

**IN THE SUPREME COURT OF FIJI**  
**AT SUVA**  
**CIVIL APPELLATE JURISDICTION**

**CIVIL APPEAL NO. CBV 0010 of 2010**  
[On Appeal from the Court of Appeal No. ABU 0042 of 2008]

**BETWEEN** : **STEPHEN PATRICK WARD** *Petitioner*

**AND** : **YOGESH CHANDRA** *Respondent*

**Coram** : The Hon. Chief Justice Anthony Gates  
President of the Supreme Court  
The Hon. Mr. Justice Saleem Marsoof  
Judge of the Supreme Court  
The Hon. Mr. Justice Suresh Chandra  
Judge of the Supreme Court

**Counsel** : Mr. C. B. Young with Mr. B. C. Patel for the Petitioner  
Mr. V. Mishra with Ms. R. Karan for the Respondent

**Date of Hearing** : 14<sup>th</sup> October 2011

**Date of Judgment** : 9<sup>th</sup> August 2016

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**J U D G M E N T**

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- [1] The Petitioner seeks special leave to appeal from and to vacate the judgment of the Court of Appeal dated 18 November 2010.

## **Factual Matrix**

- [2] The Petitioner entered into a written sale and purchase agreement on 6 January 2005 with the Respondent to sell his freehold land at Denarau Island for \$595,000. The settlement and possession date was stated as 4 March 2005 and by Clause 14 it was stipulated that time shall be of the essence of the agreement in conjunction with Clauses 15 and 16 of the Agreement.

- [3] Clause 15 of the Agreement stated as follows:

### **“PURCHASER’S DEFAULT**

If the Purchaser shall make default in payment of any moneys when due or in the performance or observance of any other stipulation or agreement on the Purchaser’s part herein contained and if such default such continue for the space of 30 days from the due date then and in any such case the Vendor without prejudice to any other remedies available to it may at its option exercise all or any of the following remedies namely:

- (a) May enforce this present contract in which case whole of the purchase monies then unpaid shall become due and at once payable or
- (b) May rescind this contract of sale and thereupon all monies theretofore paid or under the terms of sales applied in reduction of the purchase money shall be forfeited to the Vendor as liquidated damages after payment of Harcourts fees and commissions; or
- (c) May sue for specific performance of this Agreement; or
- (d) May without first tendering any transfer to the Purchaser resell the said property either by public auctions or private contract for cash or on credit and on such other terms conditions and stipulations as the Vendor may think proper with power to vary any contract of sale buy in at any auction and resell and any deficiency in price which may result on and all expenses of attending to a resale or attempted resale shall be recoverable by the Vendor as liquidated damages the Purchaser receiving credit for any payment made or applied in reduction of the purchase money. Any excess in price after deduction of expenses shall belong to the Vendor; or



(e) May re-enter upon and take possession of the said property without the necessity of giving any notice or making any formal demand.

(f) May change interest at the rate stipulated on page 1 for the delay if the Vendor agrees to an extension of time for settlement.

[4] Clause 16 of the Agreement stated as follows:

“VENDOR’S DEFAULT

If the Vendor shall make default in the performance of any stipulation or agreement on the Vendor’s part herein contained and if such default shall continue for the space of fourteen (14) days from the due date then in any such case the Purchaser without prejudice to any other remedies available to it may at his option exercise all or any of the following remedies namely:

- (a) May rescind the contract of sale and thereupon all monies theretofore paid or under the terms of sale applied in reduction of the purchase money shall be refunded to the Purchaser.
- (b) May sue for specific performance of this Agreement;
- (c) May claim damages in addition to seeking specific performance of this Agreement.
- (d) Charge interest at the rate of as stipulated on page 1 for delay on extension of time for settlement.”

[5] Clause 21 of the Agreement stated that the Agreement shall not be changed or modified in any way subsequent to its execution except in writing signed by the parties.

[6] On 26 January 2005 the deposit as required by the terms of the agreement had been paid by the Respondent to the Petitioner.

[7] On 26 January 2005 the Respondent’s Solicitors Parshotam & Co sent a form of Transfer for perusal by the Petitioner and sought confirmation of it. The Petitioner’s Solicitors Mitchell Keil & Associates forwarded the Transfer Form to Parshotam & Co on 26 February 2005.

