JCPC 2025/0119

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL
ON APPEAL FROM THE COURT OF APPEAL
OF THE REPUBLIC OF TRINIDAD & TOBAGO

BETWEEN:

DINDIAL'S HARDWARE LIMITED

Appellant

-AND-

TERESA DE SILVA

Respondent

CASE FOR THE APPELLANT

INTRODUCTION AND SUMMARY

1. This is an appeal filed by the Appellant, Dindial's Hardware Limited against the decision of the Court of Appeal of Trinidad and Tobago dated 16th December 2024.

2. By a written agreement for sale dated 10th November 2016 *('the November agreement")* the Appellant *("Dindial")* contracted with the Respondent *("Ms. De Silva")* to purchase a property situated in Maraval, Trinidad *("the said property")*. **[EB/20]**

3. The agreed purchase price for the said property was $13,000,000.00 Trinidad and Tobago dollars. A deposit of 10% ($1,300,000.00) was paid at that time by the Appellant to the Respondent. A completion date of 28th February 2017 for the sale of the said property was stated in the November agreement. On the completion date the balance of the purchase price would have become payable. **[EB/24]**

4. Clause 5 of the November agreement provided that Ms. De Silva would convey the property to Dindial by the completion date. It stated that *"on the date fixed for completion the Vendor shall forthwith execute all documents necessary for*

the transfer of the property to the Purchaser or to whomsoever he shall direct." There was no provision in the agreement to extend the time for completion.

5. Clause 6 of the November agreement required Ms. De Silva to provide an up-to-date receipt for payment of the land and building taxes and a WASA clearance certificate prior to the completion date.

6. Clause 7 of the November agreement stated that if Ms. De Silva was unable to complete the sale of the property on the completion date by reason of a defect in the title, that Dindial would be entitled to rescind the contract and to obtain a refund of the deposit monies.

7. Clause 8 of the November agreement stated that if Dindial was unwilling or unable to complete the purchase of the property on the completion date that all sums paid by Dindial to Ms. De Silva would be forfeited as liquidated damages.

8. At the time that the November agreement for sale was executed, Ms. De Silva was not the legal owner of the said property. The said property was still registered in the name of the previous owner, Ebrahim Kazim who died on 6th March 2016. Ebrahim Kazim was the surviving joint tenant of the said property as his wife, Dr. Joan Kazim, who was the other joint tenant of the said property, had predeceased him. This was not the typical case of a sale by a purchaser to a vendor. The title and we say legal title, had to be acquired in order for Ms. De Silva to be able to sell the property to Dindial.

9. The beneficiary of the property under the last Will of Ebrahim Kazim was Ebrahim Kazim's son, one Abdul-Latif Kazim ("Mr. Kazim"). He was also one of the Executors named in that Will.

10. The other executors named in that Will, were Ebrahim's wife Dr. Joan Kazim who predeceased him and two of Ebrahim Kazim's other sons Farouk Kazim and Mumtaz Kazim. Both Farouk and Mumtaz subsequently renounced all their rights and title to the Probate and Executorship of the said Will. This is reflected in the Grant that was subsequently issued. **[EB/127]**

11. However, Mr. Kazim did not reside in Trinidad. Accordingly, on 22nd April 2016 **[EB/111]** and 9th February 2017 **[EB/419]** he executed a Power of Attorney appointing another gentleman named Abdul Hafeez Ali, to be his attorney and to apply for a Grant of Probate to the estate of Ebrahim Kazim on his behalf.

12. On 12th October 2016 Mr. Kazim entered into a written agreement with Ms. De Silva in which he agreed to sell her the said property for $1.5 million United States dollars. However, pursuant to that agreement only the nominal sum of US$100.00 was ever paid by Ms. De Silva as consideration. The October agreement for sale also fixed the completion date for 28th February 2017. The stated completion date in both the October and the November agreements was therefore the same. The copy of the October agreement relied on by the Respondent in the Court below is at **[EB/89.]** The copy of the redacted October agreement which the Appellant contended he received is at **[EB/343].** No provision in the October agreement was made for any extension of time thereof.

13. However, the October agreement contained additional matters which were not contained in the November agreement. Those additional matters included:-

    a) That the said property formed part of the estate of Abdul-Latif Kazim's father Ebrahim and that Mr. Kazim had executed a power of attorney in order to facilitate obtaining a Grant of Probate of the Will. The November agreement, on the other hand, contained no reference to Ebrahim, Mr. Kazim or of the fact that the said property was not owned by Ms. De Silva at the time that the agreement was executed.

    b) At paragraph E of the October Agreement, it was stated that the purchaser (Ms. De Silva) was fully aware that the said property formed a part of the Estate of Ebrahim Kazim and that it was hoped that the Grant of Probate would be obtained on or before 31st December, 2016 but that having regard to the length of time that such applications for Grant of Probate usually take, that the date for completion of the contract was on or before 28th day of February, 2017. It was also expressly stated in that agreement that time was not of the essence.

The November agreement, on the other hand, contained no reference to the fact that a Grant of Probate had been applied for by Mr. Kazim or that there might be a delay by Mr. Kazim in obtaining the Grant or that Dindial was aware of this state of affairs.

c) That only the sum of US$100 had been paid to Mr. Kazim by Ms. De Silva as consideration for the contract. The balance of the purchase price of US$1,499,900.00 under the October agreement only became payable within 21 days of the vendor giving Ms. De Silva notice that the Grant of Probate had been obtained. The payment of the nominal sum of US$100.00 or .0067% of the purchase price pursuant to the October agreement was in direct contrast with the substantial deposit of TT$1,300,000.00 dollars which represented 10% of the purchase price which was paid by Dindial to Ms. De Silva pursuant to the November agreement. Were the November transaction to be completed an investment of US$100 would yield a currency converted profit in the region of TT$2,000,000 dollars. If the transaction with Ms. Da Silva and the estate contained in the October agreement were to collapse the outer limit of such a loss was nominal in the sum of US$100.00.

14. By email dated 4th March 2017, **[EB/36]** Dindial wrote to Ms. De Silva stating that in light of her failure to provide the required documents that she was requested to refund the down-payment. The email did not identify what those documents were. However, it is to be noted that approximately 5 ½ months later, in a subsequent letter dated 15th August, 2017 **[EB/51]** Ms. De Silva through her Attorney at Law, Mr. R. L. Ramcoomarsingh wrote to Dindial's Attorney at Law attaching a Certificate of Assessment dated 21/07/17, a WASA clearance certificate dated 10/08/17 and a Grant of Letters of Administration with Will attached of Ebrahim Kazim dated 23/06/17 which were collectively described by Mr. Ramcoomarsingh as being *"the necessary documents which relate to the subject property."* Furthermore, Clause 6 of the November agreement specifically identified an "up to date receipt for payment of land and

building taxes" and a "WASA Clearance certificate" as being documents which the Vendor had to provide prior to the completion date.

