IN THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

In the matter of an Application for Special Leave to Appeal.

D. N. Wijetunga,
No. 80/1A, Layards Road,
Colombo 05.
Now residing at
No. 04, Ramakrishna Place,
Colombo 06.

Plaintiff

S.C. Appeal No. 89/2018
S.C. (Spl) L.A. No. 77/2016
C.A. No. 702/89 (F)
D. C. Mount Lavinia Case No. 345/Z

Vs.

T. C. Amarasekera,
No. 06, 2nd Lane, C. A. M. Housing Scheme,
Baddegana Road (South),
Pitakotte.

Defendant

AND BETWEEN

D. N. Wijetunga,
No. 80/1A, Layards Road,
Colombo 05.
Now residing at
No. 04, Ramakrishna Place,
Colombo 06.

Plaintiff – Appellant

Vs.

T. C. Amarasekera,
No. 06, 2nd Lane, C. A. M. Housing Scheme,
Baddegana Road (South),
Pitakotte.

Defendant – Respondent

AND NOW BETWEEN

D. N. Wijetunga,
No. 80/1A, Layards Road,
Colombo 05.
Now residing at
No. 04, Ramakrishna Place,
Colombo 06.

Plaintiff – Appellant – Petitioner

Vs.

T. C. Amarasekera,
No. 06, 2nd Lane, C. A. M. Housing Scheme,
Baddegana Road (South),
Pitakotte.
(Deceased)

Indrajith Hiran Christopher Amarasekara
No. 06, 2nd Lane, C. A. M. Housing Scheme,
Baddegana Road (South),
Pitakotte.

Substituted Defendant – Respondent – Respondent

Before: Hon. E. A. G. R. Amarasekara, J.

Hon. Kumudini Wickremasinghe, J.

Hon. Janak De Silva, J.

Counsels: Faisz Musthapha, P.C., with Faisze Marker for the Plaintiff – Appellant – Petitioner.

R. C. Gooneratne for the Substituted Defendant – Respondent – Respondent.

Written Submissions:

01.03.2017, 02.07.2018 and 28.08.2023 by Plaintiff – Appellant – Petitioner.

01.03.2017, 03.08.2018 and 21.06.2023 by the Substituted Defendant – Respondent – Respondent.

Argued on: 01.06.2023

Decided on: 02.04.2025

Janak De Silva, J.

The Plaintiff-Appellant-Appellant (Appellant) instituted this action against the Defendant-Respondent-Respondent (Respondent) seeking a judgment for ejecting the Respondent, his servants and agents and all those holding under him from the premises more fully described in the schedule to the plaint (premises).

According to the Appellant, he had permitted the Respondent to reside at the premises from 06.11.1974. The parties had thereafter entered into an agreement by deed No. 431 dated 14.02.1975 attested by S. Gnanapandithen N.P. whereby the Respondent undertook to purchase the premises for a total consideration of Rs. 45,000/= within three (3) months from the date of execution of the said deed.

The Appellant had at the request of the Respondent granted the Respondent extensions of time to purchase the said premises. Finally, the Respondent was given time until 31.07.1977 to purchase the premises. Since the Respondent failed to do so, he became liable to hand over vacant possession. As he failed to do so, this action was instituted to evict him from the premises and to claim damages.

The Respondent denied the claim of the Appellant and contended that he was, at all times material to this action, willing to purchase the premises. However, the Appellant had failed and neglected to execute the deed of transfer for the premises in favour of the

Respondent. Accordingly, the Respondent made a cross claim for specific performance of the agreement between him and the Appellant.

Upon the conclusion of the trial, the learned Additional District Judge delivered judgment dismissing the action of the Appellant and granting the Respondent specific performance as prayed for in the answer.

The learned trial judge concluded that the time of performance was extended until 31.07.1977 and that the Appellant had failed to perform his part of the bargain by going to the bank to sign the relevant documentation after the Respondent had arranged a bank loan to make the balance payment. Accordingly, it was held that the Respondent was at all times material to this action willing and ready to perform his part of the bargain whereas the Appellant had failed to do so. Therefore, the learned trial judge dismissed the action and granted specific performance.

The Appellant appealed to the Court of Appeal which concurred with the findings of the learned trial judge and dismissed the appeal.

Special leave to appeal was granted on the following questions of law:

(1) Is the finding of fact by the learned trial judge in regard to default vitiated by the failure to take into account the relevant items of evidence?
(2) In any event, are the learned District Judge and the Court of Appeal in error to determine as to whether this is an appropriate case in which specific performance should be granted?
(3) If the plaintiff extended the time for purchase of property till 31.07.1977, is the defendant entitled to limit the payment of money to the plaintiff on or before 31.07.1977?
(4) By extending the period till 31.07.1977, has the plaintiff waived his rights with regard to the stipulation of time set out in the agreement to sell?

(5) Has the plaintiff by his conduct and documents refused to execute a transfer, well before the expiry of the stipulated time as extended?

(6) If so, can the plaintiff derive any benefit by the fact that the prices have escalated?

The first two questions of law were raised by the Appellant and the others by the Respondent.

Time of Performance

Parties admitted the execution of the agreement to sell No. 431 (P1). According to P1, it was agreed that the Appellant should sell transfer and convey and the Respondent should purchase the premises for the sum of Rupees Forty-Five Thousand (Rs. 45,000/=) free from all encumbrances within three months from the date thereof.

