Appeal No. JCPC 2025/0119

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

ON APPEAL FROM THE COURT OF APPEAL
OF THE REPUBLIC OF TRINIDAD AND TOBAGO

BETWEEN:

DINDIAL'S HARDWARE LIMITED

Appellant

\- and -

TERESA DE SILVA

Respondent

THE RESPONDENT'S CASE

A. INTRODUCTION

1. This Case is filed on behalf of the Respondent. It adopts the defined terms in the Statement of Agreed Facts and Issues **("the SFI")** and does not repeat its contents. Facts are referred to below only where the argument requires them.

2. In this Case, all references to paragraphs are shown in square brackets. Further are reference to:
   a. a page in the electronic bundle is identified by the EB.
   b. a paragraph in the Judgment of the Court of Appeal is identified by CA.
   c. a paragraph in the Judgment of the High Court Judge is identified by HC.
   d. a paragraph in the Appellant's Case is identified by AC.

3. The Respondent invites the Board to dismiss the appeal and to affirm the judgment of the Court of Appeal of Trinidad and Tobago (Kokaram, Brown-Antoine and Donaldson-Honeywell JJA) dated 16 December 2024 ("the Judgment"),[1] **[EB 1122-1142]** by which the Court of Appeal held that she was entitled to forfeit the deposit of TT$1,300,000.00 paid under the November Agreement.

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[1] **EB 1122–1143**. **[EB 1122-1142]**

4. Stripped of its rhetoric, the appeal raises one central question of law - *where a contract for the sale of land, in this case a contract of sub sale, fixes a date for completion but does not make time of the essence, is the purchaser entitled to rescind on or immediately after that date, without notice and without making time of the essence, because matters of conveyance remained outstanding on the vendor's part.*[2] **[EB 1794-1798]** The Court of Appeal answered no. In doing so it applied orthodox principles that have stood for more than a century and that this Board restated as recently as *Mungalsingh v Juman* [2015] UKPC 38.

5. On the five agreed issues the Respondent's position, developed in Parts B and C below, is as follows:
   a. the law has recognised contracts of sub-sale for over a century, and no rule required the Respondent to hold a deed in her own name before contracting;

   b. the pending grant, which was required to execute conveyances of legal title was mere proof, not the source, of a title already vested in the executor whom the Respondent could compel to convey; it was a matter of conveyance, not a fundamental defect in title which could entitle the Appellant to terminate without first making time of the essence;

   c. *Mungalsingh* concerned what a vendor must do before making time of the essence, and is no authority for excusing a purchaser from making time of the essence at all;
   d. no authority permits termination by mere lapse of time where time is not of the essence, and the delay the Appellant invokes accrued after, and because of, its own wrongful repudiation; and
   e. the validity of a rescission is judged when it is made, not by hindsight, and the hindsight here in any event favours the Respondent.

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[2] In *Emmet on Title* 18th ed. (1983) by JT Farrand states: "The position was well summarised by Dankwerts J in *Re Barr's Contract* [1956] Ch 551, at p 556: 'Apart from the provisions of any plain and clear conditions of sale, the law about making time of the essence of the contract for the purpose of completion…is subject to the following conditions: first of all, the vendor [in the case at Bar, the purchaser] must be able, ready, and willing to proceed to completion…Secondly, at the time when the vendor [here, the purchaser] purports to make time of the essence, the purchaser [the vendor] must be guilty of such default as to entitle the vendor [purchaser] to rescind the contract subject to its being done by a reasonable notice. Thirdly, once the right to serve a notice of the kind in question has arisen, the time allowed by the notice must be a reasonable time.' **[EB 1796]**

6. Part D addresses the claim for equitable relief against forfeiture, which the Appellant advances for the first time in its Case, and which the Board ought not to permit at this stage of the proceedings

7. Part E sets out the additional grounds, rejected by the Court of Appeal, on which the Respondent will rely if it becomes necessary, notice of which was given in [16] of the Respondent's detailed response of 19 December 2025 and in [32] of the SFI.

B. THE GOVERNING PRINCIPLES OF LAW
The legal principles which apply to agreements for sale where time is not of the essence

8. Where a contract for the sale of land fixes a date for completion and time is not made of the essence, failure to complete on that date is a breach of a non-essential term. It does not, without more, entitle the innocent party to treat the contract as at an end. The innocent party's route to termination runs through a notice making time of the essence and allowing a reasonable time for completion; rescission becomes available only upon non-compliance with that notice. The Court of Appeal of Trinidad and Tobago so held in *Bidaisee v Sampath* Civ App No 165 of 1985, per Gopeesingh JA at p 18 **[EB 1275]**:

> "… if one party fails to complete by that date, although time is not made of the essence in that contract, the party in default is deemed to be in breach of that non-essential term. The date fixed for completion cannot be treated as a mere target date. **As a result the innocent party may immediately thereafter give a notice that the other party is in breach of contract and make time of the essence. However, the time limited for completion by that notice has to be reasonable.** It is no longer necessary to wait until there has been an unreasonable delay after that breach before such a notice may be served. Such a breach of a non-essential term does not, however, entitle the innocent party to treat the said breach as a repudiation of the contract, justifying rescission and to rely on same as a ground for avoiding an action for specific performance by the party in breach. **It is only if the party, after being served with a notice to complete within a reasonable time is in breach and fails to complete within that reasonable period fixed by the notice (which in effect makes time of the essence) that the innocent party can treat such failure as a** repudiation **of the contract justifying rescission**." [Emphasis added.]

9. The Board dismissed the appeal from that decision.[3] The rule is of long standing. In *Bidaisee* (*supra*), Lord Nicholls of Birkenhead in giving the advice of the Board stated at

[3] *Bidaisee v Sampath* (1995) 46 WIR 461, PC. **[EB 1282-1289]**

p. 463 g[4] **[EB 1284]** that, "[t]he principle to be applied here is not in doubt." On the question of whether the time limited by a notice is reasonable, Lord Nicholls said that "the court will consider all the circumstances of the case: see the classical exposition given by Lord Parker of Waddington in *Stickney v Keeble* [1915] AC 386 at pages 418, 419." **[EB 1678 - 1679]** The principle as stated in *Stickney v Keeble* (*supra*) is that the purchaser aggrieved by the vendor's delay *"may serve upon the vendor a notice limiting a time at the expiration of which he will treat the contract as at an end"*. Similarly, in *Mungalsingh v Juman* [2015] UKPC 38 at [13] **[EB 1526 -1527]**, Lord Neuberger stated:

> "Once the date for completion had passed, either party, being ready, able and willing to complete, could make time of the essence by requiring the other party to complete within a reasonable time. If the other party did not complete within the stipulated time, the first party could then treat the Agreement as at an end."[5]

The narrow exception

10. A narrow exception permits immediate rescission where the purchaser discovers a ***"fundamental defect in title"***. Its scope was stated by Sir Robert Megarry V-C in *Pips (Leisure Productions) Ltd v Walton* [1981] 2 EGLR 172,[6] **[EB 1533 - 1541]** , adopting Sir John Romilly MR in *Forrer v Nash* (1865) 35 Beav 167 at ([1981] 2 EGLR 172 @ 174):

> "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'."

