THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

Civil Appeal No. P66 of 2015
Claim No. CV2011-01574

BETWEEN

Anirudh Mahabir

(Appellant/Claimant)

v.

Alim Mohammed

(Respondent/Defendant)

Panel:
I. Archie C.J.
R. Narine J.A.
P. Moosai J.A.

DATE DELIVERED: March 28, 2019

Appearances:

Mr. A. Manwah and Ms. S. Maharaj on behalf of the appellant.

Mr. A. Ashraph on behalf of the respondent.

I have read the judgment of Narine J.A. and agree with it.

I. Archie,
Chief Justice.

I too, agree.

P. Moosai,
Justice of Appeal.

JUDGMENT

Delivered by R. Narine, J.A

1. This is an appeal against the refusal of the trial judge to order specific performance of an agreement for the sale of a parcel of land situated at Debe Main Road, Debe.

2. On January 23, 2004, the parties entered into a written agreement under which the respondent agreed to sell the land to the appellant for the price of $1.3 million. The appellant paid the sum of $130,000.00 on execution of the agreement. The balance was due within 90 days.

3. Later that month, the respondent delivered a letter to the appellant dated January 27, 2004, advising him that he was no longer interested in selling the property, and enclosing a manager's cheque for the sum of $140,000.00, drawn by order of one Kimraj Basdeo.

4. On January 29, 2004, Ms. Carol Cuffy-Dowlat, the appellant's attorney-at-law, wrote to the respondent returning the cheque for $140,000.00, indicating the appellant's intention to complete the agreement, and warning the respondent of legal action to enforce the contract if he failed to complete.

5. Notwithstanding the clear terms of Ms. Cuffy-Dowlat's letter, the respondent purported to enter into a second agreement for sale dated January 30, 2004 to sell the land to Kimraj Basdeo and Zabida Shama Ramhit for the price of $1.4 million.

6. By letter dated April 6, 2004, Ms. Cuffy-Dowlat called upon the respondent to complete the agreement for sale dated January 23, 2004. The respondent failed to complete, following which an action was filed against the respondent in 2004 to enforce the agreement. In 2006, pursuant to an amendment to Order 3 Rule 6 of the Rules of the Supreme Court 1975, the action stood dismissed as an action in which no step was taken for a period of two years. The appellant subsequently refiled this action in April 2011. This appeal arises out of the refusal of the trial judge in this action to grant specific performance.

FINDINGS OF THE TRIAL JUDGE

7. The judge found that the respondent and Basdeo had "conspired to invent a fiction" that there was a cash payment of $140,000.00 by Basdeo, as part of an oral agreement for sale of the land to Basdeo, which preceded the agreement of January 23, 2004 to sell to the appellant. The judge found that this fiction was concocted for the purpose of providing "dubious justification" for the respondent's reneging on his agreement with the appellant. Further, there had been "an unblushing collusion" between the respondent and Basdeo to precipitate an end to the agreement in order to sell the land to Basdeo for an increased price of $1.4 million.

8. The judge further found that Basdeo was not a bona fide purchaser for value without notice of the appellant's interest, and the appellant was entitled to the equitable remedy of specific performance provided that there was no bar to the availability of the remedy in equity. However, the trial judge went on to find that there was a delay of seven years before the action was filed in 2011. She found this delay could not be regarded as reasonable. Instead, she considered that it would be reasonable to infer that both the respondent and Basdeo would have grown complacent in the expectation that the appellant had waived his rights. Accordingly, the judge expressed the view that the doctrine of laches was applicable to the proceedings, and that it would be unconscionable to grant specific performance after "the unexplained seven (7) year delay" by the appellant in seeking to enforce his rights. It was on this basis that the judge refused to order specific performance of the agreement.

SUBMISSIONS OF COUNSEL

9. Mr. Manwah on behalf of the appellant, submitted that the issue of laches was not raised by the respondent in his defence. It was raised by the court at a late

stage. The appellant was deprived of any opportunity to deal with the issue in his pleadings or evidentially at the trial.

10. The trial judge specifically found that there would be no prejudice to the respondent and Basdeo if the agreement was enforced. In addition, the trial judge expressly found that the appellant was entitled to specific performance provided that there was no bar to the grant of the remedy in equity.

