

REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CV 2007-02613

BETWEEN

SURESH CHARRAN

Claimant

AND

FRANCIS WEEKES

Defendant

BEFORE THE HONOURABLE MADAME JUSTICE JOAN CHARLES

Appearances:

For the Claimant: Ms. L. Chunilal

For the Defendant: Ms. G. Persad

Date of Delivery: 18th November 2016

REASONS

THE CLAIM

- [1] The Claimant pleaded that by an oral agreement between himself and the duly authorised agent of the Defendant on or about 13th December 1999, the Defendant agreed to sell the Claimant agreed to buy a parcel of land in Chaguanas comprising FOUR THOUSAND NINE HUNDRED AND FORTY TWO POINT ZERO SQUARE METRES, being portion of the larger parcel of land comprising Fifteen Acres One Rood and Four Perches more particularly described in the Schedule to Deed registered as No. 5430 of 1993 and bounded on the North by Lot No. 2 on the South by State lands on the East by a Road Reserved and by one lot of land on the West by lands now or formerly of John Ojoe (the subject lands) at and for the price or sum of Thirty Five Thousand Dollars (\$35,000.00).
- [2] The terms of the said agreement were:
- a) That the Claimant pay a deposit of One Thousand Dollars on the 13th December 1999;
 - b) A further sum of Four Thousand Dollars by 31st January 2000;
 - c) The balance by monthly instalments from or about the month of June 2003 on completion of payments which the Claimant was making on an adjoining lot on Chin Chin Road, Cunupia at the time.
- [3] The Claimant paid One Thousand Dollars on 13th January 1999 aforesaid, Three Thousand Dollars on 14th January on 14th January 2000 and One Thousand Dollars on January 2000. Receipts for the payments were given by the Defendant's agent to the Claimant.
- [4] The Claimant went into possession or occupation of the said land in December 1999 and remained in said occupation and possession.

- [5] The Claimant, having completed his last payment of \$500.00 on the adjoining lot in May 2003, visited the office of the Defendant's agent Raddikha Goberdhan to arrange for the monthly payments on the said lot, but she informed him that he should make arrangements with the Defendant to pay the said monthly sums of \$500.00 into the Defendant's account.
- [6] The Claimant pleaded that in or about 9th June 2003 he met the Defendant at Ms. Goberdhan's office; the Defendant asked him how much he was willing to pay for the land. By letter dated 10th June 2003 the Claimant, through his attorney at law, indicated that he was prepared to pay the balance of Thirty Thousand Dollars for the said land by monthly instalments of Five Hundred Dollars; however the Defendant did not reply to this letter. Thereafter, the Claimant's attorney by letter dated 30th June 2003 wrote another letter to the Defendant offering to pay the balance of \$30,000.00 for the subject lands in one payment; again the Defendant failed to reply to his letter.
- [7] The Claimant averred that notwithstanding repeated attempts on his part to complete the agreement for sale, the Defendant has neglected to do so. He also averred that at all material times he has been ready and willing to fulfil his obligations under the said agreement.

THE DEFENCE

- [8] The Defendant admitted paragraph one of the Statement of Claim which pleaded the fact of the oral agreement for sale of the subject lands at and for the price of \$35,000.00; he also admitted that the Claimant paid the deposit as pleaded in paragraph 2 of the Statement of Claim but denied that he agreed to monthly payments of \$500.00 as the method of paying the balance owed on the purchase price of the said land.