11. The exception has been applied in only a handful of reported cases, and its anatomy in each is the same: the vendor had nothing to convey and no enforceable right to have any title conveyed to him. In *Forrer v Nash* the vendor could not grant the term he had sold without his landlord's discretionary consent; in *James Macara Ltd v Barclay* [1944] 2 All ER 589 **[EB 1415 - 1419]** the property had been effectively requisitioned by the Government; and in *Pips* itself the lease sold had already been validly forfeited, and the

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[4] (1995) 46 WIR 461, 463 g. **[EB 1284]**

[5] In *Williams' Contract for Sale of Land and Title to Land* 4th ed. (1975) by G. Battersby, the author stated at p.533: "Where time is not made of the essence of the contract in the first instance, it may be made so by either party serving on the other a notice to complete within a reasonable time provided that, at the date of service of such notice, there had been some default or unreasonable delay on the part of the party on whom the notice is served and provided also that the party serving the notice has at that date fulfilled his part of the contract.'(Footnotes omitted.) **[EB 1801]**

[6] See also (1980) 43 P & CR 415. **[EB 1542 - 1533]**

vendor's only prospect was the discretionary grant of relief. Megarry V-C confined the principle in terms:

> "The principle was laid down by Sir John Romilly MR in Forrer v Nash (1865) 35 Beav 167 at 171. "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'. T**he 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 sold.**" [7] **[EB 1538]**
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> …
>
> But however it is put, **I would, despite some hesitation in view of the state of the authorities, hold that upon discovering that a vendor has no title or power to convey what he has contracted to convey, the purchaser may thereupon treat the contract as at an end, both at law and in equity. In saying that, <u>I speak only of defects such as the absence of title in this case</u>, and not of minor deficiencies, removable defects and so on.**[8] [Underlining ours.] **[EB 1551]**
>
> **…**
>
> **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.[9] **[EB 1551]**

12. In the cases which the principle has been applied, the vendor required the exercise of a discretion by a third party holding superior title in order to make his own title. The Respondent has not unearthed any decision of the House of Lords, the Supreme Court or this Board considering or applying the principle identified in those cases.

13. In any event, the exception is of no application where the purchaser is specifically told of the nature of the purchaser's title before the agreement for sale is executed, see *Wylson v Dunn* (1887) 34 Ch. D 569 at 578 **[EB 1771]** where it was held that the principle in *Forrer v Nash* was:

> "altogether inapplicable to a case where the vendor in the first instance tells the purchaser, and the purchaser knows from all the circumstances of the case, that the vendor has no title, and is not likely to have one for some time."

[7] Page 174. **[EB 1538]**
[8] Page 175. **[EB 1551]**
[9] Page 175. **[EB 1551]**

14. Recourse to the doctrine has also been criticised where a purchaser attempts to rely on a technical point to attempt to escape the bargain which he or she has entered into, in *re Hailes and Hutchinson's Contract* [1920] 1 Ch 233 **[EB 1578 - 1585]** a trustee sold land without any express power of sale; the purchaser's very first requisition declined the title and demanded the return of her deposit; the vendor answered that all the beneficiaries were prepared to concur in the conveyance. Astbury J declared that the vendor could make a good title, observing (at 237) **[EB 1582]** that *"it is plain that a good title has been offered <u>but the purchaser wishes to take advantage of a technical point to get out of the purchase"</u>*. [Underlining ours.]

Grades of title and matters of conveyance

15. Conveyancing law does not treat title as binary. It distinguishes grades of title, and it distinguishes defects in title from matters of conveyance. There are *<u>bad titles, doubtful titles, good titles, and good holding titles, and a good title need not be a perfect title</u>*, see generally *Barnsley* at pages 269-271 **[EB 1779 - 1781]**. Further, there are another category of 'defects' which are called '***matters of conveyance***' which are in truth not defects in title at all. These are aptly described as follows by *Barnsley* at page 268 **[EB 1778]** as follows:

> "<u>Where there exists a defect which the vendor can remove independently of another person, it is said to constitute a matter of conveyance.</u> Matters of conveyance do not strictly fall within the duty to show a good title, but there are still matters which the vendor must deal with in order to perform his contract. The following constitute matters of conveyance: the discharge of a mortgage affecting the property, the concurrence of mortgagee who is immediately redeemable, the appointment of trustees for the purpose of giving a receipt for capital money arising on a sale of settled land, but not the appointment of a new trustee for sale to replace one of the contracting parties."
> [Our underlining.]

16. A vendor who can compel a conveyance from a third party stands, for this purpose, in a position to obtain and convey the legal estate[10] and therefore that vendor does not have a fundamental defect in title[11].

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[10] *Barnsley's Conveyancing Law and Practice*, 4th ed, pp 267–271. At p 267: where the vendor *"can compel the conveyance from some third party", the vendor "is always in a position to obtain the legal estate"*. **[EB 1777]**

[11] As per the *dicta* of Megarry VC in *Pips* at page 174 set out in paragraph 11 above – a vendor must have neither title nor the ability to compel a conveyance. **[EB 1538, EB 1551]**

Contract of Sub Sale

17. A purchaser of legal title can enter into a contract of sub sale as soon as the agreement for sale is signed although he has not yet acquired legal title. In *Pittack v Naviede* [2011] 1 WLR 1666 **[EB 1554 - 1568]** Mark Herbert QC sitting as a deputy High Court Judge stated under the heading "Sub sales in General" **[EB 1563]** as follows:

> "29. …In the absence of a provision to the contrary, express or implied, a purchaser may effect a sub-sale and require the vendor to execute a conveyance or transfer in favour of the sub-purchaser direct; though the original purchaser may be required to participate for the reason stated."

18. The Board has recently emphasised the consequences of a failure by courts below to recognise and give effect to a contract of sub-sale, *Donowa v Dondridge Heights* [2024] UKPC 18 at [16] and [18] **[EB 1346 - 1347]**. In fact, in many of the decided cases, there were contracts of sub-sales. See e.g., *Stickney v Keeble (supra)* **[EB 1646 - 1687]**.

19. In fact, the sub-contract need not await the head contract. In *Wylson v Dunn (*1886) 34 Ch D 569 at 577–578 **[EB 1770 - 1771]**, the vendors agreed to sell half an acre of a field they had not yet contracted to buy; once they concluded the head contract, they had in equity got the property and could enforce the sub-sale, and the purchaser's attempted withdrawal a fortnight later came too late (at 579–581) **[EB 1772 - 1774]**. The Respondent's position was in fact stronger; her head contract preceded her sub-sale.

Executors and proof of title

20. The property of a deceased vests in his executor from death. The grant is the authenticated evidence of the executor's title, not its source: *Ingall v Moran* [1944] 1 All ER 97, a decision upheld by this Board as governing the common law position which continued to apply in Trinidad and Tobago in *Ingall v Moran* [1944] 1 All ER 97. An executor may contract to sell estate land before grant; what the grant supplies is only proof of title.[12]

21. Tellingly, executors have been contracting to sell estate land before grant for as long as the probate jurisdiction has existed; if the pendency of a grant were a "fundamental

[12] See also *Williams, Mortimer and Sunnucks, Executors, Administrators and Probate* (2008 ed), para 8-02 **[EB 1806 - 1807]**; *Barnsley*, pp 318–319 **[EB 1782-1783]**: before grant an executor can do all acts incident to his office, including entering a binding contract to sell estate land; the grant is required to prove the title, and in practice completion awaits it.

defect" entitling a purchaser to walk away without notice, no executor could enter into a binding contract for the sale of land. That is of course a heresy and not the position, so that the pendency of a grant cannot as a matter of law be a fundamental defect in title that falls within the exception. That the date for completion has passed without the grant does not change the nature of the "defect" or elevate what is a matter of want of paper proof of title into a fundamental defect.

22. The foregoing principles are dispositive of the five issues in the SFI.

C. ANALYSIS OF THE ISSUES IN THE CASE

23. Despite having agreed to certain issues in the SFI, the Appellant has reformulated the issues which it addresses in its Case. With respect, a party should not be permitted to reformulate issues in its written case as in most appeals where there are two parties, the Board will be asked to consider three sets of issues instead of the issues that have been agreed. The more parties, the more formulations of the issues. Permitting such an approach to the litigation before the Board is not conducive to efficient management and disposal of appeals.