P1 was executed on 14.02.1975. Hence, the parties should have performed their respective obligations by 14.05.1975.

The case of the Appellant is that since the Respondent failed to perform his part of the bargain by the time specified for performance, the Appellant was entitled to rescind from the agreement and the Respondent became liable to handover the premises.

The governing law of P1 is Roman-Dutch law. Where any party to a contract fails to perform his part of the bargain within the time fixed for performance, he is said to be in default or *mora*.

Mora can be either *mora ex re* or *mora ex persona*.

Mora ex re arises where time for performance has been fixed in the contract and one party fails to perform within the specified time. As Voet [22.1.26] succinctly explains, *it is not only men who make demands, but the law or even the date demands instead of a man, provided only that a fixed date was made a term in the obligation*.

Mora ex persona arises where the contract does not specify a time for performance, but on failure to perform within a reasonable time period, the creditor makes a demand for performance but the debtor fails to comply with the demand.

However, *mora* does not by itself provide an innocent party the right to rescind from the contract under Roman-Dutch law. In order for *mora* to result in the right to terminate, *time must be of essence* of the agreement or *must be made of essence* by a proper notice.

Where the contract contains a special stipulation known as *lex commissoria*, the creditor will have the right to resile from the contract where the debtor is in *mora*. *Lex commissoria* means a pact annexed to a purchase at the time it is contracted to the effect that, unless the price be paid at a certain time, the thing shall be considered as unbought [Voet 18.3.1]. Where the contract contains a stipulation known as *lex commissoria*, it will be an indication that the parties intended time to be of essence of the contract.

I must therefore examine whether time is of the essence of P1.

Time is of Essence

The concept "time is of the essence of the contract" is derived from English legal terminology and relates to the rule in English law concerning the right to withdraw from a contract due to unreasonable delay on the part of the debtor to perform his part of the bargain.

In ***Perera v. Abeysekera*** **(58 NLR 505 at 530)** Basnayake, C.J. examined what is meant by "time is of the essence of the contract" and went on to explain that:

> *"It means that* ***the performance by one party at the time specified in the contract is essential in order to enable him to require performance from the other party****. It* ***means that time is so material that exact compliance with the terms of the contract in this respect is essential to the right to require counter-performance. The first point to be determined in deciding whether time is of the essence of a***

particular contract is whether the parties have expressly made it so*. By that I do not mean that it is essential to use the very words "time is of the essence" in the contract, but* ***it should appear from the expressed terms and the surrounding circumstances taken as a whole that time is of the essence of the contract****. It is therefore primarily a matter of interpretation of the contract.* ***If the answer to the question whether time is of the essence is in the affirmative then the defaulter cannot enforce performance by the other party****."* (emphasis added)

According to Weeramantry [*Law of Contracts*, Vol. II, page 1001 (1967)], in transactions concerning land, stipulations as to time are not regarded as of the essence unless made so in express terms or such intention appears from all the circumstances.

P1 specifically states that the Seller should sell transfer and convey the premises and the Purchaser should purchase the property *within three months from the date of the said deed*. Hence any delay in performance (*mora*) arises *ex re*.

Clauses 5 and 6 of P1, sets out different remedies available to the Purchaser and the Seller respectively where the other party fails to perform his obligation on time, namely on or before 14.05.1975.

The Purchaser is entitled to ask for a refund of the sum of Rs. 10,000/= paid as advance, or to enforce the specific performance of P1 by the Seller or to be paid a sum of Rs. 10,000/= by way of liquidated and ascertained damages and not as a penalty.

The Seller is entitled to forfeit the sum of Rs. 10,000/= paid as advance, or to be paid a sum of Rs. 10,000/= by way of liquidated damages and uncertain damages and not as a penalty.

Cleary P1 contains a *lex commissoria*.

Moreover, the Appellant had by letter dated 12.08.1975 (P4), sent within three months of the last date on which the balance payment should have been made by the Respondent

(i.e. 14.05.1975), requested the Respondent to return the title deeds relating to the transaction. This clearly is an indication that the Appellant considered time to be of essence of P1.

The understanding of the Respondent appears to be the same. In letter dated 14.01.1976 (P6), the Respondent apologizes to the Appellant and asks him to accept his delay in expediting the issue.

I therefore conclude that time is of essence of the agreement (P1) between the parties. Both the Appellant and Respondent should have performed their respective obligations by 14.05.1975.

Extension of Time

The Respondent claims that this time was extended until 31.07.1997 and relies on a letter dated 08.06.1977 (P15) sent to him by Mr. S. Gnanapandithan, Attorney-at-Law for the Appellant.

On the contrary, the Appellant submitted that he sued on P2 and not on any other agreement. It was contended that although the Appellant had stated in the plaint that the Respondent was granted an extension of time until 31.07.1977, the Appellant had at the trial confined himself to the time specified in P1 and hence the statement in the plaint on the extension of time until 31.07.1977 recedes to the background. The Appellant relied on the decision in ***Hanaffi v. Nallamma*** **[(1998) 1 SLR 73]**.

The Appellant further submitted that evidence on the purported extension of time is inadmissible in view of Sections 91 and 92 of the Evidence Ordinance.