15. By letter dated 10th March 2017 **[EB39]**, Ms. De Silva responded to Dindial's letter dated 4th March 2017 through her Attorney at Law, Mr. R. L. Ramcoomarsingh. In his letter he purported to set out Ms. De Silva's version of the history of events which preceded that letter. The Trial Judge held that during the Trial, Dindial admitted the contents of that letter. However, the learned Judge declined to attach much evidential weight to that letter because it did not state that Dindial had ever agreed to any term extending the time for completion and certainly the November agreement did not. **[EB/308&309 – paras 14-20]**

16. Further correspondence passed between Ms. De Silva's Attorneys at Law and Mr. R. L. Ramcoomarsingh. However, Ms. De Silva ultimately remained steadfast in her refusal to return the deposit monies to the Appellant.

17. It is noteworthy that in the letter from Mr. Ramcoomarsingh dated 8th May 2017 **[EB/48]**, reference was made to the fact that Mr. Kazim and Ms. De Silva had allegedly mutually agreed to extend the completion date to 31st May, 2017 by which time it was anticipated that Mr. Kazim would have received the Grant of Probate. However, no written supplemental agreement evidencing such an agreed extension was ever placed before the Court or disclosed by Ms. De Silva in the Court proceedings that ensued. Furthermore, there is no evidence from Mr. Ali, the Attorney who signed the October agreement. Ms. De Silva did not present evidence to the Court showing that extensions of time were sought and agreed to in respect of the October Agreement. Any such extension had to be in writing as required by section 4 of the Conveyancing and Law of Property Act Ch 56:01. In light of this, Ms. De Silva's ability to compel good title could not be proven. Ms. De Silva also failed to provide evidence that the Vendor in the October Agreement provided her with the requisite 21 days notice period to complete the sale after the Grant was obtained, pursuant to Clause 3 of the October Agreement. After the completion date in the October agreement the Courts below lacked any evidence from the Respondent as to what subsequently took place between Ms. De Silva and the Estate.

18. Six months after Dindial purported to rescind the November agreement and approximately 9 months after the November agreement, Mr. Ramcoomarsingh wrote to Dindial's Attorney at Law by letter dated 15th August, 2017 **[EB/52]** stating that the Grant of Probate had now been obtained and that whilst Ms. De Silva was entitled to treat the Appellant's actions as being a repudiatory breach of contract which entitled Ms. De Silva to forfeit the deposit, that Ms. De Silva was still ready and willing to complete the sale and to a reasonable period of time being agreed between the parties (he suggested 2 months), in which to complete the sale and in which time would be of the essence.

19. Dindial did not agree with that proposal. Instead, a pre-action letter was issued by Dindial's Attorney at Law to Mr. Ramcoomarsingh on 13th September 2017 **[EB/57]** and Dindial thereafter proceeded to institute a substantive civil claim for the return of its deposit on 28th December 2017 **[EB/4].**

20. On 19th February 2018 Ms. De Silva filed a Defence and Counterclaim in which she denied Dindial's assertions and contended that the actions and conduct of Dindial as contained in his 4th March 2017 letter constituted a repudiatory breach of the November agreement which had entitled Ms. De Silva to treat the deposit monies as being forfeited. **[EB/65]** An Amended Defence and Counterclaim was filed by Ms. De Silva on 23rd April 2018. **[EB/224]**

21. Up to the time of Trial Ms. De Silva still did not have a deed for the said property in her name. In fact, during the Trial, Mr. Ramcoomarsingh confirmed under Re-Examination **[EB/958]** that Ms. De Silva and Mr. Kazim had mutually agreed to end the October agreement and this admission was also noted by the Trial Judge at paragraph 28 of his Judgment. **[EB/311]**

22. Again, there was not one shred of evidence written or oral between Mr. Kazim and Ms. De Silva.

23. The following salient matters were also noted by the Trial Judge:-

a) The November agreement for sale was prepared by Ms. Dindial's Attorney at law (R.L. Ramcoomarsingh**) [EB/302 & 309]**

b) Both the October and November agreements for sale favoured Ms. De Silva because the October agreement required her, as the purchaser, to only make a nominal payment as consideration towards the purchase of the said property of US$100.00 which stood to be forfeited in the event of a breach of agreement by her. In contrast, the November agreement allowed her to retain the 10% deposit of the purchase price which had been paid by Dindial of TT$1,300,000.00 in the event of a breach of the agreement by Dindial. Therefore Ms. De Silva bore minimal financial liability or risk in the event that she did not pursue the October agreement. In contrast, Ms. De Silva stood to benefit immensely in the event of a similar breach of agreement by Dindial.

c) Mr. R. L. Ramcoomarsingh was the husband of Ms. De Silva. This is a matter that was not brought to the attention of Dindial at the time that the November agreement for sale was entered. **[EB/302-para 3&4 of Judgment].**

d) Mr. R. L. Ramcoomarsingh at all times purported to act as an Attorney at Law and specifically the Attorney at Law for Ms. De Silva. However, he was not lawfully entitled to do so because he was not registered at that time on the roll of Attorneys at Law who were entitled to practice law in Trinidad and Tobago. **[EB/307 & 308 – paras 16 & 20 of Judgment]**

e) Dindial was never informed nor advised of his right to receive independent legal advice prior to entering the said agreement. **[EB-310- Para. 24]**

f) The October and November agreements were separate, in that, Ms. De Silva did not require the proceeds of sale from the November agreement in order to complete the October agreement.

