

REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

Cv.A. 105 OF 2006

BETWEEN

**RAMDEO SOOKHAI AND DANDAYAH SOOKHAI
APPELLANTS**

AND

**RAMDIAL SOOKHAI AND ROHAN LOUTAN
RESPONDENTS**

PANEL

***I. Archie C.J.
M. Warner, J.A.
A.Mendonca, J.A.***

APPEARANCES:

Mr. D. Rampersad instructed by Mr. P. Maharaj for the Appellants

Mr. W. Campbell for the first Respondent

Mr. K. Neebar for the second Respondent

Date Delivered: 14th March, 2008

Delivered by M. Warner, J.A.

I have read in draft the Judgment delivered by Warner, J.A. I agree with it and I have nothing to add.

I. Archie
Chief Justice

I also agree

A. Mendonca
Justice of Appeal

JUDGMENT

1) This appeal is in respect of orders made by Kokaram J. in June 2006, in two actions, HCA 592 and 677 of 2002, which were consolidated, since common questions of law and fact arose in both actions. The subject matter of the orders is a parcel of land comprising one lot with buildings erected thereon situated at 15 George Street, Siparia Village, Siparia (the property). The effect of the orders is that the appellants Ramdeo Sookhai and Dandayah Sookhai will have to deliver up possession of the property to one of the respondents Rohan Loutan. The controversy dates back to HCA 2731 of 1986 in which two consent orders were recorded.

2) The first consent order, which I shall paraphrase was, made by Smith J. (the order of Smith J.) on the 14th April 2000. Smith J. declared that the property was owned by the appellants Ramdeo Sookhai, and Dandayah Sookhai and the other respondent in this appeal, Ramdial Sookhai, as joint owners in equal shares. It made provision for the appointment of a valuer; for the payment by Ramdeo and Dandayah to Ramdial of one half the value of the premises; for the execution of a deed of conveyance by Ramdial on receipt of the value of his share; for Ramdial to vacate the premises within four months after receipt of the value of his share and in default of Ramdial's executing a deed conveying his share to Ramdeo and Dandayah, for the Registrar of the Supreme Court to execute it on his behalf. Ramdeo and Ramdial are siblings and Dandayah is Ramdeo's wife.

3) The second consent order, made on the 2nd July 2001, (the order of Kangaloo J.) substantially varied the order of Smith J. It was in these terms:

1. ***“that the Order of the Honourable Mr. Justice Smith dated the 14th day of April, 2000 be varied giving the***

Third-named Defendant liberty to sell the subject premises at No. 15 George Street, Siparia for a price not less than \$470,000.00;

- 2. that the Third-named Defendant be given the period of four(4) months within which to find a buyer at the above price.***
- 3. that the Third-named Defendant and any prospective purchasers be permitted to enter and view the entire subject premises;***
- 4. in default of the subject premises being sold by private treaty within the next four (4) months that the subject premises be sold by public auction at a reserve price of \$470,000.00;***
- 5. that the Plaintiffs do pay to the Third-named Defendant interest on the moneys due to him from the said sale in accordance with the Order of the Honourable Mr. Justice Smith made on the 14th day of April, 2000, at the rate of twelve (12%) per annum until payment;***
- 6. that there be no order as to costs; and***
- 7. that there be liberty to apply.”***

4) In the order of Kangaloo J. (above) any reference to the plaintiffs relates to the appellants and to the third defendant, means the respondent Ramdial.

5) By an agreement in writing dated the 3rd October 2001, Ramdial, described therein as “*the person duly authorised by a court of law to sell the property*”, entered into an agreement with a third party Rohan Loutan (the second respondent) to sell the property to him for the price of \$470,000. The final paragraph of the agreement read thus:

“This agreement does not in any way bind me for the sale to the said Rohan Loutan as a contractual agreement unless I am paid by him or on his behalf a fair and reasonable down payment for the sale of the said property within the period of THREE MONTHS.”

The agreement was expressed to be according to the order of the court.

6) By a deed of conveyance dated 28th December 2001, and registered as No DE-200200116315, Ramdial purported to convey the premises on his own behalf, and on behalf of Ramdeo and Dandayah to Rohan Loutan for the sum of \$470,000. The deed recited the respective consent orders of Smith J. and Kangaloo J and copies of the orders were annexed to the deed.

7) At all material times prior to the sale, Ramdial occupied the premises together with Ramdeo and Dandayah, but he (Ramdial) subsequently vacated them, while the other two occupants still reside there.

8) As events turned out, differences among the parties arising from disagreement about the value of the premises, continued.

