[2015] UKPC 38

Privy Council Appeal No 0113 of 2013

JUDGMENT

Mungalsingh (Appellant) v Juman (Respondent) (Trinidad and Tobago)

From the Court of Appeal of the Republic of Trinidad and Tobago

before

Lord Neuberger

Lord Mance

Lord Wilson

Lord Carnwath

Lord Hodge

JUDGMENT GIVEN ON

6 August 2015

Heard on 6 July 2015

Appellant	Respondent
Anand Beharrylal	Rekha Ramjit
Frances Ridout	Alvin Pariagsingh
	Gina Ramjohn
(Instructed by Mr Gerard Raphael)	(Instructed by Sheridans)

LORD NEUBERGER:

1.
This is an appeal against a decision of the Court of Appeal of Trinidad and Tobago (Yorke-Soo Hon, Smith and Rajnauth-Lee JJA), upholding Bereaux J's order for specific performance of an agreement for sale ("the Agreement") of a property at South Oropouche ("the Property").

The facts

2.
The Agreement, which was dated 13 September 2006 and signed by the parties, could hardly have been shorter. It was in these terms:

“I, BALDWIN [MUNGALSINGH] of [address] hereby agree to sell to SEAN JUMAN of [address] a property consisting of a dwelling house standing on 509.6 m ^{2} of land situate at 73A Harris Village South Oropouche and known as Lot ‘B’ for a price of $275,000.”

Mr Juman paid a deposit of $49,365, and was issued with a receipt. The deposit was more than the traditional 10% of the purchase price because Mr Mungalsingh needed to pay $50,000 to the previous owner of the Property to complete his purchase of it.

3.
During the three months following the making of the Agreement, there were discussions between the parties and their representatives about the obtaining of an up to date Water and Sewage Authority certificate (a “WASA certificate”) and an up to date receipt for Land and Building Taxes (a “Land Tax receipt”), showing that, respectively, water and sewerage rates (“water rates”) and land and building tax (“land tax”) in respect of the Property were fully paid up. Neither the WASA certificate nor the Land Tax receipt was provided by Mr Mungalsingh to Mr Juman.

4.
On 28 December 2006, Mr Mungalsingh’s attorney wrote to Mr Juman referring to the Agreement, stating that Mr Juman had orally agreed to complete within 90 days of 13 September, and “call[ing] upon [him] to pay the balance of the said purchase and complete this transaction on or before 31 January 2007 as to which time shall be of the essence …”. There was no reply until 14 February 2007, when Mr Juman’s attorney wrote saying that he wished to complete, but the failure of Mr Mungalsingh to provide the WASA certificate and the Land Tax receipt (“the Documents”) was causing the delay. In May 2007, Mr Mungalsingh’s attorney wrote saying the transaction was at an end and returning part of the deposit.

5.
The partial return of the deposit was not accepted by Mr Juman, who then investigated the position with regard to the water rates and land tax owing in respect of the Property. He obtained the WASA certificate in May 2007, and discovered that there was outstanding land tax of $86.50, which he paid in July 2007. Mr Juman was then prepared to complete the Agreement, and, on discovering that the Property was being re-marketed by Mr Mungalsingh, he issued proceedings seeking specific performance of the Agreement. The proceedings came on before Bereaux J.

The trial before Bereaux J

6.
Mr Mungalsingh’s case was that he had been entitled to serve a notice to complete as he did on 28 December 2006, and, in the light of Mr Juman’s failure to complete in accordance therewith, he, Mr Mungalsingh, had been entitled to treat the Agreement as at an end. Mr Juman’s case was that the letter of 28 December 2006 was ineffective as a notice to complete because Mr Mungalsingh had not obtained the Documents, and therefore the Agreement was still on foot and he, Mr Juman, was entitled to have it performed.

