

**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

PRECIS

- 1) The Appeal concerns a deposit of \$1,300,000.000 ("the deposit") paid by the Appellant ("Dindial's Hardware") to the Respondent ("De Silva") pursuant to a written agreement for sale for a parcel of land ("the Maraval property") ("the November agreement") in respect of which time was not of the essence.
- 2) De Silva did not have legal title to the property at the time of execution of that agreement for sale but had entered into an earlier agreement for sale to purchase it from Executor of the Estate of a deceased person ("the October agreement"). No grant of representation had yet been granted by the High Court in respect of that Estate. Both agreements for sale had the same completion date. Like the November agreement, the October agreement did not make time of the essence for completion.
- 3) By the date fixed for completion, the High Court still had not issued a grant of representation in respect of the Estate such that De Silva did not have legal title to the property and could not convey legal title to Dindial's Hardware.

- 4) Shortly after the completion date, Dindial's Hardware sent an email to De Silva's Attorney purporting to rescind the November agreement for sale between them and demanding a refund of the deposit without first making time of the essence.
- 5) De Silva refused to refund the deposit on the ground that Dindial's Hardware was not entitled to rescind their agreement for sale without first making time of the essence and allowing a reasonable period to elapse. De Silva called on Dindial's Hardware to complete.
- 6) Dindial's Hardware refused to complete and De Silva forfeited the deposit.
- 7) On 28th December, 2017 Dindial's Hardware/Claimant instituted legal proceedings against De Silva in the High Court of Trinidad and Tobago. In its claim, Dindial's Hardware sought a declaration that the November agreement for sale between them had been rescinded. Dindial's Hardware further claimed for the return of the deposit paid for, interest and costs.
- 8) By Amended Defence and Counterclaim filed on 23rd April, 2018 the Defendant denied the claim and counter-claimed a declaration that the Defendant was entitled to retain the deposit and costs.
- 9) On 7th April, 2020 Boodoosingh J. (as he then was) granted Judgment in favour of Dindial's Hardware.
- 10) On the 16th December, 2024 the Court of Appeal (Kokaram JA, Brown-Antoine J.A and Donaldson-Honeywell J.A) allowed De Silva's substantive appeal and awarded costs.

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STATEMENT OF AGREED FACTS AND ISSUES

A. FACTUAL BACKGROUND

1. The Appellant ("*Dindial's Hardware*") is a limited liability company incorporated in Trinidad and Tobago and its Managing Director is one Mr. Dirk Dindial.
2. Dindial's Hardware is in the Retail Hardware business, and at the material time operated along Maraval Road, Port of Spain.
3. By written agreement dated 10th November 2016 ("*the November Agreement*")¹ made between Dindial's Hardware and the Respondent ("*De Silva*"), Dindial's Hardware agreed to buy, for the price of Thirteen Million Dollars (\$13,000,000.00), and De Silva agreed to sell a freehold property comprising approximately 16,679 square feet and located on the corner of Valleton Avenue and Saddle Road, Maraval, which is more particularly described in the Deed Registered as No. 1129 of 1975 ("*the Maraval Property*").

¹ EB338

4. The November Agreement was drafted by De Silva's husband who is an Attorney-at-Law but who at the material time did not hold a practising certificate entitling him to practise law.
5. Pursuant to clause 2 of the November Agreement, on 10th November 2016 Dindial's Hardware paid the sum of One Million Three Hundred Thousand Trinidad and Tobago Dollars (\$1,300,000.00) as a deposit to De Silva representing 10% of the agreed purchase price.
6. Time was not made of the essence in the November agreement.
7. The following clauses of the November agreement for sale are of relevance for the purposes of this appeal:-
 - a) Clause 3 which stated that De Silva agreed to sell the property free from all encumbrances.
 - b) Clause 4 which stated that completion of the transaction was fixed for on or before the 28th day of February 2017.
 - c) Clause 6 which stated that De Silva was to provide Dindial's Hardware with an up-to-date receipt for payment of land and building taxes, and a WASA Clearance Certificate prior to the date set for completion.
 - d) Clause 7 of the agreement which stated that De Silva expressly agreed that should she be unable to complete the sale of the Property by reason of a defect in De Silva's title, Dindial's Hardware would be entitled to rescind the agreement and receive a full refund of the deposit.
 - e) Clause 8 which stated that should Dindial's Hardware be unwilling or unable to complete the purchase of the Maraval Property on the date fixed for completion, De Silva would be entitled to retain the deposit as liquidated damages for the Purchaser's breach.

