IN THE CARIBBEAN COURT OF JUSTICE
Appellate Jurisdiction

ON APPEAL FROM THE COURT OF APPEAL OF THE CO-OPERATIVE REPUBLIC OF GUYANA

CCJ Appeal No. CV 012 of 2013
GY Civil Appeal No. 78 of 2010

BETWEEN

GANGA CHARRAN SINGH **APPELLANT**

AND

RAM SINGH AND RAJCOOMARIE SINGH **RESPONDENTS**

Before The Honourables **Mr Justice R Nelson**
Mr Justice A Saunders
Mr Justice J Wit
Mr Justice D Hayton
Mr Justice W Anderson

Appearances

Sir Fenton Ramsahoye, SC, Mr Rajendra Poonai, Mr R Satram, Mr C V Satram and Mr Manoj Narayan for the Appellant

Mr Edward A. Luckhoo, SC, Mr Robin M S Stoby, SC, Ms Kim Kyte-John, Ms Sharon F Small and Ms Faye Barker for the Respondent

JUDGMENT
of
Justices Nelson, Wit, Hayton and Anderson
Delivered by
The Honourable Mr Justice Hayton
on the 2nd day of July, 2014
and
JUDGMENT
of The Honourable Mr Justice Saunders

JUDGMENT OF THE HONOURABLE MR JUSTICE NELSON, THE HONOURABLE MR JUSTICE WIT, THE HONOURABLE MR JUSTICE HAYTON AND THE HONOURABLE MR JUSTICE ANDERSON

An unfortunate state of affairs

[1] This is a tortuous tale of problems caused by the reluctance of joint mortgagors to give up possession of their mortgaged property when the mortgagee was trying to enforce its security. In March 1996 the mortgagee obtained a judgment in its favour for the amount of the debt with interest, but the property was not sold at auction to a purchaser until September 2004 when a 25% deposit was paid. In November 2004 the mortgagors brought legal proceedings to set aside the sale and prevent any transport being passed to the purchaser. In April 2008, days after resolution of legal proceedings in the purchaser's favour, the balance of the purchase price was paid and transport was passed to the purchaser. The mortgagors immediately brought fresh proceedings (later discontinued), claiming that the transport should be set aside and that the money paid by the purchaser to the Registrar of the Supreme Court should not be paid to the mortgagee. Shortly thereafter, in May 2008 the purchaser brought proceedings against the mortgagors for delivery of possession to him. He succeeded at trial in 2010 but the mortgagors' appeal was allowed with costs awarded against him.

[2] The Court of Appeal reserved judgment for sixteen months before holding: that the purchaser's 25% deposit was forfeited, he not having paid the balance by due dates as required by a statutory rule; that he had no right to possession since the transport to him was void; and that he was at liberty to seek to reclaim his 75% from the Registrar who was not a party to the case. The amount of the forfeited 25% deposit reduced the lucky mortgagors' debt and the property was available to be re-advertised for sale at auction to help satisfy the debt due to the mortgagee.

The detailed background

[3] A property situate at Lot 230 Almond Street, Queenstown, Georgetown was owned by the Respondents, Ram Singh and Rajcoomarie Singh, ("the Mortgagors") by virtue of Transport No 22 of 1986 of the County of Demerara. They executed a first mortgage of it to Guyana National Cooperative Bank Trust Corporation ("the Bank", subsequently taken over by Hand-in-Hand Trust Corporation) to secure a loan from the Bank but defaulted on the payments due under it. On 19th March 1996 the Bank obtained judgment for the amount of the indebtedness of the Respondents together with the usual foreclosure order authorising the Bank to proceed to execution against the property in order to receive from the proceeds of sale $9,123,198 with interest thereon at 21% p.a. from 1st February 1996. On 18th November 1998 the Registrar of the Supreme Court issued to a Marshal a Writ of Sale of Immovable Property commanding him to sell the property to satisfy the 1996 judgment. In September 2000 the Respondents applied for a stay of execution, but the application was unsuccessful.