24. In this case, the Respondent addresses the issues as formulated in the SFI. Where possible, the Respondent will attempt to cross reference its arguments to those in the Appellant's Case.

25. It is, however, important to point out by way of preliminary observation that the Appellant's arguments under its Issues 1-3 are devoid of any reference to or analysis of the legal principles. They are an attempt by the Appellant to introduce into the Board's consideration rhetoric and matters of no legal significance.

26. That said, we now turn to address the five agreed issues.

Agreed issue A – The Respondent did not need a title deed before contracting

27. The November Agreement was a contract of sub-sale, a species of agreement for sale which the trial judge obviously did not address his mind to. That these agreements are available to contracting parties and that they do not require the sub vendor to have a title

deed in hand when contracting or even at the time of completion is well recognised, *Pittack v Naviede (supra).* Indeed, the sub vendor need not have an executed agreement for sale with his vendor, *Wylson v Dunn, (supra*). There is therefore no question that the Respondent did not need to have a title deed prior to agreeing to sell to the Appellant.

28. When she executed the November Agreement, the Respondent held a purchaser's interest under the October Agreement, carrying an enforceable right to a conveyance of the legal estate to herself or to whomsoever she directed.[13] This is precisely what occurs in a contract for sub sale and it is precisely what the trial judge failed to consider but what the Court of Appeal did.

29. The Appellant complains about the COA's statement that *"to insist that a deed must exist in the Appellant's name is unrealistic and not consistent with the law on property transactions",* CA [48]. The Appellant argues that the trial judge *"did not formulate any new rule of conveyancing law"* and did not hold that a vendor must have legal title before contracting (AC [40]). The Appellant is correct that the trial judge did not do either of those things. The Court of Appeal was not commenting on anything said by the trial judge, it was in that paragraph rejecting an argument raised by the Appellant. There can therefore be no criticism of the COA's comment.

30. The Appellant repeatedly makes a related complaint that it *"never contracted to purchase an equitable interest"* (AC [35](d)–(e), [44]– [45]). That complaint attacks a position nobody holds or ever held. In a sub-sale, the sub-purchaser contracts for the legal estate. The sub-vendor performs by procuring its conveyance at completion, whether by first taking a deed in her own name or by directing her vendor to convey to the sub-purchaser. The Appellant was never asked to accept a lesser interest. The performance of the November Agreement would have resulted in the conveyance of full legal title to the Appellant.

31. The question was not what interest was being sold but rather, how long, in a contract for the sale of land where time is not of the essence, would the law permit the Respondent to

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[13] **SFI, para 12(d) [EB 1177 – now numbered 10(d)]**. See *Shaw v Foster* (1872) LR 5 HL 32 **[EB 1608 - 1645]**; *Lysaght Edwards* (1876) 2 Ch. D. 499, 505-506 per Jessel, MR **[EB 1498, 1504-1505]**; *Gordon Hill Trust v Segall* [1941] All ER 379, CA.**[EB 1351 - 1365]**

complete the conveyancing steps necessary to vest the legal estate in the Appellant before the Appellant could terminate. That is the question and the answer to that question is clear – that the Appellant must first give notice making time of the essence and allowing a reasonable period to lapse, the reasonableness of the period being determined by reference to all circumstances (*Stickney v Keeble*) (*supra*). As Megarry, VC in *Pips* (*supra)* at p. 175 **[EB 1539]** reminded us that: "*Contracts for the sale of land differs 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.*"

Agreed Issue B - Did the absence of a formal grant of representation amount to a fundamental defect in title which entitled the Appellant to terminate without making time of the essence

32. On the completion date the position was as follows:
    a. the legal estate had vested in Mr. Abdul Latiff Kazim as executor upon the death of Ebrahim Kazim;
    b. The October Agreement bound him to convey to the Respondent or at her direction; and
    c. the single outstanding step on the title side was the grant — the proof, not the source, of a title that already existed and an application for which was before the Supreme Court.[14]

33. That is the paradigm of a matter of conveyance. It bears no resemblance to *Forrer*, *Macara* or *Pips*, in each of which the vendor had no title and no right against the person who did. The Respondent had both - a vendor in whom title vested and a contract compelling him to convey. Under the very test in *Pips*, that ends the exception.

[14] **SFI, para 14**. **[EB 1178]**

34. The Appellant also had the October Agreement [with certain portions redacted, which are irrelevant for the purposes of this case] in hand before executing the November Agreement. The Appellant was also given a copy of the title deed to this property, before the execution of the November Agreement .The Appellant knew that the Respondent did not have legal title and that a grant of representation was required before the Respondent could get a title deed in hand. The exception that permits immediate termination did not apply, *Wylson v Dunn.*

35. The Respondent's position is in fact stronger than the vendor's in *In re Hailes* in which the principle in *Forrer* was held to be inapplicable. In *Hailes,* the Vendor's good title rested on the beneficiaries' mere willingness to concur, and the exception was held not to apply on the mere assertion that they would join in the conveyance and not upon proof thereof. In this case, the Respondent held a binding and enforceable contract entitling her to the conveyance as of right.

36. Like in *Hailes*, the evidence demonstrates that the Appellant simply did not wish to bound by its bargain. In cross-examination Mr. Dindial admitted that he never bothered to pursue obtaining a commitment letter from his bank,[15] **[EB 736]** never had the property valued,[16] **[EB 737]** that the bank never declined the loan,[17] **[EB 750]** that he simply gave up on the financing at the end of February 2017,[18] **[EB 807]** that he could have closed,[19] **[EB 807]** and that he no longer wanted the property,[20] **[EB 807]** On the completion date, the Appellant demanded its money back and followed up this demand in writing on 4th March 2017.[21]**[EB 349]** Added to all of those matters, was the fact that the Appellant was never ready, willing and able to complete on the date it purported to terminate the contact, as Mr. Dindial admitted that the Appellant never tendered the balance of the purchase price.[22] **[EB 715]** That is not a purchaser exercising a right of rescission for want of title. It is a purchaser repudiating a bargain it no longer wished to keep.

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[15] **EB736 Line 10-16.**
[16] **EB737 Lines 2-12**.
[17] **EB750 Lines 4-10**.
[18] **EB807 Lines 5–10**.
[19] **EB807 Lines 11-16**.
[20] **EB807 Lines 17–19**.
[21] **EB 349**.
[22] **EB 715 Line 7 to EB716 Line 14**.

37. The November Agreement says the same thing. Clause 7 entitled the Appellant to rescind and recover the deposit only should the Respondent be unable to complete the sale by reason of a defect in title; clause 8 entitled the Respondent to forfeit the deposit should the Appellant be unwilling or unable to complete on the date fixed.[23] The parties thus themselves allocated the deposit by reference to the very distinction the authorities draw. There was no defect in the title, only conveyancing steps in train, so clause 7 was never engaged; and on Mr. Dindial's admissions the Appellant was both unwilling and unable to complete, so clause 8 was. The common law and the contract give the same answer.

In any event, there is the decision of *Harold Elliott and H. Elliott (Builders) Ltd v Pierson* [1948] Ch. 452. **[EB 1366 – 1371]** This decision is authority for the further proposition that if after contract the purchaser discovers that the vendor has no title the Purchaser may repudiate, but the Purchaser must repudiate as soon as he became aware of the vendor's interest (or the lack thereof). If he does not elect to terminate immediately, he would be taken to have waived his right so to do (See page 456). In this case, Mr. Dindial knew of the necessity for a Grant of Probate before the signing of the November Agreement as he stated in his Witness Statement at [9] that he had received a copy of the redacted October Agreement with Mr. Abdul Latiff-Kazim. Accordingly, not only would *Wynne v Dunne* preclude the exception from applying, but on the principle in this case, the Appellant would have waived his right to repudiate by waiting until the completion date to terminate, having known of the vendor's interest for months.