9) By letter dated 7th January 2002, Attorney-at-law Wilston Campbell acting on Ramdial's behalf set out various sums which he intended to deduct from the appellant's share and enclosed a cheque representing the amount he calculated to be due. The cheque was not accepted. Instead, the appellants retained new legal advisers who intimated that they had instructions to apply to set aside the order of Kangaloo J.

10) By an originating summons dated the 5th April 2002, which was subsequently ordered to continue as if begun by writ, Rohan Loutan sought possession of the premises (H.C.A. 596 of 2002).

11) What followed was that Ramdeo and Dandayah filed an action (H.C.A. 677 of 2002) in which they alleged that Ramdial and Rohan were in breach of clauses 2 and 4 of the order of Kangaloo J. and that clause 4 would take effect with necessary modifications as to time. This clause provided that the property be sold by public auction at a reserve price of \$470,000.

12) Kokaram J., having heard the consolidated actions, ordered that the appellants deliver up possession of the property to Rohan; that there be judgment for Rohan on his counterclaim for damages for trespass in the sum of \$100. and that costs in both actions be taxed and paid to Rohan in default of agreement.

13) The issues to be resolved in this appeal are (i) the refusal of the trial judge to grant the appellants leave to amend the statement of claim and (ii) the interpretation of the consent orders of Smith J. and Kangaloo J.

The application to amend

14) At the trial, in 2006, Kokaram J. refused the appellants' application to amend their statement of claim to introduce illegality and fraud. The original case was founded on the respondents' failure to fulfil the stipulations as to time, in the order of Kangaloo J. (See clauses 2 and 4).

15) The judge was confronted with a situation, where, in the face of two consent orders, several cause list hearings and pre-trial reviews, there was now a complete change of case. Counsel for the appellant recognised in his written argument in this court, that the statement of claim was 'obviously vague and incomplete,' hence the necessity for the application to amend.

16) Counsel for the appellant rested the application on the general principle that the amendment should be allowed if it is for the purpose of determining 'the real question in controversy.'

17) The general principle is that even though an application to amend is late, a party should be allowed to amend unless the opposing party will suffer prejudice that could not be fairly compensated by a suitable order for costs. A court will always however, look at

materiality and must be satisfied that the proposed amendment will not be “inconsistent or useless.”

18) While there are no special rules that allegations of fraud must be pleaded at the outset, the court must be provided with sufficient material upon which the exercise of its discretion is sought. Kokaram J. said in his reasons that he was mindful of the lateness of the application, the nature of the allegations and the lack of information to support them.

The new allegations were:

- i) *that the stamp duty payable on the deed of conveyance ought to have been by reference to its evaluation as both residential, and commercial property and not as residential solely;*
- ii) *no consideration passed between Ramdial and Rohan and they were well known to one another;*
- iii) *that the order of Kangaloo J. was ‘improper and or was effected without any jurisdiction as it was markedly different from the order of Smith J.’*

19) In summary the judge’s reasons for refusal were these: the necessity for the amendment had been apparent for some time prior to the first trial and the appellant had been seeking to transform his case under the umbrella of interests of justice; the amendment was fundamental and sought to allege fraud, lack of consent and implications of impropriety; no allegations of impropriety had been made until the trial; at the pre-trial hearings, the parties had agreed that the action involved the single issue of interpreting the orders of Smith J. and Kangaloo J.

The allegation regarding payment of stamp duty

20) The form and content of the proposed plea indicated that counsel intended to argue that the illegality would render the deed void because Ramdial and Rohan were part of an illegal transaction.

21) The rates at which stamp duty is payable on a conveyance on sale of property are set out in the first Schedule to the Stamp Duty Act Chap 76:01 .The conveyance in this matter was stamped pursuant to paragraph (2) of the First Schedule which refers to property which “is or includes a dwelling house and the property is for use wholly or mainly for residential purposes”. The Schedule goes on to set out the rates which apply on a graduated scale. In seeking to set out the plea of illegality, the averment was vague and evasive. It was not disputed that the premises were used for both residential and commercial purposes, but the plea did not state that the premises were not used mainly for residential purposes.

22) If the premises were not used wholly or mainly for residential purposes that would have meant that paragraph 2 of the first schedule did not apply. The plea sought to aver that the ‘stamp duty ought to have been by reference to its evaluation as both residential and commercial property and not as residential solely”. It did not therefore conform to the statutory requirement. The established practice of the courts has been to require that allegations of illegality and fraud be pleaded with particularity. (See Bullen, Leake and Jacobs 15th Edition paras 48-02 to 49-10.)