Moreover, the Appellant submitted that the communication relied on by the Respondent to establish the extension of time has been sent marked *"Without Prejudice"* and hence inadmissible in view of Section 23 of the Evidence Ordinance.

Accordingly, the question arises whether the time for performance was extended until 31.07.1977. The Respondent relies on two facts to establish such extension of time.

Section 150 of the Civil Procedure Code

Firstly, he points out that the Appellant had in his plaint (paragraph 8) specifically pleaded that he had, at the request of the Respondent, granted the Respondent time until 31.07.1977 to perform his part of the bargain.

The Appellant countered that he had raised issues based on the time limit set out in P1 and that the statement in the plaint that time for performance was extended to 31.07.1977 recedes to the background in view of the decision in ***Hanaffi*** **(supra)**, where it was held that the trial proceeds on the issues and the pleadings recede to the background.

However, this position is untenable in law. Explanation 2 to Section 150 of the Civil Procedure Code contains an important element of the rules of natural justice. It requires the case enunciated at the trial to be reasonably in accord with the party's pleading, i.e., plaint or answer, as the case may be. No party is allowed to make at the trial a case materially different from that which he has placed on record, and which his opponent is prepared to meet. The facts proposed to be established must in the whole amount to so much of the material part of his case as is not admitted in his opponent's pleadings.

The Appellant has in his plaint (paragraph 8) specifically pleaded that he had, at the request of the Respondent, granted the Respondent time until 31.07.1977 to perform his part of the bargain. This date is reflected in letter dated 28.06.1977 (P2) sent by the Respondent to the Appellant indicating that the transaction could be finalized only by the end of July 1977.

Hence, notwithstanding the absence of any formal admission having been recorded at the trial of the extension of time, the Appellant cannot present his case on the footing that

the time for performance of the respective obligations in P1 was 14.05.1975 and not 31.07.1977.

Secondly, the Respondent relied on letter dated 08.06.1977 (P15) sent to him by the Attorney-at-Law for the Appellant. It states that based on the undertaking by the Respondent to conclude the transaction early, the Appellant had instructed his lawyer to stay legal action against him. It went on to state that as no steps have been taken by the Respondent since his undertaking in March 1977, the Respondent is now informed that unless the matter is concluded by the 17.06.1977, the Appellant will be compelled to take action against him.

The Appellant submitted that P15 cannot be considered in evidence on two grounds. Firstly, it has been sent without prejudice and hence is inadmissible in view of Section 23 of the Evidence Ordinance. Secondly, Sections 91 and 92 of the Evidence Ordinance prohibits Court considering any evidence except what is specifically set out in P1.

Without Prejudice

Many jurisdictions restrict the use in evidence of communication, oral or written, made during negotiations between parties on the express condition that it is made without prejudice.

In ***Walker v. Wilsher*** **[(1889) 23 QBD 335 at 337]** Lindley, L.J. held that the meaning of 'without prejudice' is that they mean without prejudice to the position of the writer of the letter if the terms he proposes are not accepted. If the terms proposed in the letter are accepted a complete contract is established and the letter, although written without prejudice, operates to alter the old state of things and to establish a new one.

In the United States, there is no provision identical to Section 23 of the Evidence Ordinance, but federal laws have analogous rules.

Prior to codification in the Federal Rules of Evidence, U.S. courts followed common law principles on settlement communications, largely based on English legal traditions.

The Federal Rules of Evidence were enacted in 1975, including Rule 408, which broadly excluded compromise offers and related statements from being admitted as evidence to prove liability or the value of a claim. At the time of its adoption, Rule 408 primarily focused on protecting civil litigation discussions but did not explicitly address its application in criminal cases or regulatory settlements.

In 2006, Rule 408 was amended to address growing concerns about the misuse of settlement negotiations in criminal proceedings. The amendment explicitly clarified that statements made in civil settlement negotiations with government agencies could be admitted in subsequent criminal cases. This change was prompted by cases where defendants attempted to use Rule 408 as a shield against prosecution for fraud or regulatory violations.

Rule 408 of the Federal Rules of Evidence provides that evidence of offering or accepting a valuable consideration in compromising a disputed claim – as well as any conduct or statements made during compromise negotiations – is not admissible to prove the validity or amount of a claim or to impeach by a prior inconsistent statement.

This rule codifies the public policy favoring out-of-court settlements. As the Rule's Advisory Committee explained, exclusion rests on two grounds:

(a) Such evidence is often irrelevant to the merits because an offer of settlement may reflect a desire for peace rather than an admission of weakness.
(b) Excluding the evidence promotes the public policy of encouraging free communication in settlement negotiations.

The Advisory Committee Notes to Rule 408 explicitly articulate this reasoning, citing the maxim that a party should be able to "buy his peace" without fear that an attempted compromise will be construed as an admission.

Rule 408 is not an absolute bar on all uses of settlement communications. It prohibits using compromise communications for certain purposes – namely to prove or disprove the validity or amount of a disputed claim – but allows them if offered for other legitimate purposes. The Rule itself lists examples: proof of a witness's bias or prejudice, negating a contention of undue delay, or proving an effort to obstruct justice.