- [9] The Defendant pleaded that it was a term of the oral agreement that the balance of the purchase price for the said land be paid within 90 days of the 31st January 2000 and that a written agreement for sale including this term was prepared by his agent Raddickha Goberdhan. The Defendant further pleaded that the Claimant failed to execute this agreement despite numerous requests from his agent that the Claimant do so.
- [10] The Defendant made no admission with respect to the Claimant's plea that he has been in occupation of the said land since 1999. In the alternative, he pleaded that if the Claimant was in occupation of the subject parcel since December 1999 it was without the consent of the agent or himself.
- [11] The Defendant also pleaded that 'he made no admission' with respect to paragraph 5 of the Statement of Claim in which the Claimant pleaded that upon completing payment on the adjoining lot of land in May 2003, he visited the office of the Defendant's agent to make arrangements for payment of the balance of the purchase price of the subject land. The Defendant also pleaded that on this date the Claimant indicated that he could not procure the balance due and owing on the subject land and requested that the deposit be transferred to settle the balance on another lot, 'Acre No 2'. Raddikha Goberdhan complied with the Claimant's request and a receipt was prepared which endorsed this transaction.
- [12] The Defendant asserted that at all material times he was ready and willing to perform his obligation under the said agreement.

THE REPLY

- [13] In reply the Claimant denied that he informed Raddikha Goberdhan in May 2003 that he could not procure the balance of the purchase price and instructed her to apply his deposit to another lot.

[14] He pleaded that the agent refused to accept his payments of \$500.00 as agreed between them in May 2003. On the 6th June 2003 his first attempt to pay off the balance on Acre No 2 was unsuccessful because the agent was not in office. On the 9th June 2003 he met Ms. Goberdhan who refused to accept the \$500.00.

EVIDENCE

Witness Statement of the Claimant

[15] The Claimant testified that he entered into an oral agreement with the Defendant through his (The Defendant's) agent Raddikha Goberdhan to purchase a parcel of land known as Acre No 1 (the subject land) in or about December 1999. The terms of the agreement for the purchase for the subject land were that the purchase price was \$35,000.00 and a deposit of \$5,000.00 was to have been paid the by 31st January 2000. Accordingly, he paid \$1,000.00 on 13th December 1999, \$3,000.00 on 14th January 2000 and \$1,000.00 on 28th January 2000. It was also agreed that the balance was to be paid by instalments of \$500.00 per month after completion of payment for Acre No 2.

[16] The Claimant testified further that he had purchased other parcels of land described as Acres No 2 and 3 from the said agent by paying a deposit and the balance of the purchase price by monthly instalments of \$500.00. Upon payment of the deposit for Acres No 2, 3 and the subject land, he was let into permission of those parcels by the said Raddikha Goberdhan.

[17] It was the evidence of the Claimant that he entered Acre No 1 (the subject lands) in June 2000 and planted pumpkin for export during the wet season beginning in the month of June each year.

- [18] The Claimant testified that no written agreement was ever prepared by the agent Ms. Raddikha Goberdhan regarding the purchase of the subject land or the other two parcels, nor was he ever invited to execute any such agreement.
- [19] The Claimant stated that in May 2003 when he went to the agent, Ms. Goberdhan to pay the instalment on Acre No 2. She told him to make arrangements to pay the balance to the owner since she was closing her business and going abroad. In order to facilitate this, Ms Goberdhan indicated that she would arrange for the Claimant and the Defendant to meet in her office.
- [20] The agent did not take his payment of \$500.00 for Acre No 2.
- [21] The Claimant then visited Ms. Goberdhan on the 6th June 2003 with the balance of the purchase price of \$5,000.00 for Acre No 2. The agent was not in office and the Claimant returned on 9th June to her office with the said \$5,000.00. There Ms. Goberdhan introduced him to the owner, the Defendant, for the very first time. The latter asked him how much money he was willing to pay for Acre No 1 and the Claimant indicated that he was willing to pay the balance of \$30,000.00 for the subject land and that he had a receipt to prove that he had paid the deposit of \$5,000.00. Ms. Goberdhan then told the Claimant that he had got the land for free whereupon the Claimant got angry and left shortly after.
- [22] By letter dated 10th June the Claimant, through his attorney at law, wrote to Ms. Goberdhan informing her that he was prepared to pay off the balance of the purchase price for the lands by monthly instalments of \$500.00. Neither the Defendant nor Ms. Goberdhan responded, whereupon the Claimant caused another letter dated 30th June 2003 to be sent to Ms. Goberdhan offering to pay off the balance of \$35,000.00 on the subject land. Neither the Defendant nor Ms. Goberdhan responded to the letter.