7.
Bereaux J heard evidence of fact from both parties (as well as from the agent of the previous owner of the Property), and expert evidence of conveyancing practice from an attorney at law, Mr Roop Chan Chadeesingh, who was called on behalf of Mr Mungalsingh. Mr Juman’s evidence was that he had been told by his bank, which was funding his purchase of the Property, that they needed the Documents before they would provide the funds which he needed, which corresponded with advice to

his bank contained in their solicitors' letter dated 30 January 2007, which Mr Juman produced. Accordingly, he said, on more than one occasion during October and November 2006, he had asked Mr Mungalsingh for the Documents, and that Mr Mungalsingh had "promised" to provide them. Mr Mungalsingh denied this. Mr Juman also said that following a meeting in January 2007 and following (it appears) Mr Juman's receipt of and reference to the solicitors' letter dated 30 January 2007, Mr Mungalsingh for the first time said, in a telephone conversation, that he would not be providing the Documents, and that Mr Juman would have to get them for himself.

8.
As the Judge recorded in his judgment, Mr Chadeesingh "stated that it is the vendor's responsibility to produce the WASA clearance certificate and the up-to-date lands and building taxes. If he has not produced it, he is not ready to complete the transaction". The Judge also explained that Mr Chadeesingh said that "it was the vendor's responsibility to clear any outstanding water rates and taxes and that their non-payment would be an encumbrance on good and marketable title".

9.
In his judgment, the Judge said that he considered that Mr Mungalsingh was "an abject liar" whose account of conversations and explanations for letters could not be accepted, and that Mr Juman, although he had given inconsistent evidence on one point, was "by far the more credible and consistent witness and I accept his version of events". The Judge also accepted the evidence of Mr Chadeesingh. Accordingly, he held that Mr Mungalsingh had not been entitled to serve a notice to complete on 28 December 2006, as he had not been able to show good title to the Property until the Documents had been obtained (as it happens by Mr Juman). Accordingly, he concluded that Mr Juman was entitled to specific performance of the Agreement.

The arguments on this appeal

10.
In his well-judged submissions on behalf of Mr Mungalsingh, Mr Anand Beharrylal realistically did not challenge the primary findings of fact made by the Judge, namely his acceptance of Mr Juman's evidence, and his rejection of Mr Mungalsingh's evidence where it differed. Mr Beharrylal's primary submission was that the Judge was wrong to hold that Mr Mungalsingh was not entitled to serve the notice to complete on 28 December 2006, because he had not been obliged to provide the Documents before requiring Mr Juman to complete the Agreement. He further contended that, even if this was wrong, (i) Mr Juman had not been entitled to seek specific performance when he issued these proceedings, and (ii) in any event, the Judge should not, in his discretion, have ordered specific performance.

11.
In agreement with the Court of Appeal, the Board considers that the Judge reached a decision which was correct in law and which should therefore be upheld.

Was Mr Mungalsingh entitled to make time of the essence?

12.
So far as the main issue is concerned, it is common ground that the Agreement was an "open contract", ie a contract which had all the terms which are required to render it a valid agreement in law, but no other conditions normally found in a well-drafted contract. In those circumstances, as explained in Emmet and Farrand on Title (looseleaf edition, November 2010 release), para 2.050, certain terms are implied into the contract by law. They include that (i) "good title" must be shown

within a reasonable time and (ii) completion should occur as soon as good title has been shown. It may be that term (ii) would be better expressed as being “promptly after” rather than “as soon as”, but nothing hangs on that in this case.

13.
In the normal way, time was not of the essence of the date for completion of the Agreement. In other words, while failure by one party to complete as soon as good title had been shown (or promptly thereafter) may amount to a breach of contract, it would not entitle the other party to treat the Agreement as at an end. 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. In this connection, the law is as set out in Raineri v Miles [1981] AC 1050, 1083A-1085F and 1088F-1091H by Lord Edmund-Davies and Lord Fraser of Tullybelton respectively.