The US Supreme Court has sought to follow a pragmatic approach in balancing competing interests in the application of this rule. In ***Jaffee v. Redmond*** **[518 US 1 (1996)]** the Court recognized a psychotherapist-patient privilege under federal common law, emphasizing that certain confidential communications merit protection because "the public good transcends the normally predominant principle of utilizing all rational means for ascertaining truth."

According to Coomaraswamy [The Law of Evidence, Vol. II, Book 1, (Lake House Investments Ltd), 158], the rule of evidence in English Law is that letters written and oral communications made during a dispute or negotiation between parties and expressed or otherwise proved to have been made without prejudice cannot in general be admitted in evidence without the consent of both parties.

The rationale for this rule in English law is two-fold.

Firstly, the rule rests on public policy. It is public policy to encourage people to settle their differences. As Cross observed [R. Cross and C. Tapper, Cross & Tapper on Evidence, 6th Ed., 408], it is in the public interest that disputes should be settled and litigation reduced to a minimum, so the policy of the law in favour of enlarging the cloak under which negotiations may be conducted without prejudice. As Oliver L.J. stated in ***Cutts v. Head*** **[(1984) Ch 290 at 306]**, the public policy justification, in truth, essentially rests on the

desirability of preventing statements or offers made in the course of negotiations for settlement being brought before the court of trial as admissions on liability or quantum.

However, in ***Unilever Plc. v. Proctor & Gamble Co*** **[(2000) WLR 2436 at 2448**] Robert Walker L.J., emphasized that without prejudice is not a label which can be used indiscriminately so as to immunise an act from its normal legal consequences where there is no genuine dispute for negotiation. Otherwise, it will be a convenient mode for any party to make evidence that is otherwise admissible in legal proceedings, inadmissible.

In ***Avonwick Holdings Limited v. Webinvest Limited and Anor*** **[(2014) EWCA Civ 1436 at para. 17]** Lewison L.J., stated that in order for this head of public policy to be engaged there must be a dispute. The concept of dispute is given a wide scope so that an opening shot of negotiations may fall within the policy even though the other party has not rejected the offer. In order to decide whether this head of public policy is engaged, the court must determine on an objective basis whether there was in fact a dispute or issue to be resolved. If there was not then this head of public policy is not engaged.

Secondly, the rule is based on agreement of parties. It is possible for parties to extend the usual ambit of the without prejudice rule. The rationale is that any express or implied agreement between the parties that statements made in the course of their negotiations and aimed at the settlement of a dispute should not be admissible. [See ***Unilever Plc v. Proctor and Gamble Co.*** **(supra. at 2442D)**, ***Muller v. Linsley and Mortimer*** **[1996] PNLR 74 at 77**]. As Lord Hope held in ***Ofulue v. Bossart*** **[(2009) UKHL 16, p. 12]**:

> *"The essence of the rule lies in the nature of the protection that is given to parties when they are attempting to negotiate a compromise. It is the ability to speak freely that indicates where the limits of the rule should lie. Far from being mechanistic, the rule is generous in its application. It recognises that unseen dangers may lurk behind things said or written during this period, and it removes the inhibiting effect that this may have in the interests of promoting attempts to achieve a settlement*."

As expounded in ***Unilever Plc.*** **(supra)**, there are a number of recognised exceptions to the 'without prejudice' rule in English law. Without seeking to set out an exhaustive list, some of the exceptions are:

1) When the issue is whether "without prejudice" communications have resulted in a compromise agreement being reached.
2) when the issue is whether the agreement apparently concluded as a result of the "without prejudice" negations should be set aside on the ground of misrepresentation, fraud or undue influence.
3) when the issue is whether an estoppel has arisen due to a clear statement which was made by one party to the 'without prejudice' negotiations and on which the other party is intended to rely or act, and does in fact rely or act, to their detriment (even where no concluded settlement arises).
4) a party may be allowed to give evidence of what the other said or wrote in 'without prejudice' negotiations if the 'without prejudice' rule which excludes said evidence would act as a cloak for perjury, blackmail or other "unambiguous impropriety" – in the clearest cases of abuse of the privilege.
5) evidence of negotiations may be given in order to explain delay or apparent acquiescence.
6) offers made "without prejudice except as to costs".
7) a distinct form of the privilege in matrimonial cases which extends to communications received in confidence with a view to matrimonial conciliation.

Section 23 of the Evidence Ordinance reads as follows:

> *"23. In civil cases,* ***no admission is relevant*** *if it is made either upon an express condition that evidence of it is not to be given, or under circumstances from which the court can infer that the parties agreed together that evidence of it should not be given."* (emphasis added)

In ***Multiform Chemicals (Private) Ltd., v. Machado*** **[S.C. Appeal 183/2011, S.C.M. 18.07.2024]** I held that three issues arise for consideration by a trial judge when a document is sought to be tendered in evidence. They are *relevancy*, *admissibility* and *authenticity*. All three must be determined by reference to the evidentiary rules in the Evidence Ordinance and the Civil Procedure Code as amended, particularly by Act No. 17 of 2022.

Section 23 of the Evidence Ordinance deals with relevancy. Accordingly, no admission is relevant in a civil case, if it was made:

(a) upon an express condition that evidence of it is not to be given, or

(b) under circumstances from which the court can infer that the parties agreed together that evidence of it should not be given.