Witness Statement of Dale Balkaransingh

[23] The Claimant caused a witness statement of Dale Balkaransingh to be filed on his behalf, however it is not necessary to delve into his evidence in any great detail since for the most part it was adduced to support the Claimant's contention that pursuant to the agreement for sale, the Claimant entered the subject land in 2000 and began cultivating same by growing pumpkins.

EVIDENCE FOR THE DEFENCE

Witness Statement of Anthony Joseph

[24] The Defendant also called Anthony Joseph and filed a witness statement in this matter.

[25] He testified that he became owner of the subject land by purchasing same from one Soonderdai Pudhan by Deed No 6279 of 1995. He stated further that on or about the 10th November 1999 he retained the services of real estate agent Raddikha Goberdhan of Home Searchers Real Estate Agency to obtain a purchaser for the subject land. On that date he executed an agency agreement which he exhibited to his witness statement.

[26] The Defendant stated that sometime in December 1999 Ms. Goberdhan informed him that she had obtained a purchaser for the subject land, one Suresh Charran, the Claimant. He stated further that sometime in early February, Ms. Goberdhan informed him that she had prepared a written agreement for sale with respect to the subject land and that she wanted him to attend her office on a later date to execute the said agreement. He was also informed by Ms. Goberdhan that the Claimant had been invited to that meeting. The Defendant went on to state that when he attended Ms. Goberdhan's office to execute the agreement the Claimant did not attend.

[27] Upon being told by Ms. Goberdhan 'sometime later' that Mr. Charran had failed/refused to execute the said agreement despite his promises to do so by the end of February 2000, the Defendant instructed his agent to refund the Claimant his deposit of \$5,000.00.

[28] Mr. Weekes testified that in or about June 2003 his agent informed him that the Claimant wanted to meet with him because he was once again interested in purchasing the subject land. Significantly, the Defendant stated that at this time Ms. Goberdhan was no longer his agent. At the meeting among Ms. Goberdhan, the Claimant and himself, the Defendant asked the Claimant how much he was offering for the subject land and also asked Ms. Goberdhan's opinion an appropriate price for the land. The latter suggested a price of \$60,000.00 whereupon Mr. Charran became abusive and left the office. The Defendant also testified that from 1997 to 2008 he made periodic visits to the land and never observed it under cultivation or occupation by anyone.

Witness Statement of Raddikha Goberdhan

[29] This witness testified that in 1999 she became agent for the Defendant for the purpose of selling the subject land situate in Chin Chin Road, Cunupia. At the time she had known the Defendant for approximately nine years.

[30] She contacted the Claimant and asked him whether he was interested in purchasing the subject land. Ms. Goberdhan had known the Claimant previously since she had acted as agent in the sale to the Claimant of two other parcels of land, Acres No 2 and 3. In December 1999 the Claimant indicated his interest in purchasing the subject land and this witness indicated to him orally the terms for its purchase - that the purchase price was \$35,000.00, a deposit in the sum of \$5,000.00 was to be paid by 31st January 2000 and the payment of the purchase price within 90 days of the 31st January 2000. The Claimant paid the deposit of

\$5,000.00 in three payments, the last being on the 28th January 2000. This witness denied that it was ever a term of the agreement that the balance of the purchase price was to be paid by monthly instalments of \$500.00, or that such payments were to commence from June 2003 upon completion of a similar monthly payment on Acre No 2.

[31] Ms. Goberdhan testified that 'sometime in early February' she prepared a written agreement for sale for the subject land and invited the Claimant and Defendant to attend her office to execute that agreement on a date in February that she could not remember. Whilst the Defendant attended her office, the Claimant did not do so. Upon enquiry of the Claimant he informed her that he could not attend on the agreed date because he was "busy selling eggs". She stated that the Claimant, however, promised to sign the agreement when he attended her office at the end of February 2000 in order to make a payment on Acre No 2. It was Ms. Goberdhan's evidence however that whilst Mr. Charran came to her office at the end of February he refused to sign the written agreement. Upon informing the Defendant of the Claimant's failure to sign the agreement the Defendant instructed her to refund the Claimant's deposit. When the Claimant was informed about the Defendant's instructions, he then told Ms. Goberdhan to apply the deposit to Acre No 2. Ms. Goberdhan testified that she asked the Claimant to put these instructions in writing but he never did so. She therefore left his deposit of \$5,000.00 in her business account awaiting "firm instructions" from the Claimant.

