1982 May 20

[A. LOIZOU, SAVVIDES, STYLIANIDES, JJ.]

SYMEON CHARALAMBOUS,

Appellant-Plaintiff,

v.

ANDROULLA VAKANA,

Respondent-Defendant.

(*Civil Appeal No.* 6180).

Contract—Sale of land—When time of transfer is of the essence of the contract—Part of purchase price paid on signing of contract and balance agreed to be paid within 8 days thereafter—Vendor undertaking to transfer the property after the payment of the purchase price—Purchaser ready and willing to pay purchase price and made this repeatedly known to vendor who was repeatedly postponing the performance of the contract and finally she sold the land to a third person—Mode of payment an essential term of the contract—Time of transfer only a formal part of the agreement and not of the essence of the contract—Vendor liable to pay damages to purchaser.

Damages—Breach of contract—Sale of land—Date at which damages should be assessed is the date of breach of the contract which in this case is the date of the sale of the land to a third person—Measure of damages is the difference between the contract price and the market value at the time the vendor sold the property to a third persor.

By means of a contract of sale dated 30.9.1977 the respondent -defendant sold to the appellant-plaintiff a field at Ypsonas village. The sale price was agreed at £1,950. £50 were paid on the signing of the contract and the balance was payable within 8 days thereafter. The vendor undertook to transfer the property sold in the name of the purchaser immediately after the payment of the purchase price. Two days later another £30 were paid to the vendor. Though the purchaser was ready and willing to pay the balance of the purchase price at the time

stipulated in the contract and at all times material to this case the vendor on various pretexts was postponing the transfer; and on 27.11.1977 the purchaser found out that the property had been sold by the vendor to another person for £4,000 by means of a contract of sale dated 25.11.1977. In an action by the appellant-plaintiff whereby he claimed specific performance and in the alternative refund of his deposit and damages the trial Court held that the remedy of specific performance was beyond the reach of the plaintiff as he did not satisfy the peremptory requirements of the Sale of Land (Specific Performance) Law, Cap. 232 (as amended). The trial Court further held that the defendant broke the contract and that the date of the breach was eight days after the signing of the contract as provided by the contract itself. The plaintiff was then awarded damages which were the difference of the sale price from the actual value of the property at the time of the breach that is £150. Upon appeal by the plaintiff the following issues arose for consideration:

(1) Whether the time of transfer was of the essence of the contract.

(2) Date of assessment of damages.

(3) Measure of damages.

Held, that time is of the essence of the contract where the parties have expressly stipulated in their contract that the time fixed for performance must be exactly complied with, where the circumstances of the contract or the nature of the subject-matter indicate that the fixed date must be exactly complied with and where time was not originally of the essence of the contract, but one party has been guilty of undue delay and the other party has given notice requiring the contract to be performed within a reasonable time; that in this case the mode of payment was an essential term of the contract and the time of transfer was not expressly made of the essence of the contract; that they were two different stipulations and in sequence of time the payment would precede the transfer; that the appellant was always ready and willing to pay the purchase price and he made this repeatedly known to the respondent; that the respondent was postponing the performance of the contract with the acquiescence of the appellant who repeatedly called upon him to complete the contract but she failed to respond in a positive

manner; that the respondent did not evince an intention not to be bound by the contract until she sold the land to a third person; that, therefore, the time specified in the agreement was only a formal part and was not of the essence of the contract.

(2) The respondent sold the land, subject-matter of the agreement of sale, to a third person on 25.11.1977; that the date at which damages should be assessed is the date of the breach i.e. the date when the respondent entered into the contract of sale with the third person in this case the 25.11.1977.

(3) That the measure of damages is the difference between the contract price and the market value at the time the respondent sold the property to the third person; that as the purchase price in the contract broken between the parties was £1,950 and the respondent sold the land to another person on 25.11.1977 for £4,000 the appellant is entitled to £2,050 damages and to the amount of £80 his deposit; and that, therefore, the appeal will be allowed and the judgment of the Court below will be varied accordingly.

Appeal allowed.

Cases referred to:

Iordanou v. *Anyftos*, 24 C.L.R. 97;
Avghousti v. *Papadamou & Another* (1968) 1 C.L.R. 66;
Xenopoullos v. *Makridi* (1969) 1 C.L.R. 488;
Melaisi v. *Georghiki Eteria Ltd.* (1979) 1 C.L.R. 748;
Jamshed v. *Burjorji Dhunjibhai* (1916) 43 1A.26;
Stickney v. *Keeble and Another* [1915] A.C. 386 at pp. 415–416;
Smith v. *Hamilton* [1950] 2 All E.R. 928 at pp. 932–933;
Horsler v. *Zorro* [1975] 1 All E.R. 584 at p. 586;
Johnson and Another v. *Agnew* [1979] 1 All E.R. 883 at p. 896;
Domb and Another v. *Isoz* [1980] 1 All E.R. 942;
Ridley v. *De Geerts* [1945] 2 All E.R. 654.