38. At AC [37] the Appellant sets out three potential contingencies which it says that the Court of Appeal underestimated. Those contingencies – the possibility of delay in obtaining probate, financing issues in respect of the October Agreement and a hypothetically recalcitrant Mr. Kazim are however irrelevant to this case. This is because these are ordinary contractual risks which may or may not arise in relation to an agreement for sale. They are not fundamental defects in title which would entitle a purchaser to terminate without giving notice making time of the essence and allowing a reasonable time for completion. *Pips* draws the distinction: the mere existence of an enforceable right against the third party is sufficient to uphold the vendor's contract; only the vendor with no right at all, resting on hope, falls within the exception. Even the

[23] **SFI, paras. 8 & 10 (d)–(e). [EB 1177]**

limited exit recognised in *Wylson v Dunn* — determination by notice while the vendor has not yet acquired the property in equity — was never open to the Appellant: the October Agreement preceded the November Agreement, and the equitable right it conferred subsisted throughout.

39. Those potential contingencies[24] may give rise to delay or may lead to the head agreement for sale being terminated later. But that there is the potential for that to happen does not entitle the sub-purchaser to terminate immediately under the exception. If those contingencies were to arise, the law provides the ordinary principles confirmed by this Court in *Mungalsingh* to deal with when the sub purchaser may terminate. Those rules require:

    a. The sub-purchaser must himself be ready, able and willing to complete;
    b. The sub purchaser must then serve a notice making time of the essence and specifying a reasonable period to complete, that reasonable period taking into account all relevant circumstances; and
    c. The lapse of time without performance.

40. None of those steps was taken by the Appellant in this case. The evidence demonstrates that the Appellant fails at the first stage. It was never ready, willing and able to complete so that it could not even make time of the essence on the completion date. A party who himself is not in a position to complete cannot complain about the other party's delay and purport to terminate the agreement – that is the whole point of *Mungalsingh (supra)*.

41. The same is true for the steps identified by the Appellant in AC [35] G and the complaint of reducing a multistage conveyancing process into a single administrative event. Those steps are matters which at best give rise to delay and which are dealt with under the ordinary principles, not the exception permitting immediate termination. In any event, the number of steps identified by the Appellant and the delay which may be occasioned are both overstated. Once the grant of representation was obtained, all other steps could have taken place on the same day. Indeed, a deed of conveyance directly from Mr. Kazim to the Appellant was also possible since sub-sales routinely complete by a single deed from

[24] With the benefit of hindsight, those contingencies were rendered nugatory as those matters were completely satisfied.

the head vendor direct to the sub-purchaser at a simultaneous completion, with the purchase money flowing through each completion from the sub-purchaser to his vendor and from his vendor to the head vendor.[25]

42. The charge of approbation and reprobation (AC [35] (f)) mistakes fact for contract. The collateral contract that failed below was an alleged promissory term. The "special features" identified at CA [47] are findings of knowledge that Mr. Dindial signed knowing that title stood in the Estate and that the grant was the outstanding step. Those findings rest on the agreed documents[26] and on Mr. Dindial's own admissions in cross-examination.[27] **[EB 765, EB 799]** The Court of Appeal did not extrapolate from that knowledge the existence of some new contract or contractual term after rejecting the existence of a collateral contract. Instead, the Court of Appeal considered Mr. Dindial's knowledge in the context of asking what a reasonable notice period may have been. That issue arose because of the Appellant's argument below that it nonetheless should have been permitted to terminate due to the lapse of time, an argument which the Appellant repeats before the Board. It is addressed further under issue D hereunder. The Court of Appeal was not reprobating as contended.

Agreed Issue C – Mungalsingh is distinguishable

43. The Appellant's reliance on *Mungalsingh* is misconceived. That was a vendor's claim for specific performance after the vendor had purported to make time of the essence. The Board held that a vendor who has not shown good title cannot serve an effective completion notice. The case was about the preconditions a party must satisfy *before he can make time of the essence*, not about when a purchaser may dispense with making time of the essence altogether. The Board's statement of the orthodox route, at [13], is set out at [8] above. The trial judge misapplied that decision. He took a case which explains the conditions that must exist before a party to an agreement for sale can make time of the

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[25] *Barnsley*, pp 279–280; *Pittack v Naviede* [2011] 1 WLR 1666 at [29] **[EB 1563]**. The structure had the imprimatur of the House of Lords a century ago - in *Stickney v Keeble* the vendors were completing twenty-three sub-sales by direct conveyances from the head vendor on a single day, the purchase money flowing through — "usual enough", per Earl Loreburn ([1914-15] All ER Rep 73 at 76).

[26] **SFI [10]– [12] [EB 1177 and EB 1178 now numbered paragraph 14]**; the October Agreement identified the Estate, the executor as vendor, and the completion date, and provided for conveyance to Ms. De Silva or at her direction: **SFI [12]**. **[EB 1178 now numbered paragraph 14]**

[27] **EB765 lines 8–23**; **EB799 lines 23–25** (Mr. Dindial accepted that he knew probate had first to be obtained before either agreement could be completed.)

essence and deployed it to excuse the Appellant from the procedure itself. The Court of Appeal was correct to distinguish it.

44. As to the receipt for land and building taxes and the WASA clearance certificate, these were items that the Respondent was contractually bound to provide under clause 6. The provision of same are the paradigm of the "minor deficiencies, removable defects" which Megarry V-C expressly placed outside the exception and as *Mungalsingh* itself recognizes at [21] were "*mere matters of conveyance*" and not matters of title, far less fundamental defects in title. The Board's observations in *Mungalsingh* at [18]– [20] explain why a purchaser completing a purchase wants those documents; they say nothing to entitle a purchaser to rescind without notice for their absence.

Agreed Issue D - Lapse of time did not dispense with the notice requirement

45. Issue (d) supposes that, even absent any notice, sufficient delay entitled the Appellant to terminate. No authority supports termination by mere effluxion of time where time is not of the essence. The authorities of which *Bidaisee* and *Mungalsingh* are examples among thousands, go the other way. Delay in completion beyond the completion date is a breach of a non-essential term, and the innocent party's route to termination runs through a notice fixing a reasonable time.

46. *Stickney v Keeble* is itself confirmation that long delay does not preclude the need to give notice. In that case the vendor was *"guilty of unnecessary delay*". The House of Lords did not decide the case on the basis that there had been unnecessary delay. Their Lordships considered the rule in equity that notice first had to be given making time of the essence as being settled, the issue for determination being whether the period stated in the notice was reasonable. *Stickney* itself involved a sub-sale so that the notice rule applies both in ordinary contracts for sale and in contract for sub-sales.

47. Quite apart from the foregoing, the issue does not arise on the case. The Appellant did not wait upon delay. It purported to orally rescind the agreement in the week prior to 4th March 2017 and on that date, the Appellant communicated it again in writing, EB349. In the letter from its Attorneys on 13th April 2017 **[EB 358 – 359]**, the Appellant asserted that the contract was already at an end, EB358. The *"lapse of time between the date set*

for completion and the eventual grant" therefore accrued after, and under the shadow of, the Appellant's own wrongful repudiation.