23. Ultimately, both the Trial Judge and the Court of Appeal were both highly critical of Ms. De Silva's acceptance of a windfall in retaining the deposit monies pursuant to the November agreement. The Court of Appeal, in particular, stated that the Court did not condone the inequitable characteristics of the November agreement. **[EB/1134 – Para. 40 of Judgment of Court of Appeal]**

24. On 9th June, 2020 the Honourable Mr. Justice Boodoosingh (as he then was) granted Judgment on Dindial's claim and the costs of his claim. The Trial Judge made no award of costs in respect of Ms. De Silva's counterclaim because he held that the contents of the claim and counterclaim overlapped. **[EB/301 & 322]**

25. The learned Trial Judge, Boodoosingh J in his written reasons made the following express findings:-

    a) The November agreement between Dindial and Ms. De Silva to purchase the said property and the October agreement between Ms. De Silva and Mr. Kazim for Ms. De Silva to purchase the said property were separate and distinct transactions. **[EB/309-para. 24]**

    b) Dindial was not advised to seek independent legal advice. **[EB/309-para. 24]**

    c) There was no collateral contract that allowed for a delay in completing the transaction. In contrast, the written terms of the November agreement expressly stated that 28th February 2017 was the deadline for completion. **[EB/311-para. 29]**

    d) Ms. De Silva failed to provide necessary documents to Dindial by 28th February 2017 namely the WASA clearance certificate and tax receipts which caused the November agreement to end. These documents were necessary for the Respondent to establish good title to the said property. **[EB/316-para. 33]**

e) A party must fulfil their contractual obligations before they can make time of the essence. **[EB/316-para. 33 and EB/318 – para. 36]**

f) Dindial was not required to serve a notice to complete or to make time of the essence of the contract before seeking rescission and recovery of the deposit monies. **[EB/320-para. 40]**

g) Ms. De Silva was therefore contractually obligated to return the deposit to Dindial. **[EB/321-para. 40]**

26. Ms. De Silva proceeded to appeal that decision to the Court of Appeal. **[EB/990]**

<u>THE COURT OF APPEAL UPHELD THE TRIAL'S JUDGE"S ASSESSMENT OF THE EVIDENCE AND FINDINGS OF FACT</u>

27. On the 16th December 2024 the Court of Appeal allowed Ms. De Silva's appeal **[EB/1122&1143]**. However, at paragraph 36 of its Judgment, the Court of Appeal stated that it upheld all of the Trial Judge's findings of fact and his assessment of the evidence. This included the Trial Judge's finding that there was no collateral contract between Dindial and Ms. De Silva to extend the completion date **[See paragraph 39 of the Judgment-EB/1134.)**

28. There has been no cross-appeal by Ms. De Silva in relation to those findings of the Court of Appeal which therefore stand.

<u>THE COURT OF APPEAL'S FINDINGS</u>

29. The Court of Appeal, however, disagreed with the Trial Judge's interpretation and application of the relevant law and legal principles as to the circumstances in which a purchaser is entitled to demand a refund of monies which are paid as a deposit pursuant to an agreement for sale. **[EB/1135 – Paragraphs 41 onwards]**

30. In its decision the Court of Appeal accepted the Trial Judge's findings of fact and his assessment of the evidence. However, it reversed his decision by seeking to re-characterize the legal significance of those facts.

31. In so doing the Court of Appeal erred by overlooking the fact that on the agreed completion date, Ms. De Silva remained incapable of performing the contractual obligations which she had assumed under the November agreement and that she could not insist upon the forfeiture provisions of the contract.

32. The Court of Appeal held that the Trial Judge fell into error by failing to apply the established principles of law as to the steps that can be taken when one party to an agreement for the sale of land is aggrieved by a delay in completion but time has not been made of the essence in that agreement.

33. The Court of Appeal referred to the following findings of the Trial Judge in its Judgement which the Court of Appeal considered to be errors of law:-

    a) Ignoring the special features of this transaction which included that Ms. De Silva did not have legal title when Dindial decided to buy the said property, that the title was in the name of the estate of Ebrahim Kazim and that a Grant of Probate of the estate was the only conveyancing matter standing between Dindial and the said Property. **[EB1137-para 47 of Judgment]**

    b) Insisting that a deed must exist in Ms. De Silva's name. The Court of Appeal held that such a requirement was inconsistent with the law on property transactions. **[EB1137-para 48]**

    c) Failing to acknowledge the interest that Ms. De Silva as a purchaser did have in the said property subject to her ensuring that she had good and marketable title to convey the said property either on the date of completion or soon thereafter. **[EB1137-para 48]**

d) Finding that Dindial fell within the category of cases where a notice making time of the essence was not required to bring the agreement to an end. **[EB1137-para 50]**

e) Overlooking the fact that having entered into an agreement with the executor in the estate of Ebrahim Kazim, Ms. De Silva had the power to compel a conveyance of the said property to herself or even to Dindial. **[EB1139-para 51]**

f) Failing to hold that the delay in obtaining a grant of letters of administration of the estate did not amount to a fundamental defect in Ms. De Silva's title which would allow for termination without notice on the completion date. **[EB1140-para 53]**

g) Applying the decision of the Judicial Committee in Mungalsingh v Juman 2015 UKPC 38 **[EB1522]** as legal authority for a finding that the failure of Ms. De Silva to provide a WASA clearance certificate and Land Tax receipt, which Dindial said it requested, amounted to a failure by Ms. De Silva, as the vendor, to show good title and that Dindial as the purchaser was entitled to immediately terminate the agreement. **[EB1140-para 54]**

h) That there was no basis in established law, to find that Dindial was entitled to terminate the agreement without notice and without making time of the essence and then to demand a return of the deposit. **[EB1140-para 55]**

THE ISSUES TO BE DETERMINED IN THIS APPEAL TO THE JUDICIAL COMMITTEE

34. We submit that the legal issues to be determined by the Board which arise from the Court of Appeal's decision can be particularized as follows:-

(a) Firstly, did the Trial Judge ignore the special features of this transaction which included that the Respondent did not have legal title when the

Appellant decided to buy the said property, that the title was in the name of the estate of Ebrahim Kazim and that a Grant of Probate of the estate was the only conveyancing matter standing between the Appellant and the said Property.

(b) Secondly, was the Trial Judge plainly wrong to hold that it was a legal requirement for the vendor of the property to have a deed to their property in their name either at the time that the agreement for sale was entered or upon the completion date.

(c) Thirdly, did the Trial Judge fail to acknowledge the interest that Ms. De Silva as a purchaser did have in the said property subject to her ability to produce good and marketable title to convey either at the date of completion or soon thereafter.

(d) Fourthly, was the Trial Judge wrong to find that Dindial fell within the category of cases where a notice making time of the essence was not required to bring the agreement to an end.

(e) Fifthly, did the Trial Judge overlook the fact that having entered into an agreement with the executor in the estate of Ebrahim Kazim, Ms. De Silva had the power to compel a conveyance of the said property to herself or even to Dindial. If so, was he plainly wrong to have done so.

(f) Sixthly, was the Trial Judge wrong in failing to hold that the delay in obtaining a grant of letters of administration of the estate did not amount to a fundamental defect in the title of Ms. De Silva which would allow for termination of the November agreement without notice on the completion date.

(g) Seventhly, did the Trial Judge err in law in applying the decision of the Judicial Committee in Mungalsingh v Juman 2015 UKPC 38 **[EB1522]** as authority that the failure of Ms. De Silva to provide a WASA clearance certificate and Land Tax receipt, which Dindial said it requested, amounted to a failure by Ms. De Silva as the vendor, to show good title and as a result of which the purchaser, Dindial was entitled to immediately terminate the agreement.

