

THE COURT OF APPEAL OF  
TRINIDAD AND TOBAGO

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JUDGMENT OF THE LORDS OF THE JUDICIAL  
COMMITTEE OF THE PRIVY COUNCIL,  
Delivered the 3rd April 1995  
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*Present at the hearing:-*

Lord Goff of Chieveley  
Lord Mustill  
Lord Slynn of Hadley  
Lord Nicholls of Birkenhead  
Lord Steyn

*[Delivered by Lord Nicholls of Birkenhead]*

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In 1973 Mr. Ramdass Bidaisee and Mr. Saran Sampath bought 90 acres of agricultural land at La Florissante in the ward of Arima. They bought the land as owners in equal shares, with the intention of developing it into a housing and commercial estate. The price was almost TT\$500,000. On 6th May 1977 Mr. Sampath agreed to sell his half share to Mr. Bidaisee for TT\$2 million, with completion due on 31st July 1977. Interest was payable thereafter at 9 per cent per annum. Mr. Bidaisee did not complete the agreement on that date. Eventually, on 20th March 1979 the solicitors acting for Mr. Sampath gave Mr. Bidaisee notice requiring him to complete within six days, by 26th March, time to be of the essence. Mr. Bidaisee was unable to raise the money. Mr. Sampath then sold his half share to Mr. Bridgelal Ramkissoon and five others for TT\$2.5 million.

These proceedings followed. The writ was issued on 6th April 1979. So the parties have been engaged in this litigation for

sixteen years. Mr. Bidaisee claimed specific performance of the May 1977 agreement. He joined the Ramkissoons, as it will be convenient to call them, as co-defendants. Blackman J. dismissed the plaintiff's claim, and held that Mr. Sampath was entitled to forfeit the ten per cent deposit which Mr. Bidaisee had paid in the usual way when the agreement was made. The Court of Appeal (J.A. Davis J.A., M. Ibrahim J.A. and L.B. Gopeesingh J.A.) dismissed the plaintiff's appeal. Meanwhile Mr. Sampath had died. The proceedings were continued against his personal representative. Despite this, it will be convenient to refer to Mr. Sampath as the first defendant.

### The main issue

On this appeal it was common ground that it was open to the first defendant to serve a notice making time of the essence. The main point taken was that the exceedingly short period of six days specified in the notice given on 20th March 1979 was unreasonable and that, therefore, this notice was ineffectual. In both courts below the judges reached the contrary conclusion on this point. They held the notice was reasonable. Their conclusion on this, although based on primary findings of fact, is itself a conclusion on a question of fact.

The plaintiff sought to meet this difficulty by contending that the conclusion was one which no reasonable tribunal, properly directing itself on the primary facts, could have reached and that the judge and the Court of Appeal must have misdirected themselves. Further, neither court took into account the improvements carried out by the plaintiff on the land after he had agreed to buy the first defendant's share.

The principle to be applied here is not in doubt. In considering whether the time limited by a notice to complete is reasonable, the court will consider all the circumstances of the case: see the classical exposition given by Lord Parker of Waddington in *Stickney v. Keeble* [1915] A.C. 386, 418-9. The material circumstances of the present case, additional to those already mentioned, can be summarised as follows. The May 1977 agreement envisaged that pending completion the plaintiff would begin development work. Clause 4 provided that upon signing of the agreement the first defendant as seller would deliver up possession of the land to the plaintiff as buyer "in order that he may do and execute all and any of the works for which the same is purchased". The plaintiff employed an architect and a surveyor, and he carried out preparatory work such as levelling and drainage. He or his company spent altogether about \$265,000. He obtained planning permission for phase one of the development, consisting of 105 residential units, on 30th January 1979. The permission was

conditional on certain consents being obtained before development commenced, such as the consent of the Health Authority and approval of the road plans by the Ministry of Works.

The first defendant was aware that these works were being carried out. He also knew the plaintiff needed a bank loan in order to complete the purchase. He was aware of that when the agreement was made. Further, he knew that the banks were unwilling to advance the amounts involved until planning permission had been obtained. As promised, he introduced the plaintiff to his bank, but without success.

The first defendant, for his part, was indebted to Barclays Bank of Trinidad and Tobago Limited. With the knowledge and approval of the plaintiff, his indebtedness was secured by a mortgage over the property. In the early months of 1978 the first defendant was under pressure from the bank. On 3rd April 1978 the bank gave him six weeks to repay his indebtedness, failing which it would "be left with no alternative but to call in the advance". On 15th June the bank wrote again, noting that its terms for a further extension of time had not been met, and telling the first defendant that the bank was taking steps to upstamp the mortgage.

On the following day, 16th June, the first defendant's solicitors gave notice to the plaintiff requiring completion by 14th July, that is, four weeks ahead, time to be of the essence, "failing which our client will institute legal proceedings". The plaintiff did not complete. His solicitors' response was that it was not open to the first defendant to make time of the essence.