[32] Ms. Goberdhan went on to assert that on 30th April 2013 the balance due on Acre No 2 was \$5,500.00. He made a payment of \$500.00 and the balance then stood at \$5,000.00. Ms. Goberdhan testified that the Claimant saw her in her office and again asked her to transfer his deposit of \$5,000.00 on the subject land to pay off the balance on Acre No 2. She again asked him to put this instruction in writing and he again refused. She then called in her secretary, one Margerlee Joseph, and

repeated Mr. Charran's instructions in her presence, whereupon Mr. Charran confirmed that those instructions were true. Ms. Goberdhan then made a note on the back of the duplicate copy of the receipt dated 30th April 2003 and she alone signed that note in the presence of the Claimant and Ms. Joseph. That note was exhibited to her witness statement. Ms. Goberdhan testified that she then issued a receipt to the Claimant in the sum of \$5,000.00 for full and final payment on Acre No 2. She wrote on the receipt "transfer of \$5,000.00 from Acre No 1 owned by Francis Weekes to Acre No 2". She gave the original receipt to the Claimant and kept the duplicate which she also annexed to the witness statement.

[33] Ms. Goberdhan testified that sometime in early June the Claimant told her that he was still interested in purchasing the subject land. She informed him that she was no longer the Defendant's agent as of May 2003, but agreed to arrange for the parties to meet in her office. The Claimant and Defendant met in her office on the 9th June 2003 for the very first time. She supported the Defendant's testimony as to what transpired in her office. She also added that upon the Claimant becoming abusive she telephoned the police whereupon he left.

[34] Ms. Goberdhan further testified that in or about January 2006 she executed a Deed of Conveyance in respect of Acre No 2 in favour of Mr. Charran on behalf of the vendor Soonderdai Pudhan at the office of Gerard Raphael who was also attorney at law for the Claimant in this matter.

[35] Ms. Goberdhan asserted that she never gave the Claimant permission and/or consent to occupy the subject land.

Witness Statement Winston Sylvester, Surveyor

[36] This witness conducted two surveys on the subject land, one in 1993 and the other in 2002. It was his evidence that the subject land was uncultivated and covered in bushes at the time.

Witness Statement of Margerlee Joseph

[37] Ms. Joseph was employed as a secretary by Raddikha Goberdhan on the 13th January 2003 to June 2003. Her evidence supported Ms. Goberdhan's evidence with respect to the events that transpired in the latter's office on the 30th April 2013.

Witness Statement of Gerard Raphael, Attorney at Law for Claimant

[38] In light of the evidence of Raddikha Goberdhan that attorney for the Claimant Gerard Raphael had, on the instructions of Ms. Goberdhan, prepared a deed transferring Acre No 2 to the Claimant while acting on behalf of the Claimant in this matter, I instructed Mr. Raphael to hand over the brief and to file a witness statement. I did so because I considered this allegation to be a serious one which could impact the outcome of the trial. Accordingly, a witness statement was filed by Mr. Raphael on 19th October 2011. It was admitted *de bene esse* and I ruled that I would determine its weight and/or relevance after the trial.

[39] In that witness statement Mr. Raphael testified that in or about June 2003 the Claimant retained him to write a letter to Ms. Goberdhan requesting her to accept payment of the balance of the purchase price of \$5,000.00 on Acre No 2. He received no response to that letter and on the 30th June 2003 he wrote another letter to Ms. Goberdhan indicating that the Claimant was prepared to pay the balance owing on Acre No 2 and another acre which he had contracted to purchase from her. He did not receive a response to this letter and so on the 17th September 2003 he instituted these proceedings on behalf of the Claimant.