14.
Mr Mungalsingh’s case was that he had shown good title well before 28 December 2006, and therefore the time for completion had passed, and he was entitled to make time of the essence as he did by the 28 December letter. Mr Juman’s reply, which the Judge accepted, was that Mr Mungalsingh had not shown good title as he had not produced the Documents by 28 December 2006, and that he was therefore not entitled to make time of the essence.

15.
Mr Beharrylal suggested that the Judge was wrong to accept Mr Juman’s argument, and that he had erred because he had proceeded on the basis that Mr Mungalsingh had to show “good and marketable title” rather than “good title”, and that this set too high a standard for the quality of the title required of the vendor under the Agreement. Mr Beharrylal bolstered this argument by pointing out that Mr Chadeesingh was used to acting for banks in connection with secured lending, rather than for purchasers, and therefore set too high a standard when it came to the quality of title which had to be shown to purchasers.

16.
Following the hearing of this appeal, the Board was provided with the decision of the High Court in Sieunarine v Carr (HCA No 5719 of 1986, 27 February 2008). In para 38 of his judgment in that case, Myers J suggested, without deciding, that there may be a difference between “good title” and “good marketable title”, and went on to say that the word “marketable” was “inserted to ensure that no-one is in any doubt that the approach taken in [Trinidad and Tobago] is a stricter one” than that taken in England and Wales, on the basis that it means “the type of title that the paradigmatic lender would accept as security for a loan”.

17.
In the Board’s view, there would appear to be no justification for a distinction between a “good title” and a “good and marketable title”. In Re Spollon and Long’s Contract [1936] Ch 713,718, Luxmoore J referred to a purchaser under an open contract being entitled to “a good marketable title”. And the same expression was used by Millett LJ in Barclays Bank plc v Weeks Legg & Dean [1999] QB 309, 324-325, where he described it as being a title “which the purchaser is bound to accept” in contrast with a “good holding title”, which, as he explained, “mean[s] a title which a willing purchaser might reasonably be advised to accept, but which the court would not force on a reluctant purchaser”.

18.

Thus, in the light of these authorities, it appears that (subject to the terms of the relevant contract of sale) good marketable title is what the court will require before it forces a property on an unwilling buyer. It is unsurprising that the court will not insist on a title being accepted unless it is marketable. Further, when it comes to land and buildings, the natural presumption, at least in the absence of evidence to the contrary, would be that there is only one market, which one would expect to include institutional mortgagees.

19.
To a linguistic philosopher there is a possible distinction between “good and marketable title” (the expression used by Mr Chadeesingh and the Judge) and “good marketable title” (the expression used by Luxmoore J and Millett LJ). However, in the absence of any suggestion in the cases or textbooks that there is a difference between the two expressions in the context of conveyancing law and practice, the Board considers that such fine semantic distinctions should be avoided in this field. The Board also finds it very hard to accept the notion that the courts would force on a purchaser a title which would be unacceptable to a reasonable mortgagee, and Mr Chadeesingh explained that his view as to what constituted “good and marketable title” was based on his experience of what a bank would expect as a secured lender. This is also consistent with what is said in Megarry & Wade: The Law of Real Property (8th ed, 2012), para 15-075.

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

21.
Mr Beharrylal argued that requirement for the production of the Documents was not, as a matter of law, capable of being within the ambit of a requisition on title. The precise limits on what constitutes a good title or a valid requisition are not entirely easy to define, as perusal of paras 5.002 and 5.061-5.062 of Emmet and Farrand and of para 15-082 of Megarry & Wade shows. Thus, even if Mr Mungalsingh was obliged to produce the Documents, it might be argued that it would have been good enough to produce them at actual completion – ie that their production was a matter of conveyancing rather than a matter of title.