8. At the time that the November Agreement was entered into, De Silva did not hold the legal title to the Maraval property. Legal title to the Maraval was at that time vested in the Estate of Ebrahim Kazim, deceased (*"the Estate"*). Prior to the execution of the November Agreement, De Silva had entered into a written agreement for sale dated 12th October 2016² under which De Silva had agreed to purchase title to the Maraval property from one Abdul – Latif Kazim, an executor of the Estate and sole beneficiary of the Maraval Lands (*the "October Agreement"*). The Maraval property was described in the October Agreement as forming part of the Estate of the late Ebrahim Kazim of which Abdul-Latif Kazim was the son and Executor of the said estate. Abdul-Latif Kazim was not a party to the November agreement.
9. De Silva's husband provided a copy of the October Agreement to Dindial's Hardware that contained redacted lines (the date on which the October Agreement was provided and extent of the redactions are in dispute).
10. The October Agreement:
 - a. Specified that the Maraval Property formed part of the Estate of the late Ebrahim Kazim (*"the Estate"*);
 - b. Identified Abdul Latim Kazim as Executor of that Estate as the seller and the De Silva as purchaser;
 - c. Had the same completion date as the November Agreement, that is to say, 28th February 2017.
 - d. Provided for the conveyance of title to De Silva or whomsoever De Silva directed.
 - e. Provided that 21 days notice be given by the Vendor to De Silva once the subject Grant of probate was obtained for the Estate (clause 3 refers) to effect the completion of the Agreement.

² This document is disputed – Dindial Hardware's version EB343, De Silva's version EB462

14. On the date that was set for completion of the both agreements for sale, 28th February 2017, De Silva was unable to complete the sale transaction as she did not hold legal title to the property so as to be able to transfer same to Dindial's Hardware. She did not yet have legal title because an application for the grant of letters of administration with Will annexed, in respect of the Estate of Ebrahim Kazim was still being considered by the Supreme Court. De Silva also did not provide Dindial's Hardware, prior to the date set for completion, with an up-to-date receipt for payment of Land and Building taxes, and a WASA Clearance Certificate (a clearance from the water utility provider) in respect of the Maraval property.
15. By email dated 4th March 2017³, Dindial's Hardware wrote to De Silva's husband stating as follows:
- “Further to our conversation last week, we reiterate that we request a refund of the down payment of \$1,300,000 made on November 10th 2016 as the required documents have not been provided to us to submit to our bankers. We thank you for your cooperation and wish to settle this matter in a week.”
16. At no time prior to or after that email did Dindial's Hardware (i) issue a notice making time of the essence of the November Agreement, (ii) call on De Silva to complete the November Agreement or (iii) request the provision of the up-to-date receipt for payment of land and building taxes, and a WASA Clearance Certificate as required by clause 6 of the November Agreement.
17. By letter dated 10th March 2017⁴, De Silva's Attorney responded to that letter contending *inter alia* that Dindial's Hardware was not entitled to a refund of the deposit for the reasons set out therein.
18. By letter dated 13th April 2017⁵, Dindial Hardware's Attorney wrote accepting that time was not of the essence in the November Agreement, but contending that Dindial's

³ EB349

⁴ EB352

⁵ EB358

Hardware had been entitled to terminate the November Agreement on the ground that De Silva did not have title to the Maraval Property on the completion date.