[40] Mr. Raphael testified further that he became acquainted with attorney for the Defendant Mr. Amita Goberdhan whilst he, Mr. Raphael, was a tutor at the law school and Mr. Goberdhan a student. The latter graduated in 2004 and they maintained contact. Mr. Goberdhan informed him that he was aware that Mr.

Raphael had instituted proceedings in which his mother, Raddikha Goberdhan was a witness.

[41] In or about the year 2005 Raddikha Goberdhan visited him at his office with Amita. She informed him that she believed that she could persuade the Defendant to accept the balance of \$30,000.00 owed on the third acre (the subject land). He advised her that she would have to bring both the Claimant and Defendant to his office for a meeting in order to complete that transaction and the purchase of Acre No 2.

[42] That meeting between the Claimant and the Defendant never materialized despite the fact that Ms. Goberdhan visited Mr. Raphael at his office on several occasions. On one such occasion she asked him to prepare a deed conveying Acre No 2 to the Claimant since 'she was certain that the matter would be settled and she wanted to sign the deed to show that she was serious and as a mark of good faith'.

[43] Mr. Raphael stated that it was in these circumstances that he prepared the deed and had Ms. Goberdhan execute it. He asserted that neither he nor any of his clerks signed the document as witness to its execution nor did he sign as conveyancer. Mr. Raphael also indicated that he did not tell the Claimant of this development since he only intended to do so if Ms. Goberdhan had been able to bring the Defendant and the Claimant to his office. He further indicated that the deed was disclosed to Mr. Ryan Cameron, attorney for the Defendant, during a Case Management Conference.

ISSUES

a) *Whether there is a sufficient Memorandum in writing evidencing the Agreement for Sale*

[44] The Defendant submitted that there is no Memorandum to satisfy **SECTION 4 OF THE CONVEYANCING AND LAW OF PROPERTY ACT**¹ and or the Statute of Frauds in that:

- a. The receipts do not contain a description of the purchaser/vendor.
- b. The material terms that the Claimant relies upon are not contained in said receipts. There is no mention of the method of payment of the balance of the purchase price, when these payments were to begin or that balance of the purchase price to be paid by instalments. The receipts do not contain a material term of the alleged contract as pleaded by the Claimant that he was to go into possession of the land upon payment of the deposit.

[45] The Claimant submitted that the receipts evidencing payment satisfy the requirement of **SECTION 4 of the CONVEYANCING AND LAW OF PROPERTY ACT** and the Statute of Frauds in that they show that:

- a. the Claimant is the purchaser.
- b. the subject parcel of land is one acre off Chin Chin Road, Cunupia.
- c. the purchase price is \$35,000.00 and a deposit of \$5,000.00 was paid.
- d. although Ms. Goberdhan signed without describing herself as agent for the owner, this was sufficient to describe the vendor.

[46] I agreed with the submission of the Claimant that there was a sufficient memorandum in writing of the agreement for sale such as to satisfy **SECTION 4**

¹ 4(1) No action may be brought upon any contract for the sale or other disposition of land or any interest in land, unless the agreement upon which such action is brought, or some memorandum or note thereof, is in writing, and signed by the party to be charged or by some other person thereunto by him lawfully authorized.

of the **CONVEYANCING AND LAW OF PROPERTY ACT** and the Statute of Frauds. In **Davies v Sweet**² it was held that where an agent received a deposit on the purchase price for a parcel and signed the receipt without indicating that he was doing so as agent for the vendor, the vendor was sufficiently described since an agent who contracted in his own name did not cease to be contractually bound because the other party knew that when the contract was made, that he was acting as agent. It was also held that the receipt evidencing payment for the deposit was a sufficient memorandum in writing to satisfy the **LAW OF PROPERTY ACT SECTION 40** which is similar terms to **SECTION 4 of the CONVEYANCING AND LAW OF PROPERTY ACT (Trinidad and Tobago)**. The Court also held that if the agent could be sued on the contract then his principal can be sued or sue on the memorandum signed only by the agent³.