Appeal.

Appeal by plaintiff against the judgment of the District Court of Limassol (Loris, P.D.C. and Hadjitsangaris S.D.J.) dated the 15th September, 1980 (Action No. 2854/77) whereby the defendant was ordered to pay the sum of £230.—as damages for breach of contract for the sale of land.

V. Tapakoudes, for the appellant.

Defendant absent.

A. LOIZOU J.: The judgment of the Court will be delivered by Stylianides, J.

STYLIANIDES J.: This is a case of sale of land. By a contract of sale dated 30.9.1977 (exhibit No. 1) the respondent-defendant sold to the appellant-plaintiff a field at locality "Eliochorka" in the vicinity of Ypsonas village. The sale price was agreed at £1,950.—. £50.—were paid on the signing of the contract and the balance was payable within 8 days thereafter. The vendor undertook to transfer the property sold in the name of the purchaser immediately after the payment of the purchase price. Two days later another £30.—were paid to the vendor. The purchaser was ready and willing to pay the balance of the purchase price at the time stipulated in the contract and indeed at all times material to this case. The vendor on various pretexts was postponing the transfer: she was busy in collecting her almonds; she had pressing business to do; she was ill. This lasted for about two months. The purchaser became suspicious and on 27.11.1977 found out that the property had been sold by the defendant to another person for £4,000.—by a contract of sale dated 25.11.1977. This contract of sale was indeed deposited on 25.11.1977, in virtue of the provisions of the Sale of Land (Specific Performance) Law, Cap. 232, as amended by Law 50/70, at the District Lands Office of Limassol.

On the same day he complained to the defendant and her husband that although they kept postponing the transfer in his name, they sold the land to another person. It was admitted there and then that as a higher price was offered, she sold it to another person; she was, however, willing to back out of this new contract had she been offered an even higher price.

This action ensued whereby the plaintiff claimed specific performance and in the alternative refund of his deposit and damages.

The trial Court rightly held that the remedy of specific performance was beyond the reach of this plaintiff as he did not satisfy the peremptory requirements of the Sale of Land (Specific Performance) Law, Cap. 232, as amended. (*Eleni Panayiotou Iordanou* v. *Polykarpos Neophytou Anyftos*, 24 C.L.R. 97; *Eleni Andrea Avghousti* v. *Niovi Papadamou & Another*, (1968) 1 C.L.R. 66; *Xenopoullos* v. *Makridi*, (1969) 1 C.L.R. 488;

Melaisi v. *Georghiki Eteria Ltd.*, (1979) 1 C.L.R. 748). It decided that the defendant broke the contract and transferred the property in the name of another person. And then proceeded to assess damages. The relevant passage of the judgment reads as follows:-

> "The time of the breach of the contract is eight days after the signing of the contract as provided by the contract itself and it is abundantly clear from the evidence of the plaintiff that the value of the property on such a date was the same as at the time he bought it, that is, it was approximately valued at the time at £2,000 or £2,100 at the most. The plaintiff, therefore, is entitled to damages which damages are, according to his own evidence, the difference of the sale price from the actual value of the property at the time of the breach, that is, £150.—. Of course, the plaintiff is also entitled to get the £80.—he paid to the defendant against the purchase price".

And they issued judgment for the plaintiff against the defendant for £230.—. Against this judgment this appeal was taken.

The following points pose for determination:-

(1) Was the time of transfer of the essence?

(2) Date of assessment of damages;

(3) Measure of damages.

(1) *Was the time of transfer of the essence of the contract?*

The time of performance of contracts in this country is governed by sections 47, 48 but mainly s.55 of the Contract Law, Cap. 149. Section 55 reads as follows:-

> "55. (1) When a party to a contract promises to do a certain thing at or before a specified time, or certain things at or before specified times, and fails to do any such thing at or before the specified time, the contract, or so much of it as has not been performed, becomes voidable at the option of the promisee, if the intention of the parties was that time should be of the essence of the contract.
>
> (2) If it was not the intention of the parties that time

should be of the essence of the contract, the contract does not become voidable by the failure to do such thing at or before the specified time; but the promisee is entitled to compensation from the promisor for any loss occasioned to him by such failure.