19. By letter dated 8th May 2017⁶, De Silva's Attorney-at-Law responded to that letter alleging *inter alia* that Dindial's Hardware had purported to terminate the November Agreement because Dindial's Hardware was either unwilling or unable to complete the November Agreement and that this entitled De Silva to forfeit the deposit in accordance with clause 8 of the November Agreement.
20. By letter dated 15th August, 2017⁷, De Silva's Attorney wrote to Dindial's Hardware's Attorney advising that De Silva was now in a position to complete the sale. Enclosed with that letter was a copy of the grant of letters of administration dated 23 June 2017 with Will annexed, a certificate of assessment dated 21st July, 2017 and a Water and Sewerage Authority (W.A.S.A.) clearance certificate dated 10th August, 2017. In that letter De Silva's Attorney at Law proposed that the sale of the Maraval property should proceed and be completed on terms to be agreed upon by both parties.
21. On 24th August, 2017 Abdul Hafeez Ali executed a deed of assent in which he transferred the subject property from the estate of the late Ebrahim Kazim to Abdul-Latif Kazim.
22. Dindial's Hardware did not agree to De Silva's proposal to proceed with the sale but instead proceeded to issue a pre-action protocol letter to De Silva dated 13th September, 2017⁸. In that letter Dindial's Hardware called upon De Silva to repay the deposit of TT\$1.3 million dollars to Dindial's Hardware and also to pay Dindial's Hardware's reasonable legal costs.
23. De Silva replied through her Attorney at Law by letter dated 29th September, 2017⁹ disputing Dindial's Hardware's claim.

⁶ EB361

⁷ EB365

⁸ EB370

⁹ EB375

B. THE HIGH COURT PROCEEDINGS:-

24. Thereafter Dindial's Hardware instituted legal proceedings in the High Court of Trinidad and Tobago against De Silva by Claim Form and Statement of Case filed on 28 December 2017 intituled CV2017-04669.
25. The Trial of this matter took place in the High Court on 6th and 7th November 2018 before Boodoosingh J. (as he then was).
26. The learned Trial Judge, Boodoosingh J (as he then was) granted judgment on the Claimant's claim for reasons which are set out in his written judgment dated 7 April 2020¹⁰. These included the following findings:-
 - a) The November agreement between Dindial's Hardware and De Silva to purchase the Maraval property and the October agreement between De Silva and a third party for De Silva to purchase the Maraval property were separate and distinct transactions¹¹.
 - b) Dindial's Hardware was not advised to seek independent legal advice¹².
 - c) There was no collateral contract that allowed for a delay in completing the transaction. In contrast, the written terms of the agreement expressly stated that 28th February, 2017 was the deadline for completion¹³.
 - d) De Silva failed to provide necessary documents to Dindial's Hardware by the 28th February, 2017 namely the WASA clearance certificate and tax receipts which caused the November agreement to end. These documents were necessary for De Silva to establish good title to the Maraval property¹⁴.
 - e) A party must fulfil their contractual obligations before they can make time of the essence¹⁵.

¹⁰ EB301-321

¹¹ Paragraph 24, EB310

¹² Paragraph 24, EB310

¹³ Paragraph 29, EB311

¹⁴ Paragraph 33, EB316

¹⁵ Paragraphs 33 & 36, EB316 & 320

- f) Dindial's Hardware 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 monies¹⁶.
- g) De Silva was therefore contractually obligated to return the deposit to Dindial's Hardware's but refused to do so¹⁷.