(b) Was the Claimant let into possession of the said lands, and if he was , did he acquire any rights thereby

[47] This was an issue in contention in the case that while the Claimant pleaded and testified that he was let into possession of the subject land, the Defendant and his agent vehemently denied that he was given permission to occupy said land or that he ever did.

[48] In response to the Claimant's plea that he went into occupation of the said land from December 1999 upon payment of part of the deposit and remained in occupation, the Defendant pleaded that he 'made no admission' as to this plea and averred in the alternative that if the Defendant entered the land it was without his or his agent's consent.

[49] The Claimant submitted that by this plea the Defendant is deemed to have admitted that the Claimant had been in occupation of the said land since

² 1962 1 AER 92

³ Page 95 B-G

December 1999 since, in breach of **CIVIL PROCEDURE RULE 10.5**, he failed to deny the allegation; or if he did not admit or deny, plead that he required the Claimant to prove the fact.

[50] I upheld this submission of the Claimant and held that the Defendant was required in his defence to specifically deny the Claimant's plea that he went into occupation of the subject land. A Defendant may only plead that he requires a Claimant to prove a fact where he avers that he does not know whether a fact pleaded is true.⁴

[51] The Defendant never having denied that the Claimant was in possession, the Claimant did not have to prove this fact.

[52] In the circumstances, the Claimant's act of going into occupation of the subject land amounts to Part Performance of the Contract for the Sale of the land; his occupation is referable to the contract for sale and is enforceable by Specific Performance.

[53] The Claimant, having been let into possession of the property before completion, pursuant to the antecedent agreement for sale, has acquired an equitable interest in the subject land and is entitled to relief. Laches would not prevent a court from granting Specific Performance of the contract that those circumstances, even if there had been some delay in enforcing the agreement for sale⁵.

[54] I therefore held that a delay of four years is no bar to the Claimant obtaining Specific Performance. In any event, I believed his evidence that Ms. Goberdhan agreed that he would pay the balance of the purchase price by instalments of \$500.00 monthly from June 2003. I did not find Ms. Goberdhan to be a credible witness and gave no weight to her evidence which I considered to be manifestly unreliable.

⁴ CV 2008-04045 *Andre Marchong v Trinidad and Tobago Electricity Commission and Civ App No 244 of 2008 MI5 Investigations Limited v Centurion Protective Agency Limited*

⁵ *Williams v Greatrex* 1957 1 WLR 31

[55] Even if I were wrong in holding that the receipt constituted a sufficient memorandum in writing to satisfy **SECTION 4 of the CONVEYANCING AND LAW OF PROPERTY ACT** or that his occupation of the land amounted to part performance of the contract, both of which entitled the Claimant to Specific Performance of the contract, there is yet another basis for my conclusion that he is entitled to an order for Specific Performance of the contract.

[56] The Defendant pleaded the terms of an oral agreement for the sale of the subject land to the Claimant⁶. He pleaded that:

- i. On or about the 13th December 1999 he agreed to sell and the Claimant agreed to purchase the subject land as described in paragraph one of the Statement of Claim at and for the price of \$35,000.00.
- ii. That a deposit of \$5,000.00 was agreed to be paid by three instalments of \$1,000.00 on 13th December 1999. \$4,000.00 on or before 31st January 2000.
- iii. That the balance of the purchase price of \$30,000.00 to be paid within 90 days of the 31st January 2000.