P15 is clearly qualified by the words *without prejudice* which has been typed and underlined on the top right-hand corner. Moreover, it has been sent in reply to letter dated 08.01.1977 (P14) sent by the lawyer for the Respondent which is also qualified by the same words i.e. *without prejudice*. Additionally, P15 states that the Appellant has stayed legal action against the Respondent on the undertaking of the Respondent to conclude the transaction early.

Clearly there was an ongoing dispute between the parties and these communications reflect an attempt at its resolution. In these circumstances, I have no hesitation in concluding that P15 is entitled to the privilege set out in Section 23 of the Evidence Ordinance on the basis of public policy.

Nevertheless, the privilege contained in Section 23 of the Evidence Ordinance can be waived. However, it cannot be waived unilaterally as it is a joint privilege. There can only be a joint waiver. In this case, P15 has been tendered and marked in evidence by none other than the Appellant on whose behalf P15 was sent. Moreover, even P14 was tendered and marked in evidence by the Appellant. The Respondent did not object to the

marking of either. Therefore, I hold that the privilege attached to both P14 and P15 have been waived by parties and that they were properly admitted in evidence.

Parole Evidence

The Appellant contended that P15 is in any event inadmissible in view of Sections 91 and 92 of the Evidence Ordinance.

Section 91 reads as follows:

> *"When the terms of a contract, or of a grant, or of any other disposition of property have been reduced by or by consent of the parties to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document,* ***no evidence shall be given in proof of the terms of such contract, grant, or other disposition of property****, or of such matter, except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions herein before contained."* (emphasis added)

Section 91 is based on the best evidence principle. Oral evidence cannot be substituted for the written instrument which is the very essence of the transaction. When a transaction has been reduced to writing, either by the agreement of the parties or by requirement of the law, the writing becomes the exclusive memorial of the transaction.

I observe that it is the Appellant himself who marked both P14 and P15. Having done so it is somewhat perplexing that he is now trying to contend that P15 should not be admitted in evidence.

Moreover, the Appellant did not, by marking P15, seek to prove the terms of the contract between the parties. What was sought to be done was to show that there was a subsequent agreement between parties that the time of performance was extended until 17.06.1977. This is consistent with the case the Appellant pleaded that time of

performance was in fact extended albeit to 31.07.1977. Section 91 applies only to the proof of the terms of the contract.

In any event, in ***Sangarapillai v. Arumugam*** **[(1909) 2 Leader LR 161]**, Hutchinson C.J., held that if evidence which is repugnant to section 91 of the Evidence Ordinance is let in by consent, it is too late for either party to object to its admission in appeal. In ***Seyed Mohamed v. Perera*** **(58 NLR 246)** the ruling in *Sangarapillai's case* was challenged by counsel who submitted that the law of evidence, far from being made subordinate to a rule of procedure, should receive primary consideration. But De Silva, A.J., had (at page 256) no hesitation in rejecting this submission and endorsing the view in ***Sangarapillai*** **(supra)**.

This approach is justified when we consider the Explanation to Section 154(3) of the Civil Procedure Code. It states that if the opposing party does not, on the document being tendered in evidence, object to its being received, and if the document is not such as is forbidden by law to be received in evidence, the court should admit it.

In ***Siyadoris v. Danoris*** **(42 NLR 311)** it was held that where a deed has been admitted in evidence without objection at the trial, no objection that it has not been duly proved could be entertained in appeal. Court was of the view that *forbidden by law to be received in evidence* means absolute prohibition of the document. Section 91 only prevents the receipt of other evidence in proof of the terms of such contract, grant, or other disposition of property, or of such matter.

Section 92 of the Evidence Ordinance reads as follows:

> *"When the terms of any such contract grant, or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to the last section, no evidence of any* ***oral agreement or statement*** *shall be admitted, as between the parties to any such instrument, or their*

representatives in interest, for the purpose of contradicting, varying, adding to, or subtracting from its terms." (emphasis added)

This rule amplifies the rule in Section 91. It is to the effect that when the terms of any such contract, or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to Section 91, no evidence of any oral agreement or statement shall be admitted as between the parties to any such instrument, or their representatives in interest, for the purpose of contradicting, varying, adding to or subtracting from its terms.

This prohibits admission of only oral evidence, for the purpose of contradicting, varying, adding to, or subtracting from the terms of the written agreement between the parties. It does not prevent the admission of subsequent written communication between parties to prove that some term or terms of that agreement has subsequently been varied in writing.

P15 shows that the time of performance agreed between the parties was subsequently extended in writing by the Appellant himself. It was tendered in evidence by the Appellant. In these circumstances, Section 92 of the Evidence Ordinance also has no application.

The Appellant contended he had not authorized Mr. Gnanapandithan, Attorney-at-Law & Notary Public to send P15. I have no hesitation in rejecting this contention. Mr. Gnanapandithan had acted on behalf of the Appellant and sent several letters to the Respondent previously dated 12.08.1975 (P4), 13.08.1976 (P7), 24.08.1976 (P9) and 04.11.1976 (P11). In fact, it was Mr. Gnanapandithan who attested P1. More importantly, the registered attorney on record in this action for the Appellant in the District Court is Mr. Gnanapandithan.