C. THE COURT OF APPEAL PROCEEDINGS:-

- 27. De Silva then appealed against Boodoosingh J's said decision to the Court of Appeal as Civil Appeal P.115 of 2020 (filed on 15th July 2020).
- 28. On 16th December 2024, the Panel on appeal comprised Kokaram, Brown -Antoine and Donaldson-Honeywell JJA allowed De Silva's appeal with costs.
- 29. In allowing the appeal the Court of Appeal held:-
 - a) That there was no error in the assessment of the evidence and findings of fact made by the trial judge¹⁸.
 - b) That it agreed with the Trial Judge that an oral agreement/collateral contract was improbable¹⁹.
 - c) That despite finding no fault in the Judge's assessments, the principles of law regarding the effect of 'time not being made of the essence 'of an agreement for the sale of property must be upheld²⁰.
 - d) That in cases where a party to a sale agreement for land was unable to complete and time was not made of the essence, that was to be regarded as a breach of

¹⁶ Paragraphs 36 & 40, EB318 & 320

¹⁷ Paragraph 26, EB310-311

¹⁸ Paragraph 36, EB1133

¹⁹ Paragraph 39, EB1134

²⁰ Paragraph 42, EB1135

a 'non-essential 'term. At this juncture, a party could make time of the essence and offer a reasonable time thereafter to complete²¹.

- e) That Dindial's Hardware knew of the 'special features' of the transaction, which concisely were that De Silva did not have title to the lands at the time of executing the agreement of sale and that a Grant of Probate was still yet to be obtained in order to effect any onward conveyance²².
- f) That De Silva had the power to compel a conveyance to herself or even to Dindial's Hardware²³.
- g) That the delay in obtaining the Grant of Probate for the Estate that comprised the subject lands did not amount to a fundamental defect in title²⁴.
- h) The Trial Judge was also plainly wrong in holding that the failure to provide a WASA Clearance Certificate and Land Tax receipt, which the Respondent said were requested, amounted to a failure by the vendor to show good title and the purchaser was entitled to immediately terminate the agreement.

30. By Order dated 30th September 2025, Dindial's Hardware was granted leave to Appeal the order of the Court of Appeal dated 16th December 2024 to the Judicial Committee of the Privy Council²⁵.

AGREED ISSUES ON THE APPEAL TO THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

31. The following agreed issues arise on this appeal:

- a) Whether or not the Court of Appeal was correct to hold that De Silva did not need to have a title deed for the Maraval Property before entering into the November Agreement.

²¹ Paragraph 44, EB1135-1136

²² Paragraph 47, EB1137

²³ Paragraph 51, EB1138-1139

²⁴ Paragraph 53, EB1140

²⁵ EB1149-1150

- b) Whether or not the Court of Appeal was correct in finding that the absence of a formal grant of representation in respect of the Estate was a conveyancing matter and not a fundamental defect in title such that Dindial's Hardware was not entitled to terminate the November Agreement without first making time of the essence.
- c) Whether or not the Court of Appeal was correct in holding that the decision of the Board in *Mungalsingh v Juman* [2015] UKPC 38 was distinguishable on the facts and did not mean that Dindial's Hardware could terminate without first making time of the essence.
- d) Whether or not the Court of Appeal ought to have held that, notwithstanding the failure of the Dindial's Hardware to make time of the essence, Dindial's Hardware ought to have been permitted to terminate the November Agreement having regard to the lapse of time between the date set for completion and the eventual grant of letters of administration with will annexed.
- e) Whether or not the Court of Appeal ought to have placed any reliance on the fact that had a notice making time of the essence been served between the completion date and at any time up to the trial of the matter that De Silva would not have been in a position to complete.

32. The following issues have been raised by the Respondent but are unagreed by the Appellant:-

- 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.

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CHRONOLOGY

Date	Event	REFERENCE
12/10/2016	Agreement for sale executed between Abdul-Latif Kazim, Executor of the Estate which owns the Maraval Property and De Silva for the sale of the Maraval property ("the October agreement"). Time was not made of the essence of the October agreement.	This document is disputed – Dindial Hardware's version - 343, De Silva's version - 462
10/11/2016	Agreement for sale executed between Appellant ("Dindial's") and the Respondent ("De Silva") re: Maraval property and 10% deposit paid. Completion date fixed for 28/02/2017 ("the November agreement").	338-341