(h) Lastly, was the Trial Judge wrong to find that Dindial was entitled to terminate the agreement without notice and without making time of the essence and then to demand a return of the deposit.

ISSUE 1: Did the Trial Judge ignore certain the special features of this transaction which included that Ms. De Silva did not have legal title when Dindial decided to buy the said property, that the title was in the name of the estate of Ebrahim Kazim and that a Grant of Probate of the estate was the only conveyancing matter standing between Dindial and the said property. [EB1137-para 47 of Judgment]

RESPONSE TO ISSUE 1

35. We submit that the Trial Judge was correct to adopt the approach which he did and that there was no basis for the Court of Appeal's finding because:-

a) The so-called "special features" were not legal exceptions to settled principles governing completion of contracts for the sale of land. They were merely factual explanations as to why the Respondent was unable to perform her contractual obligations on the agreed completion date. The parties contracted for completion on a specified date, namely 28th February 2017.

b) Ms. De Silva did not have legal title on 28th February 2017 nor at any time up to the trial of the matter

c) Ms. De Silva was therefore not in a position on the completion date to convey the legal estate of the said property to Dindial which she had contracted to so.

d) The fact that Ms. De Silva had acquired certain equitable rights in the said property pursuant to the October agreement was of no moment because Dindial did not contract to purchase an equitable interest in the property alone but to purchase the entire legal interest.

e) Dindial could not be compelled to accept a lesser interest than he had bargained for under the terms of the November agreement.

f) There was no collateral contract between Dindial and Ms. De Silva to extend the time for completion if probate and assent of the said property was delayed. The Court of Appeal upheld that finding **[EB/1134-para 39].** In light of those concurrent findings of fact, it was plainly wrong for the Court of Appeal, in its Judgment, to impugn the Trial Judge's decision on the grounds that the Trial Judge failed to take into account the alleged special features of this transaction. In doing so the Court of Appeal in effect approbated and reprobated. It in effect reinstated the collateral contract which the Trial Judge had rejected and which rejection the Court of Appeal had approved.

g) Furthermore, the Court of Appeal was plainly wrong to hold that the only conveyancing matter which stood between Dindial and the said property was the obtaining of the Grant of Probate of the Estate. That was a significant error by the Court of Appeal which failed to acknowledge the following additional steps which still had to take place before the sale from Ms. De Silva could be completed and which had not been done prior to the completion date of the November agreement:-

   (a) A Grant of Probate/Grant of Letters of Administration with Will annexed had to be obtained.

   (b) A Deed of Assent had to be prepared assenting the property from the Estate of Ebrahim Kazim to Mr. Kazim.

   (c) Payment of the balance of the purchase price had to be made by Ms. De Silva to Mr. Kazim.

(d) A Deed of Conveyance had to be prepared conveying the property from Mr. Kazim to Ms. De Silva and/or to Dindial.

36. The Court of Appeal therefore in its analysis effectively reduced a multi-stage conveyancing process into a single administrative event. It failed to examine the October agreement to determine its status in terms of the right of Ms. De silva to enforce or compel same at any time up to the date for completion and up to the month of August 2017 when Mr. Ramcoomarsingh wrote indicating that probate of the estate had been granted.

37. We submit that the Court of Appeal materially underestimated the number of legal and practical steps which still had to occur and procedural issues that might take place before Ms. De Silva could convey good legal title to the said property to Dindial. Whether those steps occurred sequentially or contemporaneously, or whether those procedural issues took place, the fact is that none of them had been completed by the contractual completion date. These included:-

(i) Possible delays in obtaining the Grant of Probate - Such applications can vary between months and years and the speed at which such applications can progress is subject to a variety of factors including queries from the Probate Registry, the speed at which those queries are addressed, the filing of Caveats by third parties and internal delays within the Probate Registry itself. An acknowledgement that such delays frequently take place and are unpredictable was contained in the unreacted October agreement between Ms. De Silva and Mr. Kazim that was produced and relied on by the Respondent **[EB/89&91]** although such an acknowledgment was not also contained in the November agreement executed between the Appellant and the Respondent **[EB/20].** We note that the redacted October agreement did not contain any matters about delays in obtaining a Grant.

(ii) Possible difficulties by Ms. De Silva in raising the necessary finances to pay the balance of the purchase price for the said property it being in US dollars - Ms. De Silva was bound to complete the sale with Mr. Kazim before she could compel him to transfer the property to her noting that she had only paid US$100.00 on account of the purchase price and there was no evidence adduced by Ms. De Silva at Trial of her ability to pay the balance of the purchase price to Mr. Kazim. This was not a rolled-up agreement where in the same agreement the purchaser was buying from a Third party to sell to a buyer. The October and November agreements were, as stated above, to be treated as separate by Ms. De Silva's case as revealed in cross examination. There was no evidence that Ms. De Silva possessed financing for the October agreement. In fact, as we set out below it was the very opposite.

(iii) Possible objections by Mr. Kazim from completing the sale - Any attempt by Mr. Kazim to resile from the agreement with Ms. De Silva would still have required Ms. De Silva to take several additional steps before she could lawfully compel him to transfer the said property to Dindial. She would first have to issue a pre-action letter, then file a claim in the High Court and then obtain a Judgment in the High Court and possibly pursue enforcement proceedings. If the matter was defended by Mr. Kazim then such a claim could potentially take several years to be completed. In the interim, Dindial would have been rendered powerless with no ability to control or speed up the sale of the property to him. It would be subject to the actions and conduct of Mr. Kazim, Ms. De Silva, the Probate Registry and the High Court none of whom (save for Ms. De Silva) had any contractual duty towards Dindial personally.

38. The aforementioned contingencies demonstrate why Dindial as the purchaser could not be compelled to wait indefinitely for completion which was wholly dependent upon multiple uncertain events outside of its control.

39. It is also relevant to note the following additional matters which only took place after the completion date but which the Court was also entitled to consider:-

(i) That a Deed of Assent was executed on the 24th August 2017 **[EB/133] (See exhibit E to the Defence and Counterclaim).**

(ii) That Mr. Kazim and Ms. De Silva ultimately did not proceed with the sale to Ms. De Silva and mutually agreed to end the agreement for sale about a year afterwards **[EB/311] (See Para. 28 of Judgment of Boodoosingh J.).**

<u>ISSUE 2: Was the Trial Judge plainly wrong to hold that it was a legal requirement for the vendor of the said property (Ms. De Silva) to have a deed to the said property in her name either at the time that the November agreement for sale was entered or upon the completion date.</u> [EB1137-para 48]

<u>RESPONSE TO ISSUE 2</u>

40. We submit that the Trial Judge did not formulate any new rule of conveyancing law and did not hold that a vendor must always have legal title before entering a contract for sale. His finding was that Ms. De Silva as the vendor, was unable to convey the title which the parties had contracted upon under the November agreement to be conveyed by the agreed completion date.