[4] Ultimately, a Marshal (under the control of, and responsible to, the Registrar of the Supreme Court[1]) organised a sale by auction at which on 28th September 2004 Ganga Charran Singh, the Appellant (hereafter "the Purchaser"), purchased the property for $11,020,000 and immediately paid the 25% deposit, $2,555,000, required under the articles of the auction sale that reflect Order 36 r 57 of the Rules of the High Court. By rule 57(1) "the purchaser shall forthwith deposit with the Marshal 25 per cent of the purchase money and shall pay the balance by three equal instalments, with interest at the rate of 6 per cent per annum, …at the expiration of two, four and six months, respectively." In s 2 of the High Court Act (Cap 3:02) "'The marshal' means the Registrar and includes any marshal of Guyana," the Registrar being the Registrar of the court.

[5] Significantly, rule 57(2) states as follows:

[1] See High Court Act, Cap 3:02 ss 11 and 12.

> In the event of the purchaser making default in payment of any of the instalments the amount of the deposit shall, unless the Court or a Judge on application filed within seven days of the default extend the time for payment, be forfeited and applied by the Marshal towards discharge of the execution costs and judgment debt or debts; and if there be any balance due on the said costs and debts the property may, after being re-advertised, again be put up for sale by auction and sold. If there be no balance due, the property shall be released to the judgment debtor.

[6] Aggrieved by the 28th September 2004 sale, the Mortgagors on 23rd November 2004 issued a Notice of Motion, 220-M of 2004, against the Bank, the Purchaser and the Registrar of the Supreme Court seeking an order setting aside the sale of the property as being irregular and an injunction restraining the Registrar from passing transport of the property to the Purchaser.

[7] When, as held by Chang CJ (Ag), the Purchaser turned up at the Registrar's office before expiry of two months from 28th September 2004 ready to pay the whole 75% balance of the purchase price he found that no one was prepared to accept his payment. He was told "that they could not accept [his] money because of court proceedings", which could only be the above 23rd November 2004 proceedings. The Purchaser then had to wait (as advised by his lawyer) until these legal difficulties had been resolved in his favour.

[8] An order was made by Bovell-Drakes J on 13th November 2007 giving leave to the Mortgagors to withdraw and discontinue their 23rd November 2004 proceedings. Nevertheless, on 3rd January 2008 the Mortgagors issued a Notice of Motion, 1 M of 2008, seeking the same remedies against the same defendants as in their recently discontinued proceedings. An order was, however, made by Jainarayan Singh J on 10th April 2008 and entered on 14th April 2008 dismissing the proceedings. Since matters had then been resolved in the Purchaser's favour, on 15th April 2008 he paid the 75% outstanding balance of $8,465,000, together with interest thereon of $84,882 seemingly representing almost two months interest at 6% interest for the period from 28th September 2004 to Friday 26th

November 2004. On 18th April 2008 a judicial sale transport No. 803 of 2008 of the County of Demerara was passed in his favour conferring full and absolute title as provided in section 30[2] of the Deeds Registry Act (Cap 5:01).

[9] The Purchaser might then have considered himself "home and dry", but on 24th April 2008 the Mortgagors issued proceedings No 458/08 of CD against the Purchaser, the Bank, the Registrar of the Supreme Court and the Registrar of Deeds. The Mortgagors sought orders that Transport No 803 of Demerara of 18th April 2008 was void because it was fraudulently obtained and that the sale should be set aside; that the Registrar of Deeds be directed to restore transport back in the names of the Mortgagors; that the Purchaser be restrained from dealing with the property until the determination of the action and that the Bank be restrained from collecting any of the purchase price paid by the Purchaser. Nevertheless, on 11th December 2008 Rishi Persaud J gave the Mortgagors leave to withdraw and discontinue their proceedings.

[10] On 2nd May 2008 the Purchaser himself took the initiative to bring the current proceedings by specially endorsed writ in which he sought possession of the property now owned by him under Transport No 803 of 2008, damages for trespass and an injunction restraining the defendant Mortgagors remaining, re-entering and/or occupying his property.