On 3rd August the bank gave formal notice to the first defendant, demanding immediate payment of approximately \$1.68 million. The bank threatened to sell the property at auction unless repaid in full by 24th November. However, on 20th October the bank relented. It indicated that it would stay its hand for six months on being given further security. So the urgency went out of the situation so far as the first defendant was concerned, but only for the time being. On 2nd February 1979 the bank wrote again to the first defendant, noting that planning permission had now been obtained, and reminding him that the deadline for clearing his indebtedness to the bank was the end of April.

On 8th February the first defendant's solicitors wrote to the plaintiff, stating that they understood from the first defendant that he, the plaintiff, proposed to complete. With their letter they enclosed a completion statement, made up for completion

one week thence, on 15th February. The plaintiff's solicitors' response, in a letter of 14th February, was to draw attention to the Barclays Bank mortgage, and (in effect) seek confirmation that on completion this would be discharged by the first defendant. On the same day the plaintiff's solicitors wrote to the bank, stating they had been instructed by the plaintiff "to prepare documents to finalise the sale". They asked for a statement of how much was owing, so the necessary payments might be made and the mortgage release executed. Completion did not take place on 15th February, but on 20th February the first defendant wrote to the bank, giving notice of his intention to repay his mortgage loan by 15th March. He asked for a statement of the amount outstanding, and also that the bank should have the mortgage release prepared. He sent a copy of this letter to the plaintiff, and his solicitors sent a copy to the plaintiff's solicitors. On 14th March, the day before the anticipated completion, the first defendant's solicitors wrote to the plaintiff's solicitors confirming that all was set for completion: the mortgage release was ready, details were given of the two cheques required, and the solicitors said they would attend for completion at the plaintiff's solicitors' chambers at 2.00 p.m. on the following day. A copy of this letter was also sent to the plaintiff.

The plaintiff failed to complete as arranged. The evidence does not disclose why this was so, or how or why the abortive completion arrangements came to be made if the plaintiff had not arranged his finance. On 20th March the first defendant's solicitors then wrote the final letter to the plaintiff:-

"We refer to previous correspondence herein, the last being a letter from us dated 14th instant to Mr. Hubert R. Joseph [the plaintiff's solicitors] advising that Thursday 15th March, 1979 at 2.00 p.m. at Mr. Joseph's Chambers was fixed for completion of the sale of our client's interest to you and regret that you were unable to complete.

We are now formally extending the time for completion to 2.30 p.m. on 26th March, 1979 at our office, time to be of the essence, and would advise that in the event of default, the contract will be rescinded and you will be held liable for any loss not satisfied by forfeiture of your deposit."

The plaintiff did not complete. As it turned out, he was not in a financial position to complete until the following September.

Their Lordships consider that it was open to the courts below to conclude that this was reasonable notice in the circumstances. The demand for, in effect, immediate completion did not come as a bolt out of the blue. The plaintiff was fully aware of the first defendant's wish, and financial need, to complete without any further delay. Judging from the correspondence, and the evidence

given at the trial did not take this aspect of the case any further, agreed arrangements for completion had been made, with Barclays Bank as well as between the plaintiff and the first defendant. The plaintiff simply failed to produce the money. The first defendant's six months moratorium from the bank was ticking away. It cannot have come as a surprise that the first defendant was prepared to wait no longer. Further, there is nothing to suggest that, in serving his notice when he did, the first defendant was acting in a "sharp" or unconscionable manner. Planning permission had been obtained. It seems that the plaintiff may have been unable to raise the necessary money until all the conditions attached to the permission had been fulfilled. Even if this was so, and even if this was a relevant fact, as to which their Lordships express no view, there is no evidence that the first defendant knew this at the time. Meanwhile, the first defendant had already found, in the Ramkissoons, an alternative buyer should the plaintiff still not be able to complete. He needed to finalise matters, and the plaintiff had been given adequate warning that time was running out. A notice to complete, making time of the essence, had been served the previous year. So the plaintiff was aware of what might happen again. No doubt the first defendant preferred to sell to the Ramkissoons at the higher price, but this does not undermine the conclusion that the notice given to the plaintiff was reasonable.

Nor can the plaintiff place any reliance on the money spent and work done by him on the land, the benefit of which (as to one half) would be lost to him if the first defendant was entitled to treat the contract of sale as repudiated. Counsel contended that the prospect of this loss was a factor to be taken into account in deciding what would be a reasonable period of notice. The evidence of precisely what work was done was scanty, and there was no evidence of the extent to which the work had added value to the land. The work may have increased the value of the property. One would expect that obtaining planning permission would do so. But their Lordships would simply be reduced to guessing if they were to proceed on the footing urged by the plaintiff. That would not be fair to the defendants. It was for the plaintiff to make good this point, by adducing evidence which could be challenged and controverted if necessary.