[8] On 7 March 2005 Parshotam & Co requested in writing extension of the settlement date to 16 April 2005.

[9] Mitchell Keil & Associates by email sent on 10 March 2005 stated as follows:

“We refer to our recent telephone conversations in this matter. Our client has now informed us that he would agree to an extension for settlement in this matter to the 24 March 2005. Please confirm by return.

We advise that we are in possession of an executed Transfer and Land Sales Declaration. Please forward us your cheque in the sum of \$11,300.00 in favour of the Commissioner of Stamp Duties so that we can attend to stamping of the Transfer.

We also attach Commitment Deed. Please print out two copies of the Deed and have the Deed signed by your client and return to our office for completion of execution and stamping. Please include your cheque in the sum of \$11.00 stamp duty on the Deed when returning the documents.”

[10] On 21 March 2005 Mitchell Keil & Associates sent Parshotam & Co an email stating:

“We refer to our email to you dated 10 March 2005.

We have not had your response nor have we received the stamp duty.

There is therefore no agreement to extend the settlement date.

We withdraw the earlier offer. Our client reserves his rights.”

[11] On 7 April 2005 Mitchell Keil & Associates wrote to Parshotam & Co and gave notice of rescission of the contract stating:

“In consequence of your client’s default under the said agreement in completing the purchase in accordance with the requirement to complete on or before 4 March 2005 we on instructions and on behalf of the Vendor hereby give you notice that the said sale is hereby rescinded and in pursuance of the agreement for sale the Vendor will proceed to re-sell the same property reserving his rights against your client for any other remedies available to him.”

[12] On 7 April 2005 Parshotam & Co wrote to Mitchell Keil & Associates stating:

“The writer – who has been personally handling this matter – had been ill for 8 days and has only resumed office. Our client had in the meanwhile remitted funds to us for payment of stamp duty and



seeks to proceed with the transaction. In this respect, we enclose our Trust Account cheque for \$11,990.00 drawn in favour of 'The Commissioner of Stamp Duties' for payment of stamp duty on the Transfer.

Our client's funding is also in place and settlement can be proceeded with immediately upon the Transfer being stamped.

In any event, our client relies on Paragraph 15 of the Sale and Purchase Agreement."

- [13] On 8 April 2005 Mitchell Keil & Associates wrote to Parshotam & Co reiterating rescission and refunded the deposit and the stamp duty cheque pointing out that according to Clause 15 more than 30 days had lapsed since the due date for settlement.
- [14] On 8 April 2005 the Respondent registered a Caveat against dealings with the vendor's title and instituted action in the High Court at Lautoka for an order for specific performance, an injunction restraining the vendor from reselling the property and an order extending or reinstating the caveat.
- [15] The petitioner filed a defence which included a counterclaim by which he claimed the damages for loss of chance to make a profit as well as for the wrongful lodgment of the caveat and an order for the cancellation of the caveat.
- [16] The High Court dismissed the Respondent's action and held:
1. Time for settlement of 4<sup>th</sup> March 2005 had not been validly extended to 24 March 2005.
  2. The vendor's rescission was valid.
  3. The purchaser was not entitled to specific performance and
  4. The vendor's counterclaim was dismissed.

- [17] The Respondent's appeal to the Court of Appeal was allowed and he was awarded equitable damages to be assessed as at 18 November 2010 by the Master.

**Consideration of special leave to appeal**

- [18] In the Petitioner's application for special leave the principal grounds upon which the petition was based were:

“(a) The Court of Appeal erred in law and in fact in holding that the Petitioner's rescission of the Sale and Purchase Agreement dated 6 January 2005 (“Sale and Purchase Agreement”) by letter dated 7 April 2005 was invalid, in that, the Appeal Court misconstrued vital evidence, namely:

- (i) By holding that the Appellant had by his solicitor's email of 10 March 2005 “sought an extension” of the settlement date to 24 March 2005 and “must be taken to have affirmed the contract by his conduct and thereby lost his right to rescind” [para 23, 35, 36, 37 & 39 of judgment) when in fact it was the Respondent who by his Solicitor's email of 7 March 2005 had requested an extension of the settlement date to 16 April 2005 and the Appellant had declined that request by his solicitor's email of 10 March 2005 and counter offered to extend to 24 March 2005; and
- (ii) The Appeal Court failed to give due weight to the fact that the counter offer by the Appellant was properly withdrawn before 24 March 2005 and before acceptance by the Respondent; and
- (iii) The Appeal Court failed to appreciate that clause 15 of the Sale & Purchase Agreement obliged the Appellant to act in good faith if the Respondent attempted to remedy his breach within 30 days of 4 March 2005. Consequently, when the Respondent's solicitor requested an extension of the settlement date by email of 7 March 2005 the Appellant was required to reply and he did so on 10 March 2005. The Appellant's request for documents and stamp duty cheque was in compliance of his duty under clause 15 and his counter offer to extend the settlement date to 24 March 2005 was to a date within the 30 days permitted by clause 15; and



- (iv) In the circumstances the Appeal Court was wrong to hold that the Appellant's solicitor's email of 10 March 2005 and the Appellant's counter offer to extend to 24 March 2005 were acts of affirmation of the contract.
- (b) The Court of Appeal erred in law in failing to appreciate that the Appellant's right to affirm or to terminate the contract did not arise until the breach by the Respondent had continued unremedied for 30 days from 4 March 2005 by virtue of clause 15 of the Sale & Purchase Agreement.
- (c) The Court of Appeal was wrong to hold that the Sale & Purchase Agreement was still on foot after 7 April 2005 and that it gave the Respondent a right to terminate or to seek specific performance of the Contract when in fact the Respondent had failed to exercise his powers under clause 16 of the Sale & Purchase Agreement.
- (e) The Court of Appeal erred in law in awarding equitable damages to the Respondent.
- (f) The court of Appeal erred in law and in fact in failing to consider the Petitioner's submissions filed on 22 October 2010."

[19] The Petitioner further stated that he had suffered substantial and grave injustice and the issues raised present far-reaching questions of property law and practice applicable in the Fiji Islands. That the subject matter of the case also raised issues of substantial general interest to the administration of the civil legal system in the Fiji Islands, in particular, to an appellate court's duty to consider submissions filed by a litigant.

[20] After filing the petition seeking Special Leave, the Petitioner through his Solicitors filed an affidavit dated 25 April 2011 setting out matters pertaining to practices followed by Solicitors Firms in Fiji in respect of Sales Agreements incorporating Default clauses of the nature of Clauses 15 and 16 of the Agreement that had been entered into between the parties and therefore raised matters of general or public importance.

- [21] The Respondent filed a counter affidavit objecting to the procedure followed by the Petitioner in the filing of an affidavit and bringing matters to the attention of the Court which could have been led in evidence before the High Court.

**Consideration of the granting of Special Leave**

- [22] The Supreme Court grants special leave in circumstances set out in Section 7(3) of the Supreme Court Act 1998, which provides that special leave to appeal must not be granted unless the case raises -

- (a) a far reaching question of law;
- (b) a matter of great general or public importance; or
- (c) a matter that is otherwise of substantial general interest to the administration of civil justice.

- [23] These provisions have been considered by the Supreme Court in several previous decisions such as **Bulu v. Housing Authority** [2005] FJSC 1, **Chand v. Fiji Times Ltd** [2011] FJSC 2 and has been stated that appeal would not be admitted “save where the case is of gravity involving a matter of public interest, or some important question of law, or affecting property of considerable amount, or where the case is otherwise of some public importance or of a very substantial character”.

- [24] The Petitioner in seeking to satisfy the threshold for granting of leave has taken up the position in the grounds of appeal that the issues raised in the case present far-reaching questions of property law and practice applicable in the Fiji Islands.



- [25] The Respondent has submitted that the issues raised only raise matters relating to an agreement between parties in a property transaction and therefore does not satisfy the requirements for granting of leave.
- [26] The Petitioner in filing the affidavit referred to in paragraph [20] above after the filing of the petition of appeal has sought to adduce evidence to substantiate the position that the case involves issues of general importance by referring to practices followed by Law Firms in Fiji. Filing of such affidavits is not in accordance with any provisions of the law in the Supreme Court Act of 1998 and therefore cannot be taken into account. It would be pertinent to state here that such a practice should not be encouraged as otherwise it would create a precedent.
- [27] Therefore the question remains as to whether the issues in the case involve far reaching questions of property law and practice applicable in the Fiji Islands. As set out in the grounds of appeal.
- [28] This question can be determined in dealing with the issues involved in the case before Court.