41. The Court of Appeal's statement negates the Trial Judge's finding that the purchaser never contracted to purchase an equitable interest in the said property. Nowhere in the November agreement did the parties include the same terms which were contained in the October 2017 agreement. Furthermore, the Attorney at Law who prepared both agreements was Ms. De

Silva's husband and so it would have been a relatively simple task for him to have reflected all of the same terms which had been included in the October agreement in the November agreement if it was the intention of the contracting parties in the November agreement to have been bound by the terms of the October agreement.

42. The Trial Judge made reference to same at paragraph 22 of the Judgment **[EB/309]** and the Court applied the contra proferentem rule against Ms. De Silva on the basis that her husband was the one who had drafted the November agreement.

43. The Trial Judge's point was that at the time that the completion was due to take place pursuant to the November agreement that Ms. De Silva did not have legal title to the property and that Dindial had never contracted to purchase a mere equitable interest in the said property **[EB/320-para 41]**. The Trial Judge therefore implicitly recognized the interest which the vendor had but emphasized that this was not the interest which Dindial had contracted to purchase at the time that he executed the agreement for sale and therefore Dindial should not be bound to accept a lesser title nor should he be forced to extend the time for completion of the November agreement in order to allow Ms. De Silva additional time to sort out her affairs in the hope that if such time was granted that Ms. De Silva might be able to perfect her legal title in order to be able to convey same to Dindial.

<u>ISSUE 3: Did the Trial Judge fail to acknowledge the interest that Ms. De Silva as a purchaser did have in the said property subject to her having good and marketable title to convey at the date of completion or soon thereafter.</u> [EB1137-para 48]

<u>RESPONSE TO ISSUE 3</u>

44. We submit that the Trial Judge did not fail to acknowledge the interest that Ms. De Silva as a purchaser had in the said property pursuant to the October agreement for sale. The Trial Judge correctly concluded that Ms. Dindial's

interest was only a beneficial interest and that under the terms of the November agreement Dindial had never contracted to purchase a mere beneficial interest but had contracted to purchase the legal title to the property. **[EB/312-para 30]**

45. The Trial Judge correctly concluded that an equitable interest is not the same as a legal title and that in this case the purchaser had contracted for the legal estate and should not be compelled to accept a lesser title.

46. If we look at the reality of the transaction, there was no privity of contract between Dindial and the Estate. Dindial gave evidence at Paragraph 12 of his witness statement **[EB 329]** that he had to seek financing for the purchase, as most commercial transactions require. This was a logistical nightmare. Dindial could not go to a Bank for financing as the Bank would have to place a lien by way of mortgage over the property. That charge by the bank could not be placed until the property was conveyed from De Silva to Dindial. The Court of Appeal failed to unravel the transaction, which based on the evidence given, demonstrated that it would not have occurred. Making time of the essence made zero difference because of the fact that the transaction without title in Ms. De Silva was not one that could be consummated.

ISSUE 4: Was the Trial Judge wrong to find that the Appellant fell within the category of cases where a notice making time of the essence was not required to bring the agreement to an end? [EB1137-para 50]

RESPONSE TO ISSUE 4

47. We submit that the Trial Judge's analysis of the law as to the circumstances in which a purchaser and a vendor may be required to make time of the essence before rescinding an agreement for sale was detailed and on point.

48. The Court of Appeal appeared to be of the view that irrespective of whether the time for completion had elapsed, that where it is not expressly stated in the agreement that time is of the essence, neither the vendor nor the purchaser

can ever seek to rescind an agreement for sale of land unless they have first issued a notice to the other party making time of the essence and have given the other party a reasonable additional period of time after that notice has been served in which to complete the sale.

49. In making that finding, we submit that the Court of Appeal failed to properly consider or apply the relevant legal principles as set out in the legal authorities that were relied upon by the Trial Judge in his written Judgment. The Court of Appeal erred in law in failing to note that the circumstances in which one might be required to issue a notice to make time of the essence in an agreement for sale differs greatly depending on whether the person in default is the purchaser or the vendor.

50. Firstly, at paragraphs 32 and 33 of the Judgment **[EB/312]** the Trial Judge considered the position of the vendor and referred to and relied on Mungalsingh v Juman to contend that at the date of completion a vendor must be able to show good title before he can make time of the essence

51. He went on at paragraph 34 of the Judgment **[EB/316]** to refer to **Halsbury's Laws of England 4th edition (1983) at paragraph 126** and to highlight inter alia,

> *"Even where time is not originally of the essence a party who through his own default fails to compete on the contractual date commits a breach of the contract and is liable in damages…"*

52. He then went on at paragraph 35 **[EB/317]** to refer to Re Barr's Contract [1956] Ch 551 at 556 **[EB/1569-1577]** in which Danckwerts J set out 3 conditions which have to be satisfied before time can be made of the essence for the purposes of completion the first of which is that the Vendor must be able, ready and willing to proceed to completion.

53. Based upon his application of the law from those decisions to the facts of this case the Trial Judge correctly held at paragraph 36 of the Judgment **[EB/318]**,

that Ms. De Silva as the vendor, would not have been in a position to make time of the essence on the completion date.

54. The Trial Judge then went on to analyze the circumstances in which a purchaser (Dindial) might be entitled to rescind an agreement for sale. He held that,

a) A purchaser was not obligated to make time of the essence before rescinding an agreement for sale although it was open to him to do so **(Para. 36 of Judgment) [EB/318].**

b) A breach of contract by the vendor in failing to show a good title releases the purchaser from any obligation to perform his part of the agreement and gives him the right to rescind. If he takes advantage of this right at once, without making requisitions on title or acting otherwise under the contract in such a way as to affirm it, then the contract ceases to have effect. The purchaser may then recover the deposit with interest on it and his expenses of investigating title**. (See Paragraph 37 of the Judgment in which the Trial Judge cited from Lewis Emmet, Emmet and Farrand on Title, 19th edition, Sweet and Maxwell, 7-004) [EB/318].**

c) The Trial Judge went on at paragraph 38 of the Judgment **[EB/319]** to refer to the decision in **Pips v Walton** **[EB/1542-1553]** in which Sir Robert Megarry stated that,