48. When the Respondent tendered performance on 15th August 2017 by enclosing the grant, the certificate of assessment (for lands and building taxes) and the WASA certificate, and proposing completion within two months, time to be of the essence,[28] **[EB 365]** the Appellant refused and issued its pre-action letter, [29] **[EB 370]** thereby evincing an intention not to be bound by the contract. This did not require acceptance by the Respondent because the Appellant had telegraphed its termination of the contract. Even measured to 15th August 2017, five and a half months was well judged within a reasonable time, as the Court of Appeal held at CA [57], with the knowledge both parties had from the outset that a grant was pending; what is reasonable is wholly specific fact dependent.[30]

49. Moreover, a party invoking delay must itself be ready, willing and able to complete.[31] The Appellant never was. Its Managing Director, Mr. Dindial, executed the November Agreement holding the title deed and the October Agreement, and knowing that title stood in the Estate and that a grant of representation was pending.[32] **[EB 765, EB 799]** Between execution and the completion date the Appellant never requested the clause 6 documents, never called on Ms. De Silva to complete, and never served any notice of any kind.[33] **[EB 1178]** In cross-examination Mr. Dindial admitted the matters set out at paragraph 36 above. On the day of completion, he orally requested a refund of the deposit. Four days after the completion date, the Appellant demanded its money back.[34] **[EB 349]** That is not a purchaser who is ready, willing and able to complete exercising a right of rescission for want of title. It is a purchaser repudiating a bargain it no longer wished to keep.

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[28] **EB365**.
[29] **EB370**.
[30] *Stickney v Keeble* [1915] AC 386 at 397 **[EB 1657]**; and see *Williams v Greatrex* [1957] 1 WLR 31 **[EB 1737 - 1750]**, where years elapsed.
[31] *Mungalsingh v Juman* [2015] UKPC 38 at [13] **[EB 1526]** ("being ready able and willing to complete"); *Re Barr's Contract* [1956] Ch 551 at 556; [CA 57].
[32] **SFI [10]– [12] [EB 1177 and EB 1178 now numbered as paragraph 14]**; [CA 47]; Mr. Dindial's admissions in cross-examination: **EB765 lines 8–23**; **EB799 lines 23–25**.
[33] **SFI [16] [EB 1178]**.
[34] **EB349**.

Agreed Issue E - The argument that making time of the essence would have made no difference because the Appellant could not have completed in any event

50. Agreed issue (e) asks whether the Court of Appeal ought to have placed reliance on the proposition that, had a notice making time of the essence been served at any time between the completion date and the trial, the Respondent would not have been in a position to complete.

51. It is convenient to begin by identifying where this agreed issue is dealt with in the Appellant's Case, because it receives no dedicated treatment there. The threads of the argument, so far as the Respondent has been able to ascertain are to be found as follows:

    a. The "noteworthy" matter at AC [17] that although it had been stated that there had been an agreed extension of the October Agreement, no other evidence was led to prove that extension such that the Respondent had never proven that she could have completed the contract at any future time;

    b. A bare assertion at AC [35(b)] that the Respondent *"did not have legal title on 28th February 2017 nor at any time up to the trial of the matter"*;

    c. At AC [57]– [59], where it is said that to have an enforceable right the Respondent *"had to be ready to complete"* but that the letter of 10 March 2017 shows she was *"forced to seek finance"* and that her husband had confirmed in re-examination that the October Agreement was later brought to an end for inability to raise United States dollars; and

    d. The assertion at AC [59], that *"[m]aking 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."*

52. As to the first point - as AC [17] itself concedes, there was in fact evidence that there had been an extension of the October Agreement by mutual agreement in the letter of 8th May 2017.[35] **[EB 48]** It is true that there was no corroborating evidence but there was never any obligation on the Respondent to prove any extension to the October Agreement for the following reasons:

[35] **EB48**.

a. An agreement for sale of land does not terminate automatically when the completion date passes. That is the very error which the Appellant makes on this appeal. Although the completion date has lapsed, there are steps which must be taken to bring the agreement to an end. There was no evidence of any such steps having been taken. In fact, it is undisputed that the Appellant never served a notice on the Respondent making time of the essence and granting a reasonable time to complete.

b. The Appellant, as claimant asserting a right to rescind for a fundamental defect in title, bore the burden of establishing that defect; no case of the Respondent's inability to fund the October Agreement in February 2017 was pleaded, and none was put to the Respondent or to Mr. Ramcoomarsingh.

c. To the contrary, the evidence demonstrates quite clearly that the parties to the October Agreement upheld their bargain after the completion date and indeed up to trial. As the Appellant acknowledges, the Respondent eventually provided the grant of letters of administration with the will annexed, the water clearance certificate and the receipt for land and building taxes. Clearly these had been provided by Mr. Kazim in furtherance of his obligations under the October Agreement.

d. The Appellant purported to terminate without making time of the essence for a fundamental defect. The burden was on him to establish that defect. There was no burden on the Respondent. This is confirmed by *Hailes*. In that case, recourse to the principle in *Forrer v Nash* was refused on the mere assertion by the vendor executor that the beneficiaries would concur in making the conveyance without any requirement from him to lead evidence from them confirming this.

53. As to the second point, as demonstrated under issue A above, legal title was not a prerequisite to closing on a contract of sub-sale.

54. There are three parts to the third point. The first is the assertion at AC [57] that the Respondent had 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*". There was no such requirement for the following reasons:

a. The Appellant terminated on the completion date on the basis of a fundamental defect in title. The exception in *Pips* enables a purchaser to rescind immediately at any time after execution of the agreement for sale without having to wait until the completion date has passed and without first making time of the essence. It asks whether a vendor will be able to convey when the time for conveyance comes, whether by holding title himself or by compelling a conveyance from the person who does. It is a test of anticipatory breach.

b. The test in *Pips* does not ask whether the Vendor has a present ability to complete. If exception did require a vendor to be permanently ready, willing and able to complete, there could be no contracts of sub sale as the sub purchaser would be able to rescind from the day after execution of the sub sale agreement because his vendor would not yet have title and would not then be ready willing and able to complete. That certainly is not the test.

c. Accordingly, there was no requirement for the Respondent to be ready, willing and able to complete on the completion date or up to the trial does not permit the Appellant to terminate summarily under the exception. The orthodox principles apply if the vendor is not ready, willing and able to complete on the completion date or at any time thereafter – the notice must be served allowing for a reasonable time to lapse.

d. The question of when a sub-vendor who has an enforceable right against his own vendor may be able to enforce that right is a different question as already addressed above.

e. That is the position that the Court of Appeal took, and it is correct. It rejected the Appellant's further hypothetical contention that had it served a notice on the completion date, a reasonable period for termination would have been a few days whereas the grant of representation eventually took months. It recognised correctly that what was reasonable depended on the circumstances including in this case, the knowledge from the inception that the parties had to await the grant of representation, CA [57]. Depending on the circumstances, a reasonable period of notice could be months or years, see *Williams v Greatrex* [1957] 1 WLR 31, CA

[EB 1737 - 1750]. Sometimes, even six days would suffice, depending on the circumstances, see *Chintamanie Ajit v Joseph Mootoo Sammy* [1967] AC 255, PC **[EB 1306 - 1309]**

55. The second part is the Appellant's attempt at AC [58] to rely on the statement in the letter of 10th March 2017[36] **[EB 39]** that the Respondent was now forced to finance the property is misconceived for the following reasons:

56. As already pointed out above, sub-sales routinely complete by a single deed from the head vendor direct to the sub-purchaser at a simultaneous completion, with the purchase money flowing through each completion from the sub-purchaser to his vendor and from his vendor to the head vendor.[37] That is quite normal.

    a. Further, the assertion that the Appellant would be forced to finance the completion of the October Agreement was made in the context of the Appellant's repudiatory breach by purporting to rescind the November Agreement. The Respondent's husband was not saying that she could not fund the completion. He was telling the Appellant that its repudiatory breach had led to a need to finance the purchase price as an explanation as to why the deposit would need to be forfeited.

    b. Additionally, that the Respondent needed to finance the completion of the October Agreement cannot be equated with inability to complete. There was no evidence whatsoever that she could not obtain that financing from a financial institution up to August 2017 when she presented the outstanding documentation to the Appellant and called for completion. That was never a point pleaded in the case or pressed at trial. It having not been fully explored; it cannot be relied on by the Appellant now.