22.
The questions whether the Documents must be produced by a seller, and, if so, whether their production is a matter of title, must, at least to some extent, be governed by the general practice of conveyancers in the jurisdiction in question. (That is supported by the judicial observations quoted at the beginning of para 5.002 of Emmet and Farrand and by the “doubt” referred to in para 15-082 of Megarry & Wade). In the present case, it appears to the Board that the evidence of Mr Chadeesingh, coupled with the fact that unpaid water rates and land tax can lead to distraint on, or even the sale of, the relevant property, renders it impossible for Mr Mungalsingh to challenge the Judge’s conclusion that in Trinidad and Tobago the vendor must produce the Documents before good title is shown. Further, the evidence of Mr Chadeesingh, coupled with the fact that completion meetings are no

longer common practice, at least in England and Wales, renders it hard to argue that Mr Mungalsingh could have contended that the production of the Documents should have waited until a completion meeting.

23.
In those circumstances, it was not open to Mr Mungalsingh to serve notice to complete, making time of the essence, as he purported to do on 28 December 2006, as he had not shown good title by that date – see Cole v Rose [1978] 3 All ER 1121 and Chaitlal v Ramlal [2004] 1 PCR 1. While it is unnecessary to decide the point, it should be added that, even if production of the Documents had been a conveyancing matter, it may well not have assisted Mr Mungalsingh's case, as he had not obtained the Documents by the date which he had prescribed as the completion date in his letter of 28 December 2006.

24.
The decision in Sieunarine does not touch on this point, as the issue in that case was whether the existence of outstanding water rates constituted a defect in title. It was held that it did, and the Judge said at para 40, that once the outstanding rates had been paid by the seller, that fact "had to be communicated to" the buyer. In the Board's view, Sieunarine does not cast doubt on the Judge's conclusion in this case, based on the expert evidence of Mr Chadeesingh, that Mr Mungalsingh had not shown good and marketable title by 28 December 2006, because he had not produced the Documents to Mr Juman.

An alternative argument based on estoppel

25.
Even if Mr Juman had not been entitled under the Agreement to require Mr Mungalsingh to provide the Documents, the Board considers that Mr Juman would have had a powerful argument on the basis of promissory estoppel. In the light of his promises to provide Documents, runs this argument, it would not have been open to Mr Mungalsingh to require Mr Juman to complete the Agreement without first either complying with, or resiling from, his promise – ie by either providing the Documents or giving reasonable notice of his decision not to provide the Documents.

26.
If, contrary to the Judge's view, the Agreement did not contractually entitle Mr Juman to require the Documents, the fact that Mr Mungalsingh orally agreed with Mr Juman that he would do so cannot have operated to vary the contract between the parties, in the light of section 4 of the Conveyancing and Law of Property Act. This provides that no action can be brought on a contract for the sale of land, unless there is a "memorandum or note thereof … in writing, and signed by the party to be charged". It has long been held that, in a case where section 4 or its equivalent (eg the now repealed section 40(1) of the Law of Property Act 1925 in England and Wales) applies, a term cannot be varied or even added to such a contract unless the variation or addition complies with the statutory requirements – see Goss v Lord Nugent (1833) 5 B & Ad 58, 65-66, per Lord Denman CJ.

27.
However, where (i) an oral promise or assurance is made by the seller to provide a document or information, (ii) the buyer reasonably relies on the promise, (iii) it is reasonably understood that the promise is to be complied with before the seller can claim to be ready to complete, and (iv) the seller does not resile from the promise, it appears to the Board that the seller would be estopped from treating the buyer as obliged to complete until the promise has been complied with. In this case, (i) the Judge found that such a promise was made, namely by Mr Mungalsingh that he would provide the

Documents, (ii) Mr Juman relied on the promise by not seeking the Documents, (iii) it seems clear that the Documents should have been produced before Mr Mungalsingh could require Mr Juman to complete and (iv) Mr Mungalsingh did not resile from his promise till late January or early February 2007 – ie after the notice to complete had been served, and, at the most shortly before and quite possibly even after the date which he fixed for completion.

28.
Estoppel was not relied on by Mr Juman, but it appears to the Board that, if it had been, it could well have represented an alternative basis on which Mr Juman could have defeated the contention that the 28 December 2006 letter was a valid notice to complete. Although it is unnecessary to decide the point, it appears unlikely that Mr Mungalsingh would have been able to identify any prejudice as a result of estoppel only having been raised for the first time before the Board.