11. Mr. Manwah further submitted that the judge was wrong to find that there was an unexplained delay of seven years in applying for the remedy. In exercising her discretion to withhold the remedy the judge failed to take into account that the appellant had filed an action in 2004 to enforce the agreement. The action having been dismissed by the operation of the rules of court in 2006, the appellant had until January 2008 to file another action before his remedies at law became statute barred. It was only after 2008, that the issue of laches would arise. It followed that the period for consideration was in fact between 2008 and 2011 when the present action was filed – a delay of three years, not seven years as the judge found.

12. In addition, Mr. Manwah submitted that there was no evidence on which the court could infer that the respondent and Basdeo would have grown complacent in the expectation that the appellant had waived his rights. In fact, the evidence was that the appellant refused to accept a refund of his deposit, and he did not remove the caveat he had lodged against the property, thus ensuring that the respondent could not register any transfer of the title to Basdeo.

13. In addition, Mr. Manwah contended that having regard to the judge's findings on the conduct of the respondent and Basdeo, the respondent was not entitled to rely on the equitable doctrine of laches, as a defence to the claim.

14. For the respondent, Mr. Ashraph submitted that the trial judge was correct in finding that the appellant sat on his rights for seven years before filing the action in April 2007. The time started running, for the purpose of the issue of laches, from January 27, 2004 when the respondent returned the deposit and indicated his intention not to complete the agreement.

15. Mr. Ashraph further submitted that it was not for the respondent to raise the issue of laches in his defence. It was for the appellant, who is applying for an equitable remedy, to explain the delay, and satisfy the court that it is fair and just to grant the remedy.

16. Mr. Ashraph also contended that the significant increase in the value of the land during the period of delay was a further ground on which the court should refuse specific performance.

LACHES

17. It is well settled that a litigant who seeks equitable relief is under a duty to prosecute his claim without undue delay. A claimant who sleeps on his rights may be barred from an equitable remedy where his delay in seeking relief is found to be unconscionable. The defence of laches, however arises only where there is no statutory bar. The litigant is entitled to his full statutory period before his claim becomes unenforceable (see: Halsbury's Law of England 5th Edition Volume 47(2014) at paragraph 253).

18. The legislature enacts statutes of limitation which bar legal rights. However, equity does not fix specified limits. The grant of equitable relief depends on the circumstances of the individual case (see: Halsbury's Law of England (ibid) paragraph 254).

19. Delay on its own is not enough to constitute laches: **Betterment Properties (Weymouth) Ltd v. Dorset County Council (No 2)** [2014] AC 1072 at paragraph 31 and 32, per Baroness Hale. The doctrine of laches usually applies where it would be unjust or inequitable to grant relief, for example, in cases where:

- the delay is accompanied by some change of circumstances: **P & O Nedlloyd BV v. Arab Metals Co & Ors.** [2007] 1 WLR 2299 at paragraph 55;
- where there has been acquiescence on the part of the claimant and the defendant has changed his position in reliance on it: **Lindsay Petroleum Co. v. Hurd** (1874) LR 5 PC 221 at 239-240;
- where the claimant's conduct might fairly be regarded as equivalent to a waiver, or where by his conduct he has put the defendant in a position where it would be unreasonable to place him and to later claim the equitable remedy: **Erlanger v. New Sombrero Phosphate Co.** (1878) 3 App Cas 1218 at 1279; and
- where the claimant's delay causes prejudice to the defendant (or to a third party) who acts in reasonable reliance on the claimant's acceptance of the status quo: **Fisher v. Brooker** [2009] 1 WLR 1764 at paragraph 64 per Lord Neuberger; **Betterment Properties (Weymouth) Ltd v. Dorset County Council (No 2)** [2014] AC 1072 at paragraphs 31 and 32 per Baroness Hale.

20. As the cases illustrate, in deciding whether it is just to grant equitable relief in any case the court considers such broad equitable concepts as acquiescence, waiver, reliance and detriment. In deciding whether the delay is unconscionable the court looks at the length of the delay, the conduct of the claimant, and any change in the position of the defendant, which may have been induced by such conduct. The traditional approach of the court was succinctly summarised by Lord Selborne in **Lindsay Petroleum Co. v. Hurd** (supra) at paragraphs 239-240 as follows:

"Now the doctrine of laches in the courts of equity is not an arbitrary or a technical doctrine. Where it would be practicably unjust to give a remedy, either because the party has by his conduct done that which might fairly be regarded as equivalent to a waiver of it, or where by his conduct and neglect he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted, in either of these cases lapse of time and delay are most material, but in every case if an argument against relief which otherwise would be just is founded upon mere delay, that delay, of course, not amounting to a bar by any statutory limitations, the validity of that defence must be tried upon principles substantially equitable.