57. The final part of the third point, also at AC [58], is the answer given in re-examination by the Respondent's husband that the October Agreement was terminated by mutual agreement due to an inability to source United States Dollars. That does not assist the Appellant for the following reasons:

[36] **EB39**.
[37] See footnote 12 above.

a. What the Appellant unfortunately fails to mention in that paragraph is that the termination by mutual agreement occurred after the October Agreement had been extended for almost a year.

b. Although the Appellant's Counsel was given the opportunity to cross examine on that evidence, he chose not to. The Appellant's Counsel therefore never asked whether there was any difficulty in procuring United States Dollars in August 2017 when the Appellant was called upon to complete.

c. The Appellant's pleaded case never raised any question about the Respondent's ability (or inability) to complete so that the issue of access to United States Dollars was never properly ventilated. Had that matter arose on the pleadings, the Respondent could have led precise evidence as to when she began having difficulties with access to that currency. Had that evidence been led, it may have been possible for the Courts below to consider that matter.

d. That evidence was not led. The onset, extent and progression of restricted access to United States dollars in Trinidad and Tobago over the relevant period are matters that could only have been established by evidence at trial. Without those matters having been ventilated at trial, it would be inappropriate for this Board to conclude, in the face of the letter dated 15th August 2017 calling on the Appellant to complete, that the Respondent could not then complete.

e. The proper time and manner for testing that question has long passed. It is not appropriate to test that question on an appeal to the Board. That proper way of testing the Appellant's ability to complete was through the notice procedure which the Appellant refused to engage. The Appellant ought to have attempted to complete at that stage and if the Respondent could not then complete, it could then serve notice giving a shorter reasonable time for completion and then terminating at that point. The Appellant would in that circumstance have gotten its deposit back.

f. The Appellant chose to rely on a fundamental defect in title instead and committed a repudiatory breach of the sale agreement in the process. It cannot breach its obligation to serve notice and then attempt to test before the Courts the very matters, which the notice procedure is designed to test.

58. In view of the foregoing, it is respectfully submitted that the Court of Appeal was correct to avoid exploring hypotheticals, issues that were never pleaded or properly investigated at trial[38] but choosing instead to decide the case on the actual reason put forth by the Appellant for terminating and the evidence before it in relation that issue. It cannot be faulted for so doing. A claim should have been made at the trial of this case so that the parties would have known what points/issues they had to face. It is palpably unfair for the Appellant to now raise the issue of relief against forfeiture in the circumstances of this case.

Conclusion on the agreed issues in the Appeal

59. For the reasons set out in the preceding paragraph, all of the issues agreed by the parties for the Board's determination should be answered in the Respondent's favour and the appeal should be dismissed.

60. For convenience, the reformulated issues in the Appellant's Case (AC [34(a)–(h)]) are all answered in the analysis above:

a. its issue (a) (the "special features" of the transaction, said to have been ignored) at [13], [34]– [36] and [42];

b. its issue (b) (whether a deed in the vendor's name was required at contract or completion) at [17]– [19] and [27]– [29];

c. its issue (c) (the nature of the Respondent's interest and her ability to procure good and marketable title at completion or soon thereafter) at [28] and [30]– [33];

d. its issue (d) (whether this case fell within the category permitting termination without a notice making time of the essence) at [10]– [14] and [32]– [40];

[38] The Board's approach to unpleaded points/issues which are dependent on evidence never explored in the courts below is set out in the judgment of Lord Watson in *Connecticut Fire Insurance Co v Kavanagh* [1892] AC 473 at 480, PC. **[EB 1336]**

e. its issue (e) (the Respondent's power to compel a conveyance to herself or to the Appellant) at [16], [32]– [33], [38]– [39] and [54];

f. its issue (f) (whether the pendency of the grant amounted to a fundamental defect in title permitting termination without notice) at [20]– [21], [32]– [41] and [45]– [49];

g. its issue (g) (*Mungalsingh* and the clause 6 documents) at [43]– [44]; and

h. its issue (h) (the entitlement to terminate without notice and to demand the return of the deposit) at [8]– [9], [37] and [45]– [49], and in Part D, [62]– [71], below.

61. No issue raised in the Appellant's Case is left unanswered by adherence to the issues the parties agreed.

D. THE NEW CLAIM FOR RELIEF AGAINST FORFEITURE

62. For the first time in nine (9) years of litigation, the Appellant asks in the alternative for equitable relief against forfeiture of the deposit, invoking the dictum of Denning LJ in *Stockloser v Johnson* [1954] 1 QB 476, CA (AC [71]– [77] and [87](d)). The claim is not open to the Appellant, and it is in any event bad.

63. The claim is not open to the Appellant as it was not an issue pleaded by the Appellant in the High Court nor was it raised or pursued at trial or in the Court of Appeal. The Court of Appeal cannot be "plainly wrong" as the Appellant submits at AC [76] not to consider an issue that no party has ever raised. The system is still adversarial and fairness demands that the Respondent be given an adequate opportunity to defend herself at trial against any claim for relief against forfeiture of the deposit in a contract of sale for land. No leave to appeal to the Board was ever granted in respect of that issue and the Appellant never made a procedural application as required by Practice Direction 4.23 for permission to raise this new ground. A party before this Court is not at liberty to slip in a new cause of action in equity in its written case, least of all one turning on facts never explored.[39] **[EB 1329 - 1337]** For those reasons AC [71] to [77] should be disregarded in their entirety.

[39] See the preceding footnote.

64. The claim for equitable relief against forfeiture is bad in law. It is clear enough that in equity, the Courts can give relief against forfeiture in the case of a penalty clause. The position is different in the case of a deposit paid for the sale of real property, which has been forfeited in accordance with the contact. There was in this case the usual 10% deposit, nothing out of the ordinary. The deposit was not a penalty, but it was truly an earnest of performance of the contract by the purchaser. As Lord Browne-Wilkinson noted in the *Workers Trust & Merchant Bank Ltd* case [1993] AC 573, PC (referred to below) at p.578 E-F **[EB 1756]**: *"One exception to this general rule [the rule of forfeiture] is the provision for the payment of a deposit by the purchaser on a contract for the sale of land. Ancient law has established that forfeiture of such a deposit (customarily 10 per cent. of the contract price) does not fall within the general rule…."*

65. *Importantly, Stockloser v Johnson* did not involve the forfeiture of a deposit in the contract for the sale of land. It concerned the forfeiture of instalments paid on machinery. In fact, a strong panel of judges expressed different views and did not grant any relief from forfeiture, thereby reversing the decision of the trial judge because there was no fraud, no sharp practice, [unjust enrichment or anything in the vendor's conduct that contributed to the breach] or other unconscionable conduct and the forfeiture clause must be penal in nature, in that the sum forfeited must be out of all proportion to the damage and it must be unconscionable for the vendor to retain the money; none of those indicia existed in that case. [40] The case at Bar has no such factual matrix to bring it close to the doctrine of forfeiture. In *Workers Trust & Merchant Bank v Dojap Investments* [1993] AC 573 this Court addressed the special nature of deposits paid on contracts for the sale of land, distinguishing them from forfeitures of other types of advance payments. At pages 578-579 **[EB 1756 - 1757]**, Lord Browne- Wilkinson stated:

> "*In general, a contractual provision which requires one party in the event of his breach of the contract to pay or forfeit a sum of money to the other party is unlawful as being a penalty, unless such provision can be justified as being a payment of liquidated damages being a genuine pre-estimate of the loss which the innocent party will incur by reason of the breach.* **One exception to this general rule is the provision for the payment of a deposit by the purchaser on a contract for the sale of land. Ancient law has established that the forfeiture of such a deposit (customarily 10 per cent. of the**