#### **The decision of the Court of Appeal**

- [29] The Court of Appeal set aside the judgment of the High Court as regards the validity of the rescinding of the contract by the Petitioner while accepting certain findings of the High Court.
- [30] A vital matter in relation to the contract was the date of settlement which was fixed as 4 March 2005. It is to be observed that both parties had not stated or done anything by or on the settlement date.

[31] After the lapse of the settlement date of 4 March 2005, the Respondent had made the first move on 7 March 2005 by taking the step of seeking an extension of the settlement date to 16 April 2005. The Petitioner responded to this on 10 March 2005 by stating that the settlement should be on the 24 March 2005 which was within the 30 day period (as stipulated in Clause 15 of the Agreement) from 4 March 2005. Having given the date as 24 March 2005 for settlement the Petitioner wanted a response to same by return to which there was no response by the Respondent and by email sent on 21 March 2005 the offer for the settlement date of 24 March 2005 was withdrawn. There is no denial by the Respondent regarding this intimation of the Petitioner.

[32] The High Court had decided that as a result of this correspondence that the settlement date remained as 4 March 2005. The Court of Appeal too agreed with this conclusion. The Court of Appeal Judgment at paragraph 26 stated thus:

“Thus, the position regarding the settlement date was that 4<sup>th</sup> March 2005 was the essential settlement date and either party who failed to settle on that date was in breach of the contract but the vendor could not act on the breach until thirty days had expired. Here, the Vendor gave notice of rescission on 7 April 2005 which was at a time before the thirty days required for rescission by Clause 15. Therefore, prima facie, the Vendor’s rescission was valid but the matter does not end there. (emphasis added)

### **Consideration of the Appeal**

[33] Having arrived at the conclusion that the Vendor’s rescission was prima facie valid after a consideration of the conduct of the parties regarding the terms and conditions of the Agreement, the Court of Appeal went on to consider whether the Petitioner was ready, able and willing to settle the contract on 4 March 2005 and decided that the rescission of 7 April 2005 was invalid on the basis that the Vendor by his conduct had affirmed the contract and thereby lost his right to rescind upon the principles discussed in **Sargent v. A.S.L. Development Limited** [1974-75] 131 CLR 634 at p.641.



- [34] The principle relied on by the Court of Appeal was the dictum of Stephen J in Sargent v. A.S.L. Developments Limited (supra) :

“It is not by mere delay that it is said the right of rescission was lost but rather by conduct evincing an intention to keep the contract on foot at a time when the alternative, but inconsistent, right of rescission had become available. The vendors having two inconsistent rights were, it is said, bound to elect as between them and having elected to treat the contract as subsisting they were thereafter bound to the election and thus forfeited their rights of rescission.”

- [35] Having cited the above dictum the Court of Appeal stated:

“39. In this case, clearly, the vendor intimated in his email of 10 March 2005 that the contract was on foot by not only requesting an extension of the date for settlement but also requesting for certain action to be taken by the purchaser, namely, the remittance of \$11,900.00 for stamp duties. The email of 10<sup>th</sup> March 2005 was sent at a time when the essential date for settlement had expired and the vendor had gained the right to rescind the contract at the expiry of 30 days from that date. (Emphasis added, there was no request by the Vendor, he was only responding to the request for an extension by the Purchaser)

40. The vendor must be taken to have known that after the purchaser had failed to complete the contract on the essential date of 4 March 2005, he had acquired the right to rescind the contract within 30 days of that date. Accordingly, upon the application of the principles discussed in Sargent v. A. S.L. Developments Limited the vendor must be taken to have affirmed the contract by his conduct and thereby lost his right to rescind.”

- [36] After the date of settlement as stated above the first party to take some action was the Respondent by sending the email of 7 March 2005 seeking an extension. The email of 10 March 2005 sent by the Petitioner was in response to the email of the Respondent of 7 March 2005 seeking extension of the date of settlement to 16 April 2005. The email of the Petitioner of 10 March 2005 was subject to the qualifications that the extended date



was not the date suggested by the Respondent but a different date which was 24 March 2005 and also requesting a reply by return. The email of the Petitioner of 10 March 2005 cannot be considered as an acceptance of the request of the Respondent as suggested by the Respondent but merely an indication that the Petitioner was prepared to grant an extension in the manner suggested by the Petitioner. It was in fact a counter offer made by the Petitioner which was not responded to by the Respondent. The end result of that would be that the request for an extension made by the Respondent was of no effect and therefore the breach of the agreement had been committed by the Respondent on the 4 March 2005 subject to the grace period of 30 days given in terms of Clause 15. Even considering the period of 30 days granted by Clause 15 of the Agreement, which ended on 4 April 2005, the Respondent had not made use of it to honour his obligations by the time the Petitioner rescinded the contract on 7 April 2005.