[11] The Mortgagors' defence was that Transport No 803 was void and illegal and could not be relied upon by the Purchaser because of his non-compliance with Article II of the Articles of Sale and the requirements in Order 36 rule 57(2). Hence a key issue is the applicability of rule 57(2) set out above at [5] when the Purchaser had not complied with the two monthly time limits for payment of the balance of the purchase price. Indeed, no payment was made until 15th April 2008, nearly forty-one months after the time when the first 25% instalment fell

[2] Copies of the Act marked LRO 1973 do not contain a s 17, "Requirement of certificate before passing of transport or long lease", featuring in copies marked LRO 3/1998 so that section 29 in the former becomes section 30 in the latter.

due, and no extension of the time for payment had been obtained by an application to Court filed within seven days of the default. There was, however, no counterclaim by the Mortgagors for a declaration that Transport No 803 of 2008 was void and that title should be restored to the Mortgagors by the Registrar of Deeds, which would involve a need to join the Registrar as a party. Indeed, the final sentence of the written submissions of the Mortgagors' counsel at trial simply stated, "It is submitted that these proceedings should be dismissed with costs."

The decision of Chang CJ (Ag)

[12] Chang CJ (Ag) made an order requiring the Mortgagors to deliver up possession to the Purchaser within six weeks on the basis that the Purchaser had become by judicial sale transport the owner of the property on 18th April 2008. The judge, however, rejected a claim for damages for trespass since the Purchaser had never been in possession of the property and, indeed, had never given notice to the Mortgagors to deliver up possession to him until the filing of these proceedings. Although the Mortgagors had pleaded that the transport was liable to be set aside for fraud under section 22(1)[3] of the Deeds Registry Act, there were no requisite particulars of fraud and the judge expressly made no finding of fraud. He awarded costs to the Purchaser in the sum of $35,000.

[13] Chang CJ (Ag) stated at page 11 of his judgment,

> It is the finding of this court that the plaintiff did offer to pay the entire balance of 75% of the sale purchase price within two months of payment of the initial deposit and that the office of the Registrar did refuse to accept the said offer. As such, there was no breach of Order 36 r 57(1) so as to attract the application of Order 36 r 57(2) which is premised on the opening words, 'In the event of the purchaser *making default* in payment of any of the instalments'.

[3] This should be section 23(1): see footnote 2.

He considered at page 12 that there had been a "wrongful omission on the part of the office of the Registrar of the Supreme Court to perform its official duty to accept payment from the said purchaser within the prescribed time frames." Such an omission was "no more than an irregularity which can be waived by the execution sale purchaser", as had happened when the Purchaser's payment was accepted on 15th April 2008. Thus the Purchaser had duly become owner of the property by transport on 18th April 2008.

The decision of the Court of Appeal

[14] The Court of Appeal allowed the appeal and vacated the orders of Chang CJ (Ag). It held that the Purchaser's evidence that he had offered to pay the outstanding balance before 28th November 2008 but was told by someone at the Registrar's office that the payment could not be accepted because of pending legal proceedings was inadmissible hearsay evidence. The fact that no objection had been taken when the Purchaser stated this in examination-in-chief and in cross-examination did not prevent a judge from treating the evidence as inadmissible hearsay when in closing submissions an objection was taken.[4] Indeed, it was open to a judge of his own motion, having overriding responsibility for the conduct of the trial, to decide that unobjected to hearsay evidence was inadmissible. There was thus insufficient evidence to support the Purchaser's allegation that he was not at fault in not paying up requisite instalments of the purchase price within the prescribed timetable.

[15] The court further considered that even if the Purchaser's evidence could be admitted and relied upon this "would not have absolved him from a legally imposed obligation to apply to the court to make the payment due out of time." Because the Purchaser's title had been obtained in breach of the Rules of Court, reflected in the Articles of Sale, no indefeasible title passed to him under s 30 of the Deeds Registry Act. The court concluded,

[4] This is so even though there had been cross-examination on this evidence as if it were admissible.

> [t]he respondent [Purchaser] in the face of his transgressions deliberately pursued the passing of transport to himself and in the interests of justice, we consider it appropriate to declare void Transport No 803 of 2008 standing in the name of the respondent who would be entitled to recover the sum of $8,465,000 paid to the Registrar of the Supreme Court of Judicature on the 15th April 2008

(though the Registrar, of course, was not a party to these proceedings). The Court further ordered that the $2,555,000 deposit paid by the Purchaser to the Registrar on 28th September 2004 be forfeited, and that the Purchaser pay costs of $150,000 to each of the Mortgagors.