[40] In *Stockloser (supra),* Denning LJ (as he then was) at p. 449 stated that the basis of the Privy Council case of *Steadman v Drinkle* [1916] AC 275 was, he thought, "that the vendor had somewhat sharply exercised his right to rescind the contract and retake the land, and it was unconscionable for him also to forfeit the sums already paid. Equity could not specifically enforce the contract, but it could and would relieve against the forfeiture."

contract price) does not fall within the general rule and can be validly forfeited even though the amount of the deposit bears no reference to the anticipated loss to the vendor flowing from the breach of contract. This exception is anomalous and at least one textbook writer has been surprised that the courts of equity ever countenanced it: see *Farrand, Contract and Conveyance*, 4th ed. (1983), p. 204. The special treatment afforded to such a deposit derives from the ancient custom of providing an earnest for the performance of a contract in the form of giving either some physical token of earnest (such as a ring) or earnest money. The history of the law of deposits can be traced to the Roman law of arra, and possibly further back still: see *Howe v. Smith* (1884) 27 Ch. D. 89, 101-102, *per* Fry L.J. Ever since the decision in *Howe v. Smith*, the nature of such a deposit has been settled in English law. Even in the absence of express contractual provision, **it is an earnest for the performance of the contract: in the event of completion of the contract the deposit is applicable towards payment of the purchase price; in the event of the purchaser's failure to complete in accordance with the terms of the contract, the deposit is forfeit, equity having no power to relieve against such forfeiture."** [Emphasis ours.]

66. Lord Browne Wilkinson did, however, go on to identify two exceptions to the exclusion of equity's reach. According to his Lordship at p. 579 A-G **[EB 1757]**:

> "However, the special treatment afforded to deposits is plainly capable of being abused if the parties to a contract, by attaching the label "deposit" to any penalty, could escape the general rule which renders penalties unenforceable. There are two authorities which indicate that this cannot be done. In *Stockloser v. Johnson* [1954] 1 Q.B. 476, Denning L.J. in considering the power of the court to relieve against forfeiture said, obiter, at p. 491:
>
> > "Again, suppose that a vendor of property, in lieu of the usual 10 per cent. deposit, stipulates for an initial payment of 50 per cent. of the price as a deposit and part payment; and later, when the purchaser fails to complete, the vendor resells the property at a profit and in addition claims to forfeit the 50 per cent. deposit. Surely the court will relieve against the forfeiture. The vendor cannot forestall this equity by describing an extravagant sum as a deposit, any more than he can recover a penalty by calling it liquidated damages."
>
> In *Linggi Plantations Ltd. v. Jagatheesan* [1972] 1 M.L.J. 89 Lord Hailsham of St. Marylebone L.C. delivered the judgment of the Board which upheld the claim to forfeit a normal 10 per cent. deposit even though the vendor had in fact suffered no loss. He referred on a number of occasions to a requirement that the amount of a deposit should be "reasonable" and said, at p. 94:
>
> > "It is also no doubt possible that in a particular contract the parties may use language normally appropriate to deposits properly so-called even to forfeiture which turn out on investigation to be purely colourable and that in such a case the real nature of the transaction might turn out to be the imposition

> of a penalty, by purporting to render forfeit something which is in truth part payment. This no doubt explains why in some cases the irrecoverable nature of a deposit is qualified by the insertion of the adjective 'reasonable' before the noun. But the truth is that a reasonable deposit has always been regarded as a guarantee of performance as well as a payment on account, and its forfeiture has never been regarded as a penalty in English law or common English usage."

In the view of their Lordships these passages accurately reflect the law."

67. We commend the foregoing *dicta* of Lord Browne-Wilkinson to the Board as these have put the quietus to any alleged claim of forfeiture in this case. Further, equity may therefore have a role to play where the deposit exceeds the normal 10% which it does not in this case. Equity may also play a role where the thing paid is not a true deposit, but an advance payment described as a deposit. That is not the case here. In this case, November Agreement contained the normal 10% deposit and for the forfeiture of same. There is therefore no place for equity to give relief on the highest authority – a decision of this Court. In fact, on the basis of the evidence adduced before the court, the Respondent has lost a large amount of the profit she would have made had the contract been performed by the Appellant. The October Agreement (attached to the Defence and Counterclaim as "A") stated that the Respondent agreed to pay US $1.5 M for the property [converted at an average of $6.7223 TT to US$1.00 in February, 2017 would be TT$10, 083,450.00] and by the November Agreement, the Appellant agreed to pay TT$13,000,000.00. The difference was TT$2,916,550.00, which the Respondent has lost as a result of the Appellant's breach of contract. Equity does not relieve against forfeiture of a sum which is a true deposit. The deposit represented a genuine pre-estimate of the loss or liquidated damages which the vendor incurred by reason the purchaser's breach The appellant has forfeited its deposit by its own default. The deposit is not merely part payment of the purchase money, it is a guarantee that the contract should be performed: see *Howe v Smith* (1884) 27 Ch. D 89, CA. **[EB 1391 – 1407]**

68. For the sake of completeness, the Respondent also draws the Board's attention to the description of the forfeited sum in clause 8 of the November Agreement as liquidated damages. Nothing turns on that description. In *Union Eagle Ltd v Golden Achievement Ltd* [1997] AC 514 Lord Hoffman giving the judgment of the Board stated at p. 518 F-H **[EB 1720]**:

> "Mr. Lyndon-Stanford's third point was that the purchaser was in any event entitled to the return of his deposit because it was not a genuine pre-estimate of damage. He accepted that, in the normal case of a reasonable deposit, no inquiry is made as to whether it is a pre-estimate of damage or not: *Howe v. Smith* (1884) 27 Ch.D. 89 and *Workers Trust & Merchant Bank Ltd. v. Dojap Investments Ltd*. [1993] A.C. 573. But he said that this deposit was not franked under that rule because clause 12 described it "as and for liquidated damages (and not a penalty)." Their Lordships do not think that these words deprived the deposit of its character as a deposit, an earnest of performance, which was liable to forfeiture on rescission."

69. *Union Eagle* merits attention beyond that passage. The purchaser there tendered completion ten minutes late under a contract making time of the essence; the Board nonetheless upheld the forfeiture of the 10 per cent deposit, Lord Hoffmann emphasising <u>the need for certainty in transactions in land and declining to reopen such bargains through an expanded doctrine of unconscionability</u>.[41] **[EB 1720 - 1721]** If equity would not relieve the purchaser in *Union Eagle*, who was ready, willing and ten minutes late, it will not relieve a purchaser who, on his own evidence, gave up on his financing, could have closed, and no longer wanted the land.

70. The "equitable considerations" marshalled at AC [77] do not improve the Appellant's prospects for the following reasons:
    a. The asymmetry between the US$100.00 deposit under the October Agreement and the 10 per cent deposit under the November Agreement reflects nothing but the bargains the respective parties struck; parties price their own contracts, and clause 7 gave the Appellant precisely the protection it now says it lacked — return of the deposit for defect in title — a protection it invoked and failed to make good.
    b. The matters concerning the Respondent's husband— that he was her husband, that he prepared the November Agreement, the state of his practising certificate, the absence of independent advice — were never pleaded as undue influence, misrepresentation or unconscionable bargain. The trial judge made no such findings and Mr. Dindial admitted in cross-examination that the plea that he had relied on Mr. Ramcoomarsingh's knowledge and experience was untrue.[42] The trial judge exceeded the generous ambit of judicial discretion on the evidence/facts.

[41] [1997] AC 514 at 518–519.
[42] **EB777 line 5 – EB778 line 18**.

c. The expressions of distaste for the outcome in the courts below were moral observations, not findings of unconscionable conduct; neither court granted, nor was asked to grant, relief on that footing. Those expressions were also unjustified as they were fully permissible as a matter of law. It is natural that a sub vendor engaged would wish to make a tidy profit on the sub sale.