Two circumstances always important in such cases are: the length of the delay and the nature of the acts done during the interval which might affect either party and cause a balance of justice or injustice in taking the one course or the other so far as relates to the remedy."

21. The modern approach to the application of laches is broader in scope, and directed to the inquiry as to whether on the particular facts of the case it would be unconscionable for a claimant to be permitted to assert his right to an equitable remedy. This approach was enunciated by Aldous LJ in **Frawley v. Neill** The Times 5 April 1999:

"In my view the more modern approach should not require an inquiry as to whether the circumstances can be fitted within the confines of a preconceived formula derived from earlier cases. The

inquiry should require a broad approach, directed to ascertaining whether it would in all the circumstances be unconscionable for a party to be permitted to assert his beneficial right. No doubt the circumstances which gave rise to a particular result in the decided cases are relevant to the question whether or not it would be conscionable or unconscionable for the relief to be asserted, but each case has to be decided on its facts applying the broad approach."

22. Whichever approach is adopted, it is clear that the application of the doctrine of laches is fact specific and evidence driven. While in some cases inferences of prejudice may be drawn from the inordinate length of the delay in seeking relief, the case law firmly establishes that delay alone is not sufficient to ground laches. There must be evidence of conduct or acquiescence which give rise to issues of waiver, detrimental reliance, prejudice or change of position.

23. Mr. Manwah's first complaint was that the issue was not pleaded by the respondent, and so he was deprived of the opportunity to deal with it on the pleadings and evidentially, since it was raised by the judge at a late stage in the proceedings. The consequence of the late introduction of the issue into the proceedings was that the case was starved of relevant evidence. There is, he argued, no evidence of acquiescence, detrimental reliance or any change of position of either the respondent, or Basdeo. In fact, the trial judge expressly found that there would be no prejudice to the respondent or Basdeo, if she granted specific performance.

24. There was evidence in the witness statement of Basdeo that he entered into occupation of the land in March 2004, and has remained in occupation. There was no evidence before the judge of any expenditure substantial or otherwise

on the land. At the hearing of the appeal the court enquired as to what structures, if any, were on the land. Mr. Manwah informed us that his instructions were that there was a wooden structure made of ply-board. Mr. Ashraph informed us that he had no instructions on the issue. In any event, we are bound by the evidence which was before the trial judge, which was patently lacking on this issue.

25. Mr. Manwah has put forward a further argument as to why the respondent should not have been allowed to rely on the equitable doctrine of laches as a defence. The trial judge expressly found that the respondent and Basdeo had invented the fiction of a prior oral agreement for the purpose of providing a dubious justification for the respondent's refusal to complete his agreement with the appellant. This meant of course that the respondent and Basdeo told deliberate lies to the court as part of a conspiracy between them to deceive the court with their fabricated evidence. Having engaged in such dishonest and reprehensible conduct, the respondent clearly was not entitled to equitable relief, and should not have been allowed to rely on the equitable doctrine of laches as a bar to the appellant's claim for specific performance.

SPECIFIC PERFORMANCE

26. Specific performance, like all equitable remedies is discretionary in nature. It will be refused where the claimant is guilty of inordinate delay, where the claimant is guilty of unfair conduct, or where the defendant or a third party will suffer hardship or prejudice if the remedy is granted.

27. There was a dispute in this case as to the period of delay that is relevant in considering the issue of laches. The trial judge found that there was a delay of seven years in bringing the claim for specific performance. Mr. Ashraph submitted that the trial judge was correct in so finding, since the relevant time was from the date on which the cause of action arose (being the date of the

letter indicating the respondent's intention not to complete the agreement that is, January 27, 2004) to the date of filing of the present action, that is, April 27, 2011.

28. Mr. Manwah held a different view. He argued that the relevant period was to be calculated from the date on which the cause of action for legal claims became statute barred, that is, January 27, 2008 to the date of the filing of the present action, that is, April 27, 2011 – which gives a period of just over three years.