For all the foregoing reasons, I hold that the time of performance of P1 has been extended by the Appellant to 31.07.1977. Both the District Court and the Court of Appeal were correct in coming to this conclusion.

Waiver

Learned counsel for the Respondent submitted that the time period of three (3) months specified in P1 for performance was waived by the Appellant by the grant of an extension of time for the Respondent to perform his part of the bargain. In support of this contention, he drew our attention to the decisions in ***Birmingham and District Land Company v. London and North Western Railway Company*** **[(1888) Ch. D. 268]**, ***Charles Rickards Ltd. v. Oppenheim*** **[(1950) 1 KB 616]**, **Furst (Enrico) & Co. v. W.E. Fischer, Ltd. [(1960) 2 Lloyd's Rep. 340]** and ***W.J. Alan Ltd. v. El Nasr Co.*** **[(1972) 2 All ER 127]**.

In ***Birmingham and District Land Company*** **(supra. 286)** Bowen L.J., held as follows:

> *"…if persons who have contractual rights against others induce by their conduct those against whom they have such rights to believe that such rights will either not be enforced or will be kept in suspense or abeyance for some particular time, those persons will not be allowed by a Court of Equity to enforce the rights until such time has elapsed, without at all events placing the parties in the same position as they were before."*

In ***Charles Rickards Ltd. v. Oppenheim*** **[(1950) 1 KB 616 at 623]** Lord Denning restated this proposition as follows:

> *"If the defendant, as he did, led the plaintiffs to believe that he would not insist on the stipulation as to time, and that, if they carried out the work, he would accept it, and they did it, he could not afterwards set up the stipulation as to the time against them. Whether it be called waiver or forbearance on his part, or an agreed variation or substituted performance, does not matter. It is a kind of estoppel. By his conduct*

he made a promise not to insist on his strict legal rights. That promise was intended to be binding, intended to be acted on, and was in fact acted on. He cannot afterwards go back on it."

In ***Furst (Enrico) & Co.*** **[supra. at 349]** Lord Diplock held that:

"Waiver does not vary the terms of the contract…Waiver is conduct on the part of a party to a contract which affects his remedies for a breach of contract by the other party."

Again in ***W.J. Alan Ltd.*** **[supra. at 140]** Lord Denning went on to give a more detailed exposition of the principle as follows:

"The principle of waiver is simply this: If one person by his conduct, leads another to believe that the strict rights arising under the contract will not be insisted on, intending that the other should act on that belief and he does act on it, then the first party will not afterwards be allowed to insist on the strict legal eights when it would be inequitable for him to do so…There may be no consideration moving from him who benefits from the waiver. There may be no detriment to him by acting on it. There may be nothing in writing. Nevertheless, the one who waives his strict rights cannot afterwards insist on them. His strict rights are at any rate suspended so long as the waiver lasts. He may on occasion be able to revert to his strict legal rights for the future by giving reasonable notice in that behalf, or otherwise making it plain by his conduct that he will thereafter insist on them…But there are cases where no withdrawal is possible. It may be too late to withdraw; or it cannot be done without injustice to the other party. In that event he is bound by his waiver. He will not be allowed to revert to his strict legal rights. He can only enforce them subject to the waiver he has made."

I have no doubt that these authorities correctly set out the position in English law. However, the governing law of P1 is the Roman-Dutch law. Release or *acceptilatio* is the

corresponding principle in Roman-Dutch law. It is a discharge or acquittance of an obligation, made by agreement between the parties, before the obligation has been performed, or fully performed. According to Grotius (3.41.2), Release is done either by act of man, or by the operation of law. Release can be express or implied. Where it is implied, the term waiver is generally used.

A waiver may be implied where the conduct of the creditor consists of some unequivocal act showing that he knew what his rights were and that he intended to surrender them [See ***Laws v. Rutherfurd*** **(1924 AD 261 at 263);** ***Collen v. Rietfontein Engineering Works*** **[1948 (1) SA 413 (A) at 436];** ***Martin v. De Kock*** **[1948(2) SA 719(A) at 732];** ***Borstlap v. Spangenberg*** **[1974(3) SA 695(A) at 704]]**. However, it is important that the creditor manifests his intention to do so and it is communicated to the debtor. [See ***Traub v. Barclays National Bank Ltd.*** **[1983(3) SA 619(A) at 634-5**]. There must be an acceptance of this benefit by the debtor or by someone on his behalf.

However, the written communication between parties does not establish that the Appellant waived his right to insist on timely performance of P1.

By letter dated 12.08.1975 (P4), sent within three months of the due date of performance in terms of P1, the Appellant requested the Respondent to return the title deeds relating to the premises. This is a clear indication of his intention to exercise his right to the timely performance of the obligation of the Respondent.

The Respondent replied to this letter by letter dated 25.08.1975 (P5). It states that the Respondent has applied for a loan to the Department of National Housing which was approved but the department is not in a position to grant the loan due to insufficient funding. Thereafter, the Respondent had applied to Ceylon State Mortgage Bank for a loan. The bank is now awaiting the insurance binder to take further steps. The Appellant was informed that the Respondent will be in a position to obtain the loan from the bank very early to settle the balance consideration.