71. In view of the foregoing, the Respondent invites the Board to reject *in toto* the Appellant's attempt to obtain relief from forfeiture.

E. THE RESPONDENT'S ADDITIONAL GROUNDS

72. The Respondent asks the Board to dismiss the appeal on additional grounds which were rejected by the Court of Appeal. The Respondent is not asking for the order below to be varied and therefore she was not obliged to file a cross appeal as per Rule 24 of the Board's Rules. Notice was given in the Respondent's detailed response of 19 December 2025 (para 16) in accordance with Rule 22(3) of the Board's Rules and in the SFI (para 32). The Appellant's submissions at AC [28] and [78]– [79]) are therefore misconceived.

73. The additional grounds are that:

a. The Court of Appeal erred in failing to find that the trial judge had been plainly wrong in his assessment of the evidence;

b. The Court of Appeal erred in failing to overturn certain findings or comments made about the Respondent's husband, an Attorney-at-Law; and

c. The Court of Appeal erred in refusing to overturn the trial judge's finding that there was no oral collateral contract that the time for completion would be extended to a reasonable time after the grant of probate had been obtained.

Additional grounds A and B: the assessment of the evidence and adverse findings about the Respondent's husband

74. The Respondent acknowledges the Board's settled practice of declining to review concurrent findings of fact save in special circumstances,[43] **[EB 1731]** and submits that

[43] *Water and Sewerage Authority of Trinidad and Tobago v Sahadath* [2022] UKPC 56 at [15], per Lord Leggatt.

the recognised exceptions are engaged here: the material findings rest on demonstrable misunderstandings of the evidence, on a critical finding without basis in the evidence, and on procedural unfairness — the very categories identified in *Henderson v Foxworth Investments Ltd [*2014] UKSC 41 at [67] **[EB 1389]**, which the Court of Appeal itself adopted [CA 41].

75. The six errors made by the Judge are as follows:

a. The judge stated that Mr. Dindial had tried but failed to get the title deed [HC 6], when the Appellant had pleaded receipt of it, exhibited it to its Statement of Case, and Mr Dindial admitted in cross-examination that he received it and supplied it to his bank[44];

b. the judge found that Mr. Ramcoomarsingh's evidence of an alternative offer had "the sense of being a later invention" [HC 8] — a finding of dishonesty against a witness on a fact admitted on the pleadings and never challenged in cross-examination,[45] made in breach of the rule that dishonesty must be squarely put, and one which inevitably infected the assessment of the balance of his evidence, contrary to the rule in *Browne v Dunn* (1893) 6 R. 67 (H.L.), **[EB 1290 - 1305]** because neither counsel nor the trial judge had put to Mr. Ramcoomarsingh that he was dishonest or had made a later invention or that he was a stranger to the truth, etc.;

c. the judge treated as significant matters irrelevant to any issue — the US$100.00 deposit and the prospect of a "tidy profit" [HC 11], and the practising certificate [HC 16] — demonstrating an approach coloured against the Respondent and her husband;

d. although Mr. Dindial in cross-examination admitted the accuracy of the account in the letter of 10 March 2017 (and refused to allow counsel for the Appellant to re-examine to that aspect) and the reply of 13th April 2017 contradicted none of it, the judge declined to give the letter weight [HC 14–16];

[44] Amended Defence to Counterclaim, paras 4 and 10 (**EB253-254**); **EB772 line 13 – EB773 line 3**.
[45] Amended Defence and Counterclaim, para 9 (**EB228**), admitted at para 9 of the Amended Defence to Counterclaim (**EB254**).

e. the judge invoked contra proferentem [HC 22] — a canon for construing written instruments — to resolve the anterior question whether an oral collateral contract had been made at all; and

f. the judge undertook no analysis of the inherent probabilities of the rival accounts resting instead on the single consideration that a term of the alleged kind would have been reduced to writing — a consideration inherently incapable of disproving a collateral oral contract, whose defining feature is that it stands outside the written instrument.

Additional ground C – The Collateral contract.

76. If the evidence falls to be assessed afresh, the Respondent will submit that the collateral oral contract was proved. A collateral contract is enforceable although the main contract must be evidenced in writing. *Chitty on Contracts* 34^{th} ed Vol 1 at 15-030 **[EB 1792]** summarises the relevant legal principles as follows:

> "Even though the parties intended to express the whole of their agreement in a particular document, *extrinsic evidence will nevertheless be admitted to prove a contract or warranty collateral to that agreement*. The reason is that" the parole agreement neither alters nor adds to the written one but is an independent agreement". Such evidence is certainly admissible in respect of a matter on which the contract is silent… the courts have admitted evidence to prove an overriding oral warranty or to prove oral promise that the written contract will not be enforced in accordance with its terms." [Emphasis ours.]

77. The authors refer to the decision of Harman J in *City of Westminster Properties v Mudd* [1959] Ch 129 **[EB 1310 - 1328]**. In that case, a tenant of a commercial property had used the property as a dwelling place for years. The tenant asked for a new lease. A draft was sent which contained a restriction on the use of the premises for sleeping. The tenant's solicitors deleted the clause and added a note that the tenant had been sleeping there for years. The landlords were advised that to permit the tenant to reside on the premises might cause the Rent Restrictions Acts to apply, and they objected to the deletion. A representative of the landlords orally informed the tenant that the landlords would not object to his residing on the premises if he would sign the lease in its original form. The lease was signed approximately a month after the oral assurance. Harman J <u>held that the oral assurance gave rise to a collateral contract which was enforceable.</u>

78. In this case, the probabilities all point to there being a collateral contract as contended by the Respondent. Mr Dindial executed a TT$13 million contract holding the title deed and the October Agreement. He therefore knew the grant was pending and its timing uncertain. Mr. Dindial also wanted time for the Appellant to sell the Newtown property and reduce the Appellant's borrowings to fund the purchase under the November Agreement.[46] It is inherently improbable that the November Agreement was signed in silence about the one contingency to completion which was obvious on the face of the November Agreement and the title deed that had been provided to Mr. Dindial.

79. Additionally, Mr. Ramcoomarsingh's account withstood cross-examination but Mr. Dindial's did not. Mr. Dindial retreated on the bank chronology,[47] conceded that the plea of reliance on Mr. Ramcoomarsingh was untrue,[48] and conceded that the plea that the agreement was drafted as if Ms. De Silva owned the land was incorrect.[49.]

80. In view of the foregoing, the Respondent respectfully invites the Board to find that the trial judge was wrong to reject Mr. Ramcoomarsingh's evidence that there had been an oral collateral agreement to extend time to a reasonable period after the grant of probate had been issued by the Supreme Court.

F. CONCLUSION

81. The Court of Appeal applied settled law to concurrent findings of fact. The Appellant signed with its eyes open, never asked for a single document, never called for completion, never served a notice, and walked away because its financing collapsed and it no longer wanted the land. The law of vendor and purchaser has never permitted a purchaser in that position to recover its deposit, and the new appeal to equity comes nine (9) years too late to a purchaser with no equity to invoke.

82. The Respondent therefore respectfully invites the Board to: (a) dismiss the appeal; (b) affirm the order of the Court of Appeal dated 16 December 2024; (c) if and insofar as

[46] **EB 11–14**.
[47] **EB731 line 13 – EB732 line 4**; **EB759 Lines 10-23**.
[48] **EB777 line 5 – EB778 line 18**.
[49] **EB777 lines 5-18**.

necessary, affirm that order additionally on the grounds set out in Part E; and (d) order the Appellant to pay the Respondent's costs of the appeal.

Dated this 13th day of September 2026.

Seenath Jairam SC

Jerome Rajcoomar Counsel for the Respondent

Instructed by Shantal Jairam for the Respondent