29. In my view the relevant period is neither seven years nor three years. The evidence is that the respondent's repudiation of the contract by letter of January 27, 2004, was not accepted by the appellant. He instructed his attorney to return the respondent's cheque which represented a return of the deposit and to advise the respondent that he intended to take legal proceedings to enforce the agreement. This position was reinforced by his attorney's letter of April 6, 2004, calling on the respondent to complete the sale, followed by the filing of an action against the respondent for specific performance in 2004. This action was dismissed by operation of an amendment to the Rules of the Supreme Court in 2006. Before this action was dismissed there was a subsisting claim against the respondent to enforce the agreement. It is not clear when the dismissal came to the attention of the appellant or his attorneys. It follows that the period of delay is in the region of five years (from the time of the dismissal of the action) and not seven years, as found by the judge.

30. Mr. Manwah has submitted that the period of delay for the purposes of applying for equitable relief and of considering the defence of laches, should be calculated from the expiration of the statute of limitation, which in this case is four years. ThIs would mean that the delay is to be calculated from

January 27, 2008 (four years after the respondent's letter repudiating the agreement). This gives a period of delay of three years and three months.

31. I do not agree with Mr. Manwah's submission. While it is true that the effect of the statute of limitations is to bar actions for legal remedies, as opposed to equitable remedies such as specific performance, it does not follow from this that the claimant's delay in seeking equitable relief is to be calculated from the expiration of the limitation period for legal claims, or that the period of delay for the purposes of laches is to begin from that time. The claimant's delay during the statutory period may well give rise to issues of waiver, acquiescence, detrimental reliance and prejudice to the defendant or a third party. In **P & O Nedlloyd BV v. Arab Metals Co & Ors.** (supra), at paragraph 61 Moore-Bick LJ expressed the view that:

> "*61. It is unnecessary for present purposes to decide whether, leaving aside the application of a limitation period, simple delay, however long, can give rise to a defence in equity. Although dicta in some of the cases suggest that it cannot, others indicate the contrary and I would not wish to rule out the possibility that the court would regard it as inequitable to allow a claim to be pursued after a very long period of delay, even in the absence of evidence that the defendant or any third party had altered his position in the meantime. However, if and to the extent that a limitation period is applicable to the claim, it is difficult to see why mere delay should defeat the claim until the limitation period has expired. I think Mr. Rainey's submission was right, therefore, being confined, as it was, to cases of that kind. I also think that the distinction between mere delay and delay which has an adverse effect on the position of the defendant or others is sufficient to explain the dicta in the cases on which he relied.*

Equally, however, I can see no reason in principle why, in a case where a limitation period does apply, unjustified delay coupled with an adverse effect of some kind on the defendant or a third party should not be capable of providing a defence in the form of laches even before the expiration of the limitation period. The question for the court in each case is simply whether, having regard to the delay, its extent, the reasons for it and its consequences, it would be inequitable to grant the claimant the relief he seeks…"

32. While it is settled that a claimant who seeks discretionary relief must act promptly, delay on its own, is not a bar to the grant of specific performance. This principle was forcefully articulated by Megarry VC in **Lazard Brothers & Co. Ltd v. Fairfield Properties Co. (Mayfair) Ltd** (1977) 121 Sol Jo. 793:

"…If specific performance was to be regarded as a prize, to be awarded by equity to the zealous and denied to the indolent, then the plaintiffs should fail. But whatever might have been the position over a century ago that was the wrong approach today. If between the plaintiff and defendant it was just that the plaintiff should obtain the remedy, the court ought not to withhold it merely because the plaintiff had been guilty of delay…"

33. A local illustration of the principle is to be found in **Sharif Fida Hosein v. Dassie Harrydath** (Unrep.) Civil Appeal No. 57 of 1984, in which the Court of Appeal reversed the decision of the court below and granted specific performance of an agreement for sale of land concluded in 1968. The action had been filed in 1977. The decree for specific performance was made in 1988 by the Court of Appeal.

34. The issue in this appeal is whether the circumstances are such that it is just and equitable to grant the remedy of specific performance. The relevant circumstances are:

(i) The appellant entered into a written agreement on January 23, 2004, to purchase the land from the respondent for $1.3 million and paid his deposit of $130,000.00.

(ii) On January 26, 2004, the respondent entered into a second agreement to sell the same parcel of land to Kimraj Basdeo and Zabida Shama Ramhit for the sum of $1.4 million.