[57] The above plea was sufficient to satisfy the requirement of a memorandum in writing of the agreement for sale pursuant to **SECTION 4 of the CONVEYANCING AND LAW OF PROPERTY ACT** Chap 27:12. In **Grindell v Bass**⁷ it was held that the Defendant's defence which contained all the terms of an agreement for sale of the subject land to a third party was a sufficient memorandum with the Statute of Frauds. At page 492-493 Russel LJ opined,

"It matters not that the fact that a memorandum within the Statute of Frauds would thereby be brought into existence was not present to the minds of either counsel or client. I am of the opinion that counsel being the authorized agent to sign the particular document is an agent "thereunto lawfully authorized" within the meaning of the statute, and

⁶ Defence paragraphs 1, 2

⁷ 1920 2 CL 487

that the document, containing as it does all the necessary terms, is a proper memorandum within the statute. In this view it is unnecessary to consider or decide further points which were discussed – namely, whether there had been sufficient part performance of the agreement, and whether it was open to the Claimant in the action to reply on the statute as a defence to Earle’s counterclaim.”

[58] From the above it is clear that once Counsel for the Defendant signed the defence he acted as agent for the Defendant and was duly authorised as such to plead therein the terms of the agreement for sale. In the circumstances, even on the Defendant’s case, there was a proper memorandum in writing of the agreement for sale and I so held.

[59] From the evidence before me it was not a term of the Agreement for Sale that time was of the essence for the payment of the balance of the purchase price by the Claimant. In the circumstances, where the Claimant failed to complete within 90 days of the 31st January 2000, the Defendant was not entitled to terminate the agreement. He was required to wait until there was unreasonable delay, at which point he could then serve a Notice on the Claimant requiring completion to take place within a reasonable time thereafter⁸.

[60] In **Bidaisee v Sampath**⁹ Gopeesingh J.A opined,

“Accordingly, following those decisions, I hold that in a contract which fixes a date for completion (as opposed to an open contract), if one party fails to complete by that date, although time is not made of the essence in that contract, the party in default is deemed to be in breach of that non-essential term. The date fixed for completion cannot be treated as a mere target date. As a result the innocent party is in breach of contract and make time of the essence. However, the time limited for completion

⁸ **Smith v Hamilton** 1951 CL 174

⁹ **Bidaisee v Sampath** Civ App No 165 of 1985, page 6 of the Claimant’s Submissions

by that notice had to be reasonable. It is no longer necessary to wait until there had been unreasonable delay after that breach before such notice may be served. Such a breach of non-essential term does not, however, entitle the innocent party to treat the said breach as repudiation of the contract, justifying rescission and to rely on same as a ground for avoiding an action for specific performance by the party in breach. It is only if the party, after being served with a notice to complete within a reasonable time is in breach and fails to complete within that reasonable period fixed by the notice (which in effect makes time of the essence) that the innocent party can treat such failure as a repudiation of the contract justifying rescission. On the other hand, if the contract is an open contract, in the sense that no date is fixed for completion, the law will imply a term that the contract should be completed within a reasonable time from the date of the contract. In such circumstances, therefore, a notice making time of the essence cannot be given until there has been an unreasonable delay because it is only then that there is a breach of contract."

[61] It is clear that the Defendant sought to repudiate the contract without having served a Notice on the Claimant requiring him to complete the sale within a reasonable time after said Notice. On this ground also I found that the Claimant established on a balance of probabilities that he is entitled to Specific Performance of the Agreement for Sale and I so ordered.

[62] I wish to add that I disbelieved the evidence of the Defendant and his witness particularly the evidence of Raddikha Goberdhan who I found to be not worthy of any credit at all. Having considered all of the evidence, I considered the action of Mr. Raphael in communicating with Ms. Goberdhan after he had instituted these proceedings to be very unfortunate. It was clear to him that the Claimant, his client, had made serious allegations against Ms. Goberdhan in relation to his claim; as well he knew that Ms. Goberdhan was a witness for the Defendant – to

have taken instructions from her in these circumstances falls far short of what is to be expected from such a senior attorney. Despite this, in my view, none of his actions affected my view of the evidence and the eventual outcome of this case.

[63] In the circumstances I gave judgment for the Claimant against the Defendant and ordered:

- i. Specific Performance of the Agreement of Sale of the subject property,
- ii. The Defendant to pay the Claimant's costs to be assessed by a Registrar in default of agreement.

Joan Charles

Judge