28/02/2017	Completion date. There is no completion [of the October agreement] because no grant of representation has yet been issued in respect of the Estate.	
08/02/2017	Power of Attorney executed by Abdul-Latif Kazim appointing Abdul Hafeez Ali as his power of Attorney.	419-421
04/03/2017	Email from Dindial's to De Silva referring to a conversation that took place during the previous week and repeating a request by Dindial's Hardware for a refund of the downpayment stating that the required documents were not provided to them to submit to their bankers.	349-350
10/03/2017	Letter (marked "Without Prejudice") sent by R.L. Ramcoomarsingh to Dindial's Hardware setting out history of matter and stating that De Silva has sought an extension of time to 31 st March, 2017 to complete the sale with Abdul-Latif Kazim and stating that the Grant of Probate might be obtained shortly and that De Silva may require additional time to facilitate the financing of the purchase by a financial institution.	352-356
13/04/2017	Letter sent by Dindial's Hardware's Attorney at Law, Terrence Bharath to R.L. Ramcoomarsingh referring to his letter dated 10/03/2017 and requesting a return of the deposit monies.	358-359
08/05/2017	Letter of reply sent by R.L. Ramcoomarsingh to Dindial's Hardware's said Attorney at Law refusing to return the deposit monies.	361-363
23/06/2017	Grant of Letters of Administration with Will annexed granted of the Estate of Ebrahim Kazim granted to Abdul Hafeez Ali, the lawful attorney and for the use and benefit of Abdul-Latif Kazim until he attends and applies for the Grant of Probate of the said Will.	127
21/07/2017	Certificate of Assessment for the subject property from the Ministry of Finance obtained.	366
10/08/2017	W.A.S.A clearance certificate for the subject property obtained.	367

15/08/2017	Letter (marked "Without Prejudice") sent by R.L. Ramcoomarsingh to Dindial's Hardware's said Attorney at Law stating that De Silva is now in a position to complete the sale transaction with Dindial's Hardware and providing 2 months in which to do so and stating that time is of the essence. The letter also attached a certificate of assessment/payment in the name of Ebrahim Kazim dated 21/07/17, a WASA clearance certificate in the name of Ebrahim Kazim dated 10/08/17 and a Grant of Letters of Administration with will annexed of the Will of Ebrahim Kazim dated 23 rd June, 2017 in the name of the said Abdul Hafeez Ali the lawful attorney and for the use and benefit of Abdul-Latiff Kazim.	365
24/08/2017	Deed of Assent executed by the said Abdul Hafeez Ali conveying the subject property from the Estate of Ebrahim Kazim to Abdul Hafeez Ali.	
13/09/2017	Pre-action protocol letter sent by Dindial's Hardware's said Attorney at Law to R.L. Ramcoomarsingh calling upon him personally to return the deposit and to pay reasonable legal costs.	370-373
29/09/2017	Letter of response sent by R.L. Ramcoomarsingh to Dindial's Hardware's said Attorney at Law.	375-377
28/12/2017	Dindial's Hardware instituted civil claim against De Silva for a return of the deposit monies with costs	4-64
19/02/2018	De Silva filed a Defence and Counterclaim	65-210
04/04/2018	Dindial's Hardware filed a Defence to Counterclaim	211-223
23/04/2018	De Silva filed an Amended Defence and Counterclaim	224-251
21/05/2018	Dindial's Hardware filed an amended Defence to Amended Counterclaim	252-266
07/06/2018	Dindial's Hardware filed a Reply to De Silva's Amended Defence and Counterclaim	266-268
07/04/2020	Boodoosingh J. delivered Judgment with written reasons in favour of Dindial's Hardware and dismissed the Counterclaim.	301-321
15/07/2020	Notice of Appeal filed by De Silva against that decision.	990-1010

16/12/2024	Court of Appeal (Kokaram J.A, Brown-Antoine J.A and Donaldson-Honeywell J.A) allowed the appeal setting aside the Order of Boodoosingh J and dismissed Dindial's Hardware's claim and granted Judgment on the Counterclaim and ordered Dindial's Hardware to pay costs on the claim and counterclaim.	1143-1144
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