(3) If, in case of a contract voidable on account of the promisor's failure to perform his promise at the time agreed, the promisee accepts performance of such promise at any time other than that agreed, the promisee cannot claim compensation for any loss occasioned by the non-performance of the promise at the time agreed, unless, at the time of such acceptance, he gives notice to the promisor of his intention to do so".

This is a replica of s.55 of the Indian Contract Act, 1872. In *Jamshed* v. *Burjorji*, (1916) 43 1 A.26, the Privy Council has observed that this section does not lay down any principle, as regards contract to sell land in India, different from those which obtain under the law of England; therefore, also under s. 55 of Cap. 149 the corresponding principles of the English law apply.

In *Stickney* v. *Keeble and Another*, [1915] A.C. 386, Lord Parker of Waddington said at pp. 415-416:-

"My Lords, in a contract for the sale and purchase of real estate, the time fixed by the parties for completion has at law always been regarded as essential. In other words, Courts of law have always held the parties to their bargain in this respect, with the result that if the vendor is unable to make a title by the day fixed for completion, the purchaser can treat the contract as at an end and recover his deposit with interest and the costs of investigating the title.

In such cases, however, equity having a concurrent jurisdiction did not look upon the stipulation as to time in precisely the same light. Where it could do so without injustice to the contracting parties it decreed specific performance notwithstanding failure to observe the time fixed by the contract for completion, and as an incident of specific performance relieved the party in default by restraining proceedings at law based on such failure.

This is really all that is meant by and involved in the maxim that in equity the time fixed for completion is not of the essence of the contract, but this maxim never had any application to cases in which the stipulation as to time could not be disregarded without injustice to the parties, when, for example, the parties, for reasons best known to themselves, had stipulated that the time fixed should be essential, or where there was something in the nature of the property or the surrounding circumstances which would render it inequitable to treat it as a non-essential term of the contract.

It should be observed, too, that it was only for the purposes of granting specific performance that equity in this class of case interfered with the remedy at law. A vendor who had put it out of his own power to complete the contract, or had by his conduct lost the right to specific performance, had no equity to restrain proceedings at law based on the non-observance of the stipulation as to time".

In *Jamshed Khodaram Irani* v. *Burjorji Dhunjibhai*, (1916) 43 I A.26, Lord Haldane in delivering the opinion of the Judicial Committee of the Privy Council in an Indian case said, after citing s. 55 of the Indian Code:-

"Their Lordships did not think that that section laid down any principle which differed from those which obtained under the law of England as regarded contracts to sell land. Under that law equity, which governed the rights of the parties in cases of specific performance of contracts to sell real estate, looked not at the letter but at the substance of the agreement, to ascertain whether the parties, notwithstanding that they named a specific time within which completion was to take place, really and in substance intended no more than that it should take place within a reasonable time ——— The special jurisdiction of equity to disregard the letter of the contract in acertaining what the parties to the contract were to be taken as having really and in substance intended as regards the time of its performance might be excluded by any plainly expressed stipulation. But to have that effect the language of the stipulation must show that the intention was to make the

rights of the parties depend on the observance of the prescribed time limits in a fashion which was unmistakable. The language would have that effect if it plainly excluded the notion that those time limits were of merely secondary importance in the bargain, and that to disregard them would be to discregard nothing that lay at its foundation. Prima facie, equity treated the importance of such time limits as being subordinate to the main purpose of the parties, and would enjoin specific performance notwithstanding that from the point of view of a Court of law the contract had not been literally performed by the plaintiff as regards the time limit specified. That was merely an illustration of that general principle of disregarding the letter for the substance which Courts of equity applied when, for instance, they decreed specific performance with compensation for a non-essential deficiency in subject-matter. But equity would not assist where there had been undue delay on the part of one party to the contract and the other had given him reasonable notice that he must complete within a definite time. Nor would it exercise its jurisdiction when the character of the property or when other circumstances would render such exercise likely to result in injustice. In such cases, the circumstances themselves, apart from any question of expressed intention, excluded the jurisdiction. Equity would further infer an intention that time should be of the essence from what had passed between the parties before the signing of the contract".

In England, after the enactment of the Law of Property Act, 1925, the rules of Law are now the same as those in equity. It is only in the following three cases that time is of the essence of a contract: (1) Where the parties have expressly stipulated in their contract that the time fixed for performance must be exactly complied with; (2) where the circumstances of the contract or the nature of the subject-matter indicate that the fixed date must be exactly complied with; (3) where time was not originally of the essence of the contract, but one party has been guilty of undue delay, the other party may give notice requiring the contract to be performed within a reasonable time.