[16] The result is that the Purchaser lost the property, forfeited his $2,555,000 deposit and had to pay the Mortgagors' $300,000 costs and his own lawyers' fees. Moreover, the Mortgagors' title was revived so that it could be the subject of an auction sale to satisfy the outstanding debt due to the Bank (running at 21% interest) after it had received from the Registrar the Purchaser's payment of $8,465,000 and also $84,882 interest.[5] There are obvious practical difficulties facing the Purchaser's attempts to recover this $8,549,882 received by the Registrar and paid out to the Bank. Hence the Purchaser appeals to this Court because he was not impressed by the Court of Appeal's view of "the interests of justice".

The issues before the CCJ for determining the appeal

A. Was the Purchaser's key evidence inadmissible hearsay?

[17] The Purchaser gave evidence in examination-in-chief and on cross-examination that he went to the office of the Registrar a few weeks after purchasing the property at auction in order not just to pay off the 25% due but to pay off the entire balance due. Nevertheless, he was told by Registry staff that his payment could not be accepted because of pending legal proceedings. We have no doubt

[5] It was clear to this Court (though not the lower courts) that such interest had actually been paid, the receipt having become part of the Record before this Court.

that this was not inadmissible hearsay evidence. He gave original direct admissible evidence of what he actually did and then what he attempted to do but was surprisingly unable to do. He went to the Registry bright-eyed and bushy-tailed but left with his tail between his legs. He went on to provide the reason for this otherwise inexplicable situation: his belief that he could not get his payment accepted until resolution of outstanding legal proceedings. The member of the Registry staff dealing with his proffered payment did not reject it out of hand as, no doubt, he would have done if not proffered in the customary accepted manner. The only reason given for refusing the payment was that there were outstanding legal proceedings (implicitly affecting the validity of the sale and the Registry's function in processing the sale).

[18] The statement of the staff member was not being used to establish that such legal proceedings existed but the fact that the statement was made so as to cause the Purchaser to depart the Registry without achieving the purpose he would have expected to achieve when proffering full payment. Thus it does not rank as hearsay. We endorse the Privy Council's statement that:

> It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and admissible when it is proposed to establish by the evidence, not the truth of the statement, but the fact that it was made.[6]

It so happens, however, that the truth of the statement received support from the existence of the 23rd November 2004 proceedings by the Mortgagors to have the sale set aside for irregularity and to enjoin the Registrar not to pass transport.

[19] It is necessary, however, to emphasise that in civil cases tried by a judge if no objection is taken to hearsay evidence at the time it is being given in the witness box, such evidence is admitted as part of the evidence in the proceedings, as explained in detail by this Court in *Guyana Bank for Trade & Industry v Alleyne*[7]

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[6] *Subramaniam v Public Prosecutor* [1956] 1 WLR 965, 970 (PC).
[7] [2011] CCJ 5 (AJ), (2011) 77 WIR 303 [59]-[60].

and in *Sheermohammed v S A Nabi & Sons Limited*.[8] The reason is that the judge with his extensive experience of law and life is well-placed to decide how much weight - or whether any weight - should be given to such evidence, taking account of other written or oral evidence. He can be trusted to apply his mind without prejudice to assess hearsay evidence for what it is worth in all the circumstances, unlike a jury of differing intellectual abilities with little experience of assessing evidence.

B. Was the Purchaser in breach of Order 36 Rule 57?

[20] We have no reason not to accept the findings of the trial judge[9] as set out above at [13], which, indeed, seem soundly based. Before 28th November 2004 the Purchaser went to the Registry of the Supreme Court keen and ready to pay the outstanding balance of purchase price, presumably in the customary manner, but his offer was refused. The sole ground for the refusal by Registry staff was the Mortgagors' legal action of 23rd November 2004 that claimed to set aside the purchase and restrain the Registrar from passing transport to the Purchaser. As Lord Mansfield stated in *Jones v Barkley*,[10] "the party must shew that he was ready; but if the other stops him on the ground of an intention not to perform his part, it is not necessary for the first to go farther and do a nugatory act." Since Registry staff refused the Purchaser's offer to pay the outstanding balance of purchase money that the Purchaser was obliged to pay, he had done all he could and was not in breach of his obligations as also held in *Farquharson v Pearl Assurance Co*[11] where a claimant's offer to pay his due insurance premiums was refused by the insurer's employee.