> *"When a person sells property which he is neither able to convey himself nor has the power to compel a conveyance of it from any other person, the purchaser, as soon as he finds that to be the case, may say "I will have nothing to do with it." The purchaser is not bound to wait to see whether the vendor can induce some third person (who has the power) to join in making a good title to the property."*

d) The Trial Judge at paragraph 39 of his Judgment **[EB/319]** also considered the learning in **<u>Barnsley's Conveyancing Law and Practice, M Thomson, Fourth edition, OUP at P. 645</u>** in which the learned author stated,

> *"The purchaser's right to rescind for a fundamental defect in title arises at the latest on the contractual date for completion. He is not obligated to allow the vendor further time to perfect his title. Even though time is not of the essence, he is free to rescind without first serving a Notice to complete."*

e) The Trial Judge then correctly applied these legal principles at paragraph 40 of his Judgment **[EB/320]** to conclude that,

> *"From these authorities it can be extracted that there was no requirement for the claimant to serve a notice to complete and there was no requirement for the claimant to make time of the essence of the contract. The rescission could take place on the completion date."* Further, in the same case of ***Pips v Walton*** (172 at 175) Sir Robert Megarry opined:
>
> > *"I find some difficulty in the concept of a right of rescission which operates in equity but not at law as relieving the purchaser from specific performance, but leaving him exposed to an action for damages if the vendor obtains a proper title before the last day for completion. Contracts for the sale of land differ from most other contracts for sale in that they contemplate a period between contract and completion which will suffice, inter alia, for the investigation of title**. If the day after the contract is made the vendor tells the purchaser that he, the vendor, has no title, but that he has hopes of getting title in time for completion, so that until he has got it he cannot deduce title, I cannot see much justice in telling the***

purchaser that he can rescind the contract forthwith so as to escape from specific performance, but that if he does so he will remain at risk of damages in case the vendor succeeds in obtaining a title in time… Contracts for the sale of land are based on ownership and rights, and not on mere hopes or expectations, however well founded. *A vendor whose contract is supported by an enforceable right to compel a third party to convey the land has a right in support of his contract; and this is so even if in the event his right proves, exceptionally, not to be specifically enforceable but sounding only in damages. A vendor who has no more than the benefit of an unenforceable promise to give him the land, or a claim to relief against forfeiture, has no right which supports his contract, however well-founded his expectations. If disappointed, he has no claim to specific performance or damages, but only his feelings of regret.* ***In my opinion, a vendor who lacks any title to the land that he has contracted to convey, and also lacks any rights to compel a third party to convey it, cannot escape from the principle of Forrer v Nash, supra, by pointing to his prospects of obtaining a title by being given relief against forfeiture, however excellent those prospects are. He has power neither to convey the land nor to compel anyone else to convey it, and that is the end of the matter."*** (emphasis added)

<u>ISSUE 5: Did the Trial Judge overlook the fact that having entered into an agreement with the executor in the estate of Ebrahim Kazim that Ms. De Silva had the power to compel a conveyance of the said property to herself or even to Dindial?</u> [EB1139-para 51]

<u>RESPONSE TO ISSUE 5</u>

54. We submit that the Trial Judge did not overlook the fact of whether having entered into an agreement with Mr. Kazim Ms. De Silva could have compelled Mr. Kazim to convey the property to herself or to Dindial.

55. The Trial Judge at paragraph 38 of his Judgment **[EB/319]** expressly referred to the decision in **<u>Pips v Walton</u> [EB/1542-1553]** in which Sir Robert Megarry had stated,

> *"When a person sells property which he is neither able to convey himself nor has the power to compel a conveyance of it from any other person, the purchaser, as soon as he finds that to be the case, may say "I will have nothing to do with it." The purchaser is not bound to wait to see whether the vendor can induce some third person (who has the power) to join in making a good title to the property."*

56. The Trial Judge went on to state at paragraph 41 of the Judgment **[EB/320]**,

> *"Further since the Claimant never contracted for the purchase of an equitable interest in the property the fact that the Defendant had a remedy against Mr. Kazim was also not material to the Claimant's position."*

57. Relying as the Court of Appeal did on the October agreement for sale as evidence that there was an enforceable right to cause a conveyance into Ms. De Silva's name from the Estate was wrong. On the date that was fixed for completion, there was no enforceable right for completion of the October nor November contract because the will had not been probated nor had there been

any assent of the property to anyone. To have an enforceable right against the Estate to compel a conveyance, Ms. De silva had to be ready to complete but she was not in a position to complete the sale of the property.

58. Ms. De Silva's husband Mr. Ramcoomarsingh agreed that the October and November agreements were separate. However, in Mr. Ramcoomarsingh's letter on behalf of Ms. De Silva of 10th March 2017 to Dindial **[EB 39]**, she avers that she was "now forced to seek finance to purchase the property". De Silva's inability to fund the October Agreement was made all the more clear when Mr. Ramcoomarsingh confirmed in re-examination that the October Agreement was brought to an end due to the inability to raise United States Dollars to complete the sale**. [EB/311 & EB/958]**

59. Without finance to consummate the October agreement, Ms. De Silva could not have completed the purchase of the property. Making time of the essence of the contract before recission would have done nothing as the sale of the property to Ms. De silva never occurred.

ISSUE 6: Did the Trial Judge err in law by failing to hold that the delay in obtaining a grant of letters of administration of the estate did not amount to a fundamental defect in Ms. De Silva's title which would allow for termination without notice on the completion date? [EB1140-para 53]

RESPONSE TO ISSUE 6

59. The Trial Judge did not err in law by failing to make any express finding that the delay in obtaining a grant of letters of administration of the estate was not a fundamental defect in Ms. De Silva's title which would allow for termination without notice on the completion date.

60. The Court of Appeal held that Ms. De Silva had an equitable interest in the said property by virtue of the October agreement and that the only issue was the obtaining of the Grant and that, if necessary, Ms. De Silva could compel Mr. Kazim to complete the agreement. Therefore in those circumstances, the Court

of Appeal held that it was plainly wrong for the Trial Judge to have held that Dindial was entitled to rescind the November agreement and that he instead should have issued a Notice to the Vendor requiring it to complete the sale within a reasonable period of time.

61. We submit firstly, that the Trial Judge's decision was correctly based on the fact that at the date of completion Ms. De Silva did not have legal title to the said property and that Dindial was therefore entitled to rescind the contract at that stage and to be reimbursed its deposit. However, the Respondent refused to do so. **[EB310&311 – Para 26]**

62. However, we submit that the Trial Judge's decision would also have been correct and further supported by the fact that Ms. De Silva's defect in title was not limited to Mr. Kazim obtaining a Grant. It also included (1) a deed of Assent being prepared and registered conveying the property from the Estate to Mr. Kazim, (2) Ms. De Silva paying a substantial balance of US$1,499,900.00 (in effect the entire purchase price for the said property less $100.00) to Mr. Kazim, and (3) Mr. Kazim preparing a separate deed conveying the property to Ms. De Silva or to Dindial. This had to take place before the completion of the November agreement as being separate from the October agreement.