Other arguments

29.
It should be mentioned that, in addition to relying on Mr Mungalsingh's failure to produce the Documents, Mr Juman also relied on the fact that there was land tax owing in respect of the Property, and that this meant that there was an actual encumbrance on the title. In the Board's opinion, this is a difficult argument to sustain. It appears from evidence which is now available that the land tax and water rates were paid up to the end of the calendar year 2006, and therefore nothing was owing as at the date of the letter dated 28 December 2006. It is true that land tax had become due thereafter, but, in the light of section 4 of the Lands and Building Taxes Act, that did not occur until 31 March 2007. In those circumstances, Mr Juman's reliance on outstanding rates and taxes must be rejected.

30.
That leaves the two additional points raised by Mr Beharrylal on behalf of Mr Mungalsingh.

31.
The first additional point is a contention that Mr Juman was not "ready willing and able", to use the hallowed expression, to complete the Agreement at the time when he issued these proceedings. This contention is based on the proposition that "there was no evidence that [Mr Juman] was, in fact, in a position to complete". This point does not seem to have been taken at trial, and, unless it would involve no unfairness to Mr Juman, it would be wrong to allow it be taken now. There was no reference to the point in any pleading, witness statement, oral testimony or argument before Bereaux J, and there is no good reason to allow the point to be taken now. If the point had been taken by Mr Mungalsingh, there is no reason to think that Mr Juman would not have contended that he was ready, willing and able to complete. And, if such a point is to have any prospect of success, once the party claiming specific performance avers that he is ready, willing and able to complete, the other party must be able to point to some positive evidence to support the contrary proposition, and in this case there was none.

32.
Finally, it is said on behalf of Mr Mungalsingh that, even if Mr Juman's claim was accepted, the Judge ought not to have ordered specific performance of the Agreement, and should have left Mr Juman to his remedy in damages. This submission was said to be bolstered by observations of Lord Hoffmann in Co-Operative Insurance Society Ltd v Argyll Stores (Holdings) Ltd [1998] AC 1, 11F-H, which begins with the statement that "[s]pecific performance is traditionally regarded in English law as an exceptional remedy, as opposed to the common law damages to which a successful plaintiff is entitled as of right".

33.
This statement was made in the context of an action for specific performance of a positive contractual obligation, namely a covenant in a lease to keep the demised premises open as a retail shop for the sale of groceries. In that context, it was clearly apposite. However, the more general rule was stated by Lord Hoffmann at p 11G to be that “specific performance will not be ordered when damages are an adequate remedy”. In the context of a contract for the sale of land, damages have traditionally not been regarded as an adequate remedy on the basis that each piece of land is unique – see eg AMEC Properties Ltd v Planning Research Systems Plc [1992] 1 EGLR 70, 72. Accordingly, there is nothing in this final point.

Concluding remarks

34.
In these circumstances, the Board concludes that this appeal should be dismissed. There are, however, three final points to be made.

35.
First, the submissions in this case revealed that open contracts for the sale of land are not unusual in Trinidad and Tobago, and that this may well be owing to the absence of any published standard conditions for the sale of land. The Board observes that it may be a good idea for the appropriate professional bodies to consider the feasibility and advisability of preparing and publishing such standard conditions in Trinidad and Tobago.

36.
Secondly, particularly once one appreciates that the exchange rate is in the region of $10 to £1, the costs which have been expended on these proceedings must be wholly disproportionate to what is at stake. There is not much which the Board can do about that, other than to express disquiet, and hope that proportionality is being considered in relation to legal costs by the appropriate authorities in Trinidad and Tobago.

37.
Finally, the Board would be minded to order the appellant, Mr Mungalsingh, to pay the costs of this appeal on a standard basis, but the parties have 14 days from the handing down of this judgment to make written submissions, if so advised, as to why a different order would be appropriate.