(iii) On January 27, 2004, the respondent purported to return the deposit to the appellant by cheque in the sum of $140,000.00 drawn by order of a third party and indicated his intention not to complete the agreement.

(iv) By letter dated January 29, 2004, the appellant through his attorney, returned the respondent's cheque, and gave notice that the appellant intended to enforce the agreement, by legal action if necessary.

(v) By Memorandum of Transfer dated February 20, 2004, the respondent purported to transfer the parcel of land to the Basdeo and Ramhit. The appellant caused a caveat to be lodged against the title, thus preventing the transfer from being registered under the Real Property Act Chapter 56:02.

(vi) By letter dated April 6, 2004, the appellant through his attorney, called upon the respondent to complete the agreement pursuant to clause 3 of the agreement which provided for completion within 90 days.

(vii) In 2004 the appellant filed an action in the High Court for specific performance, which stood dismissed in 2006 by operation of an amendment to the Rules of the Supreme Court. The appellant subsequently refiled the action in 2011.

(viii) The trial judge expressly found that the respondent and Basdeo deliberately concocted evidence of a prior oral agreement between them in order to justify the respondent's non-completion of his agreement with the appellant.

(ix) The trial judge expressly found that Basdeo was not a bona fide purchaser for value without notice. The evidence is that he knew of the agreement for sale to the appellant and had a cheque for $140,000.00 made out to the appellant to refund his deposit.

(x) The trial judge expressly found that there would be no prejudice to the respondent or to Basdeo if specific performance was granted. There was no evidence of prejudice before her. There was no evidence by the respondent or Basdeo of any expenditure on the land, or any change of position induced by the delay of the appellant in filing the second action.

(xi) The appellant never removed the caveat, thus maintaining the status quo as far as the title is concerned. Nor has he at any stage taken any steps to recover his deposit.

35. Having regard to all the circumstances of this matter, in my view it is just and equitable to order specific performance of the agreement for sale dated January 23, 2004.

36. Before disposing of this appeal, I will deal briefly with Mr. Ashraph's submission that the land has so significantly increased in value since the agreement for sale, that it would be unfair to grant specific performance at this time. Mr. Ashraph relies on a judgment of Hosein JA in Civil Appeal No. 6 of 1989 **Peter David Gerald Chang Sing & Ors v. Vishnu Kallicharan** (Unrep), in which Hosein JA states as an additional ground for refusing specific performance that it would be unfair and inequitable to grant it in view of the dramatic increase in the value of commercial property over the period of delay. The judge cited no authority for the proposition in his brief judgment, in which he added his additional comments having agreed with the judgments of Ibrahim and Hamel-Smith JJA, which he had read in draft. In fact, the majority judgments did not support the view expressed by Hosein JA.

37. I do not find Mr. Ashraph's submission to be attractive for two reasons. In the first place there was no evidence before the trial judge of any increase in the value of the land, save for a view expressed by the respondent, which the judge quite correctly rejected on the ground that the respondent had no expertise in valuing land. In the second place, I can think of no logical justification for an increase in the value of the land to redound to the benefit of a defendant who schemed and plotted to avoid completing a valid agreement for sale in order to obtain a higher price, or to the benefit of a third party who, with notice of the agreement, participated in the dishonest scheme.

DISPOSITION

38. It follows that this appeal must be allowed and the orders of the trial judge, except for the order for costs, are set aside. The order will be:

(i) A decree of specific performance of the agreement for sale dated January 23, 2004 is granted.

(ii) The respondent is ordered to transfer the parcel of land described in paragraph 1 of the statement of case within ninety days, upon payment to the respondent of the balance of the purchase price in the sum of $1,170,000.00. In default the registrar of the Supreme Court is directed to execute the Memorandum of Transfer in place of the respondent.

(iii) The Memorandum of Transfer dated February 20, 2004, between the respondent and Kimraj Basdeo and Zabida Shama Ramhit to be expunged from the records of the Registrar General.

(iv) The respondent is ordered to deliver vacant possession of the parcel of land upon execution of the memorandum of transfer.

(v) The respondent is ordered to pay to the appellant the costs of this appeal assessed as two thirds of those assessed below.

Dated the 28th day of March, 2019.

R. Narine,
Justice of Appeal.