[37] Even going by the principle in **Sargent's** case, the question that has to be considered is whether the response to the email of 7 March 2005 by the Respondent by the email of 10 March 2005 was an election by the Petitioner to either rescind or affirm the contract as decided by the Court of Appeal. The point of time at which the two inconsistent rights arose becomes vital in deciding this question. **Sargent's** case is on the basis of the time at which the two inconsistent rights come into existence. In the present case the existence of the two inconsistent rights did not arise until the expiry of the 30 days after the date of settlement which was after the 4<sup>th</sup> of April 2005. The Court of Appeal erred by considering the email of 10 March 2005 as the point of election of the two inconsistent rights.

[38] **Sargent's** case is therefore distinguishable from the present case as the email of 10 March 2005 was only a counter offer to the offer suggesting an extension of the settlement date made by the Respondent and not one which kept the contract on foot. The Petitioner had made his counter offer regarding the extension of the date of settlement and had wanted a response from the Respondent. Since there was no response



to that counter offer, the Petitioner had withdrawn his counter offer on the 21<sup>st</sup> of March 2005 which was three days prior to the date of settlement which he had suggested. It was within his rights to do so as the legal principle is quite clear regarding the withdrawal of a counter offer, which can be made prior to the date suggested by the counter offer as the Respondent had remained silent regarding the counter offer up to the time of the withdrawal of it. Therefore nothing flowed from the email of 10 March 2005 regarding the variance of the settlement date of the contract and was therefore not an intimation that the contract was still on foot as decided by the Court of Appeal.

[39] The Court of Appeal in holding that the Petitioner had exercised the election to keep the contract on foot by the email of 10 March 2005 erred in law in failing to take into account the subsequent conduct of the parties in relation to the said email. Consequently as there was no exercise of any election, the Petitioner's right to rescind the contract remained as before for 30 days from the 4<sup>th</sup> of March 2005. Therefore the rescission of the contract on 7 April 2005 which was after the 30 day period from the date of settlement in the Agreement was valid.

[40] It would be of interest to note that the Respondent's letter of 7<sup>th</sup> April 2005 stated among other matters that reliance was placed on Clause 15 of the Agreement. As stated earlier, Clause 15 afforded the Respondent who was the purchaser a grace period of 30 days from the 4<sup>th</sup> of March 2005 to honour his obligations. The offer by the Respondent to honour his obligations came too late as the time had lapsed by the 4<sup>th</sup> of April 2005.

[41] The Respondent submitted that the Petitioner's notice of rescission had to run for 30 days from the time the Respondent was in default. There is no reference to such a requirement in the Agreement in question and therefore the Petitioner was not obliged to run the rescission for 30 days as submitted by the Respondent. The Petitioner had rescinded the contract on 7 April 2005 after the Respondent's default had continued unremedied for 30



days from 4 March 2005 which was in terms of Clause 15 of the Agreement and was therefore a valid rescission.

- [42] Submissions were also made regarding the fact that the Petitioner was not ready by the settlement date to honour his obligations under the Agreement. This brought into consideration the question of anticipatory breach by the Respondent. It was stated in the email of 7 March 2005 sent by the Respondent that the Respondent's Solicitor had spoken to the Petitioner's Solicitor earlier about the Respondent not likely to be ready by the settlement date as his finances were not in place.
- [43] The question therefore arose in view of such anticipatory breach by the Respondent whether the Petitioner was obliged to show his readiness to complete the contract by the settlement date. The law relating to anticipatory breach is to the effect that the innocent party need not act on the anticipatory breach and can wait until the date of completion of the contract and deal with the situation then. The conduct of the Petitioner was to that effect as he had not treated the contract as at an end when there was the anticipatory breach by the Respondent. He waited till the date of settlement and 30 day grace period given to the Respondent to complete the contract before electing to rescind the contract.
- [44] Dawson J in **Foran v. Wight** (1989) 168 CLR 385 at 441-442 stated in relation to anticipatory breach:

“Repudiation by way of anticipatory breach by a party to a contract does not put an end to the contract unless the other party accepts the repudiation and rescinds the contract. Although he may do so, the other party does not have to accept the repudiation. He may continue to treat the contract as on foot and hold the party guilty of repudiation to the performance of his obligations. If those obligations remain unperformed when the time for performance arrives, the anticipatory breach will be converted into an actual breach. If the other party keeps the contract alive, he does so not only for his own benefit but also for the benefit of the party guilty of repudiation. The latter may, upon giving reasonable notice, withdraw his repudiation and complete the contract and, subject to



a qualification with which I shall deal, the other party remain bound by the contract, enabling the repudiating party to take advantage of any breach by the other party or any supervening event which would discharge him from liability. If the other party elects to rescind, the rescission is, of course, not ab initio. He is entitled to maintain an action for damages for the anticipatory breach, the damages being calculated by reference to the loss which he would suffer by the breach becoming actual, subject to any opportunity to mitigate his loss in the meantime. See Hochster v. De la Tour (36)' Frost v. Knight (37)' Avery v. Bowden (38); and Peter Turnbull & Co. Pty Ltd v Mundus Trading Co. (Australasia) Pty Ltd. (39)

It is, I think, clear that the anticipatory breach of a contract amounting to repudiation cannot, if the repudiation is not accepted, continue beyond the time for performance. At that point, the failure to perform becomes an actual and not an anticipatory breach and the remedies available are for actual, rather than anticipatory breach. See Peter Turnbull (40).

I have said that there is a qualification to the proposition that a party who elects not to accept the repudiation of a contract remain bound by the terms of the contract to perform the obligations which it imposes upon him. While the contract remains on foot for both parties, if the repudiation by one party makes it futile or pointless for the other party to attempt to perform an obligation, the law does not require him to do so. The obligation remains – it does not disappear from the contract – but the other party is treated as if he had performed in the limited sense that he is absolved from the consequences which would otherwise flow from his non-performance. This principle which emerged before the doctrine of anticipatory breach was formulated in 1853 in Hochster v. De la Tour, was originally justified as being common sense, although it has latterly be seen as the early recognition of the now developed notions of estoppels.”

- [45] The Court of Appeal considered the question of whether the Petitioner was ready and willing to honour the agreement as at the date of settlement and held that since the Petitioner was not ready and willing as at the date of settlement he had lost the right to rescind. The Court relied on the decision in Foran v. Wight (Supra) (which was relied on



by both parties in their submissions) and which dealt with a situation where the purchaser had rescinded the contract as the Vendor had not fulfilled conditions necessary for the completion of the contract. The Vendor argued that the purchaser could not validly rescind the contract as he himself was not ready to settle because of proven lack of funds.

[46] In **Foran's** case, it was held (by a majority decision with Mason CJ dissenting) that the rescission was valid as on the facts it held that the purchaser had been absolved from the requirement to be ready by the vendor's representation that he would not be able to settle on the due date and that the Vendor was stopped from insisting that the purchaser had to show readiness. There was rescission by the Vendor as well which Mason CJ held to be valid.

[47] In **Foran's** case, by a contract dated 24 December 1982 the Vendors agreed to sell and the purchasers agreed to buy a parcel of land for \$75,000. The contract provided for payment of a deposit on the execution of the contract which was deposited by the purchaser. The contract fixed 22 June 1983 as the date of completion, time being of the essence in this respect. On 20 June 1983, two days before the date fixed for completion, the solicitor for the purchasers telephoned the solicitor for the vendors and said that finance had been arranged for 22 June 1983 and had asked at what time of the day they could settle. The Vendor's solicitor had replied stated that they had a problem as one of the special conditions regarding a right of way had not been registered. Nothing was done by the vendors or the purchasers until two days after the date fixed for completion. On 24 June 1983 the purchasers served a notice of rescission to the vendors in terms of the agreement and requested the return of the deposit without prejudice to claim damages costs or expenses in respect of the default.