Lack of Consideration

23) As regards the plea that no consideration passed, it is not disputed that, a cheque representing the value of the appellants’ share of the proceeds of sale was presented to the appellants and that they refused to accept it. (See letter from Attorney-at-Law Campbell, dated 7th January 2002) This challenge would therefore fail.

Lack of Jurisdiction

24) The reference to lack of jurisdiction to make the order is also deliberately vague and admits of several connotations, one of which suggests some failure or the lack of

authority on the part of counsel who appeared for the appellant previously. This is certainly not an acceptable basis on which a court would grant leave to amend to raise so a serious matter. As I have stated allegations of that nature must be sufficiently particularised. But more than that, the authority of counsel to enter into a compromise, when it is not expressly limited, extends to the action and all matters incidental thereto. There was no indication that any limitation was imposed on counsel.

25) I therefore conclude that the amendments sought would not have assisted the appellants. I am therefore satisfied that the trial judge was correct to refuse to grant leave to amend and I endorse the reasons which he set out for refusal.

The interpretation of the orders of Smith J. and Kangaloo J.

26) The only live issue which remained was the interpretation of the orders and whether there was compliance with them. The matter was argued in the court below by agreement, on the basis of the parties' written submissions and without oral evidence. This case therefore turns on the construction of the two consent orders, which is, a matter of law (See **Bahamas International Trust Co. Ltd v Threadgold [1974] 3 All ER 881 at 884.**)

The Order of Smith J.

27) It is self evident that except as to costs, after the variation was recorded, by Kangaloo J. the only clause which remained in effect pursuant to the order of Smith J was clause (1) which declared the respective shares of the parties in the property.

The order of Kangaloo J.

28) Clauses (1) and (2) are the controversial clauses. Clause (1) gave Ramdial leave to sell the premises and clause (2) stipulated a period of 4 months within which he was required to find a buyer.

29) When a court is called upon to construe an agreement, the question for the court to determine is the meaning which the words would convey to a reasonable person having all the background knowledge which would have reasonably been available to the parties in the situation in which they were at the time when the agreement was made (See **BCCI v Ali [2001] 1 All ER 961** in which Lord Clyde cites the following passage from the speech of Lord Hoffman in **(Investors Compensation Scheme Ltd. v West Bromwich Society Ltd. [1988] 1 WLR 896 at 912.)**)

“The knowledge reasonably available to them must include matters of law as well as matters of fact. The problem is not resolved by asking the parties what they thought they intended. It is the imputed intention of the parties that the court is concerned to ascertain. The parties may well have never applied their minds to the particular eventuality which has subsequently arisen, so that they may never in fact have had any conscious intention in relation to that eventuality. It is an objective approach which is required and a solution should be found which is both reasonable and realistic. The meaning of the agreement is to be discovered from the words which they have used read in the context of the circumstances in which they made the agreement. The exercise is not one where there are strict rules, but one where the solution is to be found by considering the language used by the parties against the background of the surrounding circumstances.”

30) The rules are identical if a court is called upon to construe a consent order (See Foskett on the Law and Practice of Compromise 5th Edition 5-02-53 **General Accident Fire and Life Assurance Corporation Ltd. v Inland Revenue Commissioners [1963] 1 All ER 618** and **Morshead Mansions Ltd v Alactra Properties Ltd [2006] EWCA 492.**)

31) The construction favoured by the appellants is that the entire process of finding a buyer right down to execution of the conveyance should have been completed in four months. Since these provisions had not been met, clause 4, (the public auction clause) would be operative.

32) Counsel for the respondents argued that the order allowed a full period of four months for the defendant to find a buyer and a further four months for completion of the transaction.

33) The trial judge held that the agreement gave the defendant 8 months to complete the transaction.

34) Counsel for the appellants did, however, accept the proposition that the width of the order embraced a situation where a buyer could be found on the last day of the 'four month' period stipulated in the order.

35) In my view therefore, once that permutation was accepted by counsel for the appellants, then, given the normal legal requirements which apply for investigation and acceptance of title, it could not reasonably be expected that the conveyance could be executed simultaneously. As Lord Hoffman observed, the parties may not have applied their minds to that particular eventuality. Although the order was silent on the date for completion however, that did not mean that there was no effective completion date. There is a well established principle that completion must take place within a reasonable time – **(See Barnsley's Conveyancing Law and Practice, Third Edition page 372-373 and Johnson v Humphrey [1946] 1 All ER 460 at 463** cited in that text.