However, it appears that even by 14.01.1976 the Respondent was not able to tender the balance consideration of P1. Hence on that day he wrote P6 to the Appellant describing various reasons for his inability to obtain a loan. He goes on to urge the Appellant to accept his delay in expediting the issue and that he has been taken for a ride by the institutions referred to therein for various shortcomings and unwanted documents. He apologizes and states that he will do his best to expedite the matter and pay the balance consideration.

This request by the Respondent to the Appellant to accept his delay confirms that the Appellant has not up to that point of time waived his right to insist on timely performance of the obligation of the Respondent.

On 13.08.1976 the Appellant sent P7 to the Respondent by which he claimed a sum of Rs. 31,500/= being damages due to him in terms of letter dated 06.11.1974 (P3) and continuing damages at the rate of Rs. 50/= per day from 14.08.1976 till vacant possession of the premises are handed back. P3 is the document signed by the Respondent when he was given possession of the premises free of rent by the Appellant on 06.11.1974 on the undertaking to deliver vacant possession back on 22.11.1974.

The dispatch of P7 is inconsistent of any waiver of timely performance of P1. No doubt, P7 was sent in relation to P3. Nevertheless, P1 was entered into subsequent to P3 been signed by the Respondent. There was no need to demand vacant possession of the premises by P7 had the Appellant decided to waive timely performance of P1 and grant the Respondent further time.

The Respondent replied to P7 by letter dated 18.08.1976 (P8). There he reiterates of having applied for a loan of Rs. 35,000/= from the Ceylon State Mortgage Bank for the purpose of purchasing the premises. He states that the bank has sanctioned the loan by letter dated 18.06.1976 and is now waiting for the final insurance binder from the Insurance Corporation. He claims to have paid the necessary charges and that the corporation will forward its final insurance binder within two weeks to the bank. He goes

on to provide the reference numbers of the bank and corporation should the Appellant wish to verify this information.

In response to P8, the Appellant sent letter dated 24.08.1976 (P9). He states that the Respondent failed to purchase the premises within three months as required by P1 and reiterates the contents of P4 where by the Respondent was requested to return the title deeds to the premises immediately. The Appellant goes on to specifically state that he is not obliged to sell the premises to the Respondent.

In my view, the communication up to this point of time does not establish that there has been any waiver or release of the obligation on the part of the Respondent to perform his obligation on time. On the contrary, it clearly shows that the Appellant has taken up the position that he is not under any obligation to sell the premises. In fact, he makes a claim for damages from the Respondent for the failure to hand back vacant possession.

On 02.11.1976 the Respondent sends letter dated 02.11.1976 (P10) to the Appellant informing him that the loan is ready and that the Appellant should call over at the bank and sign the deed of transfer on or before 10.11.1976. He calls upon the Appellant to inform the date on which he can call over at the bank so that the Respondent can also be present. The Appellant was informed that the bank will pay him the balance consideration.

The Appellant responded to P10 by letter dated 04.11.1976 (P11). He reiterates the contents of P7 and P9 and affirms the stand taken earlier that he is not obliged to sell the premises to the Respondent. The Appellant once again calls upon the Respondent to return the title deeds relating to the property without further delay.

The Respondent placed much reliance on the notification given by P10 calling upon the Appellant to come to the bank to sign the deed of transfer to establish that the Respondent made tender of performance which was rejected by the Appellant. This contention is untenable for the reasons set out above. The Appellant had by then clearly notified the Respondent of his decision not to sell the premises and put him on notice of

this obligation to pay damages for failure to hand over vacant possession of the premises. To that date (i.e. 04.11.1976), there was no waiver or release of the timely performance of the obligation of the Respondent.

In any event, there is a dispute as to whether the loan from the Ceylon State Mortgage Bank was actually available on 02.11.1976, the date of letter marked P10, as the bank had by letter dated 23.08.1976 (P16) informed the Respondent that since there had been no progress in his loan application from 18.06.1976, the bank has rejected the loan and closed his file. The letter goes on to say that the balance of the initial deposit made by the Respondent will be refunded after recovery of bank expenses.

Question of law No. 5 is answered in the negative.

On 23.12.1976 the Respondent sent another letter to the Appellant (P13). The letter sets out more details of the attempts by the Respondent to obtain a loan. He goes on to state that time is not of the essence of P1. The Respondent requests the Appellant to call over at the bank on or before 24.12.1976 to sign the documents.

Thereafter it appears that some discussions had taken place between the parties during which the Appellant suggested that the Respondent pay the rent for the period occupied by the Respondent to enable the finalization of the sale of the premises. The Respondent by letter dated 08.01.1976 (P14) sent without prejudice informs that he is agreeable to this proposal and request the Appellant to inform whether he is agreeable to finalise the transaction.

No written communication between the parties thereafter have been produced in evidence until letter dated 08.06.1977 (P15) was sent by the Appellant to the Respondent where he states that legal action against him has been stayed on the undertaking of the Respondent to conclude the transaction. The Appellant further states that since no steps have been taken by the Respondent since his undertaking in March 1977, he will be

compelled to take action against the Respondent unless the transaction is concluded by 17.06.1977.