[48] The facts in the present case differ from **Foran's** case as there was no grace period given to either the vendor or the purchaser and there was no request for an extension of the date of settlement, or the making of a counter offer. As in **Foran's**, the rescission was after the



date fixed for completion of the contract which in this case was 30 days after the 4<sup>th</sup> of March 2005.

[49] The principle emanating from the decision in Foran's case stands in favour of the Petitioner in this case. The Respondent cannot hold against the Petitioner the fact of his not being ready and willing to complete the contract, for at the date of settlement which was in fact 4 April 2005, following the findings of the trial Court, the Vendor could have completed.

[50] It is clear from the foregoing that as on the original date of settlement which was 4<sup>th</sup> March 2005 both parties were not ready. As on the date after the grace period of 30 days in terms of Clause 15 of the Agreement which was 4 April 2005, the Respondent (purchaser) was not ready as he had indicated his readiness only by his letter of 7 April 2005. As regards the readiness of the parties the High Court had made the following findings:

“[17] I have also upheld the submission that the plaintiff by not furnishing the stamp duty funds until 7 April 2005 constituted sufficient conduct in itself absolving the defendant from demonstrating that he was ready, willing and able to settle. Given that 4 March 2005 was the settlement date and the default of not settling after the expiration of 30 days together with the fact that the plaintiff was required to have tendered the stamp duty before the settlement date or before the expiration of the 30 days made it unnecessary for the defendant to demonstrate that he was ready, willing and able to settle. In any event the evidence has established that the defendant was ready, willing and able to settle on 3 April 2005. ... ..”

[24] I am constrained to say that the evidence relied on by the plaintiff to support his contention that he had funds at the material time to settle is dubious at best. ... ..”

It was evident therefore that the Petitioner could have fulfilled his obligation if there was a proper response from the Respondent regarding their being ready to fulfill their part of

the contract. Therefore in the above circumstances, the reliance by the Court of Appeal on the decision in Foran's to decide in favour of the Respondent was erroneous.

[51] It would be pertinent to consider in situations as in the present case, the necessity to see whether the parties are ready and willing to honour their obligations as at the date of settlement due to the principle arising from Foran's case. In that connection it may be necessary to consider the degree of blameworthiness of the parties regarding the non-fulfillment of their obligations as at the date of settlement. In the present case, as at the date of settlement which was 4 March 2005 both parties were not ready and willing to honour the contract. But the operation of a grace period for both the Vendor and the purchaser took the contract beyond the 4 March 2005 it was 30 days from that date for the purchaser to fulfill in terms of Clause 15 and 14 days for the Vendor to fulfill in terms of Clause 16. Even after the extended period for the purchaser which was 4 April 2005 the purchaser was not ready and willing whereas according to the finding of the High Court the Vendor could have completed by 3 April 2005. The degree of blameworthiness ranks high for the purchaser in the present case and the Vendor had the right to rescind the contract after the lapse of that period. If the purchaser had been ready earlier within the 14 day grace period given to the Vendor by Clause 16 the Vendor would have been found wanting. Therefore it is the purchaser who has to take the blame for not being able to honour his obligation.

[52] Both parties cited several authorities regarding the principles incidental to the interpretation of a contract. But the main decisions relied on by the Court of Appeal were the decisions in Sargent's and Foran's which have been dealt with in this judgment.

[53] Since the case demonstrates the effect of inconsistent rights in a contract of sale and requires the consideration of parties to a contract being ready and willing to honour their obligations, it is a matter which is of public importance in the field of agreements relating to sale of land. Therefore special leave to appeal is granted.



[54] For the reasons set out above the Judgment of the Court of Appeal is set aside and the appeal of the Petitioner is allowed.

***The orders of Court are:***

- (a) Special leave to appeal is granted.
- (b) The judgment of the Court of Appeal is set aside.
- (c) The High Court judgment is affirmed with its order of costs.
- (d) The parties to bear their costs in the Supreme Court.



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Hon. Justice Anthony Gates  
**President of the Supreme Court**

A handwritten signature in blue ink, appearing to read "S. Marsoof", positioned above a dotted line.

Hon. Justice Saleem Marsoof  
**Judge of the Supreme Court**

A handwritten signature in blue ink, appearing to read "S. Chandra", positioned above a dotted line.

Hon. Justice Suresh Chandra  
**Judge of the Supreme Court**