#### The second issue

The plaintiff's second contention was based on the decision of the High Court of Australia in *Legione v. Hateley* (1983) 57 A.L.J.R. 292. On the basis of this decision, it was submitted that the court has jurisdiction to make an order for specific performance in favour of a buyer even after time has been made

of the essence and the buyer has failed to complete. In the *Legione* case the buyers had built a house on land they had agreed to buy, but subsequently they failed to complete their purchase. Gibbs C.J. and Murphy J. held, at page 300, that a court of equity will grant specific performance notwithstanding a failure to make a payment within the time specified by the contract if there is nothing to render such an order inequitable. Mason and Deane JJ., at page 308, held that if there be some element which would make it unconscionable or inequitable to insist on forfeiture of the purchaser's interest under the contract because he has not performed in strict accordance with its terms, there is no injustice to the innocent party in granting relief against forfeiture by means of specific performance with or without compensation. The High Court declined to follow the decisions of the Privy Council in *Steedman v. Drinkle* [1916] 1 A.C. 275 and *Brickles v. Snell* [1916] 2 A.C. 599.

Before their Lordships the parties were in disagreement over whether the plaintiff could take this point at all. On this their Lordships were in the difficulty that from the material before them it was impossible to know clearly what had happened regarding this point in the courts below. The point was not pleaded, as it ought to have been, if only to alert the defendants to the facts being relied upon in support of a case that it would be inequitable to permit the first defendant to treat the contract as repudiated even if time had been made of the essence. The defendants did take objection to the point before the judge, but the course of the subsequent submissions before the judge and in the Court of Appeal leaves the position obscure and unsatisfactory. In his judgment the judge did not refer to the *Legione* decision, nor did the Court of Appeal mention this as an issue.

Faced with this difficulty their Lordships invited counsel for the plaintiff to make their submissions on the assumption that the point was open to the plaintiff, and on the further assumption that the decision in the *Legione* case represents the law of Trinidad and Tobago. Having heard those submissions their Lordships considered the point was hopeless. Accordingly their Lordships did not hear argument on whether it should depart from its previous decisions in *Steedman v. Drinkle* and *Brickles v. Snell*. Their Lordships are not to be taken as expressing any view on the important point of law raised by the *Legione* decision.

The point is hopeless in the present case, because it lacks the necessary factual foundation in the absence of any evidence on whether, and to what extent, the money spent and the work done by the plaintiff increased the value of the land. Without any such evidence there is no material on which to found a conclusion that it would be unconscionable for the first defendant to insist on

treating the contract as at an end, or that it would be equitable to make an order for specific performance despite the plaintiff's failure duly to complete the contract.

### The third issue

The third issue was a claim by the plaintiff that the court should exercise its jurisdiction under section 7(2) of the Conveyancing and Law of Property Ordinance to order repayment of the plaintiff's deposit. Section 7(2) provides:-

"Where the Court refuses to grant specific performance of a contract, or in any action for the return of a deposit, the Court may, if it thinks fit, order the repayment of any deposit."

Under this subsection, which corresponds to section 49(2) of the (English) Law of Property Act 1925, the court has a wide discretion. Here, the gain afforded to the first defendant by retention of the deposit is more than offset by the amount of interest, some \$250,000, he would have received had the sale been completed in March 1979. Even so, and having regard to the price of the resale to the Ramkissoons, he did not suffer a loss. This, of itself and without more, is not a sufficient reason for the court to exercise its discretion in favour of a defaulting buyer. The traditional deposit paid by a buyer when he enters into a contract is an earnest for the performance of the contract, and can be retained by the seller if the buyer defaults. Equity did not regard this as a penalty against which it granted relief: see *Workers Trust & Merchant Bank Ltd v. Dojap Investments Ltd* [1993] A.C. 573, 578-9. Section 49(2) has never been understood as intended to overrule this principle, and it should not be so interpreted or applied.

So the search is for something more. In the present case the money spent by the plaintiff on work done in connection with the land does not qualify under this head, for the lack of evidence of the effect of such expenditure on the value of the land. Nor does the first defendant's profit on reselling at a higher price to the Ramkissoons. In the first place, against the uplift of \$500,000 in the price must be set the loss of interest already mentioned. Secondly, and more generally, their Lordships simply do not know the reason for the higher price. This may have been due to movements in land prices generally. Once again, their Lordships are being asked to speculate. This is not a proper basis on which the court should exercise its discretion. Their Lordships can see nothing which would entitle them to interfere with the decision of the courts below on this point. On the contrary, they agree with their decision.

Their Lordships dismiss the appeal. The appellant must pay the respondents' costs before their Lordships' Board.