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[8] [2011] CCJ 7 (AJ), (2011) 78 WIR 364 [38]-[39].

[9] An appellate court is most reluctant to interfere with such findings: *McGraddie v McGraddie* [2013] UKSC 58; *Persaud v Sewchand* (2009) 76 WIR 299; *Meenavalli v Matute* [2014] CCJ 8 (AJ) [4].

[10] (1781) 99 ER 434, 440, 2 Dougl 684, 694, cited and applied by the Supreme Court of New Zealand in *Bahramitash v Kumar* [2005] NZSC 39, [2006] 1 NZLR 577 and by the High Court of Australia in *Foran v Wight [*1989] HCA 51, (1989) 168 CLR 385. Intriguingly, South African Roman Dutch contract law, though, of course, not applicable here, is to the same effect as those common law authorities: see F du Bois (ed) *Wille's Principles of South African Law* 9th ed p 862.

[11] [1937] 3 All ER 124, 131.

[21] It follows that there was no breach of rule 57(1) as to timely payment of instalments that the Purchaser was obliged to pay, so that rule 57(2) cannot apply because it is premised upon "the event of the purchaser making default in payment of any of the instalments." If the Registrar had duly accepted the proffered payment in November 2004 then all instalments with interest would have been duly paid. As it is, it was not until April 15th 2008 after resolution of various legal proceedings in the Purchaser's favour that the Registrar accepted payment of the 75% balance, $8,465,000, and interest thereon of $84,882 representing almost two months' interest at 6% p.a. as if everything had duly occurred just before Sunday 28th November 2004.

C. Did the Purchaser duly obtain a judicial sale transport despite a breach of duty by the Registrar in refusing to accept proffered payment by the Purchaser?

[22] Even though there was no breach of rule 57(2) by the Purchaser, there was a breach of duty by the Registrar when there was a refusal to accept payment proffered by the Purchaser to enable him to fulfil his obligations under rule 57(1) as described above in [4]. It matters not that the Purchaser went beyond that obligation to pay the 75% balance of purchase price by three two-monthly instalments of 25% with 6% interest, but was prepared to pay the entire balance within two months with 6% interest, thereby much assisting the Mortgagors whose mortgage debt carried 21% interest. The Registrar is also in a fiduciary "no profit, no conflict" role in looking after the interests of mortgagee judgment creditors and mortgagor judgment debtors, who are both relying upon the Registrar to organise an auction sale to sell the mortgaged property in all the circumstances at the best price reasonably obtainable to a purchaser able to pay the 25% deposit forthwith. The sooner the better it is for both mortgagee and mortgagor if the Registrar obtains money due from a purchaser to satisfy the mortgagor's capital and interest liabilities to the mortgagee. The Registrar and his or her staff have no discretion to refuse prompt payments obliged to be made pursuant to rule 57(1) whether or not they think this is the decent thing to do. This is true even if, for example, the mortgagor has brought legal proceedings to

impeach the purchaser's contract, in which event, by virtue of rule 57(2), the purchaser can apply, within seven days of the due date for paying purchase money, to a judge to exercise his or her discretion to grant an extension of time for such payment.

[23] Does the wrongful refusal by the Registrar of the Purchaser's proffered payment in November 2004 or the late acceptance in April 2008 of the same proffered payment enable the Mortgagors to mount a successful challenge to the validity of the judicial sale transport passed in favour of the Purchaser and conferring him with full and absolute title by section 30 of the Deeds Registry Act? Clearly not. If the Registrar had acted correctly in November 2004, she would have accepted payment of the $8,465,000 balance of the purchase price with $84,882 interest thereon for the period until such payment as being in full satisfaction of the Purchaser's obligations - but she could not have passed transport to the Purchaser until resolution of the Mortgagors' proceedings impeaching the sale. She would have had to hold the $8,729,882 in an interest-bearing account until the resolution of those proceedings. When they were resolved in April 2008 she accepted on 15th April 2008 the $8,729,882 that had been proffered back in November 2004 in full satisfaction of the Purchaser's outstanding obligations at that time. Thus in April 2008 she made good her irregular refusal in November 2004 by an acceptance of a payment that she was obliged to make so as to put the Purchaser in the position in which he was entitled to have been in November 2004, the September 2004 contract of purchase still subsisting. The Purchaser is not obliged to pay any extra interest so as to provide a double benefit to the Mortgagors whose delaying tactics throughout kept them in possession of the sold mortgaged property.[12] In these circumstances there is no possibility of impugning the powerful wording of section 30 of the Deeds Registry Act.