63. We therefore submit that Ms. De Silva's title was defective as at the completion date and this fully entitled Dindial to rescind the November agreement for sale.

ISSUE 7: Did the Trial Judge err in interpreting the decision of the Judicial Committee in Mungalsingh v Juman 2015 UKPC 38 to mean that the failure of Ms. De Silva to provide a WASA clearance certificate and Land Tax receipt, which Dindial said it requested, amounted to a failure by Ms. De Silva as the vendor to show good title which entitled Dindial, as the purchaser, to immediately terminate the agreement? [EB1140-para 54]

RESPONSE TO ISSUE 7

64. We submit that the Trial Judge correctly analyzed and applied the legal principles in Mungalsingh v Juman to the facts of this case.

65. The Judicial Committee of the Privy Council *inter alia* outlined in ***Mungalsingh v Juman*** [2015] UKPC 38, at paragraphs 18 through to 20 **[EB/1522-1532, see page 1528]**, that the courts would not force on a purchaser a title which would be unacceptable to a reasonable mortgagee. The Board went on to say that 'good and marketable title' is what a mortgagee such as a bank would expect as a secured lender. To that effect the Board opined that conveyancing practice in Trinidad and Tobago was that good title was not shown unless the seller produced documents for Land and Building Taxes and Water Rates to show that indeed there were no encumbrances on the property in the form of unpaid taxes. The Board orated as follows:

> ***"[18]*** *Thus, in the light of these authorities, it appears that (subject to the terms of the relevant contract of sale)* ***good marketable title is what the court will require before it forces a property on an unwilling buyer****. It is unsurprising that the court will not insist on a title being accepted unless it is marketable. Further, when it comes to land and buildings, the natural presumption, at least in the absence of evidence to the contrary, would be that there is only one market, which one would expect to include institutional mortgagees.*
>
> ***[19]*** *To a linguistic philosopher there is a possible distinction between "good and marketable title" (the expression used by Mr Chadeesingh*

and the Judge) and "good marketable title" (the expression used by Luxmoore J and Millett LJ). However, in the absence of any suggestion in the cases or textbooks that there is a difference between the two expressions in the context of conveyancing law and practice, the Board considers that such fine semantic distinctions should be avoided in this field. The Board also finds it very hard to accept the notion that the courts would force on a purchaser a title which would be unacceptable to a reasonable mortgagee, and ***Mr Chadeesingh explained that his view as to what constituted "good and marketable title" was based on his experience of what a bank would expect as a secured lender****. This is also consistent with what is said in Megarry & Wade: The Law of Real Property (8th ed, 2012), para 15-075.*

[20] More particularly, Mr Chadeesingh said, and the Judge accepted, that conveyancing practice in Trinidad and Tobago was that good title was not shown unless the seller produced the Documents. On the face of it at any rate, there is no reason to doubt this. Unpaid land tax gives rise to a charge on the relevant property (see s 18 of the Lands and Buildings Taxes Act), and unpaid water rates and unpaid land tax can each result in distraint on, or even the sale of, the property concerned (see ss 7 - 13 of the Rates and Charges Recovery Act, s 74(5) of the Water and Sewerage Act and ss 22 - 27 of the Lands and Buildings Taxes Act respectively). Accordingly, it is easily understandable why a buyer of property would wish to be sure that neither water rates nor land tax were owing in respect of that property before he completes his purchase. (emphasis added)

66. However, in this case Ms. De Silva and her Attorney at Law failed to provide these documents to Dindial prior to the completion date.

67. In fact, those documents and the Grant of Letters of Administration with Will Annexed were only sent to Dindial's Attorney at Law by letter dated 15th August 2017 **[EB/52]** almost 9 months after the November agreement had been

rescinded. It is clear from the date of those documents that all of them post-dated the completion date.

68. Furthermore, in this case the defects in title were not limited to the W.A.S.A clearance certificate and land and building taxes receipt alone but also included, the Grant of Letters of Administration with will annexed, a deed of assent, payment of the balance of the purchase price by Ms. De Silva to Mr. Kazim and a deed of conveyance in the name of Ms. De Silva (since the November agreement had made no reference to or contractual term in relation to title being vested in a third party, or any agreement by Dindial to accept a conveyance from that third party such as Mr. Kazim instead of from Ms. De Silva.) The Court of Appeal did not examine all of the steps and all of the documents that were required by Ms. De Silva to place herself in a position to compel a third party to transfer title to her.

69. The Trial Judge was therefore entitled in all of the circumstances to hold that Dindial as the purchaser, was entitled to immediately rescind the November agreement. That finding was supported by the legal authorities cited by the Trial Judge at Paragraphs 37-39 of his Judgment. **[EB/318]**

ISSUE 8: Did the Trial Judge err in law in finding that Dindial was entitled to terminate the agreement without notice and without making time of the essence and then to demand a return of the deposit when there was no legal basis to make such a finding? [EB1140-para 55]

RESPONSE TO ISSUE 8

70. We submit that the Trial Judge correctly analyzed and applied the relevant principles of law relating to circumstances when a purchaser is entitled to rescind an agreement for sale. In so doing, the Court correctly focused on the fact that at the date of completion Ms. De Silva had neither disclosed essential documents which were necessary to establish that she had good and marketable title to the said property nor did she in fact have the legal title which she had contracted with Dindial to sell because at that stage legal ownership was still vested in the estate of Ebrahim Kazim. Further, to this date Ms. De

Silva has never had legal ownership and good and marketable title to the said property.

DID THE COURT OF APPEAL ERR IN LAW IN FAILING TO CONSIDER, IN THE ALTERNATIVE, WHETHER BASED ON THE UNCONSCIONABILITY OF THE TRANSACTION DINDIAL, AS THE PURCHASER, SHOULD BE ENTITLED TO A REFUND OF ITS DEPOSIT FROM MS. DE SILVA

71. If, contrary to the Appellant's primary submissions, this Committee finds that the November agreement was not lawfully rescinded, then we submit that this Committee ought to grant equitable relief against the forfeiture of Dindial's deposit having regard to the following matters.

72. The Court of Appeal made strong findings regarding the inequity of the said transaction. However, the Court fell into error by assuming that it was only required to examine whether the Trial Judge's interpretation and application of the relevant law was wrong and if it was held to be wrong then to overturn it.