In *Smith* v. *Hamilton*, [1950] 2 All E.R. 928, Harman, J., said at pp. 932-933:-

> "This was a contract for the sale of land, and it goes without saying at this date that, unless there was something special, the time limited in the conditions of sale for completion was not a date which, in the words of the old law, was of the essence of the contract. In other words, the equitable view which now prevails in regard to all contracts and has prevailed for a very long time in the case of real estate is that the Court looks to the substance of the matter and will not allow provisions relating to dates to control the general view that the contract, when made, is to be performed if it is just and equitable so to do, notwithstanding that time be over-run. There are, of course, circumstances in which time can be said to be of the essence of the contract from the beginning. Everybody knows, for instance, that on a sale of licensed premises, or a sale of a shop as a going concern, and, perhaps, the sale of animals in certain circumstances, time is of the essence because it necessarily must be so. Apart from that, however, it would need very special circumstances to make time of the essence of the contract on a sale of an ordinary private dwelling-house with vacant possession".

The mode of payment is an essential term of the contract. The time of transfer is not expressly made of the essence of the contract. They are two different stipulations and in sequence of time the payment would precede the transfer. The appellant was always ready and willing to pay the purchase price and he made this repeatedly known to the respondent. The subject of the sale is land. The time specified in the agreement for the transfer, in our view, is only a formal part and was not of the essence of the contract.

The respondent was postponing the performance of the contract with the acquiescence of the appellant. The appellant repeatedly called upon the respondent to complete the contract but she failed to respond in a positive manner. The respondent did not evince an intention not to be bound by the contract until she sold the land to a third person.

(2) *Date of assessment of damages.*

The respondent sold the land, subject-matter of the agreement

of sale, to a third person on 25.11.1977. The appellant found out about it shortly afterwards and then he tried to have the contract completed as any reasonable purchaser would have done.

The question as to the date at which damages should be assessed was considered in a number of cases in the past. The view was expressed that the damages should be assessed as at the time of the breach.

In *Horsler* v. *Zorro*, [1975] 1 All E.R. 584, at p. 586, Megarry, J., as he then was, indicated that there is no inflexible rule that common law damages must be assessed at the date of the breach.

In *Johnson and Another* v. *Agnew*, [1979] 1 All E.R. 883, (H.L.), Lord Wilberforce said this at page 896:-

> "The general principle for the assessment of damages is compensatory, i.e. that the innocent party is to be placed, so far as money can do so, in the same position as if the contract had been performed. Where the contract is one of sale, this principle normally leads to assessment of damages as at the date of the breach, a principle recognised and embodied in s.51 of the Sale of Goods Act 1893. But this is not an absolute rule; if to follow it would give rise to injustice, the court has power to fix such other date as may be appropriate in the circumstances.
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> In cases where a breach of a contract for sale has occurred, and the innocent party reasonably continues to try to have the contract completed, it would to me appear more logical and just rather than tie him to the date of the original breach, to assess damages as at the date when (otherwise than by his default) the contract is lost".

This dictum of Lord Wilberforce was applied in *Domb and Another* v. *Isoz*, [1980] 1 All E.R. 942.

In the present case it seems to us that the date at which damages should be assessed is at the date when the respondent entered into the contract of sale with the third person, i.e. the 25th November, 1977.

(3) *Measure of damages.*

The measure of damages is the difference between the contract

price and the market value at the time the respondent sold the property to the third person.

In *Ridley* v. *De Geerts*, [1945] 2 All E.R. 654, Lord Greene, M.R., had this to say:-

> "There is no question of specific performance because the respondent thought it proper to back out of this transaction when she had been offered a higher price, and she has in fact completed that purchase for £1,600, that is £200 more than the appellant was to pay. The question, then is what is the measure of damages. Prima facie one would have thought on the evidence before us—and we are asked to assess the damages—the measure of damages would be the difference between the two prices, £200".

The purchase price in the contract broken between the appellant and the respondent was £1,950.—. The respondent sold the land to another person on 25.11.1977 for £4,000.—. The appellant is entitled to £2,050.—damages. He is furthermore entitled to the amount of £80.—, his deposit.

In view of the foregoing the appeal is allowed and the judgment of the District Court varied to the extent that judgment for the appellant-plaintiff is entered in the sum of £2,130.— with costs here and in the Court below.

Appeal allowed with costs here and in the Court below.