[24] The Purchaser is therefore entitled against the Mortgagors to possession of the property, as held by Chang CJ (Ag) whose orders we uphold. The appeal is

[12] *Re Hewitt's Contract* [1963] 3 All ER 419,422; *Wise Think Global Ltd v Finance Worldwide Ltd* [2014] HKFCA 26 [26]-[27].

allowed and the orders of the Court of Appeal are vacated. The Mortgagors are to pay the costs of the Purchaser here and in the Court of Appeal, to be taxed if not agreed.

A moral for purchasers whose purchase is impeached

[25] It is now clear that if a purchaser of mortgaged property finds his purchase challenged by the mortgagor, he still has to pay the requisite balance of the price to the Registrar (who must accept it) unless he makes a successful application under rule 57(2). By virtue of this rule, within seven days of the default in making a due payment (or such extended time as may be permitted by a judge under Order 48 r 4 of the Rules of the High Court) the purchaser needs to apply to a judge to exercise his or her discretion to grant an extension of time for any due payments.

JUDGMENT OF THE HONOURABLE MR JUSTICE SAUNDERS, JCCJ

[26] I agree with the opinion delivered above. I wish to add some remarks of my own on the issue of the forfeiture of the deposit since counsel for the Mortgagors contended, and the Court of Appeal determined, that the Purchaser's deposit had been forfeited. This determination resulted in a further declaration that the Purchaser's transport was void. The three brief points I would make are that: (a) forfeiture is effected by the Registrar. It does not occur automatically by operation of law. In this case no forfeiture was so effected; (b) if a party is aggrieved that the Registrar failed to effect forfeiture, then the relevant cause of action must at least include the Registrar as a defendant; and (c) a court ought not ordinarily to declare a deposit forfeited or a transport void when no action has been commenced or a counterclaim made for such relief. Since in these proceedings there was no such action or counterclaim filed by the Mortgagors, the Court of Appeal erred in making such declarations.

The meaning of "shall … be forfeited"

[27] The provisions of Order 36 Rule 57(2) were set out at [5] above. The crucial words are that in the event of failure to pay the balance of the purchase monies as and when due:

> …the amount of the deposit *shall*, unless the Court or a Judge on application filed within seven days of the default extend the time for payment, *be forfeited* and applied *by the Marshal* towards discharge of the execution costs and judgment debt … (emphasis added)

[28] The Court of Appeal interpreted these words literally to mean that, upon non-compliance with the payment schedule stipulated in Order 36 Rule 57(1),[13] there is immediate and automatic forfeiture of the deposit. I disagree with this interpretation. In my opinion, even if there is some failure by the purchaser to comply with the strict terms of the Rule, the expression "shall … be forfeited" must nevertheless be interpreted to mean "shall be liable to forfeiture". This meaning can be deduced from the text itself. The activities that provide the content of both verbs, "*forfeited*" and "*applied*", are to be carried out "*by the Marshal*" i.e. the Registrar. To invoke forfeiture, that official must take some positive action. She may, for example, have to make inquiries as to whether any extension of time has been granted. She would certainly first have to apprise the purchaser of the intention to forfeit and allow the purchaser an opportunity to make representations. If the Registrar does nothing then she has obviously waived the right to forfeit.