In my view, the most crucial item of evidence in this appeal is the letter dated 28.06.1977 (P2) sent by the Respondent to the Appellant in response to letter dated 08.06.1977 (P15). There the Respondent states that because of various disputes, even the bank wanted to cancel the loan and the Respondent had with the greatest difficulty kept the loan going with the bank. He goes on to state that he will now make arrangements to finalise the matter by making the extra payment called by the bank and also the extra payment the Respondent amicably promised to pay to the Appellant. He further goes on to state that the matter could be finalized only by the end of July 1977 as he has to make the necessary arrangements.

Even assuming that there was a prior waiver or release by the Appellant, it was possible for him to make time of the essence again of the agreement between the parties. In ***W.J. Alan Ltd.*** **[supra. at 140]** Lord Denning held that it is possible for a person who has waived his right to timely performance to be able to revert to his strict legal rights for the future by giving reasonable notice in that behalf, or otherwise making it plain by his conduct that he will thereafter insist on them.

P15 in my view is due notice given to the Respondent of the intention of the Appellant to consider the extended time of performance as being of essence of P1 notwithstanding any extension. We have before us a situation where time was of essence at the time parties entered into the agreement. This time of performance was extended by P15. Hence the question arises as to whether the Appellant can once again make time the essence of P1 by giving such notice.

The converse position was considered in ***Microutsicos v. Swart*** **[(1949) 3 SALR 715]** where the Appellate Division of the Supreme Court of South Africa considered the question as to when delay on the part of a buyer in making provision for payment of the purchase price

of land is regarded as equivalent to total failure which entitles the seller to regard it as terminating the contract. It was decided in that case that Roman Dutch Law, like English Law, does not regard the mere fact that the debtor makes default on the stipulated date, if there is one, as sufficient for this purpose. Fagan, A. J. A. held (at page 715) that:

> *"where a time for the performance of a vital term in a contract has been stipulated for and one party is in mora by reason of his failure to perform it within that time, but "time is not of the essence of the contract", the other party can make it so by giving notice that if the obligation is not complied with by a certain date, allowing a reasonable time, he will regard the contract as at an end."*

I have no doubt the same rationale is applicable where time was of essence of an agreement between parties from its inception, and later the time of performance was extended by parties. One party is entitled to make time of essence once again by giving due notice to the other party. Modern commercial requirements require parties to commercial transactions to have the freedom to continue with their commercial activities without being held for ransom by intransigent counterparts. That can only be done by recognizing the right of a party to make time of the essence of an agreement once again by giving due notice to the other party.

In this action, the Appellant appears to have extended the time of performance by P15 with a view to settle the dispute. However, in the same letter the Respondent is notified that failure on the part of the Respondent to conclude the transaction by 17.06.1977 will compel the Appellant to take action against him.

I therefore hold that the extended time of performance i.e. 31.07.1977 continued to be of essence of the agreement between the parties.

Question of law No. 4 is answered in the negative.

Failure of the Appellant

The extension of time until 31.07.1977 as pleaded in the plaint came into existence only after P2 was sent. Hence, in order to succeed in the cross claim, the Respondent should have led evidence to show that he had made the bank loan operative and notified the Appellant to execute the required documents. However, no such evidence has been led in this case. Although a witness from the State Mortgage and Investment Bank was called to testify on behalf of the Respondent, he did not testify on any loan been made operational after letter dated 28.06.1977 (P2) was sent. His testimony referred to making a loan operational towards the end of 1976 during which period the documentary evidence establishes that the Appellant had taken up the position that he did not need to execute any documents in favour of the Respondent since he failed to perform his part of the bargain by 14.05.1975.

In summary, the evidence discloses the following:

(1) Time was of the essence of P1.
(2) Both parties had to perform their respective obligations by 14.05.1975.
(3) The Respondent failed to perform his part of the obligation by 14.05.1975.
(4) On or after 08.06.1977, the time for performance was extended until 31.07.1977.
(5) By that time, the Appellant had not waived or released the Respondent from making a timely performance.
(6) However, the Respondent failed to tender the balance amount by 31.07.1977.

For all the foregoing reasons, questions of law Nos. 1 and 3 in the affirmative.

A party seeking to enforce specific performance of a contract should have been ready and willing to perform his part of the bargain by the time for performance. The Respondent has failed to lead any evidence to show that he had made tender of the balance consideration on or before 31.07.1977. He is therefore not entitled to any order of specific performance.

Accordingly, I answer question of law No. 2 in the affirmative.

In view of the answers given to questions of law Nos. 1 to 5 above, question of law No. 6 does not arise.

For all the foregoing reasons, the judgment of the learned Additional District Judge of Mt. Lavinia dated 19.07.1979 and the judgment of the Court of Appeal dated 29.03.2016 are hereby set aside.

I enter judgment in favour of the Appellant as prayed for in prayers (a) and (b) the plaint dated 20.04.1979 which reads as follows:

> *a) for judgment ejecting the defendant, his servants and agents and all those holding under him from the land and premises more fully described in the schedule hereto;*
>
> *b) for liquidated damages in the sum of Rs. 10,000/-.*

The learned District Judge of Mt. Lavinia is directed to enter decree accordingly.

The Appeal is allowed with costs.

JUDGE OF THE SUPREME COURT

E. A. G. R. Amarasekara, J.

I agree.

JUDGE OF THE SUPREME COURT

Kumudini Wickremasinghe, J.

I agree.

JUDGE OF THE SUPREME COURT