36) If, therefore the agreement for sale was concluded on the 30th October, 2001, then there was no breach of the stipulation to find a buyer within the four month period. The deed was executed on the 28th, December 2001 so that in my view, the time within which the transaction was completed was reasonable, in all the circumstances.

37) This construction is notably at variance with that of the trial judge who reasoned on the basis that the stipulations as to time be construed sequentially. He allowed eight

months for completion of the transaction. However, I am in agreement with his finding that the respondent had not breached the orders of either Smith J. or Kangaloo J.

38) Finally, Counsel for the appellants argued that “liberty to sell” did not include a power to execute the conveyance on behalf of the other vendors. It is to be recalled that Ramdial purported to execute the deed on his own behalf and on behalf of Ramdeo and Dandayah. Further, that the respondents had not complied with the provisions of Order 31 Rules 7 – 9 of the Rules of the Supreme Court 1975, which relate to “other sales of land by order of the Court,” that is, sales which are not ordered pursuant to the Remedies of Creditors Act Chapter 6 No. 2.

Rule 8 (2) provides:

The party entitled to prosecute the order must, subject to paragraph (3), take out a summons to proceed with the order.

Rule 8 (3) provides:

Where an order for sale made pursuant to rule 7 contains directions with regard to effecting the sale, the party entitled to prosecute the order shall not take out a summons under paragraph (2) unless and until he requires further directions of the Court.

Rule 8 (4) provides:

On the hearing of the summons, the Court may give such directions as it thinks fit for the purpose of effecting the sale, including, without prejudice to the generality of the foregoing words, directions: -

(a) appointing the party or person who is to have the conduct of the sale;

(b) fixing the manner or sale, whether by contract conditional on the approval of the court, private treaty, public auction, tender or some other manner;

(c) fixing a reserve or minimum price;

(d) requiring payment of the purchase money into court or to trustees or other persons;

(e) for settling the particulars and conditions of sale;

(f) for obtaining evidence of the value of the property;

(g) fixing the security (if any) to be given by the auctioneer, if the sale is to be by public auction, and the remuneration to be allowed him;

(h) requiring an abstract of the title to be referred to counsel appointed by the Court for his opinion thereon and to settle the particulars and conditions of sale

39) The order of Kangaloo J. essentially, met all the components of rule 4 which were relevant to a sale by private treaty. The only point at issue is whether Ramdial was authorised to convey on behalf of the appellants. The general rule is that when a sale takes place by order of the court, the persons to convey are the persons having the legal estate. (See Hals Laws Vol 42. 4th Edition para 285). In this particular case, those persons would be Ramdeo, Dandayah and Ramdial. It is however necessary to construe the order of Kangaloo J. to determine whether it in any way departed from that general rule.

40) Applying the same principles of construction referred to above, I think that the orders must be construed in the context of the course of conduct of the parties involved. Whereas consensus was arrived at about sharing the proceeds of sale between the two hostile factions, there is nothing in the language used in the orders that would convey to the reader that the respondent was authorised to execute the deed of conveyance on behalf of the appellants. A construction which would permit the respondent to execute the deed on behalf of the appellants could mean that they could have no control whatsoever over payment to them of their share of the proceeds and the completion of the sale. Such

a construction would not have been reasonable nor realistic. I therefore agree with counsel for the appellants that Ramdial was not authorised to convey on the appellants' behalf. However, having so concluded, the fact that the application was not made under Order 31 does not mean though, that the sale should be declared a nullity as the court however has wide powers to make consequential orders as the nature of the case requires (See section 39 of the Supreme Court of Judicature Act Chapter. 4:01)

41) In light of the above, I would dismiss the appeal with costs, but order that the respondent Rohan Loutan's Attorney-at-Law do take steps to have a deed of rectification prepared conveying the appellants' share and interest in the property to him within 21 days after this court determines the amount of the appellant's share in the proceeds of sale, and that the deed be submitted to the appellants' Attorney-at-law for execution by them within 14 days thereafter; and in default of the appellants' so doing that the Registrar of the Supreme Court do execute the same on the appellants' behalf; that the costs of preparation, stamping and registration of the said deed be borne by Routan Loutan; that the appellants' share in the proceeds of sale be paid to them by Ramdial upon the appellants' executing the deed or upon the execution of the deed on their behalf by the Registrar; that the appellants do deliver up possession of the premises to Rohan Loutan upon receipt of their share of the proceeds of sale; that there be liberty to apply.

42) As a consequence of this decision, we will entertain further argument on the monies held by the respondent Ramdial representing the appellants' share of the proceeds of sale and the deductions, if any, to be made from them.

M. Warner
Justice of Appeal