73. At Paragraph 40 of the Court of Appeal's Judgment **[EB/1134]** it stated,

> *"The Trial Judge's comments, interspersed in the Judgment, showed strong disapproval of what he may have sensed as grave injustice in the Appellant's retention of the TTD$1,300,000.00 deposit. He commented, for example, on the fact that the Appellant stood to make a tidy profit. That was an accurate observation since she never took title of the Maraval property and had only paid US$100.00 down on it. The Court also disparages the Appellant's acceptance of a windfall and, in no way, condones the inequitable characteristics of the transaction."*

74. However, we submit that it was open to the Court of Appeal and to this Committee in light of the concurrent findings made by both the High Court and by the Court of Appeal, to find that the transaction was inequitable and that the Claimant was entitled to be repaid the deposit or to such other sum as the Court may have considered to be appropriate in all of the circumstances.

75. The Court of Appeal failed to consider its jurisdiction to do so as referred to in **Stockloser v Johnson [1954] 2 WLR 439 at page 489 to 490** **[EB/1586-1607]** in which Denning LJ stated,

> *"But where there is a forfeiture clause or the money is expressly paid as a deposit (which is equivalent to a forfeiture clause) then the buyer who is in default cannot recover the money at law at all.* ***He may however have a remedy in equity, for, despite the express stipulation in the contract, equity can relieve the buyer from forfeiture of the money and order the seller to repay it on terms as the Court thinks fit."***
>
> ***(our emphasis)***

76. We submit that the Court of Appeal was plainly wrong, in light of its other findings, not to consider and to hold that Dindial would alternatively be entitled to have a remedy in equity which would have relieved Dindial as the purchaser from forfeiture of the money and which would have ordered Ms. De Silva as the seller to repay the deposit to Dindial on terms as the Court might think just.

77. The equitable considerations in this case which weighed in favour of ordering Ms. De Silva to repay the deposit monies to Dindial were as follows:-

    a) That the October 2016 agreement which was integral to the November agreement, only required Ms. De Silva to pay the nominal sum of US$100.00 in the event of non-completion of the purchase of the said property by her from the third party whilst the November 2016 agreement required Dindial to pay Ms. De Silva 10% of the purchase price in the sum of TT$1,300,000.00. This amounted to a significant difference in the risks which the parties agreed to abide by in the event of an inability to complete the agreement.

    b) That the person who prepared both the October and November agreements was the husband of Ms. De Silva.

    c) That this fact was not disclosed to Dindial by Ms. De Silva at the time that he entered the November agreement.

d) That it was never disclosed to Dindial that Ms. De Silva's husband and Attorney at Law did not possess a practice certificate.

e) That Dindial was never advised of his right to retain independent legal advice in light of same.

f) That Ms. De Silva and Mr. Kazim ultimately mutually agreed to bring the October agreement to an end one year later.

g) That at no time was Ms. De Silva ever the owner of the said property nor did she ever incur any financial liability as a result of the aborted October agreement. However, even if she did, under the said agreement that liability was limited to the nominal sum of US$100.00. However, in contrast, under the terms of the November agreement for sale, Ms. De Silva stood to obtain a significant and inequitable windfall as a result of Dindial not purchasing the said property.

<u>ANCILLARY ISSUE – THE RESPONDENT'S UNAGREED ISSUES</u>

78. The Respondent has raised two un-agreed issues in the Statement of Issues namely:-

a) Whether or not the Court of Appeal was correct to find that the trial judge had not erred in his assessment of the evidence or findings of fact.

b) Whether or not the Court of Appeal was correct to find that it was improbable that there existed a collateral contract that Dindial's Hardware would grant extensions of time under the November Agreement to allow for the completion of a grant of representation in respect of the Estate.

79. We submit that the Court of Appeal accepted the findings of the Trial Judge in relation to his assessment of evidence and findings of fact including his finding that that there was no collateral contract that Dindial would grant extensions of time under the November Agreement to allow for the completion of a grant of representation in respect of the Estate. These constitute concurrent findings of fact which it is the settled practice of the Board not to depart from save and except in exceptional circumstances none of which apply in this case.

80. In **Water and Sewerage Authority of Trinidad and Tobago v Sahadath [2022] UKPC 56** **[EB/1726-1736]**. In the course of the Board's judgment, Lord Leggatt said,

> *"15. The second issue raised is whether the trial judge 'had sufficient evidence before him' to conclude that the Authority's leaking pipeline caused the damage to the claimants' home. To succeed on this issue the Authority would need to persuade the Board to depart from its settled practice of declining to review concurrent findings of fact made by two lower courts, unless there are some special circumstances which would justify a departure from the practice."*

81. In this case as the transcript shows, there was extensive cross-examination of the witnesses who gave evidence and we submit that this Board should defer to the Trial Judge's findings of the facts as upheld by the Court of Appeal and decline to interfere with the concurrent findings of fact.

CONCLUSION

82. This case highlights the very impossible nature of this transaction and its inability to be workable. The dates for completion of both transactions were on the same day. Unless Ms. De Silva had the finance to buy the property before the Dindial's purchase, it would have created an insurmountable feat to have this transaction concluded.

83. Consider it this way, Ms. De Silva never had the property in her name. Dindial goes to the Bank for a loan, the Bank says, “I cannot finance you as we are unable to place a mortgage on record for the property unless it is in Ms. De Silva’s name to be conveyed to you.” A finance company would have to prepare a cheque for Ms. De Silva but it cannot do so as Ms. De Silva needs to purchase the property from the Estate. Where does that money come from on the same date in US dollars?

84. No bank would in their right commercial sense give Ms De Silva money to buy a property from a third party with which Dindial had no privity of contract.

85. Serving a notice to make time of the essence was therefore useless in every sense of the word. The Court of Appeal unfortunately did not look at this transaction from a practical conveyancing standpoint. They treated the existence of the October agreement to purchase from an Estate, (un-probated), as sufficient to invoke a notice requirement. Had they examined the reality of what was before them in the evidence, the simple conclusion was that the service of a notice in the circumstances of this case would have made no difference to the absence of title.

86. Even so, when Mr. Ramcoomarsingh wrote his letter advising Dindial in the month of August that Ms. De Silva could complete the transaction, that was almost 6 months after the date fixed for completion, an inordinately long time for any Court to expect a party to complete a commercial transaction.

<u>THE RELIEF SOUGHT</u>

87. In conclusion, it is respectfully submitted that:-

   a) This appeal should be allowed.
   b) That the Judgment of the Court of Appeal should be set aside.
   c) That the Judgment of the Trial Judge should be restored.

d) Alternatively, Dindial should be granted equitable relief against forfeiture of the deposit and there should be an order for repayment of the deposit on such terms as the Board considers just.

TERRENCE BHARATH SC

28 August 2026