[29] Leaving aside a textual interpretation, depending on the context in which they are used, words in a statute seemingly prescribing immediate or automatic forfeiture

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[13] O 36 Rule 57(1) reads:

> Whenever any immovable property (not being a plantation in cultivation) shall be sold at execution other than summary or parate execution for a sum exceeding one hundred dollars the purchaser shall, unless he pay the purchase money at the time of the sale, forthwith deposit with the Marshal twenty-five per cent of the purchase money, and shall, if the purchase money do not exceed the sum of five hundred dollars, pay the balance by three equal instalments, with interest at the rate of six per cent *per annum*, at the expiration of one, two and three months respectively, and if the purchase money exceed the sum of five hundred dollars he shall pay such balance with such interest by three equal instalments at the expiration of two, four and six months respectively.

need not be read literally. See, for example, the decisions of the Judicial Committee in *Quesnel Forks Gold Mining Co. v Ward and others*[14] and *Young v Bess,*[15] a case from St Vincent and the Grenadines where it was argued, unsuccessfully, that there was automatic forfeiture of a title to freehold land on contravention of statutory restrictions on the holding of land by aliens. In these cases the court considered the context in which the applicable words prescribing forfeiture were expressed and concluded that forfeiture was not automatic but could be waived notwithstanding the apparently clear words of the statute.

Rendering a transport void

[30] The purchaser in this case possesses a transport and one of the central features of Guyana's unique Roman-Dutch system of land law is the relative certainty of title produced by the passing of transport. A transport passed is presumptively indefeasible. By section 30 of the Deeds Registry Act, Cap 5:01, a judicial sale transport passed vests full and absolute title to the immovable property sold subject only to such statutory claims, registered incumbrances, registered interests and registered leases as have not been extinguished by the sale.

[31] Counsel for the Mortgagors submitted that the expression "transport passed" in section 30 could only be intended to refer to a transport validly passed. The implication was that unless every "i" is dotted and every "t" crossed the transport is inexorably rendered void. This would be a surprising result because, not even a transport obtained by fraud is automatically void as a matter of course. The statute says that it is "liable in the hands of all parties or privies to the fraud to be declared void by the Court in any action brought within twelve months after the discovery of the fraud." To obtain relief on the basis of fraud, a plaintiff is obliged to institute proceedings, carefully pleading and particularising the fraud, and also ensure that the case is brought within a year after its discovery. The point is that, firstly, with respect to the Registrar's handling of the receipt of

[14] (1920) AC 222.
[15] [1995] 46 WIR 165.

monies from a purchaser at a judicial sale, not every irregularity or non-compliance with the literal wording of the relevant statute will result in the ultimate invalidation of the transport; especially where the irregularity has not created an injustice. Secondly, a court ought not to invalidate a purchaser's transport by a side wind. Instead, proceedings should be commenced with the objective of rendering the transport void.

[32] The Registrar should certainly have acted differently in relation to the receipt of the balance of the purchase monies. In conducting a judicial sale the Registrar is obliged to comply with the statutory provisions and to honour her fiduciary duties towards both the judgment debtor and the judgment creditor. This does not mean, however, that the Registrar has no discretion to exercise or that she must act unreasonably. So, for example, the Registrar is entitled to exercise her discretion to accept accelerated payment from the purchaser and not insist on the purchaser paying the purchase monies by three equal instalments at the expiration of two, four and six months respectively. Ultimately, since no steps were taken by the Registrar to invoke forfeiture, and since, in any event, and for the reasons given by Justice Hayton, there were no good grounds upon which forfeiture could have been invoked, the purchaser's deposit was never forfeited or in danger of being forfeited and his transport cannot be impeached, certainly not on this basis.

The orders and declarations of the Court

[33] The appeal is allowed.

(1) The orders of the Court of Appeal are to be vacated, and Ganga Charran Singh is declared to be the owner by Transport No 803 of 2008 of the County of Demerara of Lot 230 Almond Street, Queenstown, Georgetown and, as such, he is entitled to possession of the said property.

(2) The orders of Chang CJ (Ag) for the Respondents, Ram Singh and Rajcoomarie Singh to deliver up possession of the said Lot 230 to Ganga Charran Singh and to pay him costs of $35,000 are upheld.

(3) The Respondents are to deliver up possession of the said Lot 230 to Ganga Charran Singh forthwith and to pay the costs of the Appellant in this appeal and in the Court of Appeal to be taxed if not agreed. Certified fit for one senior and one junior counsel.

The Hon Mr Justice R Nelson

The Hon Mr Justice A Saunders **The Hon Mr Justice J Wit**

The Hon Mr Justice D Hayton **The Hon Mr Justice W Anderson**